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THE INTERFACE BETWEEN ENERGY, ENVIRONMENT AND COMPETITION RULES OF THE EUROPEAN UNION

NATIONAL REPORT – PORTUGAL

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A. Regulation and Competition Policy

Q 1. and 2. Will the limited powers of ACER and the responsibilities placed upon ENTSO-E and ENTSO-G require greater cooperation between national regulatory authorities (NRAs) *inter se* and with the EU to open up the European power and gas sectors to greater cross-border competition, at least at the wholesale supply level? Or will increased competition turn out to be mainly a task for the competition authorities to ensure progress in dismantling predominantly national markets, for example by stopping discriminatory congestion management practices of transmission system operators, as in the *Svenska Kraftnät* case?

The lack of independence and adequate powers of NRAs at national level, and the absence of a permanent structure at EU level with clear competences to promote and enforce cross-border integration of the Internal Energy Market, were said to be the main reasons behind the strengthening of competences of NRAs and the creation of the Agency for the Cooperation of Energy Regulators ('ACER') by the Third Energy Package[2] [3].

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[2] The 'Third Energy Package' was approved by the European Parliament and the Council on 13 July 2009 and consists of Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Regulation (EC) 713/2009 establishing an Agency for the Cooperation of Energy Regulators, Regulation (EC) 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) 1228/2003, and Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) 1775/2005 (OJ L 211, 14.8.2009, pp. 1-55). See in particular recital 33 of Directive 2009/72/EC, recital 29 of Directive 2009/73/EC and recital 3 of Regulation (EC) 713/2009.

[3] Until implementation of the Third Energy Package is complete, the organisation and powers of NRAs will vary considerably between Member States. Some NRAs are perceived as not being completely independent from

Directives 2009/72/EC and 2009/73/CE address the main obstacles to the effectiveness of NRAs by establishing that Member States must designate a single authority at national level, guarantee its independence (regarding notably the appointment of its top management, decision-making power, and adequate human and financial resources), and provide NRAs with broad investigative and sanctioning powers, including the power to impose fines up to 10% of the annual turnover of infringing companies[4], similarly to the powers of the European Commission under EU competition law[5]. However, even when all Member States have fully implemented the Directives,[6] NRAs will still remain poorly equipped to deal with cross-border issues on an individual basis, and are therefore unlikely to actively exercise their enforcement powers beyond national borders.

The creation of ACER will certainly facilitate a much closer cooperation between NRAs and with the Commission. Yet the EU legislator has given the new agency a primarily advisory role. Its opinions and recommendations are expected to foster coordination among transmission system operators ('TSO') and NRAs, contribute to the implementation of the new (non-binding) EU ten-year network development plans and promote the sharing of good practices. Through the adoption of framework guidelines and participation in the development of network codes, ACER, together with NRAs, the European TSO Networks[7] and the Commission, will also contribute to the optimal functioning of, and cross-border access to, energy networks[8]. Nevertheless, ACER has limited autonomous decision-making powers, which are restricted to technical issues, exemptions for new infrastructure and cross-border energy infrastructure access issues (and, concerning the latter two cases, only on a subsidiary

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other State bodies, in particular from national governments. In several Member States, NRA competences are spread at national level between several bodies, and their resources are in some instances insufficient to adequately perform their missions. For instance, as seen below, the Portuguese Energy Regulator, ERSE still lacks competence to impose sanctions for violations of regulatory rules, despite being functionally and financially independent. See in this respect W. Boltz, 'The new regulatory agency: A practical guide to its functioning and priorities', in J. Glachant, N. Ahner and A. de Hauteclocque (eds.), *EU Energy Law*, Vol. V, (Claes & Casteels 2010), p. 134-135.

[4] See Articles 35 and 37 of Directive 2009/72/EC and Articles 39 and 41 of Directive 2009/73/EC.

[5] See Regulation (EC) 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU')] (OJ L 1, 4.1.2003, p. 1), in particular Articles 23 and 24 thereof.

[6] Although the transposition period of both Directives expired on 3 March 2011, there are still several Member States (such as Portugal) who have yet to complete implementation into national law. Given the precedents, this is an issue unlikely to be easily solved: according to the Commission, 40 infringement procedures have been initiated on the implementation of the Second Package alone (see COM (2010) 639 final, p.9). In addition, even after formally being given the new powers, NRAs who at present do not have strong enforcement powers will naturally take some time to adjust to their new role.

[7] The European Network of Transmission System Operators for Electricity (ENTSO-E) and the European Network of Transmission System Operators for Gas (ENTSO-G), established pursuant to Regulation (EC) 714/2009 and Regulation (EC) 715/2009.

[8] See Articles 6 and 7(1) to 7(6) of Regulation (EC) 714/2009.

basis, when the competent NRAs cannot reach an agreement or when they jointly refer the matter to ACER)[9].

The Directives require NRAs to 'closely consult and cooperate with each other' in the fulfilment of their regulatory duties[10]. When given the necessary investigative and punitive powers, NRAs may therefore jointly decide to enforce EU energy rules in cross-border matters concerning, for instance, non-discriminatory access to networks. However, despite the cooperation between authorities being facilitated by ACER and the assistance from the Commission, this is likely to occur only in a limited number of cases. Given that each NRA will apply its national procedural law, joint action will also pose legal and practical issues regarding, for instance, allocation of competence, information and document sharing, rights of defence of infringing companies and proportionality of sanctions. Thus, in the absence of a single regulatory authority entrusted with effective decision-making powers to enforce the provisions of the Internal Energy Market, joint intervention of NRAs in order to open up the Energy sector to greater cross-border competition is likely to be a limited phenomenon.

Conversely (or perhaps for that same reason) competition law is likely to remain an important instrument for the Commission and national authorities to further the completion of the EU energy market for the foreseeable future.

In recent years, the energy sector has been high on the European Commission's priority list for competition law enforcement. In particular, subsequent to the Commission's 2007 Energy Sector Inquiry, which 'confirmed serious competition problems' in EU electricity and gas markets[11], the Commission has been 'forcefully pursuing infringements of Community competition law in the sector wherever the Community interest so requires'[12], and has successfully concluded a large number of antitrust investigations, both under Article 101 (prohibiting restrictive agreements and practices) and Article 102 (prohibiting the abuse of a dominant position) of the Treaty on the Functioning of the European Union ('TFEU')[13].

[9] See Articles 7(7), 8(1), 8(2) and 9(1) of Regulation (EC) 714/2009.

[10] See Article 38 of Directive 2009/72/CE and Article 42 of Directive 2009/73/CE.

[11] See Commission Press Release IP/07/26, of 10.1.2007, as well as the 'DG Competition Report on the Energy Sector Inquiry', SEC (2006)1724, 10.1.2007.

[12] See DG Report on the Energy Sector Inquiry, p. 12.

