

**Euro-vision of Energy Trade with Russia:  
Current problems and future prospects for EU solidarity in energy trade**

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**Abstract**

This article provides an analysis of the legal framework against which the energy trade between the European Union (EU) and the Russian Federation (Russia) has been conducted. In doing so the EU's ability and duty to operate its external energy trade in solidarity are analysed. In addition, the article assesses whether and to what extent the current EU – Russia energy trade is conducted within the confines of a rule based system. In order to illustrate the arguments, the relevant jurisprudence and EU Member State practices are utilised. It is concluded that principle of solidarity is a legal requirement which is embedded in the *acquis communautaire* of the EU therefore it shall be observed. However, the energy policies across the EU indicate that Member States do not act in solidarity when it comes to their energy relations with Russia. Furthermore, the overall framework for EU – Russia energy trade does not amount to one that is based on the rule of law as it lacks a number of essential elements *inter alia* an independent adjudication, effective and predictable legal redress and enforcement mechanisms. These characteristics expose the EU and its citizens to risk and uncertainty.

*“Laws and principles are not for the times when there is no temptation:  
they are for such moments as this, when body and soul rise in mutiny*

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*against their rigour ... If at my convenience I might break them, what would be their worth?"*

— Charlotte Brontë, *Jane Eyre* (1847)

## Introduction

When the first European Community was founded over 60 years ago,<sup>2</sup> energy demand and prices were a fraction of what they are today. While energy has always been an important and a volatile field, liberalisation of energy trade at the international level was not a priority for states<sup>3</sup> and ideological divisions between communist and market economy based countries further polarised energy relations. Following the end of the Cold War the concept of security has evolved to include non-traditional security areas such as energy.<sup>4</sup> For example, the European Union (EU) was alarmed by the interruption of its energy supplies<sup>5</sup> from Russia when on the 1<sup>st</sup> of January, 2006 Russia cut off its gas supplies to Ukraine for four days.<sup>6</sup> Russia is the EU's biggest energy supplier and this was the first time in the EU's history when energy supplies from Russia were affected not by purely

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<sup>2</sup> The First European Community (The European Coal and Steel Community) was founded in 1951.

<sup>3</sup> Cottier T. *et al.*, Energy in WTO law and policy, May 2010:

[http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_7may10\\_e.pdf](http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_7may10_e.pdf).

<sup>4</sup> De Jong S., *et al.*, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon' [2010] *European Foreign Affairs Review*, Vol.15, 511 and Youngs R., Energy Security: Europe's New Foreign Policy Challenge, (Abingdon: Routledge, 2009).

<sup>5</sup> Crude oil and natural gas supplies are the sole concern of this paper.

<sup>6</sup> Stern J., "*The Russian-Ukrainian gas crisis of January 2006*", Oxford Institute for Energy Studies (from January 16<sup>th</sup> 2006), available at, [http://www.oxfordenergy.org/pdfs/comment\\_0106.pdf](http://www.oxfordenergy.org/pdfs/comment_0106.pdf) (accessed on 12 Dec 2013); Stern J., "*Natural Gas Security Problems in Europe: The Russian – Ukrainian Crisis of 2006*" [2006] *Asia – Pacific Review*, Vol. 13, No.1.

technical or accidental but deliberate political and economic factors.<sup>7</sup> A year later Belarusian oil supplies were cut-off by Russia, which received a strong condemnation from the EU leaders.<sup>8</sup> Indeed, in 2007, the European Council of Foreign Relations asserted that Russia was the EU's most divisive foreign policy issue and that the EU has been underperforming in this realm.<sup>9</sup> The most severe and long-lasting example of Russian cut-offs occurred in 2009 during the second Russian – Ukrainian Gas Crisis which included some of the EU Member States.<sup>10</sup> Following the recent events in Ukraine and Crimea, on 01 April 2014, Gazprom announced a 40% price increase for gas for Ukraine.<sup>11</sup> These events made it clear that Russia is prepared to use its energy resources as a political weapon.<sup>12</sup> The latest developments in

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<sup>7</sup> Haghighi S.S, *“Energy Security: The External Legal Relations of The European Union with Major Oil and Gas Supplying Countries”*, (Hart Publishing, 2008). For discussion pertaining to Russian economic nationalism of the energy sector see, Christie, E., ‘Energy Vulnerability and EU-Russia Energy Relations’, *Journal of Contemporary European Research*, [2009] Vol. 5 (2), 274.

<sup>8</sup> Primarily German Chancellor Angela Merkel; *“Russia ‘forced’ into oil shutdown”* BBC News (from Tuesday 9<sup>th</sup> Jan 2007) available at <http://news.bbc.co.uk/1/hi/6243573.stm> (accessed on 2 Jan 2013).

<sup>9</sup> Judah B., *et al*, ‘Dealing with a Post-Bric Russia’, European Council on Foreign Relations, 2011, pp. 49-53 [www.ecfr.eu/page/-/ECFR44\\_RUSSIA\\_REPORT\\_AW.pdf](http://www.ecfr.eu/page/-/ECFR44_RUSSIA_REPORT_AW.pdf).

<sup>10</sup> Pirani S., Stern J., Yafimava K., *“The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment”* Oxford Institute for Energy Studies (from February 2009) available at <http://www.oxfordenergy.org/pdfs/NG27.pdf> (accessed on 12 Dec 2013); Kovacevic A., *“The Impact of the Russia-Ukraine Gas Crisis in South Eastern Europe”* Oxford Institute for Energy Studies (March 2009) available at <http://www.oxfordenergy.org/pdfs/NG29.pdf> (accessed on 12 Dec 2013).

<sup>11</sup> Soldatkin V., Russia tightens squeeze on Ukraine with gas price rise, 01 April 2014, Reuters; <http://www.reuters.com/article/2014/04/01/ukraine-crisis-gas-idUSL5N0MT14Z20140401>

<sup>12</sup> Blank S., *“Russia’s Energy Weapon and European Security”* Strategic Studies Institute, September 2009, available from Atlantic Council – [www.acus.org/files/Stephen\\_Blank-RussiaEnergy.pdf](http://www.acus.org/files/Stephen_Blank-RussiaEnergy.pdf). Also see, Cohen A., *“Europe’s Strategic Dependence on Russian Energy”* Backgrounder Nr 2083 (from 5<sup>th</sup> November 2007) available at <http://www.heritage.org/Research/Europe/bg2083.cfm> (accessed on 12 Dec 2013); Smith C. K., *“Russian Energy Pressure Fails to Unite Europe”* CSIS Euro-Focus Vol.13, Nr. 1

Ukraine and in Crimea in particular are likely to affect the energy trade further in the coming months. Given this recent digression of EU-Russia energy relations it is necessary to consider the adequacy of the current EU legal mechanisms of energy security management.

This article critically evaluates whether the existing legal framework of the EU-Russia energy relations operate in light of the EU's 'solidarity' principle and explores if and to what extent it ensures a reliable energy supply from Russia to the EU. The legal analysis focuses only on the external aspect of this framework and does not cover any of the internal measures found in Member States. Accordingly, the institutional and legal tools conferred to the EU by the Member States in the Treaties are examined so as to establish the EU's competence in monitoring and enforcing this principle. Moreover, the contribution of the Court of Justice of the European Union (CJEU) in clarifying the division of competences between the EU and the Member States as well as the effectiveness of the Common Foreign and Security Policy in energy dealings with Russia is considered. Discussion is geared towards finding whether the EU has sufficient legal tools to speak with one voice in line with the 'solidarity principle'<sup>13</sup> when it comes to external

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(from 24<sup>th</sup> January 2007) available at [http://harvard-bssp.org/files/2006/publications/eurofocus\\_v13n01.pdf](http://harvard-bssp.org/files/2006/publications/eurofocus_v13n01.pdf) (accessed on 12 Dec 2013).

<sup>13</sup> For example, Article 3(3) Treaty of the Functioning of the EU (TFEU) requires the EU to establish an internal market, which shall promote solidarity among Member States. Article 4(3) Treaty on the EU (TEU) (as amended by the Lisbon Treaty) provides that the Member States are required to sincerely cooperate with the EU and with each other. Articles 2 and 21 of the TEU stipulate 'solidarity' in international relations. Article 24 TEU states "mutual political solidarity among MS and Article 31 TEU underlines the "spirit of mutual solidarity" in EU's external action. Chapter IV (Articles 27-38) of the [Charter of Fundamental Rights of the European Union](#) is entitled 'Solidarity.' In *Poucet v. Assurances générales de France (AGF) et Caisse mutuelle régionale du Languedoc-Roussillon (Camulrac)*, *Pistre v. Caisse autonome nationale de compensation de l'assurance vieillesse des artisans (Cancava)*, [Cases C-159/91 and C-160/91](#), [1993] ECR 637, the Court of Justice for the EU has also recognised 'solidarity' as a fundamental principle. Ross has even suggested solidarity to be conceived as a potential "new constitutional paradigm for the EU". See, Ross M., 'A New Constitutional Paradigm for the EU' in Ross and Borgmann-Prebil (eds.) *Promoting Solidarity in the European Union* (Oxford University Press, 2010).

energy relations with Russia. There is no single definition of solidarity in the EU but it is seen as both a principle that distinguishes the EU and its Members from other international organisations<sup>14</sup> and a fundamental value on which the EU (especially the Single Market) is based. Given the actual and potential vulnerabilities the EU face both economically and politically,<sup>15</sup> it is argued that the principle of solidarity (embedded in the *acquis*) shall be a guiding principle in energy relations of the EU<sup>16</sup> as it does in many other economic spheres. Indeed, the EU Commission states that efficient and fully integrated energy networks are the backbone of the single market.<sup>17</sup> While the EU institutions, the EU Commission in particular, has been keen to assert the centrality of market liberalisation to its future energy policy and energy diplomacy and create a unified policy towards energy relations,<sup>18</sup> this stance has been countered by the Member States' bilateral energy agreements with Russia. These practices are discussed with reference to a number of case studies so as to illustrate different approaches to energy

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<sup>14</sup> Hartwig I. and Nicolaidis P., 'Elusive Solidarity in an Enlarged European Union' [2003] *Eipascope* Vol.3, p. 19.

<sup>15</sup> For a detailed analysis of energy vulnerability in the context of EU –Russia energy relations see, *supra note* 4, Christie.

