INTRODUCTION

Developments in the EU internal energy market have been ongoing since the end of the 1990’s, with a common EU external energy policy lagging behind. Only from 2005-2006 onwards did the external dimension truly move up the EU’s political agenda, mainly under the stimulus of geopolitics and successive energy delivery cessations. Attaining a coherent and effective EU external energy policy has been mired with problems: disagreement over the geopolitical and market-based means to achieve the supposedly common objectives, inter-institutional coordination issues, or disagreement on whether the EU should act at all. In December 2009 the Lisbon Treaty explicitly conferred powers in the sphere of energy on the European Union (194 TFEU), with the aim of providing a stronger basis from which to alleviate these problems. The goal of this paper is to explore what positive or negative impact the new legal basis as well as the new external relations institutions have had on EU external energy policy. The yardstick for this examination will be the state of play before December 2009.

In this paper I first set out the three pillars of EU energy policy as they developed since 2005: (1) security of supply (2) within a competitive market (3) while ensuring its environmental
sustainability. This then forms the basis for the second section which provides the post-Lisbon perspective on EU energy policy. Here the paper argues that the overall direction of EU energy policy in terms of means and objectives largely remains in place, and points out that the Lisbon Treaty has simply codified earlier political choices. However, it argues that this is not necessarily a bad thing, since the objectives of EU energy policy are not so much in question. Indeed, most agree on the need for secure energy supplies at affordable prices while safeguarding the environment. Rather, in legal-institutional terms the Lisbon Treaty created a number of new obstacles, and institutionally might even have caused a serious setback to a comprehensive EU external energy policy. The following three issues are dealt with in this paper:

(1) **Vertical competence division:** The progressive advancement of the internal market suffers from a similar faith of the aviation market; namely limited ‘political recognition’ of external competence and predominance of national member state interests over the common EU interest.

(2) **Post-Lisbon Institutions:** There is the glaring absence of the High Representative/Vice President in energy matters, the EEAS is a missed opportunity for energy, and the predominance of the Commission and the Presidency continues or have even strengthened compared to the pre-Lisbon situation. As a consequence the CFSP aspects of external energy policy now risks further being underrepresented, or at the very least, being represented by the Commission with no significant role for the EEAS and its leadership.

(3) **Horizontal competence division:** By conferring a new competence in the TFEU, the Lisbon Treaty has created a new area for ‘inter-pillar’ friction, namely the energy-CFSP nexus. Since before December 2009 energy security formed a significant part of the CFSP, this paper then argues how to combine the CFSP legal basis, the new energy legal basis, and the non-affect clause as the legal foundation for both internal and international instrument of EU external relations.

The paper concludes that these legal-institutional hurdles are not insurmountable, but that mainly the vertical EU-Member State relationship; and the absence of the EEAS and the High Representative are to be urgently resolved.

**THE DEVELOPMENT OF EU ENERGY POLICY BEFORE LISBON: SUSTAINABILITY, COMPETITIVENESS AND SECURITY**

**Key Moments & Instruments of EU External Energy Policy Pre - & Post-Lisbon**

The 2003 European Security Strategy did not include energy security in its threat assessment, and instead was dominated by the wake of 9/11. Only in its introductory statement could we find that “Energy dependence is a special concern for Europe”. Since then, much has changed in the Union’s threat assessment and at the Hampton Court informal European Council of October 2005 agreed that the Union would need to define a common European energy policy. In response the Commission published a Green Paper in March 2006, which was endorsed by the European Council the same month. After the endorsement numerous policy documents followed, notably for present purposes the October 2006 Communication entitled ‘external energy relations – from principles to

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3 Document 7775/1/06 REV 1, Brussels European Council 23/24 March 2006, Presidency Conclusions.
action’, the January 2007 Communication ‘an energy policy for Europe’ (commonly known as the first strategic energy review), the 2007-2009 Action Plan of the European Council, the second Strategic Energy Review of November 2008 … that being but a selection of the ‘overarching’ strategic energy policy documents not including numerous specific documents and proposals. By the time of the 2008 review of the European Security Strategy, energy was now mentioned as the “artery of the European economy” facing a wide array of security challenges and “our response must be an EU energy policy which combines external and internal dimensions.”

After the entry into force of the Lisbon Treaty on December 2009, the new legal basis was supposed to create momentum for a new grand launch of a revamped EU energy policy, though this has been overshadowed by events in the neighbourhood and the euro-crisis. The November 2010 Commission Communication formulated chalk lines of a 2020 energy strategy in preparation for what was supposed become an ‘Energy Summit’, a European Council discussing only this topic. While that summit did take place, it was strongly overshadowed by Tunisian and Egyptian events and the euro-crisis, illustrated by the two declarations on these topics annexed to the Conclusions. While not without importance, weight did shift to the 28 February 2011 the energy Council which adopted a set of formal conclusions endorsing the “Energy 2020” programme. Of notable importance for the external dimension is that the February European Council requested that the Commission by June 2011 “submit a communication on security of supply and international cooperation aimed at further improving the consistency and coherence of the EU’s external action in the field of energy.” To that end the Commission opened public consultations between 21 December 2011 and 7 March 2011, though at the time of writing (15 June 2011) the Communication or the comprehensive report promised following the consultation had yet to be published.

Three pillars of EU energy policy: Security, Sustainability & Competitiveness.

The first strategic energy review of 2007 lists a number of threats to EU energy supplies: increasing dependency on a small number of third countries prone to instability; expected exponential increases in global demand with rising and volatile prices; and climate change. To address these threats EU energy policy is based on three pillars which reflect means-ends relationships: The

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8 ESS 2008 review, 1 and 8.
9 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy 2020, A strategy for competitive, sustainable and secure energy, Brussels, 10.11.2010, COM(2010) 639 final
10 European Council Conclusions, Brussels, 4 February 2011, 4.
11 First Strategic Energy Review, see note 5, 2-4.
A strategic objective is to provide ‘secure and affordable energy to consumers’, which must be addressed by means of ensuring environmental sustainability, limiting the EU’s vulnerability to supply fluctuations and promoting growth and jobs. Since 2007 and now also in the Energy 2020 Strategy, this is commonly referred to as ‘sustainability, security and competitiveness’. The next three paragraphs briefly explain what they imply.

