

2

AN OVERVIEW OF EU ENERGY LAW

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A. Introduction	2.01	(4) Public service obligations (PSOs)	2.34
B. Regulation of the Upstream Hydrocarbons Sector	2.05	(a) General	2.34
(1) Upstream licensing	2.05	(b) Protection of vulnerable customers	2.36
(2) Safety of offshore oil and gas operations	2.06	(5) Security of supply	2.37
(a) Minimum safety standards	2.07	(a) Security of gas supply	2.37
(b) Liability for environmental damage	2.08	(b) Security of electricity supply	2.38
(c) Appointment of a competent authority	2.09	(6) Infrastructure	2.40
(d) Emergency response	2.11	(7) EU's external energy policy	2.43
(e) Reporting of information	2.13	D. Enforcement	2.46
(f) Impact on operations outside the EU	2.14	(1) Role of the EC	2.46
(3) Transparency requirements	2.15	(2) The Agency for the Cooperation of Energy Regulators (ACER)	2.48
(4) Access issues	2.16	(3) Competition law	2.50
(a) Third-party access (TPA)	2.17	(4) The Public Procurement Rules	2.51
C. EU Energy Regulatory Issues	2.22	(5) State aid	2.53
(1) Unbundling	2.22	(6) End-user market	2.54
(2) Certification	2.30	E. Conclusions	2.55
(3) New infrastructure	2.32	(1) General	2.55
		(2) Future directions	2.56

A. Introduction

2.01 This chapter reviews the sector-specific legislation in force at the European Union (EU) level concerning the gas and electricity sectors.² Provisions of EU law on competition, public procurement and state aid will be outlined briefly at the end of the chapter given their significance for the energy sector as a whole. Other areas of general EU law concerning environmental law, freedom of establishment, movement of goods and services, and climate change are not covered in this chapter albeit knowledge of these areas is needed for a compressive understanding of the legislation impacting the above sectors. In February 2015 the Commission adopted a European Energy Union Strategy which consists of the following five pillars: ensuring energy supply security, further integration of the national energy

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² There has been much debate in the past on whether there is such a thing as EU energy law or whether the term describes nothing more than 'elements of general EU law when applied to the energy sector': K Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013) 1. It is clear from this chapter that there is a specific body of EU law regulating the oil, electricity, and gas sectors.

markets, reduction in energy demand, decarbonisation of the energy mix and promotion of research and development.³ Since it is a strategy that is still in its infancy the Energy Union does not form part of EU energy *acquis* and therefore is not discussed in this chapter.

Prior to the Treaty of Lisbon (2009),⁴ the EU energy *acquis* in the field of electricity and gas had been adopted invoking the competences of the European Community (as the EU was previously called) in the areas of the common market and environment. The first concrete step in energy regulation was taken with the adoption of the first energy liberalization package in 1996 for electricity⁵ and in 1998 for gas.⁶ However, these packages had ‘little firepower to change the way in which the energy business had been run for decades’.⁷ It was the European Commission’s (EC) implementation of competition law to the electricity and gas industries in the late 1990s and early 2000s that changed how energy companies operate in the EU. **2.02**

The adoption of the EU Treaty of Lisbon in 2009 marked the turning point in energy regulation at the EU level. The EU and Member States (MSs) now share competence in the field of energy.⁸ In particular, Article 194(1) of the Treaty of Lisbon provides that the ‘Union policy on energy shall aim [...] to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks’. Importantly, the provision thus makes clear that any energy regulation at the EU level can only be adopted ‘in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment’. **2.03**

It would seem that little attention has so far been given to another important limitation to the nature and scope of legislative powers of the EU in the sphere of energy contained in paragraph 3 of Article 194. It provides that EU’s exercise of its competence ‘shall not affect an MS’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply’. In other words, an MS’s sovereignty over its energy mix and energy policy is reserved. **2.04**

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank a Framework Strategy for a Resilient Energy Union with a Forward-looking Climate Change Policy COM (2015) 080 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0080&from=EN>> accessed 5 September 2016.

⁴ European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

⁵ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 027, 30.1.1997, pp 20–9, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31996L0092>> accessed 5 September 2016. As part of the second energy package this Directive was repealed and the following Directive was adopted in 2003: Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, pp 37–56 <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003L0054>> accessed 5 September 2016. The Third Energy Package was adopted in 2009 and its provisions will be discussed in Section C.