<sup>16</sup> A Common Energy Policy has been of limited effect because the security framing contributed to the further legitimisation of EU member states' reluctance to cede sovereignty in the energy domain. The European Parliament and the Commission in particular spoke in favour of a 'Common foreign energy policy strategy' owing to the recognition of the fact that energy supply could not be dealt with only within the market sphere, but also needed a strategic, foreign policy approach, enabling the EU to maintain a unitary position in international energy relations. The necessity of setting new instruments to govern energy at the EU level was also supported by the academic community. Natorski M. And Surrallés A., 'Securitizing Moves To Nowhere? The Framing of the European Union's Energy Policy', *Journal of Contemporary European Research*, [2008] Vol. 4, No. 2, 71.

<sup>17</sup> EU Commission, Single Market Act II – Together for New Growth, COM (2012) 573 final. 03.10.2012.

<sup>18</sup> EU Commission. (2008a), Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions: Second Strategic Energy Review - An EU Energy Security and Solidarity Action Plan [COM (2008) 0781] and European Commission. (2008b). Memo: EU Energy Security and Solidarity Action Plan: Second Strategic Energy Review [MEMO (08) 703].

trade with Russia. Lastly, in part 5, a commentary on the future prospects of EU – Russia energy trade is provided.

## 1. Russia as an important supplier of the energy for the EU

The Russian Federation (Russia) is the primary energy supplier for the EU.<sup>19</sup> Russia is known to have the largest natural gas reserves and seventh largest crude oil reserves in the world. It is also the biggest exporter of oil and gas to the EU, with its supplies accounting for 25% of oil and 33% of gas.<sup>20</sup> The EU's overall dependency on gas imports is expected to rise significantly by 2030<sup>21</sup> with its energy consumption rising by 15% in comparison to the demand in 2000. This is particularly true with respect to EU's imports of the natural gas. The future projections show that European gas production is expected to decline<sup>22</sup> and the reliance on the imported natural gas will grow considerably<sup>23</sup> a fact recognised already in the EU Council Directive 2004/67/EC.<sup>24</sup> A growing reliance on natural gas is mainly

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<sup>19</sup> *Supra note*, Haghighi. Also see, Plebalgs A., “EU-Russia Energy Relations: Common Goals and Concerns” [2009] *Oil Gas & Energy Law* Vol.2; and The European Commission, “A European Strategy for Sustainable, Competitive and Secure Energy” (Green Paper) (2006) COM 105 Final.

<sup>20</sup> [www.energy.eu/#dependence](http://www.energy.eu/#dependence) (accessed on 12 Dec 2013); Eurogas statistics at [www.eurogas.org](http://www.eurogas.org). Russia provides 100% of gas imports of at least 7 Member States of the EU. The EU Commission, EU Energy Policy Data, SEC (2007) 12.

<sup>21</sup> European Commission, “Towards a European Strategy for the Security of Energy Supply” (Green Paper) COM (2000) 769 Final.

<sup>22</sup> International Energy Outlook 2004 available at; <http://tonto.eia.doe.gov/FTP/forecasting/0484%282004%29.pdf> (accessed on 12 Dec 2013).

<sup>23</sup> International Energy Outlook 2005 available at; <http://tonto.eia.doe.gov/FTP/forecasting/0484%282006%29.pdf> (accessed on 12 Dec 2013).

<sup>24</sup> Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, OJ L 127, 29/04/2004, Preamble, para.13.

due to its increasing popularity as a substitute to less eco-friendly fuels and its relatively low price in comparison with other energy resources.<sup>25</sup>

On average, the EU's dependence on Russian energy is 26%<sup>26</sup> however; the level of dependency strongly varies between the Member States (MS).<sup>27</sup> Out of 28 EU Member States only Denmark and the United Kingdom are independent on oil imports, and the same countries with the addition of the Netherlands have no dependency on gas imports.<sup>28</sup> Andris Piebalgs, former Energy Commissioner for the European Commission stated that *"the relationship [with Russia] is one of interdependence not dependence which means that Russia needs us much as we need Russia ... sales of Russian raw materials to the EU contribute to over 40% of its federal budget and the EU represents almost 80% of cumulative foreign investments in Russia. This clearly shows interdependence..."*<sup>29</sup>.

It is clear that Russia is and will continue to be, an important supplier of energy to the EU in the foreseeable future and it is engaged in promoting its Nord Stream and South Stream pipelines which are designed to feed Europe. This interdependence is recognised by in the *Roadmap of the EU – Russia Energy Cooperation to 2050*.<sup>30</sup> However, this relationship is also described as one of "asymmetric interdependence" whereby Russia has been able to exploit divisions within the EU and pursue bilateral energy trade agreements with a number of Member States and uses its energy as

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<sup>25</sup> E.g.: coal and oil. See, Nies. S., "Oil and gas delivery to Europe: An Overview of Existing and Planned Infrastructure" [2008] *Oil Gas & Energy Law* Vol.3.

<sup>26</sup> Woehrel S., "Russian Energy Policy Toward Neighbouring Countries" Congressional Research Service (report from 2<sup>nd</sup> September 2009) available at <http://www.fas.org/sgp/crs/row/RL34261.pdf> (accessed on 17 Dec 2013).

<sup>27</sup> For the list of the most dependent MS on Natural Gas Supplies see Table 1 in Cohen A., "Europe's Strategic Dependence on Russian Energy" Backgrounder Nr 2083 (from 5<sup>th</sup> November 2007) available at <http://www.heritage.org/Research/Europe/bg2083.cfm> (accessed on 17 Dec 2013).

<sup>28</sup> *Supra note*, Haghighi.

<sup>29</sup> *Supra note*, Plebalgs.

<sup>30</sup> European Commission, 2011, "Energy Roadmap 2050," [http://ec.europa.eu/energy/energy2020/roadmap/doc/com\\_2011\\_8852\\_en.pdf](http://ec.europa.eu/energy/energy2020/roadmap/doc/com_2011_8852_en.pdf).

leverage in diplomatic, trade, economic and political disputes.<sup>31</sup> Furthermore, if we were to confirm Christie's argument that "it is rational for Europeans to understand Russia as an ambitious geopolitical player whose ruling elites are motivated by a combination of nationalism, domestic political survival and national economic gain"<sup>32</sup> then it becomes even more necessary to place this relationship on a legal, predictable mandate rather than leave it to the less certain field of power politics. In the current global economic crisis, a secure energy relations and supply are imperative for the functioning and growth of the EU and its common market effectively. Accordingly, the solidarity among the EU Member States is essential and hence it is expressed in the provisions of EU law.

## 1.2. What is the Security of Energy Supply?

The concept of "security of energy supply"<sup>33</sup> is used interchangeably with a term having the same meaning as "energy security".<sup>34</sup> Energy security is vital for everyday activities of a functioning society<sup>35</sup> thus the need for

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<sup>31</sup> *Supra note*, Judah B., *et al.* p. 49.

<sup>32</sup> *Supra note* 4, Christie, p. 276.

<sup>33</sup> The definition of 'security of energy supply' has been a subject to an extensive discussion, see: Saga B., "Introduction of Competition in Gas Markets: Effects on Contract Structures and Security of Supply", in Hancher L., "The European Energy Market: Reconciling Competition and Security of Supply", Bundesanzeiger, 1995, pg. 93; See Barton B., Redgwell C., Ronne A., Zillman D., "Introduction", in Barton B., Redgwell C., Ronne A., Zillman D., "Energy Security – Managing Risk in as Dynamic Legal and Regulatory Environment", Oxford University Press, 2004, p.5; Cameron P. "Competition in Energy Markets – Law and Regulation in the European Union", (Oxford University Press, 2007); Alhajji A.F., 'What is Energy Security? (5/5)' [2008] *LI Middle East Economic Survey*, 2.

<sup>34</sup> Maican O-H, "Some Legal Aspects of Energy Security in the Relations Between EU and Russia" *Romanian Journal of European Affairs* Vol.9, No.4.

<sup>35</sup> Most of the industries, such as agriculture, mining, construction and manufacturing rely heavily on the energy supplies. The level of the demand for the energy varies from country to country and from industry to industry depending on a number of factors , see: *Supra note*, International Energy Outlook 2004



reliable sources of adequate supplies of energy is “... *central to states’ security, economic development and stability*”.<sup>36</sup>

Security of energy supply is currently at the top of the agendas of most European states<sup>37</sup> and the EU,<sup>38</sup> which makes it an international security issue. Security of supply is also “*a cornerstone of European energy policy*”<sup>39</sup> being one of its three main objectives.<sup>40</sup> From Russia’s perspective, energy security is defined as the “... *state of protection of the country, its citizens, society, state, economy from the threats to the secure fuel and energy supply*” and “*the full and secure provision of energy resources to the population and the economy on affordable prices that at the same time stimulate energy saving, the minimization of risks and the elimination of threats to the energy supplies of the country*”.<sup>41</sup> Russia has repeatedly used energy both as a foreign policy tool in the form of a threat or punishment for states that have conducted policies that Russia dislikes.<sup>42</sup> Thus, as in any other defence and international relations policy conducted at the EU level, energy relations policy of the EU also requires unified and cooperative approach among its Members. This would allow the EU to have a strong standing and gravity of bargaining power when dealing with its trade partners

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<sup>36</sup> Flynn C., “*Russian roulette: the ECT, transit and Western European energy security*” [2006] *Oil Gas & Energy Law* Vol.4.

<sup>37</sup> *Ibid.*

<sup>38</sup> The EU’s official view on Energy Security: “*Energy supply security must be geared to ensuring, the proper functioning of the economy, the uninterrupted physical availability at a price which is affordable while respecting environmental concerns. Security of supply does not seek to maximise energy self-sufficiency or to minimise dependence, but aims to reduce the risks linked to such dependence.*”: *Supra note*, EC Green Paper (2000).

<sup>39</sup> *Supra note*, Selivestrov .