On the first point – sustainability – this is expected to work as follows: First, the Commission argues that working to reduce CO₂ emissions will lead to using less energy thereby addressing energy security on the demand side. Additionally, combating climate change is expected to decrease dependence on foreign imports “by increasing the share of domestically produced energy, diversifying the fuel mix and the sources of energy imports and increasing the proportion of energy from politically stable regions as well as creating new jobs in Europe.” Furthermore, climate change is addressed through emissions trading. For the trading scheme to work, the Commission argues that only a competitive market can ensure its success, which will also give transmission system operators to have an interest to encourage connections to renewable energy sources and stimulate change in generating and using energy. In a nutshell, we can see that the objective of sustainability can serve as a goal in itself, to be realized through market mechanisms (the third competitiveness pillar). However, the environmental objective can also function as a means to realize the EU’s energy security. These kinds of means-ends interconnections and justifications are commonly found throughout policy discourse on EU energy policy.

The security pillar is the second element of EU energy policy: First, it is necessary to address risks related to supply cessations regardless of their natural, political, or technical origins. For example, one problem noted repeatedly is that third countries are insufficiently investing in energy production. In a February 2008 speech, Solana was rather straightforward on this point: “Contrast Gazprom’s strategic spending spree abroad with the lack of investment and waste at home”, a statement whereby the former High Representative expressed strong concern over foreign control over strategic European energy interests. Supply security also encompasses concerns over sufficiently diversified sources of hydrocarbons such as seen in the controversies over Nord Stream, South Stream and the Nabucco pipelines; but also apprehension over limited future resources in producer countries due to insufficient investment. Second, given that a number of member states are highly or completely reliant on a single gas supplier, it is crucial to increase solidarity between them. Such initiatives are often accelerated by geostrategic exigencies: In November 2008 the Commission argued that the Gas Security Directive could be improved towards greater harmonisation of security of supply standards, and it stated that it would propose a revised version of the Directive in 2010. However, the January 2009 cut in gas supplies from Russia via Ukraine

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12 Idem, 5.
13 Idem, 5. ‘A Strategic Objective to guide Europe’s Energy Policy’
14 Idem, 14.
15 Idem, 5 & 11.
16 Idem, 4
18 First Strategic Energy Review, see note 5, 10.
accelerated legislative work in this area, and the gas security Regulation entered into force on 32 December 2010.19

The final pillar is competitiveness, and is deeply interconnected to the previous two pillars: First, strong legal frameworks are required to funnel investment towards new environment friendly technologies, and the development of those technologies “will potentially”20 contribute to economic growth, increased international trade and more jobs in Europe. Lower energy demand will then support energy security by requiring less imports; less imports will lead to decreasing ‘loss of wealth’ created within the EU, which could instead be then instrumentalized towards competitiveness. Second, the competitive market will result in fair prices for consumers, and will overcome the ‘progressive concentration of hydrocarbon reserves in a few hands.’21 However, respect for free market principles and competition is required, as is further investment in sufficient infrastructure in and outside the Union to support competitiveness and security of supply. As regards the connection with sustainability, according to the second strategic energy review “a competitive energy market is fundamental in achieving the "20-20-20" targets”.22

Two lessons emerge from the overview of the preceding three pillars: Firstly, the different political, security, economic and environmental aspects are deeply intertwined, and cannot be detached from each other. Secondly, the red thread through this overview is that the Union largely seeks to realize its secure and affordable energy through a market-based methodology which heavily draws on regulation (regulations, directives, bilateral and multilateral agreements etc.) to achieve its objectives. Legal frameworks and market mechanisms are perceived as providing dividends on all fronts: they provide a fertile investment climate to the benefit of the economy and job-creation, allow for emissions trading to the benefit of the environment, have the ability to lock-in producers and provide secure energy supplies, and so on.

The Three Key Obstacles to an Effective and Coherent EU External Energy Policy

The March 2006 Green Paper already recognized that “a coherent external policy is essential to deliver sustainable, competitive and secure energy”, adding that “it would be a break from the past, and show Member States’ commitment to common solutions to shared problems.”23 For the Commission, the effectiveness of such a policy would be dependent on progress in the creation of the internal market, on regular and formal political coordination at EU level, all in pursuit of commonly defined objectives. A June 2006 non-paper to the European Council written jointly by the Commission and the services of then SG/HR Solana argued that an effective external policy on energy depends on being able to “harness the EU’s collective resources and ‘put them at the service of shared interests’. In order to achieve that this policy: “must be coherent (backed up by all Union policies, the Member States and industry), strategic (fully recognizing the geo-political dimensions of energy-related security issues) and focused (geared towards initiatives where Union-level action

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20 First Strategic Energy Review, see note 5, 5.
21 Idem, 4.
22 Second Strategic Energy Review, see note 7, 2.
can have a clear impact in furthering its interests). It must also be consistent with the EU’s broader foreign policy objectives such as conflict prevention and resolution, non-proliferation and promoting human rights. An external energy policy has to be based on a clear prior identification of EU interests, and reliable risk assessments. “24

Against those laudable objectives, we can identify three obstacles to achieving them:

1. Vertical: fragmentation and prioritization of individual Member State interests and absence of commitment to the common EU interest.

2. Horizontal: institutional fragmentation, substantive disagreement and diffuse control over different elements of the coherent EU external energy policy.

3. Substantive: lack of real political agreement and substantive policy fit on the connection between the market-oriented approach of EU external energy policy and the geopolitical and geostrategic dimension of relations with producer – and transit countries.

The first point can be illustrated by the February 2009 Council meeting which took place a few weeks after the Russian-Ukrainian gas dispute had left many of the Eastern EU countries in the cold and in the dark.25 Even when adopting the second Strategic Energy Review the Member States could not resolve the tension that marks EU energy policy: “Solidarity between Member States has to be strengthened and balanced with Member States’ responsibility over their energy security, fully respecting Member States’ choice of energy mix and sovereignty over energy sources.”26 While the EU responded to the January 2009 crisis by for example adopting the Gas Security Regulation in December 2010, that episode illustrates how the presence of an EU-level energy policy would have thoroughly alleviated its impact, and how the internal and external dimension are deeply intertwined. For example, a well-functioning internal market would alleviate obstacles created by the incapacity of member states to share information on current gas flows; gaps in EU-energy infrastructure exacerbated shortages which could not be alleviated inter-member state solidarity; bilateral deals of the Member States such as that of Bulgaria still failed to safeguard that country from the supply disruption; and so on.27 Hence, on the one hand there is the ‘EU interest’, the recognition that acting together will be to the benefit of the Union as a whole; on the other hand there is the unwavering pursuit of national interests and possibly breaking ranks by individual member states. The German-Polish tensions over the Nord Stream pipeline and the South Stream and Nabucco sagas have been symptomatic of an EU external policy that could scarcely be called coherent and efficient. As one Council official stated it: “we can end the bilateralism only when there is a true internal market.”28