[13] See Commission Decisions of 11.10.2007, Case COMP/B-1/37.966 – *Distrigaz* (OJ 2008/C9/05), of 30.1.2008, Case COMP/B-4/39.326 – *E.ON Energie AG* (2008/C240/06), of 5.03.2008, Case COMP/B-1/38.700, *Greek Lignite* (2008/C93/03), of 26.11.2008 Cases COMP/39.388 and 39.389 – *German Electricity Balancing Market (E.ON)* (2009/C36/08), of 18.3.2009 Case COMP/39.402 – *RWE Gas Foreclosure*, of 8.07.2009 Case COMP/39.401 – *E.ON/GDF* (2009/C 248/05), of 3.12.2009, Case COMP/39.316 – *GDF* (2010/C 57/09), of 17.3.2010, Case COMP/39.389 – *Long Term Contracts France (EDF)* (2010/C 133/05), of

Pursuant to Regulation (EC) 1/2003 the Commission has broad powers to investigate and punish infringements to Articles 101 and 102, and is particularly well-placed to pursue cross-border behaviour that compromises the Internal Market[14].

The Commission has made a particularly active use of the new 'commitment decision' procedure introduced by Article 9 of Regulation (EC) 1/2003[15] to change the structure of electricity and gas markets and eliminate obstacles to the internal energy market. Although Member States have tenaciously opposed mandatory ownership unbundling of transmission networks in Directives 2009/72/CE and 2009/73/CE, such an outcome was achieved when, in exchange for the closing of abuse of dominance investigations, E.ON and RWE committed to divest their electricity and gas transmission networks, respectively, and more recently ENI agreed to divest controlling stakes in three international gas pipelines supplying Italy[16]. The Commission also applied Article 9 to improve entry into gas wholesale markets in Belgium, France and Germany[17], and led Svenska Kraftnät, the state-owned Swedish electricity TSO, to subdivide the Swedish electricity market into several bidding zones, in order to manage congestion in the transmission system without limiting capacity on interconnectors (which would harm electricity imports from neighbouring states)[18]. Finally, the EU Merger Regulation[19] has also been used by the Commission to impose comprehensive sets of structural and behavioural remedies in order to complete the liberalization of energy markets[20].

14.4.2010, Case COMP/39.351 – *Swedish Interconnectors* (2010/C142/08), of 4.5.2010, Case COMP/39.317, *E.ON/Gas* (2010/C 278/06) and of 29.9.2010, Case COMP/39.315 – *ENI* (2010/C 352/10).

[14] National Competition Authorities ('NCAs'), such as the Portuguese Competition Authority (*Autoridade da Concorrência*) can also apply EU competition law, and as a rule also have significant prosecutorial powers under national law. Enforcement action by NCAs in cross-border energy issues faces the same obstacles as action by NRAs referred to above, although mechanisms are already in place to improve cooperation between EU competition authorities (see for instance the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43).

[15] Article 9 of Reg. (EC) 1/2003 allows the Commission to close an investigation, making commitments offered by the investigated companies binding on such undertakings, without adopting a prohibition decision and imposing a fine. See H. von Rosenberg, 'Unbundling through the Back Door… the case of network divestiture as a remedy in the energy sector', [2009] E.C.L.R. 237.

[16] See respectively, Commission decisions of 26.11.2008 Case COMP/39.388 and 39.389 – *German Electricity Balancing Market (E.ON)*, of 18.3.2009 Case COMP/39.402 – *RWE Gas Foreclosure* and of 29.9.2010 Case COMP/39.315 – *ENI*.

[17] See Commission Decisions of 11.10.2007, Case COMP/B-1/37.966 – *Distrigaz*, of 30.1.2008 Case COMP/B-4/39.326 – *E.ON Energie AG*, and of 17.3.2010, Case COMP/39.389 – *Long Term Contracts France (EDF)*.

[18] Commission Decision of 14.4.2010, Case COMP/39.351 – *Swedish Interconnectors*

[19] Council Regulation (EC) 139/2004 of January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p.1).

[20] See Commission Decisions of 21.12.2005, Case COMP/M.3696– *E.ON/MOL* (2006/622/EC), of 14.11.2006 Case COMP/M.4180 – *Gaz de France/Suez* (2007/194/EC), and of 9.12.2004, Case COMP/M.3440, *EDP/Eni/GDP*. The Commission's decision prohibiting the acquisition of GDP (the Portuguese gas incumbent)

The Commission's recent practice suggests that EU competition rules have an important role to play in the energy sector, and that the Commission does not hesitate in adopting, under its competition law powers, quasi-regulatory measures in order to eliminating artificial obstacles to cross-border energy trade. In this regard, the 'acceptance' of unilateral commitments by the parties in exchange for the closure of antitrust infringement has proven to be a valuable tool at the Commission's disposal to restructure the European energy sector[21], especially after the recent confirmation by the European Court of Justice of the Commission's wide margin of appreciation in applying Article 9 of Regulation (EC) 1/2003[22].

In sum, even after the full implementation of the Third Energy Package competition law will likely remain a powerful (if not the preferred) tool of market integration in the energy sector, since, despite the strengthened cooperation at the EU level by the NRAs, ACER and the Commission, competition law can be uniformly enforced throughout the EU by a single authority, which is endowed with strong powers and has an extensive experience in the energy sector. [23]

3. In this context, what is the position of your Member State with respect to enforcement of Competition Law (EU and national) in the energy sector, whether by sector-specific NRAs, by NCAs or a combination of the two?

In Portugal, EU and Portuguese competition law[24] is enforced solely by the Portuguese Competition Authority (*Autoridade da Concorrência*) ('Authority')[25], which has competence over all sectors of the economy, including energy, and is part of the European Competition

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by EDP (the electricity incumbent) and Eni was upheld by the General Court (GC 21 September 2005 Case T-87/05, *EDP v Commission*), but the Court annulled the Commission's findings on the natural gas markets, since Portugal benefitted from a derogation for being an 'emergent market' under Article 28 of Directive 2003/55/EC. In Portugal, although there are no reported antitrust decisions into the energy sector, the Portuguese Competition Authority has been very active in reviewing merger control cases, and in several instances has imposed remedies (see decisions of 20.09.2004, Ccent. 48/2003 – *EDP/Portgás*, of 11.11.2005, Ccent. 16/2005 – *Enernova/Ortiga/Safra*, of 30.11.2005, Ccent. 60/2005 – *Enernova/Tecneira*, of 25.6.2008, Ccent. 2/208 – *EDP/Pebble Hydro*, of 25.06.2008, Ccent. 6/2008 *EDP/Alqueva*, and of 13.12.2010, Ccent. 23/2010, *EDP/Greenvouga*).

[21] See L. Hancher and P. Larouche, 'The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest' in P. Craig and G. de Burca (eds.), *The Evolution of EU Law*, 2nd Edition (Oxford, 2011), p. 754.

[22] ECJ 29 June 2010 Case C-441/07 P *Commission v Alrosa*, paras. 34-50.

[23] See Communication of the Commission 'Energy 2020 – A strategy for competitive, sustainable and secure energy', 10.11.2010, COM (2010) 639 final, p. 9.

[24] Law 18/2003, of 18 June. The Government has recently launched a public consultation on the reform of the Competition Act, and is due to present a proposal for a new Law to Parliament until the end of January 2012.

[25] The Authority was created in 2003 by Decree-Law 10/2003, of 18.1.2003, and has administrative and financial independence from Government. The three-member board is appointed for a once-renewable five years term, and may only be dismissed during its term if found guilty of misconduct.