<sup>40</sup> Amongst “sustainability” and “competitiveness” – *Supra note*, EC Green Paper (2006)

<sup>41</sup> Ministry of Energy of the Russian Federation, “*The Summary of the Energy Strategy of Russia for the Period of up to 2020*” (2003) approved by the Decree No. 1234-p of August 28, 2003, issued by the Government of Russian Federation;

<sup>42</sup> Nygren B., *The rebuilding of Greater Russia: Putin’s Foreign Policy Towards the Baltic CIS Countries*, (Routledge, 2008) and Lucas E., *The New Cold War: Putin’s Russia and the Threat to the West*, (London: Palgrave Macmillan, 2008). For example, Russia cut off gas to Czech Republic when it supported the US missile defence plan in 2008. See, Elder M., *Russia exerts its power*, *Financial Times*, 31 October 2008, p. 6.

in the energy field. The EU's small number of energy suppliers; Russia, Iran, Iraq and Saudi Arabia and in the Caspian ex-Soviet countries such as Kazakhstan, Azerbaijan, Turkmenistan, and Chechnya have not developed liberal open markets nor do they have democratic governance based on the rule of law; and in almost all of these jurisdictions, power politics determine energy policy. Furthermore, energy is the only efficient and credible Russian export sector and arguably the most important commodity for its economic stability. Energy as the bloodline of Russian economy is somehow a weakness for Russia and therefore makes Russia a fierce trade partner. This is yet another incentive for the EU to establish solidarity in its external energy relations with Russia.

## 2. Legal framework for the EU external energy policy

The concept of the EU's competence in the area of energy policy could be viewed in a broader context of the EU's external energy policy and international affairs.<sup>43</sup> It has been suggested that the EU's external energy policy has three distinct dimensions.<sup>44</sup> In one of the dimensions the EU is acting<sup>45</sup> as two distinct entities:

- I. as a single economic block with its internal (regional) law making powers and external law making powers within the international/supranational organisations;<sup>46</sup> and

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<sup>43</sup> The notion of policy could be defined as a "set of coherent norms and values, forming a political regime": Belyi V.A., "The EU's External Energy Policy", in Guayo I., Redgewell C., Roggenkamp M.M., "Energy Law in Europe: National, EU and International Regulation (2<sup>nd</sup> Ed., Oxford University Press, 2007); general definition of a regime provides that regime is a formation of "implicit or explicit principles, norms, rules, and decision-making procedures around which actor's expectations converge", see: Krasner S., "Structural causes and regime consequences: regimes as intervening variables" [1982] *International Organisation* 36 (2), pg. 1 -21.

<sup>44</sup> *Supra note*, Belyi.

<sup>45</sup> Bretherton C., Vogler J., "The European Union as a Global Actor", (Routledge, 2006).

<sup>46</sup> On this level EU's acting under the European Union competence and is externally represented by the Commission.

- II. as an intergovernmental organisation expressing the geopolitical security preferences of individual Member States.<sup>47</sup>

The analysis in this paper adopts the former perspective as it aims to focus on the legal framework, instead of issues of diplomacy and international politics, which fall under the latter.

### **2.1. European Union as a single economic block**

The EU treaties provide specific competences and powers to the EU institutions in clearly defined areas (e.g. free movement of goods, competition policy, etc) and it is in these areas that the Member States have given up their sovereignty to a great extent. This is also acknowledged and reiterated on a number of occasions by the Court of Justice for the EU (CJEU). For example, the CJEU spoke of the new legal order constituted by the EU for whose benefit the Member States had limited their sovereign rights<sup>48</sup> and that the law stemming from the treaties cannot be overridden by rules of national law, and national courts have a duty to give full effect to provisions of EU law.<sup>49</sup> It is also established that where there is a conflict between EU and national law, the national law rule must set aside that rule.<sup>50</sup>

The crucial issue in analysing competences of the EU regarding the external energy policy is the marking of the division of the competences between the EU and the Member States. As a general rule, the more the issue is related to the basic community principles and single market rules, the more likely it is that it will fall within the competences of the EU. Expansion of these basic “common” principles results in the gradual extension of the EU’s competences. Treaty on the Functioning of the European Union (TFEU) 2009 provides that the EU has the authority to negotiate and conclude international agreements in areas regarded as the

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<sup>47</sup> On this level EU’s actions fall under Common Foreign Security Policy (CFSP) with its international representation by the High Representative for the CFSP.

<sup>48</sup> Case 26/62 *Van Gend en Loos* and Case 6/64 *Costa v ENEL*.

<sup>49</sup> Case 106/77 *Simmenthal* and Case 11/70 *Internationale Handelsgesellschaft*.

<sup>50</sup> Case C-213/89 *Factortame* (No2).

common commercial policy.<sup>51</sup> Furthermore, where the Union promulgates common rules in order to implement such a common policy, the Member States of EU have no longer been authorized to individually or collectively conclude other obligations with third parties affecting those rules.<sup>52</sup> The issue of the division of competences between the EU and the Member States analysed here is closely tied to the question of whether the EU can and shall speak in solidarity with one voice in the area of energy policy and security.<sup>53</sup>

### **2.1.1. From the European Coal and Steel Community to the Treaty of Nice**

The first European Treaty, establishing European Coal and Steel Community (ECSC) in 1952<sup>54</sup> was primarily concerned with the distribution of domestic energy resources amongst its original six Member States (MS).<sup>55</sup> In the 1940's and 1950's the primary energy resource was coal. Internal coal and gas resources were sufficient and the reliance on oil imports was minimal. In the following years oil began to slowly substitute coal as an energy resource due to its competitive price. Subsequently, the European Community's (EC) focus began to shift from internal regulation of coal to external supplies of other energy resources. This shift has not been legally reflected in the treaties and the MS were free to determine their relations

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<sup>51</sup> TFEU Article 207.

<sup>52</sup> Case 22/70 *Commission v Council* [1971] ECR 263, 274.

<sup>53</sup> *Supra note*, Haghghi, p. 67.

<sup>54</sup> The Treaty itself expired in 2002, but some of its provisions were incorporated into subsequent treaties; for details see:

[http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_ecsc\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm)

(accessed on 17 Dec 2013).

<sup>55</sup> Article 3 of the ECSC “...to promote a policy of natural resources rationally and avoiding their unconsidered exhaustion”. For a historical overview see, *supra note*, Haghghi.

with non-EC countries.<sup>56</sup> This lack of legal mandate on EC's 'external security of supply' was only partially justifiable, because while the energy reserves were sufficient at that time, the future dependence on external energy resources was foreseeable. On the other hand, Article 95 of the ECSC established a legal avenue which provided that the necessary (additional) powers might be granted to the Community upon the unanimous approval from the Council of Ministers.

Subsequent treaties – The European Atomic Energy Community (EURATOM) Treaty, 1957 and European Economic Community (EEC) Treaty, 1957 which were later amalgamated (together with ECSC, 1952) by the Merger Treaty 1967,<sup>57</sup> covered all the main energy activities, including the rational use of natural resources and the funding of common infrastructure projects.<sup>58</sup> One of the important additions was Article 103 EEC that offered the Council a possibility (upon the proposal from the Commission) to adopt measures in a case of difficulties that may arise in supply of certain products, including energy supply. The EURATOM Treaty on the other hand, did not stipulate any measures that would contribute to the security of the energy supplies and indeed 'favoured' the use of nuclear energy over the use of imported fossil fuels.<sup>59</sup>

All subsequent treaties<sup>60</sup> with the exceptions of the EC Treaty<sup>61</sup> and the Maastricht Treaty, 1992 did not provide any provisions helping to secure energy supply to the EU.<sup>62</sup> Thus, there was very little legal imperative or duty for the EU and its Member States to act jointly when it came to energy policy and contracts with non-EU countries.

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<sup>56</sup> *Supra note*, Belyi.

<sup>57</sup> For details, see, <http://www.ena.lu/> (accessed on 17 Dec 2013).

<sup>58</sup> *Supra note*, Belyi.

<sup>59</sup> Oil, gas or coal; see Articles 64 and 66 of the EURATOM.

<sup>60</sup> Single European Act of 1986, The Treaty of Amsterdam 1997, Treaty of Nice 2001.

<sup>61</sup> Analysed below.

<sup>62</sup> Maastricht Treaty included a reference to measures in the sphere of energy in Art 3 EC, in the context of sustainable development. However the article did not determine the ways through which the activities under this article should be put in place, rendering it unusable by the Community. Subsequent treaties (Nice and Amsterdam) also contained Article 3, but similarly without detailed rules on its implementation.

### 2.1.2. From the European Community<sup>63</sup> Treaty to the Treaty of Lisbon – The EU

The reason why both Treaties (the European Community Treaty and the subsequent Lisbon Treaty) should be analysed together is that their combination most accurately portray the current position of the EU law in the area of the external energy relations. With the Treaty of Lisbon 2007<sup>64</sup> (ToL) in force since the 1st of December 2009, the EC Treaty has been amended and number of other changes has been implemented,<sup>65</sup> but the majority of these provisions have not yet been tested. The provisions under the EC Treaty were put to practice for a number of years and arguably provided a solid basis for the reforms under the ToL.

Article 5 of the EC Treaty 1957, stated that “*the community shall act within the limits of the powers conferred upon it by this treaty and of the objectives assigned to it therein*”. Thus once the powers had been assigned to the Community, the MS were prevented to take unilateral action.<sup>66</sup>

The powers conferred to the Community<sup>67</sup> by the EC Treaty, fell into two categories: explicit and implicit.<sup>68</sup> Explicit powers were listed in Articles 3 and 4 of the EC Treaty in the form of “objectives”. None of these expressly stated whether the EU has competence<sup>69</sup> in relation to the energy or energy security. However, the Community developed the internal powers that were

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<sup>63</sup> “EC”, “EU” and the “Community” will be used interchangeably in this text withstanding the changes brought by the Treaty of Lisbon in 2009.

<sup>64</sup> For details, see: [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm) (accessed on 10 Dec 2013).

<sup>65</sup> For the general analysis see: Fairhurst J., “*Law of the European Union*”, 9<sup>th</sup> Ed., (Pearson Education Limited, 2012); Kaczorowska A., “*European Union Law*”, (Routledge-Cavendish, 2010).

<sup>66</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585 at 593 and 584.

<sup>67</sup> Now the “Union”.

<sup>68</sup> For further analysis see: *Supra note*, Kaczorowska.