26 Council Conclusions Brussels, 19 February 2009, 6692/09, 2.
The second and third points above, institutional fragmentation and substantive disagreement are deeply intertwined obstacles to an effective and coherent EU external energy policy. The three pillars of EU energy policy in the external dimension translate in a strong focus on a legal framework within which market principles can bring secure energy supplies at low prices. This emphasis on extending ‘the benefits of the internal market’ beyond EU borders regularly clashes with those Member States and EU officials who are convinced that a more ‘geopolitical’ route is preferable towards securing energy supplies. In a 2009 book based on extensive interviews, Youngs captured this issue as follows: “the principal division was described by officials as being between the Commission’s Energy and Transport directorate, on the one hand, and Relex and the Council on the other hand. The latter berated the former’s influence as an ‘energy technocracy’ whose market-based recipes were blind to geopolitical realities. The ‘energy technocrats’ complained that too much alliance-oriented foreign policy had already infected the coherence of EU strategies. […] In sum, officials acknowledged that the situation was not one of the ‘markets and institutions’ storyline having triumphed, but rather of sharply contrasting policy preferences persisting within different institutions and forums.”

In conclusion, in the pre-Lisbon era, we had a policy field which certainly developed a number of central objectives (the three pillars), but which was mired with deep-rooted horizontal (between and within the institutions), substantive disagreement over means and ends, and vertical (between the EU and Member States) schisms. The second part of this paper examines how the Lisbon Treaty has positively or negatively impacted that picture.

THE IMPACT OF THE NEW ENERGY COMPETENCE ON EU EXTERNAL ENERGY POLICY

Codification of the Three Pillars in the TFEU and the Energy 2020 Strategy.

The described energy policy developed without the existence of an explicit competence in the field, with most legislative instruments being adopted on the basis of the former Article 95 TEC in combination with other legal bases where necessary. The Lisbon Treaty has now explicitly conferred upon the Union a competence in this field, a power which is shared between the Union and its Member States. (Art. 4 TFEU) Energy is specifically mentioned in Article 122 TFEU (measures in case of supply disruption), Article 170 TFEU (developing trans-European energy networks), and Article 192 TFEU (environmental measures which might affect member states’ energy mixes). However, these three articles had predecessors in the pre-Lisbon Treaty era, and the main novelty with the Lisbon Treaty is indeed Title XXI, Article 194 TFEU. This article states that:

“In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, 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

Idem, 40-41.
(d) promote the interconnection of energy networks.

... Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c) ...”

The EU institutions sought to grasp the momentum created by the new Lisbon Treaty competence, and between May and July 2010 held a round of consultations involving Member States, local authorities, public and private stakeholders and private citizens. This then resulted in the publication in November 2010 of the ‘Energy 2020 programme’, carrying the subtitle ‘A strategy for competitive, sustainable and secure energy’. The 2020 programme states that ‘the inclusion of energy policy in the EU Treaty calls for a new outlook’ which was endorsed at the 4 February 2011 European Council and the 28 February TEE Council meetings.

As is to be expected, the Lisbon Treaty competence is not a sea-change in the direction of EU energy policy, but rather a codification of the policy-process that preceded it. Both the TFEU competence and the Energy 2020 strategy are a logical continuation of the three pillars in substantive formulation of objectives and means for their execution. The energy 2020 programme explicitly recognizes this: “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” Constructing the Union’s policy on the past basis is both logical and in itself not problematic. This because the challenge to a common EU energy policy has been less that of disagreement on objectives, and more one on means: All can agree on affordable energy for consumers, the necessity of protecting the environment, and the importance of secure energy supplies into EU borders. Rather the problem is one of insufficient, inefficient and incoherent execution.

The remainder of this contribution will thus focus on the legal and institutional impact of the Lisbon Treaty on the three key problematic areas which existed before December 2009: (1) prioritization of individual Member State interests (2) horizontal institutional fragmentation and disagreement (3) lack of real political agreement and substantive policy fit on the connection between the market-oriented approach the geostrategic dimension of EU external policy. Has the Union been provided with the legal basis and the institutions to more coherently and effectively implement an external energy policy?

Managing the EU – Member State Relationship: Proposal for a new Regulation formalizing the duty of loyalty.

In this subsection I shall reflect on developments in the vertical EU – Member State relationship in the field of energy policy. I shall do so by sketching a comparison with developments in the aviation policy which shows remarkable similarities with EU energy policy. On this basis it is

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31 Idem, 2.
possible to reflect on the state of play in energy policy post-Lisbon in light of the aviation experience.

Prior to Community intervention in the field of air transport, this industry was highly fragmented and dominated by national flag carriers, state-owned airports, and deep government intervention. This was an obvious obstacle to the 1992 Single Market programme, and the EC thus adopted three successive ‘packages’ of liberalizing legislation in ’87, ’90 and ’92 respectively.\textsuperscript{32} The EU energy markets were no different, dominated by national energy champions vertically integrated across production and distribution thereby possessing quasi-monopolies in their respective constituencies. The EU has equally responded by three packages of liberalisation measures: the electricity and gas directives of the late 1990’s, the second package of mid-2003, and the latest 3\textsuperscript{rd} package of mid-2009. Both liberalisation processes went hand-in-hand litigation in Luxembourg, and both lacked an external dimension. As in the 2006 Green Paper on energy Policy, the 2001 White Paper on transport stated that there is ‘an urgent need for an external dimension to air transport’.\textsuperscript{33} Indeed, what was lacking at the Community level was a ‘true pan-European approach’ in external aviation as a logical extension of the progressively developing internal market.\textsuperscript{34} Given this reality, the Commission was highly pro-active in its two-pronged strategy to attain an EU external aviation policy.\textsuperscript{35} On the one hand it followed the judicial strategy that led to the 2002 ‘Open Skies’ judgments partially recognizing EU exclusive competence in this policy field. On the other hand it used the threat of American competition and the lack of leverage on the part of individual Member States in dealing with the US,\textsuperscript{36} to construct a pan-European identity in the aviation field. As a consequence, from 2002 onwards a true “EU aviation policy” emerged also consisting of three pillars: first, there is the completion of the European Common Aviation Area which extends the internal market to a number of countries in the EU’s neighbourhood. Second there is the negotiation \textit{by the Union} of global agreements with key partners such as the US, China, Brazil, Russia and India. Finally, there is the process of rectifying the legal situation post-Open Skies Judgments. This occurs through Regulation 847/2004 which organizes the procedure whereby Member States’ bilateral aviation agreements either become mixed agreements, or agreements concluded exclusively by the Union.