Network. The NRA for the energy sector in Portugal, *Entidade Reguladora dos Serviços Energéticos* ('ERSE'), does not have competence to apply competition law.

Pursuant to the Competition Act, ERSE should be consulted by the Authority whenever an antitrust investigation in the energy sector is initiated or when a concentration affecting the energy market is notified to the Authority under Portuguese merger control rules. ERSE therefore frequently gives its opinion to the Authority within merger control cases in the energy sector reviewed by the Authority. Similarly, ERSE should also inform the Authority when it becomes aware of any conduct in the energy sector which may infringe competition law[26].

4. With respect to NRA roles, powers and duties, are there any peculiarities or difficulties in the position of your Member State (for example, limiting or promoting cooperation with other Member States' NRAs or with respect to the EU Network of Competition Authorities)?

ERSE, created in 1997, is the national regulatory authority for the electricity, gas and oil sectors in Portugal. According to its Statute, ERSE is a public body with administrative and financial autonomy from the Government, and performs its regulatory and supervisory duties independently[27].

Directives 2009/72/CE and 2009/73/CE have been partially implemented into Portuguese law, and therefore ERSE is required to cooperate with other NRAs and with ACER, in accordance with EU law rules[28]. Even before implementation of the Directives, ERSE liaised often with other NRAs and was an active participant in the Council of European Energy Regulators ('CEER')[29].

ERSE also has a very close working relationship with the Spanish NRA for energy (CNE – *Comisión Nacional de Energia*), as well as with the Portuguese and Spanish Regulatory

[26] See Articles 29 and 39 of the Competition Act.

[27] See Decree Law 97/2002, of 12 April, pursuant to which ERSE's three-member board is appointed by the Council of Ministers for a once-renewable five year term, and may only be relieved for serious misconduct in the discharge of its duty.

[28] See Article 58 (a) of Decree-Law 29/2006, of 15 February, recently amended by Decree-Law 78/2009, of 20 June (implementing Directive 2009/72/CE), and Article 51 (a) of Decree-Law 30/2006, of 15 February, recently amended by Decree-Law 77/2009, of 20 June (implementing Directive 2009/73/CE).

[29] See ERSE Annual Report for 2010, pp. 35-42.

Authorities for Financial Markets[30], within the framework of the Iberian Electricity Market ('MIBEL') and its Regulatory Council, which brings together the four regulators[31].

Despite having broad regulatory powers over the regulated activities of the energy sector ERSE does not, however, have the power to adopt binding decisions on energy companies and to impose penalties for the breach of legal and regulatory obligations, as the specific national law providing for such powers remains to be adopted. It is expected that until the end of March 2012 the Statute of ERSE will be revised in order to introduce such competences and fully implement Directives 2009/72/CE and 2009/73/CE into Portuguese law[32].

5. Considering that exemptions from the regulatory regimes for gas and electricity are permitted, what safeguards are in place at the Member State level for protecting 'process' rights such as the right to be heard and access to justice, and which national bodies are responsible in ensuring that these rights are respected?

ERSE being an administrative body, its decision-making powers are exercised within the boundaries of national procedural law[33], which provides both for procedural rights of companies subject to ERSE's supervision and for effective review of its decisions.

Decisions adopted by ERSE regarding an individual and concrete situation are, except when sanctions are imposed, subject to the Code of Administrative Procedure, under which interested parties have, *inter alia*, the right to be heard before a decision affecting their interests is taken. In order for this right to be exercised, ERSE will usually notify the

[30] The *Comissão de Mercado dos Valores Mobiliários* ('CMVM') (Portugal), and the *Comisión Nacional del Mercado de Valores* ('CNMV') (Spain).

[31] The MIBEL – *Mercado Ibérico da Electricidade* (www.mibel.com) is a joint initiative from the Governments of Portugal and Spain with a view to the construction of an integrated regional electricity market in the Iberian Peninsula. Discussions and convergence efforts of both Governments first started in 1998, and MIBEL finally started operations in July 2007. The main founding documents are two international agreements signed by the two countries in Santiago de Compostela (1 October 2004), and Braga (18 January 2008). MIBEL has two organized markets: a spot market (day and intraday), operated by OMI-E (*Operador do Mercado Ibérico de Energia – Polo Espanhol*), headquartered in Spain, and a derivatives market, operated by OMI-P (*Operador do Mercado Ibérico de Energia – Polo Português*), headquartered in Portugal. The two market operators share the same board, whose presidency alternates bi-annually between the two countries. The MIBEL markets are directly supervised by the energy and financial authorities of the country where they are incorporated. The four regulatory authorities also coordinate their action in the Regulatory Council, which in turn coordinates the supervision of MIBEL.

[32] The Portuguese Government has committed, within the ongoing EU-IMF Financial Assistance Program, to fully implement the Third EU Energy Package by the end of March 2012, ensuring the NRA's independence and all powers foreseen in the Directives. See the Memorandum of Understanding of 1 September 2011 entered into the Government, the European Commission, the European Central Bank and the International Monetary Fund ('Memorandum of Understanding'), Section 5.2.

[33] In particular, the fundamental rights enshrined in the Constitution (Articles 20, 32 and 268) and the general procedural rights contained in the Administrative Procedure Code and Code of Procedure in the Administrative Courts or (if sanctions are imposed) in the General Law for Administrative Offences (*Regime Geral das Contra-Ordenações*), approved by Decree-Law 433/82, of 27 October, , as amended, and the Criminal Procedure Code.

interested parties a draft decision, and request written comments within no less than 10 working days. ERSE may also opt for an oral hearing[34]. All decisions of ERSE affecting the rights or interests of a natural or legal person are subject to judicial review, and can be challenged before the new Competition, Regulation and Supervision Court[35].

As mentioned above, national legislation empowering ERSE to impose sanctions for the violation of legal and regulatory energy rules is not yet in force. Considering the precedents of other regulated sectors, and the obligation to provide for penalties up to 10% of the annual turnover of infringing companies pursuant to Directives 2009/72/CE and 2009/73/CE, such penalties will likely take the form of an administrative offence (*contra-ordenação*), punishable with a fine imposed by ERSE. The infringing companies will therefore benefit from the procedural rights provided in the General Regime of Administrative Offences, and notably from the right to be heard, and will be able to challenge the decision before the Competition, Regulation and Supervision Court.

6. Are the latest proposals (COM(2010) 726) on market abuse in the energy sector likely to present challenges for the NRAs whether in their sole capacity or as a hybrid with national financial regulatory bodies at Member State and/or EU level?

The Commission's proposed Regulation on energy market integrity and transparency[36] contains a tailor-made market abuse framework for all electricity and gas wholesale products which are not financial instruments, and as such are not covered by the Market Abuse Directive[37]. It prohibits insider trading and market manipulation practices and requires public disclosure of inside information, in similar terms to those applying in financial markets, and is

[34] See Articles 100 to 102 of the Administrative Procedure Code. A number of exceptions to the right to be heard are defined in Article 103 (for instance, in matters of urgency or if the decision is favourable to the interests of the parties concerned).