<sup>69</sup> Article 133 EC on Commercial Policy; Article 111(3) EC concerning the exchange rate system for the ECU in relation to non-Community currencies; Article 174(4) EC on the protection of environment; Article 174 (4) EC on the protection of environment; Article 181 EC on development co-operation; Article 310 EC on association agreements.

not expressly derived from the treaty, but from global and/or general objectives. In the area of the energy security, the EC's powers were extended through the use of the "flexibility clause" pursuant to Article 308. This provision enabled the Community to expand the legislation into the areas where no separate legal basis was provided. In other words, Article 308 allowed the EC to adopt measures only if no other provision in the Treaty did.<sup>70</sup> This article was extensively used in the area of energy, for a wide-range of purposes such as concluding various international trade agreements including the Energy Charter Treaty.<sup>71</sup>

The EC Treaty also provided two other provisions allowing the EU to grant internal measures in the field of energy: Article 95 provided a solution to the difficulties that may arise in the harmonisation of the internal market, whereas Article 100 was drafted to be used when the "*severe difficulties arise in the supply of a certain products*".<sup>72</sup>

Similar to the EC Treaty, Article 13(2) TEU (as amended by the Treaty of Lisbon) has reinstated the obligation on the EU to act pursuant to the principle of conferral. Article 2(6) TEU stipulates that the scope of the EU's competences should be determined by the treaties. It introduces three categories of Union's Power: exclusive competence;<sup>73</sup> shared competence,<sup>74</sup> and actions to support, coordinate or supplement the actions of the Member States.<sup>75</sup> According to Article 4(2)(i) TFEU, "energy" falls in the area of shared competence between the EU and MS. It means that MS can only legislate and adopt legally binding acts if this right has not yet been exercised by the EU.<sup>76</sup>

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<sup>70</sup> *Supra note*, Haghghi, p. 72.

<sup>71</sup> Analysed below.

<sup>72</sup> Additionally there were two other areas of the EC Treaty where the energy was mentioned for purposes different than the security of supply: Article 154 EC related to the establishment of trans-European networks in the area of energy and Article 175 EC on MS' choices of the different energy sources in the context of environmental protection.

<sup>73</sup> Article 3 TFEU.

<sup>74</sup> Article 4 TFEU.

<sup>75</sup> Article 6 TFEU.

<sup>76</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585 at 593 and 584.

### 2.1.3. Principle of Solidarity

The spirit or the principle of solidarity has been recognised as one of the founding and guiding principles of European Communities. Since the very start of the European Project solidarity has been articulated both in legal and political contexts. For instance, the Preamble to the Treaty Establishing the European Coal and Steel Community Treaty (1951) stipulated that ‘Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development’. Later in the Single European Act (1986) and in the Maastricht Treaty (1992) ‘solidarity’ appeared alongside ‘cohesion’.<sup>77</sup> The Preamble to the Lisbon Treaty not only commits its signatories ‘to deepen the solidarity between their peoples while respecting their history, their culture and their traditions but also expands it in numerous policy areas and activities of the EU and its Member States. One of the important changes brought by the ToL in relation to energy is indeed the *principle of solidarity*.<sup>78</sup> This principle has been promoted by the Commission since the 1990s and appears in various parts and contexts of the ToL including the security of the energy supplies. For example, Article 194(1) TFEU provides that in the context of establishment of energy market and protection of 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”.*

However, Article 194(2) states that the measures taken under Article 194 shall not affect the MS’s right to choose the energy resources and suppliers.<sup>79</sup> Thus, Maltby argues that ‘solidarity’ in this context is vague<sup>80</sup>

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<sup>77</sup> Sangiovanni A., ‘Solidarity in the European Union’, [2013] Oxford J Legal Studies (Summer 2013) 33 (2): 213-241

<sup>78</sup> Article 4(3) TFEU.

<sup>79</sup> Nevertheless “*measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply*” (Art. 192(2)(c) TFEU) may be passed through the special procedure specified in Article 192(2) TFEU.



and Konstadinides opines that the solidarity clause (under Article 222 TFEU) renders the solidarity as an “interpretative, rather than legally binding commitment”.<sup>81</sup> This is not completely accurate because Article 222 TFEU stipulates solidarity in situations arising from atrocities and in crisis management, including modern threats from non-state agents such as terrorist organisations and manmade disasters, areas which do not necessarily fall into the economic realm and policy. Whereas the other legal provisions outlined here are linked to the Single Market and intra-community trade activities thus are directly linked to explicit aims and objectives of the Treaties for which the EU has competence. It should also be noted that rules on Single Market have consistently been held to have direct effects and supremacy.<sup>82</sup> It seems that the requirements of solidarity in the economic field and energy policy are clear and there has been ‘prior consultation’ between Member States and political institutions of the EU. Therefore, it could be argued that principle of solidarity has gravity and may be invoked as a duty on Member States in the context of common internal and external energy policy. The Treaty objectives are intrinsically far too valuable to be

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<sup>80</sup> Maltby T., ‘European Union energy policy integration: A case of European Commission policy entrepreneurship and increasing supranationalism’, *Energy Policy*, [2013].

<sup>81</sup> Konstadinides, T., ‘Civil protection in Europe and the Lisbon ‘solidarity clause’: A genuine legal concept or an article exercise. Uppsala Faculty of Law Working Article 2011:3, available at: <http://www2.statsvet.uu.se/LinkClick.aspx?fileticket=ywEQQ722Uul%3D&tabid=3159&language=sv-SE>.

<sup>82</sup> The doctrine of ‘direct effect’ applies in principle to all binding EU Law including the Treaties, secondary legislation and international agreements. See, Case 26/62 *Van Gend en Loos* [1963] ECR 13; Case 6/64 *Costa v ENEL* [1964] ECR 585 and Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125. Also note that Article 4(3) TEU stipulates that “Pursuant to the principle of sincere cooperation...the Member States shall take any appropriate measure...to ensure fulfilment of the obligations arising out of the Treaties...[and] shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.” Declaration 17 under TFEU states that “...in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.”

held hostage to the norm of state sovereignty and discretion provided by Article 194(2) and, therefore, ought to override that norm.

In addition, Article 122(1) TFEU provides that in a case of severe difficulties in the supply of *“certain products notably in the area of energy”*, the Council, on a proposal from the Commission, may decide upon the measures appropriate to the economic situation. That decision shall again be reached in a *spirit of solidarity* between MS.

The Treaty of Lisbon also foresees a possibility of difficulties in cases of energy crisis when Member States have an obligation to consult each other and take necessary steps to resolve these problems, placing the issue of energy security in a broader context. These instances are laid out in Article 347 TFEU and are *“clearly defined and do not lend themselves to any wide interpretation”*<sup>83</sup> which do cover *“measures taken for reasons of public safety and security”*.<sup>84</sup>

“Energy”, unlike other areas covered by the Treaty, does not contain an express encouragement for the MS to foster co-operation with third countries and international organisations. It has been suggested that such *“categorisation of the Union’s policy in the field of energy is designed to allow the Union to embark on activities at the external level because nothing in the provision limits the competence of the Union in this respect”*.<sup>85</sup>

Article 308 EC which was extensively used in the area of energy has been modified in the Treaty of Lisbon under Article 352 TFEU. Article 352(1) TFEU provides the Union with a general legislative power: *“If action by the Union should prove necessary... to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council...shall adopt the appropriate measures”*. On the one hand the scope of Article 352(1) TFEU is wider than of Article 308 EC as it refers to the objectives of the EU and is not confined to the internal market which was the case under Art 308 EC. On the other hand its application is limited, as it requires unanimity in the Council and the consent of the European

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<sup>83</sup> Case 13/68, *SPA Salgoil v Italian Ministry of Foreign Trade*, [1968] ECR 453, p. 463.

<sup>84</sup> Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 26.

<sup>85</sup> *Supra note*, Haghighi, p. 81.

Parliament.<sup>86</sup> Furthermore, over-reliance on this article would no longer be necessary as the EU has gained express legal basis in the area of energy,<sup>87</sup> which is likely to expand as the secondary legislation becomes denser.<sup>88</sup>

While Article 95 EC which makes reference to energy in the context of environmental protection has been “transferred” to the Treaty of Lisbon under Article 114 TFEU, it adds no further competences to the EU regarding energy security.

The EU institutions which are endowed with the responsibility to devise both an internal and external common energy policy and strategy have indeed given heed to the principle of solidarity in EU’s secondary legislation. For example, the EU Commission highlighted the importance of completing the internal market in natural gas and indicated that the existing rules and measures were not adequate<sup>89</sup> and titled its 2<sup>nd</sup> Strategic Energy Review as “An EU Energy Security and Solidarity Action Plan”.<sup>90</sup> While Regulation (EC) No. 663/2009 requires MS to implement the aforementioned Action Plan in light of solidarity among MS,<sup>91</sup> EU Directive 2009/73 provides that the MS “**shall** cooperate in order to promote regional and bilateral solidarity” (emphasis added).<sup>92</sup> It is important to note that the use of the term ‘shall’ indicates that there is an explicit obligation on the Member States to cooperate. The EU Directive 2009/119/EC<sup>93</sup> also calls upon the MS to cooperate with the Commission so that Community-wide solidarity and cohesion in regards to energy (oil) policy can be ensured and the objectives

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<sup>86</sup> *Supra note*, Fairhurst J.

<sup>87</sup> Article 4(2)(i) TFEU.

<sup>88</sup> *Supra note*, Haghighi, pg. 83. Also see the CJEU jurisprudence explained below.

<sup>89</sup> Directive 2009/73/EC

<sup>90</sup> The 2<sup>nd</sup> Strategic Energy Review of 13 Nov. 2008, An EU Energy Security and Solidarity Action Plan, COM(2008)781.

<sup>91</sup> Regulation (EC) No. 663/2009 of the European Parliament and of the Council, 13 July 2009, establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy, L 200/31.

<sup>92</sup> Directive 2009/73/EC, Article 6.

<sup>93</sup> Council Directive 2009/119/EC, 14 September 2009, imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, L 265/9, Recital 13.

of this Directive<sup>94</sup> can be achieved.<sup>95</sup> Similarly, the European Parliament (EP) has consistently made reference to the solidarity in its recent reports and legal proposals pertaining to energy.<sup>96</sup> In addition, jurisprudence of the CJEU indicates that the principle of solidarity must inform Member States' action and implementation of secondary legislation.<sup>97</sup> As Ross opines, solidarity in the EU is a real and viable 'constitutional principle'<sup>98</sup> and it could be argued that it is becoming one of the general principles of EU law.