This brief parallel with EU energy policy shows us that the following arguments will play in a push for an EU external energy policy.

(1) Subsidiarity (Art. 5.3 TEU) and a duty of loyalty (Art. 4.3 TEU): namely that the Union can more effectively defend European interests in aviation and/or energy than individual member states

\textsuperscript{33} Idem, para 92.
\textsuperscript{34} Council Decision 80/50/EEC of 20 December 1979 setting up a consultation procedure on relations between Member States and third countries in the field of air transport and on action relating to such matters within international organizations, OJ L 010, 24/01/1980 pp. 0024-0025
can; or that at the very least Member States should loyally pursue the EU interest as commonly defined at (European) Council level.

(2) Completion of the internal market: economically an internal market requires an external dimension to function effectively, and legally the internal legislation has implied (exclusive) external EU competences as its consequence.

The Communication on the Energy 2020 strategy starts with the ominous-sounding warning: “The price of failure is too high. Energy is the life blood of our society ... The energy challenge is one of the greatest tests which Europe has to face”\(^{37}\). The Commission’s evaluation of past initiatives towards facing this challenge is grim. On the lacklustre completion of the internal market it notes that over 40 infringement proceedings are underway on the second internal energy market package from 2003 alone.\(^{38}\) On the external dimension the strategy notes that “despite serious gas supply crises that have acted as a wake-up call exposing Europe’s vulnerability, there is still no common approach towards partner, supply or transit countries.” In response, the Commission makes a number of strong claims in the Energy 2020 strategy both on subsidiarity and on loyalty.

On *subsidiarity*, the Commission’s wish to grasp the post-Lisbon momentum is unequivocal: “The EU is the level at which energy policy should be developed. Decisions on energy policy taken by one Member State inevitably have an impact on other Member States. ... The time has come for energy policy to become truly European.”\(^{39}\) The European Council is perhaps less enthusiastic when it merely stated that “there is a need for better coordination of EU and Member States' activities with a view to ensuring consistency and coherence in the EU’s external relations with key producer, transit, and consumer countries.”\(^{40}\) On *loyalty*, we also find a number of important statements in the Commission Communication: “The EU must now formalise the principle whereby Member States act in the benefit of the EU as a whole in bilateral energy relations with key partners and in global discussions.”\(^{41}\) On the next page of the strategy we find that: “Mechanisms will be proposed by the Commission to align existing international agreements (notably in the gas sector) with the internal market rules and to strengthen cooperation between Member States for the conclusion of new ones.”\(^{42}\) These final two statements are interesting in that they state that there will be some kind of formalization of EU – Member State loyalty in EU external relations. Substantively they concern gas supply contracts of the EU Member States with producing countries which are regularly problematic from an EU law perspective. Gas deliveries are commonly agreed as take-or-pay contracts between energy giants and/or the governments of the countries in which they are based. These contracts generally have duration of 20 to 25 years to counterbalance the substantial investment required to implement them. Additionally, these agreements have persistently contained clauses which prohibit European companies to resell gas outside their home country: ‘destination clauses’. These clauses protect gas deliveries against having to compete with themselves, and

\(^{37}\) Idem, 2.
\(^{38}\) Idem, 3.
\(^{39}\) Idem, 4.
\(^{40}\) Conclusions of the European Council, Brussels, 4 February 2011, 4.
\(^{41}\) ‘Energy 2020: A strategy for competitive, sustainable and secure energy’, see note 30, 17.
\(^{42}\) Idem, 18.
guarantee the effectiveness of bilateral price negotiations between the third country and the various EU Member States. Such carving up of the market is obviously a concern from the perspective of EU law: On the one hand, territorial restrictions are clearly prohibited by Article 101 TFEU (former 81 TEC), and on the other hand the decade-long length of the agreements with preferential national pricing is equally incompatible with a EU-wide liberalized market. Taking the example of Russia, this country has fiercely defended such take-or-pay contracts with their destination clauses. The Commission has already from 2000 onwards threatened legal action against European companies and while it was unable to have any impact on the length of the member states’ agreements with these countries, between 2000 and 2004 destination clauses were being dismantled and removed from bilateral agreements with Russia.

Overall, this sufficiently illustrates that these bilateral agreements are not supportive of the EU objective of sustainability, security and competitiveness where they maintain the EU Member States’ susceptibility to geostrategic divide-and-rule approaches and hamper the smooth functioning of the internal market. In response to the request for more formalized solidarity mechanisms requested in the 2020 Energy Strategy, the European Council of 4 February 2011 made the following statement:

“*The Member States are invited to inform from 1 January 2012 the Commission on all their new and existing bilateral energy agreements with third countries; the Commission will make this information available to all other Member states in an appropriate form, having regard to the need for protection of commercially sensitive information.*”

Further taking a cue from EU aviation policy, it is likely that this open-ended invitation without a formalized legal structure will suffice to command the loyalty that Article 4.3 TEU and the realization of secure energy supplies and a well-functioning internal market might require. The provenance of this ‘invitation’ leaves little doubt: the Hungarian Presidency had sought a stronger commitment from leaders to inform each other about energy agreements, but this met with the resistance of Italy and the United Kingdom.

As a consequence stronger mechanisms are required, and the EU should consider adopting a Regulation such as Regulation 847/2004 adopted in the field of external aviation, and more recently also Regulation 664/2009 in external dimension of matrimonial matters. These are relatively novel instruments of vertical EU – Member State cooperation in EU external relations which are meant to

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46 COUNCIL DECISION 80/50/EEC of 20 December 1979 setting up a consultation procedure on relations between Member States and third countries in the field of air transport and on action relating to such matters within international organizations, OJ L 010, 24/01/1980 pp. 0024-0025
47 European Voice, Safety-first approach to European Energy Policy, 23-29 June 2011
formally organize duties of information (and sometimes authorisation) in these policy areas where the EU and Member States share competences. Taking inspiration from the Aviation Regulation, such an instrument in the field of energy would formalize and broaden the European Council’s invitation to an instrument managing the duty of cooperation as it exists between the Union and its Member States. I submit that in substance such an instrument would complement the three pillars/objectives of EU energy policy and that it would complement the set-up and objectives of other EU instruments such as the December 2010 Regulation on the security of gas supplies. That regulation focuses on the internal dimension of gas security through information, planning and coordination since “there is a clear risk that measures developed unilaterally by [a] member state may jeopardise the proper functioning of the internal gas market and the supply of gas to customers”. A Regulation such as this one would focus on the external dimension in support of the “comprehensive and effective common approach to security of supply [in particularly requiring] transparency, solidarity and non-discriminatory policies compatible with the functioning of the internal market, avoiding market distortions and the undermining of market responses to disruptions.”