[35] The Competition, Regulation and Supervision Court was recently created by Law 46/2011, of 24 June, as a specialized judicial body to hear appeals against decisions of the Competition Authority and other sectoral regulatory authorities, such as ERSE. The new court is to be made operational up to the end of March 2012 (see Memorandum of Understanding, Section 7.19.(i)). The court, when hearing appeals of decisions other than those imposing fines, will apply the rules of the Code of Procedure in the Administrative Courts. When reviewing decisions imposing fines, the Court will apply the rules of the General Regime of Administrative Offences, and as subsidiary law the Code of Criminal Procedure. Judgments of the Competition, Regulation and Supervision Court may be further challenged before an appeals court (the competent appeals court is not yet known, as the location of the new court remains to be decided).

[36] Proposal for a Regulation of the European Parliament and of the Council on energy market integrity and transparency, 8.12.2010, COM (2010) 726 final ('Proposal'). The Proposal has since been approved and published as Regulation (EU) 1227/2011 of the European Parliament and of the Council, of 25 October 2011, OJ L 326, of 8.12.2011, p. 1.

[37] Directive 2003/6/ECDirective 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16 (as amended), which has been transposed into the Portuguese Securities Code (*Código dos Valores Mobiliarios*).

to be enforced by NRAs, in cooperation with the competent financial authorities and ACER (to this effect market participants are subject to reporting obligations to ACER, which will then share the information with NRAs, NCAs and competent financial authorities)[38].

Even though the proposed rules were recommended by NRAs and financial authorities themselves[39], the application of the new energy market abuse prohibitions will present significant challenges to NRAs, especially to those, such as ERSE, without active enforcement practice and experience.

The implementation of the Third Energy Package will provide NRAs with effective powers and hopefully with sufficient resources to ensure strong enforcement of the applicable rules. There are, however, specific issues NRAs will have to address when enforcing the new market abuse rules. For instance, the additional workload of management and analysis of voluminous and complex data, which is somehow mitigated due to the background knowledge and familiarity of NRAs with the energy markets. The broad investigatory powers envisaged by the Proposal will also have to be made compatible with procedural rights and guarantees under national law (for instance, phone tapping and access to correspondence in Portugal are severely restricted[40]), and NRAs will be faced with the need to adopt robust decisions backed up by solid evidence. NRAs will have to cooperate closely with other national authorities, such as the Prosecutor's Office (where market manipulation and insider trading are criminal offences, as in Portugal), and in particular with the national financial authority competent to enforce the Market Abuse Directive, in order to avoid overlapping actions, to gain helpful insights of its experience in the financial markets and to share best practices.

Joint action by several NRAs against illegal conduct with cross-border impact will also present the challenges inherent to enforcement action by more than one independent authority. This issue is partly addressed by the Proposal, with empowers ACER to convene an

[38] See Articles 3 to 11 of the Proposal. The Commission will adopt delegated regulations laying down the detailed requirements for the reporting of transactions (Article 7(1) of the Proposal).

[39] See CESR and ERGEG advice to the European Commission in the context of the Third Energy Package, Response to Question F.20 – Market Abuse, CESR/08-739, October 2008, p. 3. See also ERSE Annual Report for 2010, March 2011, p. 39.

[40] Under criminal procedure rules, interference with communications and correspondence are only allowed if previously authorised by a judge and in case of criminal conduct punishable with prison sentences above 3 years (see Articles 187 to 189 of the Criminal Procedure Code). In general access to phone records and correspondence is prohibited in case of administrative offences, which are punishable with a fine (see Article 42 of the General Regime for Administrative Offences).

'investigatory group' representing the relevant NRAs, formally under the Agency's coordination, and requires NRAs to provide all necessary assistance[41].

As mentioned above, Portuguese and Spanish NRAs and financial authorities already cooperate closely within the Regulatory Council of the Iberian Electricity Market, MIBEL[42]. The two organised markets of MIBEL, the spot market, operated by OMI-E (located in Spain), and the derivatives market, operated by OMI-P (located in Portugal), are subject to the laws of Spain and Portugal, respectively, and are directly regulated by each country's competent authorities, without prejudice of the cooperation of all the authorities within the Regulatory Council[43]. The derivatives traded in OMI-P constitute financial instruments and are therefore subject to supervision by CMVM, whose powers include the enforcement of the Market Abuse Directive. The spot market is supervised by the Spanish NRA, CNE, which for this reason will be the authority primarily competent to enforce the new energy market abuse rules in MIBEL. The four authorities recognise, at any rate, that the interconnection between the spot and the derivative markets at the Iberian level requires the joint exercise of enforcement activity, which will therefore have to be intensified in the case of the new energy market abuse rules[44].

B. Promotion and Subsidy of Renewable Energy

7. Are Directive 2009/28/EC and the purely national subsidy schemes and national RS consumption targets it perpetuates fully compatible with principles and rights established in the Treaty, as interpreted by the Court? For example, does the preclusion of the exchange of instruments evidencing renewable power output between suppliers and generators in different Member States, as a means of proving compliance with minimum renewable electricity consumption quotas or earning feed-in tariffs, interfere with internal trade and distort competition in the electricity market?

The question of maintaining different national support schemes for renewable energy sources ('RES'), or a harmonised one at EU level, in order to meet the environmental targets set at EU

[41] See Articles 11(4) to 11(6) of the Proposal.

[42] See question 4 and n. 31 *supra*.

[43] See Articles 4 and 11 of the Santiago de Compostela Agreement (as amended).

[44] See the Memorandum of Understanding between CMVM, CNE, CNMV and ERSE for the effective cooperation and coordination of supervision of MIBEL, of 17 May 2011, as well as the MIBEL Regulatory Council document *Descrição do Funcionamento do MIBEL*, of November 2009, pp. 217-229, both available at www.erse.pt.

and national levels by Directive 2009/28/EC[45], has been the object of considerable debate in recent times[46].

National support schemes for RES may indeed constitute an obstacle to cross-border electricity trade in the EU, given that direct financial support limited to electricity produced from RES at national level necessarily has the effect of restricting electricity imports from other Member States. For this reason, Directive 2009/28/EC and national implementing legislation at first glance would seem to be somewhat at odds with the Treaty provisions on free movement of goods, which prohibit all rules capable of hindering, directly or indirectly intra-Union trade[47], except if justified by the Treaty derogations or by mandatory requirements under the case law of the Court of Justice[48].

Although the case law suggests that the EU Institutions enjoy a greater measure of freedom than the Member States, the Institutions must have regard for the principle of free movement of goods when framing legislation[49]. The new Article 194 TFEU clarifies, however, that Union policy on the internal energy market shall have regard for the need to preserve and improve the environment, and should aim both to ensure the functioning of the energy market, and to promote energy efficiency and energy saving and the development of new and renewable forms of energy[50]. As the Treaty does not establish a hierarchy between these two objectives, the EU legislator is left with a margin of discretion as to the balance to be struck between them.

The approach followed by Directives 2001/77/EC[51] and 2009/28/EC up to present has consciously given priority to the growth of RES on environmental grounds over the completion of internal market. When the first Directive entered into force, Member States

[45] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

[46] See Council of European Energy Regulators, Implications of Non-harmonised Renewable Support Schemes: a CEER Public Consultation Document, 11.10.2011 (Ref: C11-SDE-25-04), and in particular the literature referred to in p. 14.