#### **2.1.4. Developments by the Court of Justice of the European Union (CJEU) in the area of energy security**

The CJEU's institutional role conferred under the Treaties represents a significant transfer of jurisdictional authority, previously embedded within national courts, and underpins the supremacy of EU law. For many years the CJEU has been involved in clarifying the division of powers between the EU and Member States. Most of the EU's powers and competences in the area

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<sup>94</sup> Article 1 of Directive 2009/119/EC provides the objective as ensuring "a high level of security of oil supply in the Community through reliable and transparent mechanisms based on solidarity among MS".

<sup>95</sup> *Ibid.* Recitals 28 and 33. Similar provisions are present in regards to electricity in EU Directive 2009/72/EC, 13 July 2009, L 211/55, Recital 24; in regards to oil and petroleum products in EU Directive 2006/67/EC, 24 July 2006, L 217/8, Recital 18; in regards to natural gas supply in EU Directive 2004/67/EC, 26 April 2004, L 127/92, Recital 13.

<sup>96</sup> See, for example, the EP Committee on Industry, Research and Energy Report on Energy Infrastructure Priorities for 2020 and Beyond, 14 June 2011, (2011/2034 (INI)), makes reference to solidarity seven times.

<sup>97</sup> In Joined Cases C- 411/10 and C- 493/10 the CJEU held that treaty aims and obligations (e.g. common asylum policy) are to be governed by the principle of solidarity and fair sharing of responsibility (para. 93). Also see Judgment of the Court (Sixth Chamber) of 29 September 1987. - *Fabrique de fer de Charleroi SA and Dillinger Hüttenwerke AG v Commission of the European Communities*. - ECSC - Additional quotas. - Joined cases 351 and 360/85; and C-56/99 *Gascogne Limousin viandes* where the CJEU held that in the context of the pursuit of an objective recognized by EU law, all Community producers, regardless of the Member State in which they are based, must together, act in a spirit of solidarity and equality.

<sup>98</sup> Ross M., Promoting Solidarity in the European Union, (OUP, 2010), p.4.

of energy security and supply were implied prior to the ToL,<sup>99</sup> consequently it was even more important to draw a clear demarcation line separating these competences. It can be asserted that the CJEU is “*both willing and able to assert itself as the highest court in a constitutional order adjudicating on competences*”<sup>100</sup> and its “*opinion may be sought on the questions concerning the division of competences between the Community and the Member States*”.<sup>101</sup> It is however up to the EU institutions to initiate such inquiry for the CJEU’s perusal. So far, the Commission, as the main EU institution endowed with the duty of monitoring the Member States and ensuring the aims and objectives of the Treaties are achieved,<sup>102</sup> has not challenged any unilateral Member State activity in the energy sector.<sup>103</sup>

#### **2.1.4.1. Article 30 EC Treaty – Public policy grounds and “necessity”**

Initially, the CJEU’s opined that the Member States were the best authorities to make decisions on the security of their energy supplies thus has given deference to executive decisions within Member States. However, this view began to change giving a way to the expansion of the external competences in energy relations to the Community.<sup>104</sup>

In the *Campus Oil* case,<sup>105</sup> the CJEU held that even if the Community rules on the matter of energy supply exist, the complementary measures of MS on national level should not be excluded. Therefore the MS were permitted to derogate from the basic Treaty principles under Article 30 EC

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<sup>99</sup> Primarily through the use of Article 308 (see above) and up until the ToL.

<sup>100</sup> Bast A. and Bogdandy A., “*The European Union’s Vertical Order of Competences: the Current Law and Proposals for its Reform*” [2002] *Common Market Law Review* Vol.39, 227, p. 238.

<sup>101</sup> Case 1/94 *on the Competence of the Community to Conclude International Agreements concerning Services and the Protection of Intellectual Property* [1994] ECR I-5267, para. 9.

<sup>102</sup> Article 17 TFEU.

<sup>103</sup> Enforcement action by the Commission can be initiated under Article 258 TFEU.

<sup>104</sup> *Supra note*, Haghghi, p. 84.

<sup>105</sup> Case 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] ECR 2727.

(now Article 36 TFEU) on “public security” grounds, *inter alia* due to the “necessity” of securing the energy supplies. The CJEU’s rationale for this decision was the fact that the petrol was very important to each country’s existence and economic security.<sup>106</sup>

In the case of *Commission v Hellenic Republic*,<sup>107</sup> the issue of “necessity” of securing the energy supply was reconsidered. Although the facts of this case were similar to the *Campus Oil*,<sup>108</sup> the CJEU interpreted the notion of “necessity” more strictly and held that it should be interpreted beyond “*purely economic reasoning*” and expressed the need for “*less restrictive*” measures than straightforward derogations. This decision changed the threshold for the MS’ ability to restrict trade in energy.

Members States’ freedom to derogate from the Treaty provisions due to the “necessity” of securing energy supplies was further limited in the Opinion of the Advocate General in the *Preussen Elektra* case.<sup>109</sup> It remained doubtful<sup>110</sup> whether it was still possible to rely on the “public security” exceptions under Article 36 TFEU if these particular issues have been addressed by the EU in the form of a secondary legislation.

#### **2.1.4.2. Implied EU external powers & the doctrines of “necessity” and “effect”**

The EU can acquire legal personality (i.e. a capacity to be represented internationally and to enter into international treaties with third parties) only through transfer of that power from Member States to the EU. This could be done in two ways: through explicit reference to the provisions of the Treaty<sup>111</sup> or through the progressive development of the CJEU’s case

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<sup>106</sup> Another reason for this stance may be the fact that in the 1980’s there were no real attempts to create an internal energy market for oil and gas.

<sup>107</sup> Case 347/88 *Commission v Hellenic Government* [1990] ECR I-4747.

<sup>108</sup> Case 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] ECR 2727.

<sup>109</sup> Opinion C-379/98 *Preussen Elektra AG and Schleswig AG* [2001] ECR I – 2009.

<sup>110</sup> The doubt remained as the Court’s decision was made on the environmental protection grounds: See, at paras 68-81.

<sup>111</sup> Eg. Ex Article 281 EC and Article 47 TFEU granting the EU a “legal personality, i.e. “*capacity to enter into contractual and other relations with third States, and bear full*

law that originates from the case of *ERTA*.<sup>112</sup> In *ERTA* it was held that if there is any common rule that deals with externalities,<sup>113</sup> the EU has an implied external power in the field covered by this common rule.<sup>114</sup>

Furthermore, the EU has the power to enter into international agreements in policy areas for which it has competence and may add to the agreement without the need for an additional legal basis.<sup>115</sup> This principle was later developed by the CJEU and has been referred to as the “*necessity doctrine*”. The “*necessity doctrine*” grants the EU an authority to enter into international agreements if it is necessary for attaining objectives of the EU,<sup>116</sup> but only when the “*attainment of the objectives*” of the Treaty is inextricably linked to the externality.<sup>117</sup>

Another important doctrine developed by the CJEU extending the external competence of the Community, is the “*effect doctrine*” stating that if the international commitment falls within the area covered by the external measure, then the “*effect*” is established.<sup>118</sup>

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*responsibility for one’s actions*”: Arcas L. R., “*EU Legal Personality in Foreign Policy?*” [2006] *Boston University International Law Journal* Vol.24, p. 167.

<sup>112</sup> Case 22/70 *Commission v Council* (*ERTA*) [1971] ECR 263.

<sup>113</sup> In *ERTA* the “common rule” was provided under Regulation No. 543/69.

<sup>114</sup> It is important to limit the external competences of the Member States to prevent the existing internal community rules from being affected by their individual actions. The more measures adopted in a certain field, the more likely it is that the Community will acquire an exclusive competence, see: Case 2/91 (*ILO*) on the Convention No. 170 of the International Labour Organisation concerning Safety in the use of Chemicals at Work [1993] ECR-I-1061.

<sup>115</sup> Case 268/94 *Portugal v. Council* ECR [1996] I-06177.

<sup>116</sup> Opinion 1/76 *Draft Agreement Establishing a European Union Laying up Fund for Inland Water*.

<sup>117</sup> Case 1/94 on the Competence of the Community to Conclude International Agreements concerning Services and the Protection of Intellectual Property [1994] ECR I-5267.

<sup>118</sup> *Open Skies* cases: C-476/98 *Commission v Denmark*; C-468/98 *Commission v Sweden*; C-471/98 *Commission v Belgium*; C-472/98 *Commission v Luxembourg*; C-475/98 *Commission v Austria*; C-469/98 *Commission v Finland*; C-476/98 *Commission v Germany*; C-466/98 *Commission v Great Britain and Northern Ireland* - All judgments of 5 November 2002.

The operation of the two principles - “*necessity*” and “*effect*” - has two major consequences for energy security. Firstly, the more energy related measures come to existence the more the EU competence in this area will be. Secondly, the gradual expansion of the internal and external competence of the EU might lead to its exclusive competence in some aspects of energy security policy.<sup>119</sup>

While there is a linguistic certainty pertaining to the principle of solidarity therefore an implicit and explicit duty to observe this principle is placed on Member States, political questions and the intent of the Member States have continuously hindered the realisation of solidarity in the energy relations between the EU and Russia. In other words, the provisions pertaining to the principle of solidarity have been considered as precatory.<sup>120</sup> “Precatory treaty provisions are deemed judicially unenforceable not because of the parties’ (or anyone’s) intent, but because what the parties agreed to do is considered in our system of separated powers, a ‘political’ task not for the courts to perform.”<sup>121</sup> This trend can clearly be seen in the context of energy policy and deference afforded to Member States by the CJEU.

However, it should be noted that the objectives of the EU are worded in *mandatory* terms. For example, Article 3 (3) TEU states that:

“The Union *shall* establish an internal market. It *shall* work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It *shall* promote scientific and technological advance. It *shall* combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men; solidarity between generations and protection of the rights of the child.

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<sup>119</sup> Cremona M., “*External Relations and External Competence: The Emergence of an Integrated Policy*”, in Craig P., de Burca G., “*The Evolution of EU Law*”, (Oxford University Press, 1999).

<sup>120</sup> As opposed to ‘obligatory’.

<sup>121</sup> Vazquez C., ‘The Four Doctrines of Self-Executing Treaties’ (1995) 89 *American Journal of International Law* 695, 712.