Taking inspiration from the Aviation Regulation, such an instrument could fulfil a number of functions. The articles of the aviation regulation are mentioned so as to illustrate the feasibility and terms in which such an instrument could be drawn up:

1. The regulation it would formulate this not as an invitation but as a legally binding obligation of information, consultation as well as imposing substantive obligations. (Article 1 Aviation Regulation)
2. Rather than mere information, such an instrument could require an obligation for consultation at EU level on proposed bilateral negotiations. Though undoubtedly sensitive, such consultations would focus on compatibility with “the EU interest” as defined in the Energy 2020 strategy and the long-term 2050 goals. (Article 2 Aviation Regulation)
3. Legally, the EU interest would imply an obligation not to conclude new agreements which infringe EU competition laws or introduce any new incompatibilities with the EU’s internal market. This would imply that any agreements on pipelines should allow non-discriminatory access to booking capacity for transit, non-discriminatory tariffs as well as allowing for bi-directional flows in line with the gas security regulation. For example, in the case of the South Stream project several EU Member States have concluded bilateral agreements with Russia which if they will be applied upon completion of the pipeline, will contravene EU law.

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50 Gas Security Regulation, preamble, para 5
51 Gas Security Regulation, preamble, para 22
53 Günther OETTINGER, EU Commissioner for Energy, Speech at the South Stream event, SPEECH/11/382, 25/05/2011
Politically the EU interest would include a subsidiarity assessment as to whether certain projects such as Nord Stream, South Stream, Nabucco ought not be pursued at EU rather than national level. In this fashion the regulation would not require authorization of the agreement as is the case in aviation, but would feed into the policy process of common and coherent EU external energy relations and impose formal obligations to consider the EU interest.

Confidentiality of information or consultation could be safeguarded as is the case in the aviation Regulation. (Article 8 Aviation Regulation)

Finally, there would be an obligation to report upon completion of the negotiation, to ensure compliance with the substance of the regulation. (Article 4 Aviation Regulation)

The preceding paragraphs drew the parallel with aviation to illustrate that EU external energy relations are still relatively underdeveloped, at the stage where EU aviation policy found itself at around early 2000: A stage where Member States reluctantly concede that common action is required to ensure the common interest in secure energy supplies, resulting in fairly modest advances along non-binding commitments of further coordination and information. In that sense the post-Lisbon competence has not generated the momentum and innovation one could hope for. This may indeed be due to the euro-crisis and more pressing matters in the neighbourhood, though this should not detract from the fact that more is needed to ensure that Member States “facilitate the achievement of the Union’s tasks” (4.3 TEU) in the field of external energy policy. Hopefully the overdue June 2011 “Commission Communication on Energy security and international cooperation” reinvigorate initiatives to that end.

**The Post-Lisbon Institutional Framework: Absent the HR and the EEAS?**

Javier Solana, the predecessor of the current High Representative was most active in the sphere of EU external energy policy, viewing energy security as an inherent part of the Union’s CFSP. When EU energy policy was being drawn up during the first half of 2006, he ensured that his services drafted jointly with the Commission a non-paper to the attention of the European Council to support a coherent and over-arching approach to EU external energy policy. Thereafter, at regular intervals Solana made appearances and speeches at prominent events where he emphasized the importance of energy in his work: “Hardly a day goes by that I am not confronted in my role as High Representative with the impact that energy has: from Sudan to Venezuela, from Iran to the Caucasus and beyond.” In terms of institutions and personalities leading EU external relations, EU external energy policy has undergone a deep shift with the Lisbon Treaty for two reasons: first there is the birth of the EEAS on January 2011, and second there is the replacement of Javier Solana with Catherine Ashton. The energy security dimension of the CFSP was (highly concisely)
recognized in the 4 February 2011 European Council as follows: “The High Representative is invited to take fully account of the energy security dimension in her work.”

Mrs. Ashton took up her post at the beginning of 2010, and at the time of writing has fulfilled her task for one and a half year. To examine her role in EU external energy policy, I have conducted a broad discourse analysis of the statements made by her or service, and studied them for their explicit reference to, or significance for EU external energy policy. For that analysis, I adopt the EEAS own division of its foreign policy discourse which consists of five categories. This taxonomy is based on who is the author of the respective statement, where authorship and level at which the message is conveyed indicates relative political importance of the event or subject matter for the European Union: Of the first and highest order are statements by the High Representative on behalf of the European Union, followed by statements by the High Representative herself. Thereafter follow statements by the spokesperson of the High representative, and finally there are what the EEAS website calls ‘local EU statements’ by the EEAS delegations or their heads of mission. Alongside these four categories we have Mrs. Ashton’s speeches where the EEAS distinguishes between ‘speeches’ and remarks, and where the level of importance depends on the event at which the speech is associated. Mining through this discourse we find a near total absence of energy issues:

- The High Representative made 109 statements ‘on behalf of the European Union’ between 1 January 2010 and 9 June 2011, and not a single statement concerned EU energy policy or energy security.
- Between 1 January 2010 and 9 June 2011, 320 statements were made ‘by the High Representative’. 310 of these statements were as High Representative, of which only 10 were as ‘High Representative/Vice President of the Commission’.
- Thirty of these statements were issues jointly with other members of the European Commission: 18 joint statements with Commissioner Fule (on neighbourhood policy related issues), 5 statements with Commissioner Piebalgs (development), 1 with Commission President Barroso & European Council President Van Rompuy together, 1 with Barroso and 1 with Van Rompuy separately (Arab Spring related); 2 with Reding on gender related issues, and one with Commissioner Malmström. On three occasions she also made statements jointly with foreign colleagues: once with Hillary Clinton and twice with Sergey Lavrov. Hence, none of these statements were related to energy issues and no statements were made jointly with Commissioner Oettinger.
- Between 1 January 2010 and 9 June 2011, the High Representative has given 30 speeches, none of which had energy as their main topic. In fact, in only two of them is ‘energy’ or ‘energy

58 All are chronologically available on the EEAS website: http://eeas.europa.eu/ [last accessed 16 June 2011]
59 Statements is perceived quite broadly by the EEAS, and also includes two dozen ‘remarks’ or similar comments made by the HR on different occasions.
security’ mentioned in passing, once at an ASEM meeting and once at remarks following an Eastern Partnership ministerial meeting.