[47] See Article 34 TFEU (formerly 28 EC) and ECJ 11 July 1974 case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837, para. 5.

[48] See Article 36 TFEU (formerly 30 EC) and ECJ 20 February 1979 case 120/78, *Rewe Zentrale v Bundesmonopolverwaltug für Branntwein (Cassis de Dijon)* [1979] ECR 649.

[49] See ECJ 29 February 1984 Case 37/83, *REWE-Zentrale v Direktor der Landwirtschaftskammer Rheinland* [1984] ECR 1229, as well as P. Oliver, *Free Movement of Goods in the European Community*, 4th edition (Thomson-Sweet & Maxwell 2003), p. 68.

[50] The other two objectives of Union policy under Article 194 are the ensuring of security of energy supply and the promotion of interconnection of energy networks.

[51] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal market, OJ L 283, of 27.10.2001, p. 33 (modified and later repealed by Directive 2009/28/EC),

already operated different national support mechanisms, and the directive had the express aim of 'guarantee[ing] the proper functioning of these mechanisms',[52] until they could be adapted, after a sufficient transitional period, to the developing internal electricity market, through the creation of a 'Community support framework'[53].

In subsequent monitoring reports, the Commission observed that due to widely varying potentials and developments in different Member States regarding renewable energies, harmonization seemed very difficult to achieve in the short term[54]. The Commission's first proposal for a new RES Directive nevertheless included harmonised provisions for the design and transfer of guarantees of origin, in order to facilitate cross-border trade and consumption of electricity from RES[55]. However, following discussions with the Council and the European Parliament, the final version of what became Directive 2009/28/EC was less ambitious, preserving national support schemes, although including three optional mechanisms that allow Member States to cooperate in supporting RES investments[56] [57].

National support schemes contributed to a dramatic change in production from RES in many Member States[58], and therefore play a significant role in the attainment of EU's environmental protection objectives. However, according to the Council of European Energy Regulators, different national support schemes may have negative implications in two respects. On the one hand, significant differences between national schemes may affect the decisions of investors regarding where to locate new projects, leading to less than optimal location of RES

[52] Article 4(1) of Directive 2001/77/EC was explicit. The Commission was required to evaluate the application of national support mechanisms, recognising that they 'could have the effect of restricting trade', only on the basis of its contribution to the environmental objectives of (now) Articles 11 and 191 TFEU.

[53] Under Article 4(2) of Directive 2001/77/EC, the Commission had to report on the use of the national support mechanisms, and should, if necessary, propose a EU framework. However, even leaving a considerable flexibility to Member States, the implementation of Directive 2001/77/EC at national level was not straightforward: between 2004 and 2009, the Commission was obliged to start 61 infringement proceedings for non-compliance with the directive (see COM (2009) 192 final, p. 5).

[54] See the Communication: 'The support of electricity from renewable energy sources', 7.12.2005, 2005 (COM) 627 final, and Staff working document 'The support of electricity from renewable energy sources', 23.1.2008, SEC (2008) 57.

[55] See Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, 23.1.2008, COM (2008) 19 final.

[56] See Articles 6 (statistical transfers), 7 to 10 (joint projects) and 11 (joint support schemes) of Directive 2009/28/EC.

[57] The maintenance in the Directive of specific national targets likely made Member States wanting to be able to decide on national support instruments and policies appropriate to reach such targets. See M. Schöpe, 'The new EU Directive on renewable energies from the perspective of a Member State, in C. Jones (ed.), *EU Energy Law*, Vol. III – Book Three (Claves & Casteels 2010), p. 182.

[58] In Portugal, the change has been substantial. In 2010, supported RES capacity (mainly wind power and co-generation) accounted for 32.5% of installed capacity and 34.4% of electricity consumption in the country, against 12.7% and 6.9% in 2002, respectively. If large hydro plants (not supported) are included, electricity from RES represented 54% of national consumption in 2010 (ERSE, *Informação sobre Produção em Regime Especial (PRE)*, August 2011).

technology, and subsequently to higher costs for RES support EU-wide. On the other, non-harmonisation of support schemes may affect the functioning of European wholesale electricity markets, as it can distort price formation and compromise the convergence of national electricity prices (market coupling) that will allow for greater competition within the internal energy market. It has nevertheless been argued that harmonisation of support schemes may have limited benefits[59].

As RES technology becomes more mature, and the share of price supported electricity in the EU increases, the negative effects of national support mechanisms to the internal market may outweigh its environmental benefits, and may therefore have to be carefully assessed. Yet this debate is likely to take place at political level. As discussed below, it is doubtful that the Court would allow itself to interfere with the political choices of the EU legislator in this area, except if the restrictive effects of the EU measure are manifestly greater than necessary to attain the legitimate objective in view[60].

8. More specifically, would the Court's decision in the case of *Preussenelektra* still be valid in 2012, given both the substantial expansion of wind and solar power generation output, and the maturing of the EU liberalised markets in power and gas, in the meantime?

If asked in the present day to rule on a national support scheme for RES such as the German legislation in *PreussenElektra*[61], the Court would have to take into account a number of significant legal[62] and factual[63] developments which occurred in the last decade.

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[59] Especially if national differences remain in other areas of the internal energy market (for instance on rules regarding the technical operation of the system), or if interconnection capacity is insufficient. It has also been said that national schemes may better reflect the differences between the state of RES development between Member States, and different ambitions beyond the defined targets or for certain technologies. Further, an harmonised scheme which does not differentiate by technology may reduce dynamic efficiency, as only the most competitive technologies in the short-term would expand, and it could also be argued that the dramatic change needed to convert the existing schemes into a harmonised EU mechanism could have a negative effect on investor confidence, if not accompanied by adequate safeguards. See CEER, Implications of Non-harmonised Renewable Support Schemes, pp. 30-42.

[60] Although bound to have regard to the principle of the free movement of goods, EU Institutions are perceived to enjoy a greater freedom than that permitted to the Member States in view of the special tasks which the EU is permitted to perform (see in this respect Peter Oliver, *Free Movement of Goods in the European Communities*, p. 73).

[61] ECJ 13 March 2001 Case C-379/98 *PressenElektra AG and Schleswag AG* [2001] ECR I-2159.

[62] First, the Lisbon Treaty introduced Article 194 TFEU, which clarifies the objectives pursued by the Union's energy policy, placing at the same level the functioning of the internal energy market and the promotion of new and renewable forms of energy. In addition, since 2001 national support programs have been framed by Directive 2001/77/EC, and continue to constitute the model for RES financing under Directive 2009/28/EC. Finally, subsequently to Directives 96/92/EEC and 98/30/EC, which represented only a 'further phase of liberalisation' of the electricity and gas markets, the Union has enacted the Second (Directives 2003/54 and

In *PreussenElektra* the Court ruled that, despite being capable, at least potentially, of hindering intra-community trade, the German RES support scheme was not, in the state of Community law at the time, incompatible with Article 34 TFEU (formerly Article 28 EC), taking into account the aim of the legislation – the protection of the environment through the reduction of greenhouse gas emissions – and the 'particular features of the electricity market, which make it difficult to determine its origin once it has been injected into the grid[64].