It *shall* promote economic, social and territorial cohesion, and solidarity among Member States. It *shall* respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced.”

This provision, created by the Member States, is clearly intended to establish legal effects. In relation to questions of intent, the CJEU does not concern itself with the intentions of the Member States in assessing the legal effects of the Union provisions it is called on to interpret and apply. Instead the CJEU assesses the language of a provision in light of the overall purposes of the Treaties (teleological approach). In this regard, a ‘general’ interpretive assumption is that all individual Union measures are intended by the Member States collectively to fit within the overall scheme of the Union legal order, which is based on the achievement of the Treaty objectives. Yet, in the context of state practice and solidarity in the energy relations with Russia, such intentions are hard to come by.

### 3. Member States’ Practises

Each EU Member State has had a different relation with Russia. The scope of this paper does not allow for a comprehensive analysis of all 28 Member States yet, these differences can be explained in light of historical, geo-political,<sup>122</sup> social, economic factors and national interests. It can be argued that this wide spectrum of factors have shaped the energy relations with Russia where by Member States negotiate gas imports with Gazprom bilaterally. Consequently, some get much better deals than others and Gazprom insists that the gas pricing agreements should be kept confidential.

**Bulgaria** as an ex-communist country under the Soviet Union found herself vulnerable during the January 2009 gas crisis and still finds herself

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<sup>122</sup> Interestingly, statistical data indicates a direct correlation between a state's geographical proximity to Russia and that state's dependence on Russian energy; Eurogas - 2011. “Statistical report 2011,” [http://www.eurogas.org/uploaded/Statistical%20Report%202011\\_091211.pdf](http://www.eurogas.org/uploaded/Statistical%20Report%202011_091211.pdf) (accessed on 22 March 2014).

pushed into a corner by Russia.<sup>123</sup> Gazprom has linked gas prices to South Stream pipeline participation and inserted clauses to its contracts which require Bulgaria to finance this project,<sup>124</sup> exclude competition and impose penalty payments if new contracts are not expedited.<sup>125</sup> EU law stipulates that such agreements ought to work in line with the aims and objectives of the EU and its single market (including competition and the Third Energy Package)<sup>126</sup> and requires that stake holders such as civil society groups, local residents, environmental organisations, be consulted on such large construction projects. At the time of the South Stream pipeline agreement between Russia and Bulgaria, the EU Commission had not been informed about the environmental impact assessment of this project nor was there any transparency in regards to the other provisions of the agreement. Subsequently, the Commission referred Bulgaria along with Romania to the

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<sup>123</sup> Judah B., *et al*, 'Dealing with a Post-Bric Russia', European Council on Foreign Relations, 2011, p. 53 [www.ecfr.eu/page/-/ECFR44\\_RUSSIA\\_REPORT\\_AW.pdf](http://www.ecfr.eu/page/-/ECFR44_RUSSIA_REPORT_AW.pdf) and Assenova M., Protests against Rising Energy Prices in Bulgaria: Will Sofia Follow Warsaw and Kyiv's Lead on Shale Gas?, *Eurasia Daily Monitor*, (2013) Vol. 10, Issue: 29.

<sup>124</sup> Russian-Bulgarian energy relations near melting point, 13 November 2012; <http://www.euractiv.com/energy/russian-bulgarian-energy-relatio-news-515999>.

<sup>125</sup> EurActiv, Gazprom links gas price to South Stream participation, 12 August 2012, <http://www.euractiv.com/energy/gazprom-links-gas-price-south-st-news-514481> (accessed on 22 March 2014).

<sup>126</sup> Russia president Putin branded EU's efforts to liberalise the energy market as "no better than terrorism". Gregory Feifer, Too special a friendship: Is Germany questioning Russia's embrace?, 24 January 2013, [http://www.rferl.org/content/germany\\_and\\_russia\\_too\\_special\\_a\\_relationship/24262486.html](http://www.rferl.org/content/germany_and_russia_too_special_a_relationship/24262486.html). Also note that the Third Energy Package "directive is designed to promote competition and prevent the monopolisation of energy industries in EU countries, this has a direct impact on Russia. That is because in several EU countries, and particularly the Baltic States, Russia is responsible for both the production and the transportation of natural gas. So its interests would directly be threatened by this directive. There have already been several countries that have actively tried to enforce this directive on Russia, such as Lithuania, while other countries have started to implement the process legally, like Slovakia." <http://www.euractiv.com/energy/russia-eu-energy-politics-analysis-508992>.

CJEU (under Art 258 TFEU) for failing to fulfil their obligations under EU law.<sup>127</sup>

**Poland**, as a country previously under the control of Soviet Union, has a history of strained relations with Russia. It is therefore not surprising that Poland's 45% of its energy imports from Russia is perceived as a threat to Poland's energy security.<sup>128</sup> Russia's dominance is enhanced by its large share in Polish oil and gas imports and a lack of Polish share in Russia's exports. Poland's position is complicated by the fact that the country hosts a number of energy routes from Russia to West Europe. Thus as a consumer and a transit country, Poland is important not only for Russia but also for the region. In some instances, Poland has been able to utilise its EU member status and its logistical transit position in taking contrasting stances against Russian initiatives. For instance, Poland delayed the new EU- Russia Partnership and Cooperation Agreement by several months following its meat export dispute with Russia.<sup>129</sup> In addition, Poland has lobbied hard for 'energy solidarity' and Europeanisation of energy security since the 2006 Russia-Ukraine energy crisis<sup>130</sup> and sought to diversify its energy supplies.<sup>131</sup>

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<sup>127</sup> [http://europa.eu/rapid/press-release\\_IP-13-42\\_en.htm](http://europa.eu/rapid/press-release_IP-13-42_en.htm). Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005; and Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks; [http://europa.eu/rapid/press-release\\_IP-11-1437\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1437_en.htm). Also note that Antoine Colombani, spokesperson to Competition Commissioner Joaquín Almunia, said the Commission had opened an antitrust case against Gazprom in September 2012.

<sup>128</sup> Honorata, N., "Poland's energy security strategy," *Journal of Energy Security*, [2011]: [http://www.ensec.org/index.php?option=com\\_content&view=article&id=279:assessing-polands-energy-security-strategy&catid=114:content0211&Itemid=374](http://www.ensec.org/index.php?option=com_content&view=article&id=279:assessing-polands-energy-security-strategy&catid=114:content0211&Itemid=374).

<sup>129</sup> Sharples J., 'Russo-Polish energy security relations: a case of threatening dependency, supply guarantee, or regional energy security dynamics?', [2012] *Political Perspectives*, Vol. 6, No. 1, 35.

<sup>130</sup> Roth M., "Poland as a policy entrepreneur in European external energy policy: towards greater energy solidarity vis-à-vis Russia?", [2011] *Geopolitics*, 16 (3): 600-625 and Maltby, T., "The development of EU foreign policy: Enlargement and the case of external energy security policy towards Russia, 2000-2010," [2010] *PSA*, [http://www.psa.ac.uk/journals/pdf/5/2010/1630\\_1484.pdf](http://www.psa.ac.uk/journals/pdf/5/2010/1630_1484.pdf).

For instance, in 2006, Poland presented a joint position on the diversification of energy supplies to Central and East European countries, prepared together with the Czech Republic, Hungary and the Austrian EU Presidency, and also promoted a joint action plan (worked out with the Czech Republic, Slovakia, Austria, Hungary, Slovenia, Croatia and Romania) to reduce dependence on Russian natural gas. This was a clear indication that Poland wanted a joint action in energy relations with Russia.

The efforts by Poland have, to a certain extent, been hampered by the German engagement with Russia, which resulted in Germany being branded as a Russian “Trojan horse” within the EU.<sup>132</sup> As an influential member of the EU, **Germany** relies heavily on Russian energy supplies and is Gazprom's largest customer and Russia's biggest trading partner in general. Germany's successful export-driven economic success depends partly on Russian energy supplies. For many years Germany and Russia enjoyed smooth energy trade relations and as a result Germany has been able to concede special deals from Russia to the point that previous German chancellor, Gerhard Schroeder, is one of the board directors for the North European Gas Pipeline (NEGP) who complemented President Putin as a “flawless democrat”. It is argued that promise of a steady flow of cheap Russian energy has encouraged German politicians to surrender a degree of sovereignty by reducing their enthusiasm for EU unity and collective action, on international policy in general<sup>133</sup> and on the energy front in particular.<sup>134</sup> For instance, Merkel led the effort to block proposed EU regulations that would have restricted foreign companies from buying European energy

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<sup>131</sup> *Supra note*, Sharples.

<sup>132</sup> Judah B., *et al*, ‘Dealing with a Post-Bric Russia, European Council on Foreign Relations’, 2011, p. 50 citing Rettman A., ‘Polish FM in Wikileaks: Germany is Russia’s Trojan horse’, EU Observer, 16 September 2011. [www.ecfr.eu/page/-/ECFR44\\_RUSSIA\\_REPORT\\_AW.pdf](http://www.ecfr.eu/page/-/ECFR44_RUSSIA_REPORT_AW.pdf).

<sup>133</sup> Note that when the Bush administration campaigned to put Ukraine and Georgia on a path to NATO membership, which provoked anger in Russia, Merkel led the opposition to the plan and blocked progress.

<sup>134</sup> *Supra note*, 107.

utilities. These measures were aimed at slowing Gazprom's monopoly in the energy market.

Russia sees its relationship with Germany as a valuable asset for asserting greater influence in European affairs<sup>135</sup> thus provides certain privileges in return. For instance, Gazprom has signed deals containing flexible and favourable terms that have proved very profitable for its German partners, such as its main Nord Stream collaborators: energy giant E.ON and chemical giant BASF. These companies each control almost one-quarter of the Yuzhno-Russkoye gas fields that will provide most of the supplies for Nord Stream. Germany, the Netherlands and France have 49% stake in the Nord Stream project, which is another indication that there is a cultivation of bilateral agreements rather than a unified approach among EU Member States when it comes to energy security and relations with Russia.