In short, the High Representative still has a long way to go in order to ‘fully take into account energy security into her work’. Unfortunately the structure of the EEAS as it stands on 1 April 2011 – the date of the last available updated organigramme, does not bode well for its role in EU external energy policy. Namely, as Blockmans has observed, the diplomatic service which was set up to provide greater coherence to EU external relations has so far been a missed opportunity from the perspective of EU external energy policy. Namely, in the original discussions on the EEAS during early 2010, cross-cutting issues such as energy security received a specific desk. However, from June 2010 only four thematic desks were left: human rights, multilateral issues, non-proliferation, and terrorism. Energy would have been an ideal topic on which the EEAS could have developed specialised expertise so as to combine knowledge both from energy markets as well as energy diplomacy. At the time of writing – June 2011 – it seems that energy is indeed not included as a cross-cutting issue in this institution, and therefore Blockmans rightly asserts that this is a missed lost opportunity for greater coherence in EU external energy policy.

**The Post-Lisbon TEU & TFEU Legal Bases: Clash of Energy versus CFSP?**

**Autonomous and international instruments of EU external energy policy**

On the relationship between EU energy policy and other policies, the Energy 2020 Strategy states the following: “As well as being vital for the EU’s security of supply, the external dimension of EU energy policy must be consistent and mutually reinforcing with other external activities of the EU (development, trade, climate and biodiversity, enlargement, Common Foreign and Security Policy and others). There must be synergies between energy objectives and other policies and instruments including trade, bilateral agreements, and development cooperation instruments and vice-versa. Energy security is closely intertwined with EU’s foreign and security priorities. Diversification of fuels, sources of supply and transit routes is essential for EU security as are good governance, respect for the rule of law and protection of EU and foreign investments in energy producing and transit countries. Moreover, EU policy will pay particular attention to safety and security of oil, natural gas pipelines and related production and transport infrastructure by combining energy policy and CFSP instruments.”

As regards those instruments, EU external energy policy is conducted both through autonomous instruments and international agreements. The aforementioned Gas Security Regulation of December 2010 is a prominent example of the first, and has as its sole legal basis Article 194 (2)

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60 “Issues like climate change, food and energy security, and the fight against piracy cannot be addressed alone.” Remarks by HR/VP Catherine Ashton at the 10th ASEM Foreign Ministers’ Meeting, Brussels, 6 June 2011

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61 “It has provided political impetus in key areas such as our negotiations on new Association Agreements with partners; mobility; trade and investment and energy cooperation.” EU HR/VP Ashton, Remarks after the Extended Ministerial meeting on Eastern Partnership, SPEECH/11/146, 03/03/2011


63 Energy 2020, see note 30, 16.
TFEU. This prompts the following question examined in this final subsection: does that legal basis imply that an important part of what was formerly dealt with through the Common Foreign and Security Policy, has now been transferred to the TFEU as a Union competence shared with the Member States? Formulated in relation to choice between legal bases, when Article 194 (1) TFEU states that “Union policy on energy shall aim in a spirit of loyalty to ... ensure security of energy supply in the Union”, does that competence only cover the internal dimension of EU energy policy; with the presence of the CFSP and Article 40 TEU thereby excluding the possibility of implied powers? I shall first look more in-depth at the security dimension of instruments used in the context of EU external energy policy so as to answer the post-Lisbon legal basis question.

The regulation ‘concerning measures to safeguard security of gas supply’ requires that each Member State establish a preventive action plan and emergency action plan.\(^{64}\) These plans should aim to mitigate effects identified in a risk assessment to a Member State’s security of gas supply the Regulation obliges each Member State to draw up by 3 December 2011.\(^{65}\) The Regulation also imposes substantive obligations to ensure bi-directional capacity of gas infrastructure,\(^{66}\) obligations to ensure minimum gas delivery guarantees to certain protected customers and the possibility of declaring ‘a Union emergency’ which triggers coordination at EU level.\(^{67}\) In a nutshell, the gas regulation has a clear ‘security of supply’ rationale yet concerns wholly ‘internal measures’. However, the connection with the CFSP is explicitly made where its preamble reads: “The Report on the Implementation of the European Security Strategy... highlights the growing reliance on imported energy as a significant additional risk for the Union’s security of energy supply and stresses energy security as one of the new challenges for security policy. The internal gas market is a central element to increase the security of energy supply in the Union, and to reduce the exposure of individual Member States to the harmful effects of supply disruptions.”\(^{68}\) Therefore, this internal autonomous EU measure has a clear external, CFSP dimension, though has as its legal basis only Article 194 TFEU.

In the category of international instruments, the multilateral Energy Community and Energy Charter Treaties are currently the most prominent but new instruments are on the drawing board. For example, at present the Union is considering a multilateral agreement on a Trans-Caspian Natural Gas Pipeline system which is part of continued efforts to diversify supplies into the EU in the context of the so-called Southern Corridor. The recommendation to open negotiations was presented to the Council on 3 May, and follows on the visit of Commission President Barroso and Commissioner Oettinger to Baku in January 2011. At that occasion a Joint Declaration on the Southern Gas Corridor was signed by the Azeri President Aliyev and President Barroso,\(^{69}\) an event where the high representative is noticeably absent in spite of its importance for security of energy supplies.

\(^{64}\) Article 4, Gas Security Regulation, see note 48.
\(^{65}\) Article 9, Gas Security Regulation, idem.
\(^{66}\) Articles 6 and 7, Gas Security Regulation, idem.
\(^{67}\) Article 11, Gas Security Regulation, idem.
\(^{68}\) Gas Security Regulation preamble, 11.
\(^{69}\) General Secretariat of the Council, Note on factual information regarding international relations in the field of energy – Information from the Commission and the Presidency, Brussels, 26 May 2011, 10723/11.
On a bilateral basis, the European Union has also been adopting a large number of non-legally binding energy memoranda of understanding. These cover a wide range of topics depending on the country at issue, and may include enhancing safety and security of transit systems, harmonization with EU market principles, initiatives towards increased upstream investment, and so on. From a legal perspective, these MoU’s are explicitly stated to “record political intent alone and provide for no legal commitment” but may serve “as a basis for possible future discussions between the parties concerning a legal agreement”. Since the 2nd strategic energy review of November 2008, the EU made it an explicit objective to convert these commitments into legally binding agreements.