Given the current importance of electricity from RES in the EU[65] and the case-law of the Court, it would be difficult to argue that national support schemes are not capable of hindering intra-Union trade within the internal electricity market (although it is not referred by the Court, at the time *PreussenElektra* was delivered electricity produced by RES under the scheme corresponded only to 1% of German electricity consumption[66]). These measures would thus likely fall within the scope of Article 34, which prohibits quantitative restrictions and measures having equivalent effect.

It has long been established that protection for the environment constitutes a mandatory requirement which may limit the application of Article 34[67]. Traditionally mandatory requirements could only be relied on in cases of national measures indistinctly applicable to national and imported products, which is not the case of national RES support schemes (which only benefit electricity produced at national level). However, the Court already applied the mandatory requirement of environmental protection to distinctly applicable measures in cases such as *Walloon Waste*[68] and in *PreussenElektra*, and it could do so again, although it would be desirable that the Court's position on this issue is clarified, as suggested by AG Jacobs[69]. In addition, although the reasoning is not clear, *PreussenElektra* also

55/EC) and the Third Energy Packages (Directives 2009/72 and 73/EC), with the objective of creating a 'fully operational' internal market for electricity and natural gas.

[63] Between 2000 and 2010 both wind and solar power capacity in the EU increased dramatically, from 12.8 GW to more than 84 GW for wind (a 654% increase) and from 0.19 GW to more than 25 GW in the case of solar power (a 13,500% increase). See The European Wind Energy Association, 'Wind in Power: 2010 European Statistics', February 2011.

[64] See *PreussenElektra*, paras. 71-81.

[65] Electricity from RES in 2009 represented 18% of total electricity generated in the EU, although there are significant differences between Member States (see European Commission Market Observatory for Energy: Key Figures, June 2011, pp. 19-20).

[66] See Opinion of AG Jacobs in *PreussenElektra*, para. 204.

[67] ECJ 20 September 1988 Case 302/86 *Commission v Denmark* [1988] ECR 4607, para. 9. See also the Opinion of AG Jacobs in *PreussenElektra*, para. 216.

[68] ECJ 9 July 1992 Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

[69] See Opinion of AG Jacobs in *PreussenElektra*, para. 229

appeared to consider that environmental protection can be read into the Article 36 TFEU derogation on public health[70].

It would therefore appear that, although restricting trade, national RES support schemes can be justified by the protection of the environment (either as a mandatory requirement or as derogation under Article 36 TFEU), if they comply with the principle of proportionality. In this respect, the analysis will largely depend on the facts of the case. But in general terms, considering what was said above, national RES support schemes continue to represent, in the absence of a harmonised EU regime, an essential contribution to the attainment of the mandatory national targets of Directive 2009/28/EC[71], and it is not unreasonable to argue that its benefits continue to outweigh any restrictive effects they may have on cross-border electricity trade.

9. Are there notable features of your Member State's implementation of the RES 2009 Directive that present challenges and difficulties with respect to cross-border cooperation, if they are provided for at all (joint projects, for example, whether between governments and their authorities or between private parties, and statistical transfers under the Directive)?

Directive 2009/28/EC was implemented into Portuguese law by Decree-Law 117/2010, of 25 October and Decree-Law 141/2010, of 31 December. These acts do not contain any provision on the voluntary cooperation mechanisms provided by the Directive (statistical transfers, joint projects or joint support schemes). Therefore to date Portugal has yet to implement Articles 6 to 11 of Directive 2009/28/EC.

The Regulatory Council of MIBEL, bringing together Portuguese and Spanish energy and financial regulators, has recently launched a broad public consultation on the main regulatory harmonisation issues for the integration within the Iberian Electricity Market (MIBEL) of the energy produced by countries under the national RES support scheme ('special generation regime', *produção em regime especial*)[72]. Besides consulting on the harmonisation of purely

[70] *PreussenElektra*, para. 75 ('It should be noted that [the policy to promote RES] is also designed to protect the health and life of humans, animals and plants', the grounds for derogation under Article 36). See Catherine Barnard, *The Substantive Law of the EU*, Third Edition, Oxford, 2010, p. 162.

[71] See Recital 25 of Directive 2009/28/EC: 'One important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes, in order to maintain investor confidence and allow Member States to design effective national measures for target compliance'.

[72] See Public Consultation Document of Regulatory Council of MIBEL: *Harmonização regulatória da integração da produção em regime especial no MIBEL e na operação dos respectivos sistemas eléctricos*, of 2.11.2011. The public consultation extends until 15.12.2011. This initiative was adopted within the context of the Regulatory Compatibilisation Plan agreed to by the Portuguese and Spanish Governments. Other

technical rules in order to improve the functioning of MIBEL's spot and derivatives markets[73], the NRAs and financial authorities are requesting feedback on:

- Harmonisation of remuneration rules for the national support schemes. Portugal has a Feed-in Tariff, and Spain has a mix of Feed-in Tariff and Feed-in Premium. The authorities wish to know from market operators which are the advantages and inconveniences of tariff simplification and harmonisation at Iberian level, as well as the appropriate measures and calendar ('roadmap') for tariff convergence and its application to existing installations.
- The integration of the Portuguese and Spanish guarantee of origin systems at the Iberian level. As all electricity consumed in both countries is traded through the same hub (the spot and derivative markets), it appears logical to the authorities that consumers receive complete information as to the electricity they share (these guarantees, however, are not related to 'green certificates')[74].

C. Climate Change

10. To what extent has the choice of the emissions trading scheme (the EU ETS) to deliver climate change targets had the final word vis-à-vis alternative methods such as carbon and energy taxation?

It is generally acknowledged that reduction of greenhouse gas (GHG) emissions needed to limit global warming is most efficiently achieved by putting a price on emissions on carbon dioxide (CO2) and other GHG gases, and that there are two basic mechanisms to achieve carbon pricing: either a 'cap-and-trade' system (which sets a binding cap on emissions and allocates allowances to emitters, through an auction or for free, based on historical emissions) or a carbon tax, which directly sets the price of carbon, and is taken into account by emitters in their pricing and output decisions[75].

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harmonization initiatives have already been undertaken in the past, for instance regarding regulated electricity tariffs (which are gradually being phased out), consumer switching procedures, interruptibility agreements, acquisition by last resort suppliers and power guarantee mechanisms. See Regulatory Council of MIBEL: *Descrição do Funcionamento do MIBEL*, of November 2009, pp. 231-236.

[73] See footnote 31 above.

[74] See Public Consultation Document of Regulatory Council of MIBEL, pp. 35-37.

[75] See G. Federico, 'Climate Change and Environmental Policies in the European Electricity Sector', in *Concorrência & Regulação* Issue 5, January-March 2011, p. 293.

The Emission Trading System ("ETS"), implemented since 2005[76], is the main EU instrument of mitigation of GHG gases, and, as the only multi-country cap-and-trade scheme in existence today, is also the biggest carbon market in the world. Although its initial design was said to be flawed in some important respects, such as the over-allocation of allowances during the first phase (2005-2007), the ETS established a transparent price of carbon across Europe, and (as revised by Directive 2009/29/EC[77]) will remain a key mechanism to reach EU emission targets for the 2010-2020 period.