⁶ Directive 1998/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.7.1998, pp 1–12 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998L0030>> accessed 5 September 2016. As part of the second energy package this Directive was repealed and the following Directive adopted in 2003: Directive 2003/55/EC of the European Parliament and of the Council Concerning common Rules for the Internal Market in natural Gas and Repealing Directive 98/30/EC, OJ L 176, 15.7.2003, p 57 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436860383990&uri=CELEX:32003L0055>> accessed 5 September 2016. The Third Energy Package was adopted in 2009 and its provisions will be discussed in Section C.

⁷ K Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013) 65.

⁸ Treaty on the Functioning of the European Union (TFEU), Art 4.2(i).

B. Regulation of the Upstream Hydrocarbons Sector

(1) Upstream licensing

- 2.05** As noted above, pursuant to Article 194 TFEU an MS retains the right to determine where new or prospective hydrocarbon exploration and production projects will take place. Nevertheless, the EU Directive on the conditions for granting and using authorizations for the prospection, exploration, and production of hydrocarbons sets out rules concerning the conditions for exploration and production.⁹

Article 2 of the Directive requires an MS to ensure that any licensing procedure for the prospection, exploration, and production of oil and gas is conducted on a non-discriminatory basis. An MS can choose between two methods of granting authorizations to prospect, explore for, and produce oil and gas. Under the 'licensing round' system, interested entities are invited to apply for a particular area within a given time period.¹⁰ Under the 'open door' system, the areas are available on a permanent basis and may be the subject of a request or a grant of authorization at any time.¹¹ The two systems may be combined if need be. When granting the licence the MS is required to ensure that its duration does not exceed the period necessary to carry out the activities for which the authorization is granted.¹² The criteria for granting authorizations include the technical and financial capabilities of the entities and the way in which they propose to prospect, explore, and/or bring into production the geographical area.¹³ MSs retain the options to limit the access for public interest reasons as well as subject these activities to the payment of a financial contribution or a contribution in hydrocarbons.¹⁴ Under the principle of reciprocity companies from outside the EU can also apply for an authorization.¹⁵ MSs are required to report to the EC on (i) which geographical areas have been opened for prospecting, exploration, and production, (ii) authorizations granted, (iii) the entities holding authorizations and the composition thereof, and (iv) the estimated reserves contained in its territory.¹⁶

(2) Safety of offshore oil and gas operations

- 2.06** Directive 2013/30/EU on the safety of offshore oil and gas operations¹⁷ was adopted in 2013 as a response to the Deepwater Horizon disaster of 2010 in Gulf of Mexico.¹⁸ The key provisions of the Directive are summarized below:

⁹ Art 2 of the Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, OJ L 164, 30.6.1994, pp 3–8 <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31994L0022&from=EN>> accessed 5 September 2016.

¹⁰ Art 3(2).

¹¹ Art 3(3).

¹² Art 4(2).

¹³ Art 5(1).

¹⁴ Art 6.

¹⁵ Art 8.

¹⁶ Art 9.

¹⁷ Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178, 28.6.2013, pp 66–106 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436861768845&uri=CELEX:32013L0030>> accessed 5 September 2016.

¹⁸ Originally, it was proposed that the legislation would take the form of a regulation which would have been directly applicable in the EU MSs and thus would have prescribed the same rules concerning safety throughout the EU. There were significant concerns within the UK oil and gas industry in particular that the proposed

(a) Minimum safety standards

Article 4 obliges MSs to: (i) assess the technical and financial capability of licensees at the time a licence is granted or transferred and, when doing so, to take into account the licensee's ability to cover potential liabilities arising from offshore oil and gas operations; (ii) ensure that the operator is approved by the licensing authority; (iii) require operators to ensure that all suitable measures are taken to prevent major accidents in offshore oil and gas operations; ensure that operators are not relieved of their duties under the directive by the fact that actions or omissions leading or contributing to major accidents were carried out by contractors; (iv) require operators to ensure that offshore oil and gas operations are carried out on the basis of systematic risk management so that the residual risks of major accidents to persons, the environment, and offshore installations are acceptable; (v) ensure that operators and owners as appropriate establish schemes for independent verification, respond to, and take appropriate action based on the advice of the independent verifier, and make such advice available to the competent national authority; and (vi) ensure that operators (or owners in relation to non-production installations) submit to the competent authority a number of documents detailed in Article 11 of the Directive, including a corporate major accident prevention policy, a safety and environmental management system applicable to the relevant installation, a report on major hazards, and an internal emergency response plan. **2.07**

(b) Liability for environmental damage

Article 7 requires MSs to ensure that licensees are financially liable for the prevention and remediation of environmental damage pursuant to the provisions of Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (ELD). Accordingly, the directive makes clear that it is the licensee (rather than the operator or the contractors) who bears liability for environmental damage.¹⁹ The Directive extends the scope of the ELD beyond the twelve nautical miles of territorial waters to cover waters of the exclusive economic zone of MSs. **2.08**