Quoting in full the description of the form these new agreements or clauses is necessary towards examining the post-Lisbon legal basis of such agreements:

“Today the EU has Memoranda of Understanding on energy with a large number of third countries. Europe should develop a new generation of “energy interdependence” provisions in broad-based agreements with producer countries outside Europe. Energy interdependence provisions should aim at a balance between security of demand and security of supply. The focus should be on encouraging upstream investments, facilitating the development of the necessary infrastructures, clear conditions of access to markets (within energy and across economic sectors), dialogue on market and policy developments, and dispute settlement provisions. Transit arrangements must be agreed to guarantee normal flows even in periods of political tension, possibly through innovative approaches such as joint management and even ownership of pipelines by companies of supplier, transit and consumer countries. The provisions should be based on the EU’s energy acquis where appropriate, and the principles of the Energy Charter Treaty. The provisions should contribute to a long term political framework, reducing political risks and encouraging commitments by private companies on supply and transit. ... Special attention will be given to key external infrastructures which face heightened non-commercial risks.”

The connection between demand and supply-side security, market access and a secure investment climate is extensive, thereby blending legal, political and economic aspects in what are called ‘energy interdependence clauses or agreements’. From a policy perspective these aspects can indeed not be separated, though legally they raise the age-old problem of EU external action: on what legal basis should they be based: CFSP or energy competence? The choice impacts which are the respective roles of the institutions and the member states therein, as for example their negotiation

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70 To the best of this author’s knowledge (they are not published in the O.J.), such MoU’s exist with Azerbaijan, Egypt, Jordan, Iraq, Morocco, Russia, Kazakhstan, Turkmenistan, and Ukraine.
72 Second Strategic Energy Review, see note 7.
73 Idem, 8.
would involve the Commission or EEAS in a different fashion, and pre-emption of the member states applies differently whether it is concluded on a CFSP legal basis or the TFEU legal basis.

**Requirement for a TEU-TFEU Dual Legal Basis for International Instruments**

In the Lisbon Treaty, we find two legal bases for the adoption of international agreements with a security component. On the one hand we have Article 24 and 37 in the EU Treaty (CFSP), and on the other hand we have Article 194.1(b) stating the objective that the Union must *‘ensure security of energy supply in the Union’*. Recall now that it was the 2008 review of the European Security Strategy which originally called energy flows the artery of the European economy, a formulation which has now been copied into the 2020 energy programme. With the advent of an explicit energy competence, should this be read as implying that energy security has been ‘lifted out’ of the Union’s common foreign and security policy, and instead is a traditional shared-pre-emptive ‘communitarized’ policy? In policy terms, it implies a debate over which ‘kind of security’ is covered by the CFSP or by the TFEU. In legal terms and for the present purposes I formulate the question as follows: given their clear external dimension as opposed to the gas security Regulation, should instruments such as the multilateral on Trans-Caspian gas transit or the energy interdependence clauses be adopted on the basis of Article 194 TFEU, Article 24 TEU, or both?

As regards the gas security regulation, the absence of a CFSP legal basis is rather straightforward for two reasons: First, the TEU excludes the adoption of ‘legislative measures’ in this policy context (Art. 24 (1) TEU), and second, given the purely internal dimension of the measures Article 194 (2) TFEU surely suffices. As regards competence to conclude international agreements in the sphere of CFSP, Article 37 of the EU Treaty states that *“The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter.”* This article then has to be read jointly with Articles 3, 21 and 23 and 24 TEU. Article 23 TEU is a general article which states that international action of the Union pursuant to the Treaty Chapter on CFSP shall be guided by the principles in Article 3 TEU, and the objectives as laid down in Article 21 TEU. None of mentions energy security specifically, and concern security more generally. Article 3 states that “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.” Article 21 is part of the Lisbon Treaty’s commitment to increased coherence in EU external relations: “safeguard its values, fundamental interests and security” as an integral part of *all* EU international action. Article 24 TEU is then (slightly) more specific, by stating that the EU’s *“competence in matters of CFSP shall cover all areas of foreign policy and all questions relating to the Union’s security”*

Energy security ‘in’ the Union is thus only mentioned in Article 194 TFEU, but in the past the Union through its High Representative has certainly been active in the field of energy security through the framework of the CFSP. For example, in a February 2008 speech former High Representative for CFSP Solana explained that *“the link between energy and foreign policy works in two directions. We talk a lot about how we can use our foreign policy instruments and relationships to secure our energy interests. Call it energy security through foreign policy. In practical terms, this means being more united and disciplined in our energy diplomacy. Promoting sound market principles and investment protection in our neighbourhood and beyond.”* Developing
joint crisis mechanisms and strategic reserves, especially in gas. Above all, it means making progress with diversification in supply and transit routes... But there is also energy security in foreign policy. Recent academic research has confirmed what many long suspected. Oil and gas rich countries are nine times more likely to suffer from violent conflicts than those which are non-resource rich. Nearly all experience political instability, poor governance and human rights abuses. This is partly because oil and gas revenues often lead to corruption, rent-seeking behaviour and insufficient economic diversification. But also because they shield countries from external pressure, including us, to promote good governance.”74

Recall also the request of the European Council for the current HR/VP to be appropriately involved in EU external energy policy, and combined with this excerpt from the former High Representative this then provides an appropriate context for the interpretation and scope of Article 194 TFEU: Namely the fact that this article is in the TFEU, and not even in Title V on EU external relations which outlines the Union’s common commercial policy, development policy, and so on. Indeed, the Union’s energy competence is part of Part Three of the TFEU entitled ‘Union Policies and Internal Actions’, rather than Part Five entitled ‘External Action by the Union’. Additionally, it states that the Union is to ‘ensure security of supplies in the Union’. In itself that should not provide an obstacle to EU external powers since the implied competence doctrine would provide the necessary basis on which to conclude the energy interdependence clauses: “Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has competence to enter into the international commitments necessary for the attainment of that objective, even in the absence of an express provision to that effect.”75

This may then imply that the Union could indeed use Article 194 TFEU as a legal basis for the energy interdependence clauses, given its reference to security of supply. However, the presence of the CFSP counters the possibility of implying competences from that article: First, this new competence codifies the three pillars of security, sustainability and competitiveness, and in that trifurcated definition security of supply has always been realized through internal measures such as the emissions trading scheme, reducing domestic consumption, or most recently the gas security regulation. The first and second strategic energy review which the Lisbon Treaty codifies has always treated the external dimension as something complementary yet additional to the three pillars of energy policy. Therefore it is most likely that this is the kind of supply security which Article 194 refers to. This reading of that provision is the logical consequence of the codification of the policy process in the years preceding its ratification. However, this explanation would not in itself suffice to exclude implied external competences from Article 194 TFEU were it not for the presence of the CFSP with its external and security oriented objectives, as well as the crucial Article 40 TEU.