It has been argued that a carbon tax has potential advantages over a cap-and-trade system[78]. There have been several attempts since 1990s to introduce a unitary carbon tax at EU level, which encountered the opposition of some Member States (such as the United Kingdom). At national level, however, the potential of carbon taxes has been recognised, and a number of Member States have put in place either carbon taxes or taxes on carbon-based energy[79].

Cap-trade-systems and carbon taxes can have complementary roles, as they can cover different parts of the economy. Cap-and-trade systems in particular are of difficult application to small or diffuse emitters, such as those in the transportation sector, which represents a substantial part of GHG emissions. The recent Commission proposal to amend Directive 2003/96/EC on taxation of energy products[80] addresses this issue by introducing a CO2 emission element into the taxation of energy products not covered by the EU ETS (transport, households, agriculture and small industries). Although it retains minimum tax rates and does not attempt full harmonisation, which would be unacceptable to Member States, this proposal constitutes a meaningful progress and may contribute positively to the EU's climate change

[76] Pursuant to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32.

[77] Directive 2009/29 of the European Parliament and of the Council of 23 April 2009, OJ L 140, of 5.6.2009, p. 63.

[78] Especially if allowances are given away for free (which has mostly been the case under the ETS to date). Higher price volatility in allowance prices can also deter investments with high up-front costs, whereas a carbon tax can create a more stable environment for investors, although the setting of the adequate price can also raise difficulties. See for instance I. Parry, *Reforming the Tax System to Promote Environmental Objectives: An Application to Mauritius*, International Monetary Fund Working Paper 11/124, p. 7, or G. Federico, 'Climate Change and Environmental Policies in the European Electricity Sector', n. 75 *supra* pp. 302-304.

[79] Denmark, Finland and Sweden established carbon taxes during the early 1990s, and more recently the UK, the Netherlands, Ireland and France have either introduced taxes on carbon-based energy or are considering such measures. See *European Commission Taxation Papers: Innovative financing at a global level*, Working Paper No. 23/2010, p. 31.

[80] Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, of 13.4.2011, COM (2011) 169 final. See also Commission Press Release IP/11/468 and Memo 11/238.

and energy efficiency policies, creating at the same time a basic CO2-based EU framework that limits the multiplicity of environmental national tax policies existing today[81].

Addressing emissions reduction by fiscal measures at EU level will, at any rate, always be a complex issue, since all legislation must be unanimously approved[82], and Member States are invariably reluctant to transfer additional tax competences to the Union.

11. Have differences in viewpoints on the above been reflected in legal measures in your Member State and how have they been resolved?

The main instruments of Portuguese law to meet the national targets for GHG emissions under the Kyoto Protocol are the National Program For Climate Change[83], the implementation of the EU ETS[84] and the Portuguese Carbon Fund, created in order to ensure compliance with the Kyoto national targets (through the acquisition if necessary of emission credits) and to support projects contributing to GHG emission reduction[85].

Portugal does not have a tax applying to CO2 emissions in a comprehensive way and, although one of the main objectives of the present Government is to significantly increase energetic efficiency until 2020[86], there is no indication that a carbon tax is being envisaged.

There is however a number of fiscal measures in place at national level for which CO2 emissions are relevant (either directly or indirectly). As from 2007, the car registration tax has been calculated according to both engine capacity and the CO2 emitted by the vehicle[87]. In the last two years, excise duties on all motor fuels have also increased significantly: for instance, in the Draft Budget Law for 2012, the tax rate on heating diesel suffers a 53.8% increase

[81] Nevertheless the proposal has also been criticised for not being sufficiently ambitious (see for instance Opinion of the European Economic and Social Committee of 27.10.2011, ECO/303).

[82] Under Article 113 TFEU.

[83] See Council of Ministers Resolutions 104/2006 of 23 August and 1/2008, of 4 January, which set forth the specific measures to be adopted in the energy, transportations, forestry, agriculture and urban waste sectors, in order to improve energy efficiency and production and use of energy from RES (including financial support for RES electricity generation).

[84] See Decree-Law 233/2004, of 14 December, as amended.

[85] See Decree-Law 71/2006, of 24 March, as amended, as well as Agência Portuguesa do Ambiente [*Portuguese Envirornment Agency*]: *Ponto da situação das políticas de alterações climáticas em Portugal*, 24.4.2011.

[86] The Government aims at a 25% overall reduction in national energy consumption until 2020 and at a 30% reduction in the energy consumption of State bodies, thus going beyond the national targets set by EU law. See Program of the XIX Constitutional Government, June 2011, p. 45.

[87] See Article 7 of the *Código do Imposto sobre Veículos* (approved by Law 22-A/2007, of 29 June, as amended).

relative to 2011[88]. In addition, a tax on the consumption of electricity, in line with Directive 2003/96/CE, will become applicable by 2012[89].

Security

12. and 13. To what extent has your Member State implemented EU legislative measures on energy security in ways that seek to ensure the functioning of the internal market but which also promote measures of solidarity with other Member States? Has this had any significant impact upon the distribution of domestic institutional responsibilities for such matters (both within the government and public sector and as between public and private)?

The main responsibilities regarding security of supply in electricity, natural gas and oil rest with the Government. In short, the Directorate-General of Energy and Geology of the Ministry for Economy ("DGEG") monitors the security of supply in electricity, natural gas and oil, and reports annually to the Government[90]. The electricity and natural gas transmission system operator ("TSO") in Portugal, *REN – Redes Energéticas Nacionais, SA*, cooperates closely with DGEG in the monitoring of security of supply, and is also required to submit to the Government and to the NRA ten-year development plans for the electricity and gas transmission systems, which should ensure the adequacy of the system and the security of supply[91]. In addition, suppliers of natural gas and oil fuels are subject under national law to maintain minimum reserves of natural gas and oil[92]. This obligation is monitored by REN in the case of natural gas reserves[93] and by EGREP (the Portuguese stockholding entity) in the case of oil reserves,[94] and is enforced in both cases by DGEG[95]. Should an energy crisis occur, the responsible minister may adopt safeguard measures, as provided by EU law[96].

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[88] See PriceWaterhouseCoopers State Budget 2012 Portugal, October 2011, available at www.pwc.com/pt/oe2012.

[89] See Draft Law 27/XII (on the State Budget for 2012), submitted by the Government to Parliament on 17.10.2011.

[90] See Articles 32 and 32-A of Decree-Law 172/2006, of 23 August, as amended, Article 47 of Decree-Law 140/2006, of 26 July, as amended, and Article 27 of Decree-Law 31/2006, of 15 February.

[91] See Article 30 of Decree-Law 29/2006, Articles 32 and 32-A of Decree-Law 172/2006, Article 26 of Decree-Law 30/2006, and Article 12 of Decree-Law 140/2006, all as amended.

[92] Minimum quantities of gas reserves were raised – considering that Portugal has only one land border and one LNG Terminal – to reach 24 days by 2015, 30 days by 2020 and 35 days by 2025. See Decree (*Portaria*) 297/2011, of 16 November.