Gazprom negotiates bilaterally between itself and its corporate partners in the EU, which results in an asymmetric bargaining power in favour of Gazprom. Whilst Gazprom benefits from a centralised data analysis, individual European energy companies end up competing against each another with incomplete information about one another and about supply prospects. As analysed by Westphal in detail, Germany's bilateral relationship with Russia has been beneficial to Germany, yet this markedly state-centric approach to energy has somewhat undermined international governance, namely the common EU approach.<sup>136</sup> However, more recently, with Germany's initiative the EU Joint Political and Security Committee with Russia was established and Polish-German joint letter called for a

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<sup>135</sup> Stelzenmuller C., 'Germany's Russia Question – A new Ostpolitik for Europe', (April/March 2009] *Foreign Affairs*, 89. Russian approach has been twofold: to build up its relationship with Germany as the pipeline and contracting hub; and to squeeze the alternative supplies from the Caspian, by trying to continue the Soviet strategy of routing its exports via Russia, whilst frustrating alternative (non-Russian) outlets via (for example) Georgia. For further analysis, see: Dieter Helm, *Russia, Germany and the European Energy Policy*, 14 December 2006; [http://www.opendemocracy.net/globalization-institutions/government/energy\\_policy\\_4186.jsp](http://www.opendemocracy.net/globalization-institutions/government/energy_policy_4186.jsp).

<sup>136</sup> Westphal K. in Aalto P., (Eds.), "*The EU-Russian Energy Dialogue: Europe's Future Energy Security*", (Aldershot: Ashgate (2008) ch. 5.

coordinated EU approach to Russia “based on shared interests and objectives”.<sup>137</sup> These developments could be seen as the start of a convergence amongst two Member States who traditionally differed in their relations with Russia.

**Italy** is the Russian Federation’s third largest trade partner and purchase approximately 15% of its oil and 30% of its gas from Russia.<sup>138</sup> Like Germany, Italy has benefited from certain preferential treatment by Russia: South Stream AG, is a joint company comprised of Gazprom and ENI, Italy’s main oil company. South Stream project rivals Nabucco project which is supposed to diversify EU’s energy supplies thus reducing reliance on Russian energy. It is argued that Italy was keen to endorse the South Stream project with the prospect of profits by politically connected companies.<sup>139</sup> However, there is also another factor behind Italy’s stance; it is expected that gas production in Italy (along with Germany and the United Kingdom) will decline substantially over the next two decades.<sup>140</sup>

One of the other leading energy consumers in the EU, France has also forged strong links with Russia. The leading **French** electricity group, Électricité de France (EDF), has acquired a minority stake in this venture in tandem with Gazprom’s advances to enable the French GDF SUEZ to participate in Nord Stream pipeline. In addition, France’s Total energy company is closely linked to various Russian companies.

There is no doubt that Nord and South Stream pipeline projects are Russia’s main instruments to promote its energy and transit interests in Europe and which it exploits by affording various privileges to select EU

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<sup>137</sup> Foreign Ministers, Sikorski R and Westerwelle G., EU-Russia Relations, 17 November 2011; [www.msz.gov.pl/index.php?document=46717](http://www.msz.gov.pl/index.php?document=46717).

<sup>138</sup> Italian Ministry of Foreign Affairs, New Italian/Russian Relations; [http://www.esteri.it/MAE/EN/Politica\\_Estera/Aree\\_Geografiche/Europa/I\\_nuovi\\_rapporti.htm](http://www.esteri.it/MAE/EN/Politica_Estera/Aree_Geografiche/Europa/I_nuovi_rapporti.htm).

<sup>139</sup> Smith, K. C., Russia-Europe Energy Relations – Implications for U.S. Policy, Center for Strategic & International Studies, February 2010,

<sup>140</sup> Kjarstand J. and Johnson F., ‘Prospects of the European Gas Market’, *Energy Policy*, [2007] Vol. 35, p. 874.

countries. These brief examples of state practices above indicate that energy policies among EU Member States that do not always diverge when it comes to Russian energy supplies. Rather, the policies formulated are subject to complex interdependence factors, which results in differing rationales and drives for energy trade relations with Russia.

It is also clear that it is difficult to isolate external relations of the EU Member States from affecting internal market rules of the EU. Given the various bilateral approaches undertaken towards Russia at the EU Common Energy Policy has had a limited effect. Currently, there are some 18 bilateral partnership agreements among 27 EU member States.<sup>141</sup> A unified approach has also been hampered because the security framing of energy policy (as opposed to an economic activity) towards Russia contributed to the further legitimisation of EU member states' reluctance to cede sovereignty in the external energy policy domain. This has a direct influence on how the principle of solidarity is perceived and practiced by Member States.

The EU political institutions such as the European Parliament and the Commission spoke in favour of a 'Common foreign energy policy strategy' recognising the fact that energy supply could not be dealt with only within the market sphere, but also needed a strategic, foreign policy approach, enabling the EU to maintain a unitary position in international energy relations.<sup>142</sup> The necessity of setting new instruments to govern energy at the EU level was also supported by dominant member states but at the same time these countries continued favouring their large national energy companies (national champions), contravening Internal Market rules and provoking intergovernmental disputes such as the Spanish-German conflict about the takeover of Endesa by E.ON that broke out at the end of 2006. Member states' bilateral strategies to secure their energy supply also caused

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<sup>141</sup> Judah B., *et al*, 'Dealing with a Post-Bric Russia, European Council on Foreign Relations', 2011, pp. 53-54 [www.ecfr.eu/page/-/ECFR44\\_RUSSIA\\_REPORT\\_AW.pdf](http://www.ecfr.eu/page/-/ECFR44_RUSSIA_REPORT_AW.pdf).

<sup>142</sup> See the recent Commission decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32012D0994:EN:NOT>.



major intra-EU tensions and mutual accusations of a lack of solidarity.<sup>143</sup> Two particularly contentious cases in this context have been Germany's bilateral agreement with Russia to build 'Nord Stream' under the Baltic Sea without intermediaries; and Hungary and Italy's deals with Gazprom to build the 'South Stream' pipeline to the detriment of the Nabucco pipeline, one of the main European projects for diversifying the sources of gas supplies to EU countries. These countries preferred intergovernmental cooperation outside the EU framework in clear defiance of solidarity.

Both the treaties (primary) and secondary legislation of the EU are international (and supranational) legal instruments thus the legal commitments emanating from them have profoundly shaped the EU project. It is clear that the EU is based on common values as it aspires to establish collective political and legal commitment amongst its Member States. Whilst the EU legal order operates pursuant to the doctrine of supremacy of EU law, the objectives contained in the Treaties and in the acts of the EU institutions cannot realistically be achieved through the immediate assertion of legal demands alone.<sup>144</sup> This has been the case in regard to the principle of solidarity. In the energy field in particular, it is clear that Member States have conducted bilateral arrangements for their energy supplies from Russia. This is neither conducive to the establishment of a strong legal framework nor does it comply with the principle of solidarity. With the development of EU secondary legislation and embedding of the solidarity principle therein, there is a clear signal to Member States to coordinate and co-operate in their external energy policies. Ignoring this principle and hoping that it will never be enforced by the EU is wishful thinking. This principle is likely to become enforceable at EU level as the EU energy policies develop and harmonise, and once the current economic crisis is over. Accordingly, Member States should set clear, short, medium and long-term strategies in

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<sup>143</sup> Maltby T., 'European Union energy policy integration: A case of European Commission policy entrepreneurship and increasing supranationalism', *Energy Policy*, [2013] <http://dx.doi.org/10.1016/j.enpol.2012.12.031> (accessed on 17 Dec 2013).

<sup>144</sup> Timothy Moorhead, 'European Union Law as International Law', *European Journal of Legal Studies*, Volume 5, Issue 1 (Spring/Summer 2012), p. 126-143.



complying with and developing the solidarity doctrine in their external energy relations.

#### 4. Future Prospects

Arguably, all inter-state trade relations ought to be put on a legal footing so as to enhance certainty and protection of the interests of the trading partners and other stakeholders. Among the several bilateral and multilateral legal instruments that are designed to enhance the security of energy supplies from Russia to the EU, there are number of regimes potentially capable of providing a sound basis for cooperation between the EU and Russia in the energy sector:

- The Partnership and Cooperation Agreement 1994 (PCA);
- The Energy Charter Treaty (ECT) 1994;
- Draft Convention on Energy Security;
- The political agreements within the framework of EU-Russia Energy Dialogue;<sup>145</sup>
- The Treaty Establishing the Energy Community; and
- The World Trade Organisation.<sup>146</sup>

It is not possible to examine these regimes in detail within the scope of this article.<sup>147</sup> However, it can be asserted that there are difficulties in establishing a common ground in EU-Russia relations within these international trade agreements. These difficulties stem from the fact that majority of these regimes are not strictly based on the rule of law as they lack a number of essential elements *inter alia* specific and explicit

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<sup>145</sup> *Supra note*, Maican.

<sup>146</sup> It should be noted that Russia is not a member of the WTO thus this agreement is not binding but could potentially be utilised if and when Russia's accession to the WTO is realised.

<sup>147</sup> For a detailed study of WTO and Energy Charter Treaty see, Selivanova Y., "Regulation of Energy in International Trade Law", (Kluwer Law International, 2011).

commitments, an independent adjudication, effective and predictable legal redress and enforcement mechanisms.<sup>148</sup>

The current situation indicates that the EU is facing a monopolistic and quasi-statist energy supplier, which is not willing to embed the energy trade in a predictable and independent legal framework. The rule of law is not only problematic in Russia's external energy trade relations but also in its domestic sphere. For example, by utilising the military, law enforcement, and security agencies (*siloviki*), the Russian bureaucratic elite achieved the *de facto* nationalization of YUKOS (the largest oil company in Russia) while securing the imprisonment of its former owners.<sup>149</sup> It can be argued therefore, that in addition to creating a more predictable energy policy, the future of Russia depends on whether and to what extent the elites within Russia can agree on new rules of international trade.<sup>150</sup>

The fact that the Member States of the EU are neither able to create solidarity or speak with one voice helps Russia's dominance in political and economic power in energy trade. A number of suggestions have been made to improve the security of EU-Russia energy relations. For example, Konoplyanik proposes three possible ways for creating a "common EU-Russia" energy space.<sup>151</sup> The first option is the export of EU *acquis communautaire* directly through geographic expansion of the EU or indirectly

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<sup>148</sup> While the WTO Dispute Settlement Understanding has automatic jurisdiction with independent adjudication and a good record of ensuring compliance, the WTO agreements do not systematically address energy regulation as a distinctive sector. See, T. Richards and L Herman, Relationship between International Trade and Energy, WTO - Research and Analysis, World Trade Report 2010, [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_richards\\_herman\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_richards_herman_e.htm).