The description of the energy interdependence clauses in the 2nd strategic energy review has an indubitable CFSP angle to it: protecting infrastructures facing heightened non-commercial risk (e.g. terrorism), political dialogue on security of supply, and ensuring secure supplies during periods of

74 Speech by Javier Solana, see note 17.
increased political tension. These are areas clearly beyond the realm of extending the internal market and more within the remit of the CFSP. (Article 24 TEU) I submit that therefore energy interdependence agreements, or association agreements with an interdependence clause are mandated by primary law to be based on a dual TFEU-TEU legal basis, namely article 194 TFEU and Articles 24 and 37 of the TEU. In line with the ECJ’s centre of gravity case-law, in aim and content the description of these instruments in this and preceding paragraphs indicate that they equally pursue objectives of a security and economic nature.76 Prior to the Lisbon Treaty that might have implied that the 194 TFEU legal basis would be the sole correct article, but after Lisbon the dual legal basis solution is the only option.

Article 40 TEU states that “The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the TFEU. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.” This article is the consequence of the Member States’ ever-lasting wish to retain the old second pillar as opposed to policies pursued in the context of what was known as the first pillar. One year before the Lisbon Treaty entered into force, the ECJ gave its decision in the ECOWAS case which concerned the relationship between the CFSP and EC development policy.77 Here the Court effectively stated that if a measure equally pursues a CFSP (now TEU) and a non-CFSP (now TFEU) policy objective (such as development) the former Community legal basis is to prevail. In this judgment, this meant that an initiative to combat the illegal sale and spread of small arms and light weapons in a conflict zone was to be adopted on the basis of the EC’s development competence. The Court argued that while the CFSP instrument pursued security objectives equally strong to its development objectives, the latter competence was to prevail due to the hierarchic predominance of the first pillar over the second pillar. The Lisbon Treaty has now invalidated that reasoning, because Article 40 TEU places the CFSP and the EU energy competence of Article 194 TFEU in an equal position, with a legal obligation for the implementation of the CFSP not to affect EU energy policy, and vice versa. If one would interpret that article in a highly formal fashion, the consequence would be rather paradoxical: On the one hand, the EU is to be more coherent in its external relations, a legal obligation entrenched in primary law. (Arts. 4.3 and 21 TEU) On the other hand, how might an energy interdependence clause merge together the political and security rationales of energy policy with its market and rule-based logic if the two competences might not affect each other.

One solution would be to conduct EU energy policy purely on the basis of the TFEU legal basis, though institutionally such would not aid cooperation between the Commission and the EEAS. To ensure a coherent EU energy policy, Article 40 TEU should be interpreted with a focus on the words ‘shall not affect the implementation’ of these policies. The consequence of that interpretation

76 CASE C-91/05, Commission v. Council (Small Arms/ECOWAS), [2008] ECR I-03651.
77 Idem.
of Article 40 TEU is then a reasoning such as the Court has deployed in Portugal v. Council. In that judgment, the Court had to investigate the Community agreement concluded with India, and the Portuguese contention that the Common Commercial Policy and development legal bases were insufficient to cover the provisions of the Agreement concerning specific cooperation matters such as energy or intellectual property. However, the Court stated that the qualification of that agreement as a broad cooperation agreement was not changed because it contained clauses on various specific matters. The key rationale for the Court was that these clauses did ‘not prejudice’ the competence question at the implementation level. Stated differently, the inclusion of these clauses did not affect the competences of the Community or the Member States to implement the clause of a specific international agreement, as the case may be. That reasoning can then be applied to the present situation: the non-affect clause excludes that external competence can be implied for measures of an external, energy security nature on the basis of Article 194 TFEU. However, dual legal bases for the energy interdependence clauses/agreements allow the Union to bind itself to the fullest of its TEU and TFEU competences with commensurate involvement of both the EEAS and the Commission. Internally then, the energy interdependence clause is without prejudice of EU competence and inter-institutional issues which would have to be resolved as indicated in the previous section of this paper. Overall, this allows the Union to pursue a coherent external energy policy in all its facets, combining both the geo-political and market-oriented strands of this policy.

CONCLUSION

The following conclusions can be drawn from the preceding analysis. First, in policy terms the direction of EU energy policy has not seen a deep shift in direction with the entry into force of the Lisbon Treaty. Rather, Article 194 TFEU which has conferred a shared competence on the Union codifies the policy formation process prior to the entry into force of the Lisbon Treaty. Second, while initially the new competence was used to build momentum for a true EU external energy policy, the euro crises and developments in the Southern Mediterranean pushed the EU’s political agenda off track. Notably in the vertical EU – Member State relationship, not much has changed but for the open-ended invitation of informing the Commission on Member State bilateral agreements with third countries. This paper then suggested that the Union would do well to emulate the experience of EU aviation policy, and draw up a legally binding Regulation to manage their cooperation in the external energy sphere. Third, the institutional reshuffle after Lisbon has actually deteriorated the coherence in EU external energy relations. Whether this is caused by the lack of interest of Mrs. Ashton in energy affairs as opposed to her predecessor, or by the EEAS structural limitations and initial institutional navel-gazing, the consequence is that the foreign security dimension of energy policy has completely disappeared from the CFSP’s institutional and policy remit. The Commission is now more than before the Lisbon Treaty dominating EU external energy

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80 Idem, para 39.
policy. While that may stimulate a more coherent EU energy policy, sidelining the new RELEX institutions is obviously not in keeping with the rationale for which the Lisbon Treaty set them up. Finally, the new legal basis in energy erects a previously non-existing area for inter-pillar friction, e.g. the energy policy – CFSP nexus. This article has suggested that the dual legal basis for external instruments is the only solution, combined with a sufficiently flexible interpretation of the non-affect clause in Article 40 TEU.

In sum, the new competence and institutions in the Lisbon Treaty certainly did carry potential for a stronger EU external energy policy. However, for now, institutional bickering and loss of political momentum seems at best, to have led to business as usual; and at worst, to have deteriorated various legal and policy aspects of the EU’s external energy policy: The most pressing issues to be resolved is the EU – Member State loyal cooperation towards the common EU interest, and the complete absence of the EEAS and the High Representative in EU external energy policy.