[93] Article 53 of Decree-Law 140/2006

[94] See Articles 27 and 30 of Decree-Law 31/2006 and Decree-Law 339-D/2001, of 28 December, creating EGREP (*Entidade Gestora de Reservas Estratégicas de Produtos Petrolíferos, E.P.E.*).

[95] See Article 49 (5) of Decree-Law 140/2006.

[96] See Articles 8 of Decree-Laws 29/2006, as amended.

Directive 2005/89/EC[97] on the security of electricity supply has been transposed into national law, and the Government is preparing the implementation of Regulation (EC) 994/2010[98] on the security of gas supply, but further details on implementing measures of this regulation have yet to be made public.

There are, however, a number of initiatives between Portugal, Spain and France, both at the regulatory and networks levels, with the aim of uniting national markets into regional electricity and gas markets, and thereby gradually creating an internal electricity market, which would contribute to guaranteeing the security of energy supply.

Alongside the Iberian electricity market (MIBEL), which is already in operation and is being consolidated, the creation of an Iberian natural gas market (MIBGAS) is a political priority of both governments[99]. Further, the NRAs from Portugal, Spain and France are working together for the development of the South-West Electricity Regional Market ('South-West ERI') and of the Gas Regional Initiative for Southern Europe ('South GRI')[100].

The development and integration of transmission networks are being planned in concert by the TSO of each country. REN and *REE – Red Electrica Española* (the Spanish electricity TSO) envisage reinforcing the interconnections between Portugal and Spain, practically doubling the existing capacity in 2014-2015, in order to reduce congestions and improve the functioning of MIBEL[101]. In addition, REN and Enagas (the Spanish gas TSO) have also planned a third interconnection between the Spanish and Portuguese gas transmission networks, in the context of the South Gas Regional Investment Plan, which also includes the Iberian-French Corridor project, with a view to achieving a regional natural gas market encompassing Portugal, Spain and France. Among other foreseen developments in the Portuguese network, REN is planning to increase the underground storage facilities of Carriço

[97] Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L 33, 4.2.2006, p. 22.

[98] Regulation (EU) 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295, of 12.11.2010, p.1.

[99] See Memorandum of Understanding, Section 5.3.The proposed organizational model and operational principles of MIBGAS have been presented by the two NRAs in 2008 for government approval. NRAs are also proposing mutual recognition of gas supply licences and the harmonization of access tariffs.

[100] In 2010, NRA's work within South-West ERI concerned interconnection and available capacity, convergence of information requirements for TSOs, congestion management and the use of interconnection. In relation to South Grid, the priorities defined for 2010 were investments in new interconnections, access to transportation capacity, transparency, interoperability and security of supply. See ERSE Annual Report to the European Commission, August 2011, pp. 43 and 62.

[101] Two additional interconnections (in the North and South of Portugal) are planned, which will raise average interconnection capacity up to 3,000 MW. See REN, *Development and Investment Plan of the Electricity Transmission Network 2012-2017* (2022), July 2011, Executive Summary, p. xii.

(in central Portugal), in order to double the existing capacity, which will allow the integration of the underground gas storage facilities in Portugal and Spain, one of the main objectives of the new interconnection pipeline.[102]

A final note to mention that in July and August 2011 the Government eliminated the special rights the State had over *EDP – Energias de Portugal, SA.* and *GALP Energia SGPS, S.A.*, the main electricity and gas and oil companies in Portugal, respectively, which had the stated objective of guaranteeing the security of energy supply in Portugal[103]. The Government has recently been charged by the Parliament with enacting a legal regime to safeguard energy infrastructure essential to security of supply, in compliance with EU law[104].

The Treaty

14. How is your Member State actually or likely to be affected by Article 194 of the Treaty on the Functioning of the European Union (the Energy Chapter) which offers opportunities but also imposes constraints with respect to the choice of energy sources and natural resources, and energy and environmental legal bases?

The new Article 194 TFEU confers on the European Union a clear and explicit competence in energy policy (which is shared with the Member States), placed squarely between the spheres of the internal market and of the protection of the environment[105]. The Lisbon Treaty reflected the evolution of energy policy within EU law, which started with the liberalization of the gas and electricity sectors under the competition provisions in the 1980s and the internal market rules in the 1990s, and gained a significant environmental dimension subsequent to the commitments made by the Union on climate change subsequent to the signing of the Kyoto Protocol.

The express reference in Article 194 (1) to the need to protect and improve the environment as a basis for energy policy, and the stated objective of promoting energy efficiency and

[102] See South Gas Regional Investment Plan 2011-2020, prepared by Enagas GRT Gaz, REN and TIGF pursuant to Article 12(1) of Regulation (EC) 715/2009.

[103] Further to Decree-Law 90/2011, of 25 July and the amendment of the companies' articles association in July and August 2011. Further to infringement proceedings initiated by the European Commission, the Court of Justice ruled in both cases that the special rights were incompatible with EU law, reasoning that such rights restricted free movement of capital and, although the security of supply constituted a public security justification under Articles 52 and 65 TFEU, the State did not demonstrate that the rights at issue complied with the principle of proportionality. See ECJ 11 November 2010 Case C-543/08, *Commission v. Portugal (special rights over EDP)*, and ECJ 10 November 2011 Case C-212/09, *Commission v. Portugal (special rights over GALP)*.

[104] See Law 50/2011, of 13 September.

[105] See Article 4 TFEU.

energy saving and the development of new and renewable forms of energy, could raise concerns as to the discretion Member States maintain as to their choice energy sources and natural resources. Article 194 (2), however, defines a clear border between EU action and Member States competences, by clearly stating that Member States retain sovereignty over national energy resources, their energy mix and the general structure of their energy supply. The degree to which Article 194 (1) constrains Member State action in this area is therefore open to discussion[106].

Even if Article 194 could be interpreted as limiting Member States' action on environmental grounds, Portugal is not likely to be seriously affected. In the last decade, Portugal devoted significant attention and resources to the production of electricity from renewable sources (in particular wind power and hydro plants) in order to reduce the country's energy dependence. Supported 'special production' RES generation increased in share from 13% of total installed capacity in 2003 to approximately 33% in 2010. In 2010, 54% of the electricity consumed in Portugal was produced from RES[107]. The Portuguese Government 2020 targets are also ambitious: 31% of gross final consumption of energy coming from RES and 60% of all electricity produced from RES. The Government further commits to reduce the country's energy consumption in 25% by 2020[108].

[106] See House of Lords European Union Committee 10th Report of Session 2007–08 '*The Treaty of Lisbon: an impact assessment*' 13.3.2008, Section 9.34.

[107] See ERSE Annual Report to the Commission, August 2011, pp. 33-36.

[108] See Council of Ministers Resolution 29/2010, of 15 April and Program of the XIX Government, June 2011, p. 45. Given the financial impact of RES support on public finances, in the context of the EU-IMF Financial Assistance Program the Government committed to reviewing the efficiency of support schemes for co-generation and other RES generation, and propose possible options to reduce the feed-in tariff, including the possibility of agreeing a renegotiation of existing contracts. For new contracts, feed-in tariffs are to be revised downwards, and alternative mechanism (such as fee-in premiums) is to be analysed (see Memorandum of Understanding, Sections 5.7 to 5.10).