<sup>149</sup> Yakovlev A., In Search for a New Social Base or Why the Russian Authorities Are Changing Their Relations with Business By, *Russian Analytical Digest*, 21 Dec. 2012, No.121, p. 10.

<sup>150</sup> *Ibid.* Yakovlev opines "Russia's highest officials recognize that in order to preserve the political regime, it is necessary to change the model of relations with business. However, the lack of correct stimuli for bureaucrats at the middle level continues to be a serious obstacle for development".

<sup>151</sup> Konoplyanik A., "A Common Russia-EU Energy Space: The New EU Russia Partnership Agreement, Acquis Communautaire and the Energy Charter" [2009] *Journal of Energy and Natural Resources Law* Vol. 27, No.2.

through a new bilateral EU – Russia Agreement. He opines that this is the least feasible option as Russia never expressed its willingness of either joining the EU or adopting its *acquis* in any way or through a bilateral agreement. The second option is the creation of the PCA either on principles of ECT or via a new agreement. The creation of a new PCA clearly faces a number of obstacles that may be impossible to circumvent. The third option that is advocated is the Russia's accession to the ECT. Although this option would be the best way forward to improve security in EU – Russia energy relations, it has become less feasible in light of the recent Russian withdrawal of its provisional application of the ECT.

In addition, it is feasible to create a single energy market and ensure EU competition rules are enforced in the energy sector.<sup>152</sup> This is one of the priorities of the EU Commission.<sup>153</sup> Once an integrated energy sector is established, it will be easier to achieve energy security and regulate internal and external suppliers (including Gazprom) effectively. In fact, on 03 October 2013, the EU Commission has instigated an anti-trust case against Gazprom, which could lead to a £9.26bn fine.<sup>154</sup> Subsequently in February 2014, despite the initial resistance to cooperate with the Commission's investigation, it was reported that Gazprom would implement European Union market rules and would not “question (implementation) of the EU's Third Energy Package”.<sup>155</sup> Willingness by Russia to comply should not come as a surprise because the long-term Russia gas supply contract expires in

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<sup>152</sup> EU Commission, 'Making the internal energy market work', COM (2012) 6663.

<sup>153</sup> EU Commission, 'Single Market Act II: Twelve priority actions for new growth', IP/12/1054, 03.10.2012. For example, Article 36 of the Directive 2009/73/EC, could be applied vigorously to control and check investment by dominant companies such as Gazprom. For a detailed analysis of the implications of the Gas Directive see, Yafimava K., The EU Third Package for Gas and the Gas Target Model: major contentious issues inside and outside the EU, Oxford Institute for Energy Studies, NG 75, April 2013, <http://www.oxfordenergy.org/wpcms/wp-content/uploads/2013/04/NG-75.pdf>.

<sup>154</sup> The initial investigation was started in September 2012.

<sup>155</sup> Sytas A. *et al.*, Russia's Gazprom agrees to adopt EU market rules in Lithuania –PM, Reuters, 07 February 2014, <http://uk.reuters.com/article/2014/02/07/lithuania-gazprom-idUKL5N0LC2HU20140207>.

2015<sup>156</sup> and the maintenance and the cost of the energy production is a major concern for Russia.<sup>157</sup> However, with the escalation of crisis in Ukraine and Crimea, it is not clear whether the promises to comply with the EU rules will be fulfilled.

Current circumstances suggest that there is no comprehensive solution to these problems. Arguably, the most appropriate solution is the exploitation of the existing avenue of EU-Russia energy relations via the EU-Russia Energy Dialogue and other international legal forums to which both parties belong.<sup>158</sup> Although these platforms, apart from the WTO DSU, are not capable of delivering legally binding measures, it provides a forum where political, legal and technical opinions of both sides could be confronted and addressed with the intention that perhaps, one day a legal consensus can be reached.

The most recent developments in regards to the EU - Russian Energy relations are articulated in the 2013 Energy Dialogue Roadmap (EDR)<sup>159</sup> initiative following the Common Understanding on the Preparation of the Roadmap of the EU-Russia Energy Cooperation until 2050.<sup>160</sup> The initiative serves as a generalized Terms of Reference for the future EU- Russia Energy Dialogue. The EDR sets out an ambitious strategic target of creating a Pan-European Energy space and there is a clear emphasis on

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<sup>156</sup> Alternative buyers of Russian energy could be China and India. However, they are unlikely to accept and pay the lucrative prices the European consumers pay.

<sup>157</sup> Hanson P., *The Russian Budget: Why So Much Fuss?*, *Russian Analytical Digest*, 21 Dec. 2012, No.121, p. 1-2 demonstrating that “When oil prices fell steeply in 2008– 09, its GDP in Russia fell by 7.8% (2009 over 2008). This was the largest percentage fall among G-20 nations”.

<sup>158</sup> For example, Leal-Arcas suggests that Kyoto Protocol could depoliticise the EU-Russia energy debate and take the pressure off from gas and oil agenda and encourage parties to concentrate on issues with global significance. Russia, the EU and its Member States are signatories to the Kyoto Protocol, 1997. Leal-Arcas R., *International Trade and Investment Law*, (Edward-Elgar, 2010) p. 156.

<sup>159</sup> Roadmap – EU Russia Energy Cooperation until 2050, March 2013; [http://ec.europa.eu/energy/international/russia/doc/2013\\_03\\_eu\\_russia\\_roadmap\\_2050\\_signed.pdf](http://ec.europa.eu/energy/international/russia/doc/2013_03_eu_russia_roadmap_2050_signed.pdf).

<sup>160</sup> Common Understanding on the Preparation of the Roadmap of the EU-Russia Energy Cooperation until 2050, Brussels, 24 February 2011.

“improvement of the legal framework governing the relations, which should contain strong provisions on energy to lay a firm basis to permit the gradual approximation of rules, standards and markets in the field of energy which could be the basis for greater reciprocal investments and technology exchange”. However, in the immediate future it is unlikely that the current energy EU-Russia trade environment will be set against a legalistic framework.

In the coming months the EU is likely to intensify the diversification of its energy supply whilst limiting investment by Russian companies in the single market. This could mean turning to North Africa (e.g. Algeria) and to other EEA countries such as Norway; and investing in alternative energy (e.g. renewables) and enhancing existing extraction of fossil fuels (e.g. coal and gas) and using unconventional extraction methods such as hydraulic fracturing (a.k.a. fracking for shale gas).<sup>161</sup>

With the crisis in Crimea, both national and regional security rhetoric are increasingly shaping the EU – Russia relations.<sup>162</sup> In this context energy will be a geostrategic priority and a determining factor in shaping the landscape.

## Conclusion

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<sup>161</sup> Press Release: Environment: European Commission recommends minimum principles for shale gas, European Commission - IP/14/55 22/01/2014. The Communication and the Recommendation by the EU Commission in this regard can be found at: [http://ec.europa.eu/environment/integration/energy/unconventional\\_en.htm](http://ec.europa.eu/environment/integration/energy/unconventional_en.htm).

<sup>162</sup> The United States, NATO, EU and Russia and other regional (Baltic) countries are all bolstering their military measures in the region and putting in place a number of sanctions against each other. Taylor I., NATO moves to bolster eastern European defences against Russia, The Guardian, 01 April 2014, <http://www.theguardian.com/world/2014/apr/01/nato-eastern-europe-defences-russia-putin-crimea>; RT News, NATO making best effort to show it's doing something about Crimea, 03 April 2014, <http://rt.com/op-edge/nato-crimea-speculation-on-threat-093/>; COUNCIL REGULATION (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:078:0006:0015:EN:PDF>.

Having explored the evolution of the current state of energy trade and relations between the EU and Russia it is possible to conclude that the attempts by the EU to secure its energy supplies have been twofold:

Firstly, the EU has taken internal steps and reformed both its institutional framework and competences of its agents (e.g. the Commission and High Representative for Foreign Affairs and Security) in the realm of international energy trade and security. In tandem with these changes the principle of solidarity has been acknowledged in the Treaty so as to enhance the political and economic power of the EU. The latter initiative however has been hampered by different interests and at times conflicting priorities and strategies of Member States. It could be argued that although the principle of solidarity features persistently in a number of legal provisions, its application has been diverse and has not been effective in regards to EU energy policy. Secondly, the EU has endeavoured to engage with Russia at bilateral and multilateral legal platforms so as to place its energy trade with Russia in a legal footing. However, Russia continually resisted such initiatives and such stance has been perceived as “a signal to the international community that Russia refuses to live by its international commitments and is not interested in protecting future energy investments.”<sup>163</sup>

Russia owns and the EU needs an invaluable commodity – energy – for their economic development and security. This mutual reliance however has not been reflected on the legal framework as the demand for Russian energy is great and the EU has not managed to diversify its energy sources or suppliers, yet. Until this aspect of the EU-Russia energy relations changes, it will be challenging to create solidarity between Member States and to convince Russia to commit to legal obligations. Unilateral and bilateral action and agreements also undermine the EU’s overall normative and institutionalist approach to international energy relations as well as its credibility because of its underlying contradictions to the main principles of the Energy Charter Treaty. Importantly, such bilateral policies and practices

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<sup>163</sup> Gaillard E., “*Russia cannot walk away from its legal obligations*” Financial Times, 18 August 2009.

pursued by the key EU member states (namely, Germany, France, Italy, etc) put smaller economies in a predicament as they have to either continue to call for a stronger common EU energy security policy which ensure solidarity (which is hindered by the stronger Members State by the bilateral deals with Russia), or with the limited bargain they have, they end up negotiating bilateral deals with Russia.

The EU has sufficient legal scope to create a common energy policy both internally and externally. The doctrine of solidarity is still developing and is likely to become a permanent feature of external energy policy as the internal (EU) energy market is harmonised and regulated effectively with the enforcement of competition and anti-trust rules. This is a priority for the EU as integrated energy infrastructure is a precondition for economic integration and growth.<sup>164</sup> However, Member States have continuously preferred to pursue bilateral trade agreements and this in turn has weakened the potency and spirit of the solidarity.

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<sup>164</sup> EU Commission, Single Market Act II – Together for New Growth, COM (2012) 573 final. 03.10.2012.