(c) Appointment of a competent authority

Article 8 requires MSs to appoint a 'competent authority', which will be responsible for assessing reports on major hazards and overseeing the operator's compliance with the requirements of the Directive. In order to ensure that there is no conflict of interest, such authority must be independent of any functions relating to the economic development of offshore natural resources and licensing of offshore oil and gas operations. **2.09**

The tasks and powers of such authority are set out in Articles 9 and 18, and include the power to 'prohibit the continued operation of any installation or any part thereof or any connected infrastructure where it is established that the requirements of this Directive are not being fulfilled or there are reasonable concerns about the safety of offshore oil and gas operations'. **2.10**

regulation would require unnecessary changes to be made to the sophisticated offshore oil and gas safety regime adopted in respect of the North Sea based on a 'goal-setting' approach to regulation. In the end, the EC relented and the rules of offshore safety were adopted in the form of a directive, thereby giving MSs more discretion on how the objectives regarding safety are to be implemented and achieved.

¹⁹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, pp 56–75 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437341366754&curhypi=CELEX:32004L0035>> accessed 5 September 2016.

(d) Emergency response

- 2.11** Article 28 requires operators of offshore installations, or owners as appropriate, to prepare and submit internal emergency response plans to the competent authority. Such plans must take into account the risk assessments undertaken as part of the major hazards reporting, and include an analysis of the oil spill-response effectiveness. The content of the internal emergency response plan is set out in paragraph 10 of Annex I.
- 2.12** Pursuant to Article 29, the MSs are required to prepare external emergency plans in cooperation with operators, which cover all offshore oil and gas installations or connected infrastructure within their jurisdiction and make them available to the EC and other MSs.

(e) Reporting of information

- 2.13** Article 12 requires operators and owners, as applicable, to report to the competent authority on relevant incidents and to make such information available to the public. Such reports must consider safety and the environment. A thorough review will need to be conducted at least every five years and the results must be notified to the competent authority. In particular, operators must report on major hazards for installations before operations start and ensure that this information is updated over time when appropriate or as required by the competent authority.

(f) Impact on operations outside the EU

- 2.14** Article 19 requires European oil and gas companies to (i) ensure that their major accident prevention policies cover operations outside the EU and (ii) report any major accidents they are involved in to their domicile country.

(3) Transparency requirements

- 2.15** Directive 2013/34/EU²⁰ obliges companies and all public interest entities active in the extractive industries including oil and gas to prepare and publish annual reports regarding payments made to governments above EUR 100,000 in provide greater transparency regarding the relations between oil and gas companies and governments particularly in developing countries.

(4) Access issues

- 2.16** The Third Energy Package (TEP)²¹ entered into force on 3 March 2011 and sets out the rules for the internal market for gas and electricity. The TEP consists of two Directives and three Regulations.²² In this section the key provisions of the Electricity and Gas Directives and the Agency for the Cooperation of Energy Regulators (ACER) Regulation will be discussed.

²⁰ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, pp 19–76 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0034>> accessed 5 September 2016.

²¹ I Bernaerts notes the EC's disappointment 'that by March 3, 2011 not a single state had managed to transpose the Directives on time' (I Bernaerts, 'The Internal Energy Market: Practical Priorities for the Commission' in J Glachant, N Ahner and A Hauteclouque (eds), *EU Energy Law & Policy Yearbook 2012* (Clay's & Casteels Law Publishers 2013) 38.

²² Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L211, 14.8.2009 (the 'Electricity Directive') <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436864058396&uri=CELEX:32009L0072>>; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009, pp 94–136 (the 'Gas Directive') <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0073>>

(a) *Third-party access (TPA)*

Pursuant to Articles 32 of the Gas and Electricity Directives the owner and operator of gas and electricity infrastructure is required to provide eligible third parties with access to capacity on a non-discriminatory basis.²³ The TPA obligation is imposed in respect of electricity transmission and distribution systems, gas transmission and distribution pipelines, and LNG facilities, as well as in respect of gas storage facilities and linepack.²⁴ It also extends to upstream pipeline networks, ‘including facilities supplying technical services incidental to such access [...] except for the parts of such networks and facilities which are used for local production operations at the site of a field where the gas is produced’.²⁵ **2.17**

A regulated TPA regime is prescribed with respect to transmission networks, whereby either the tariffs or the methodologies underlying their calculation must be approved by the national regulatory authorities. The tariffs must be published, apply to all eligible customers objectively and without discrimination between system users. No renegotiation with particular customers is possible, nor can rebates or special schemes be offered. Access to gas storage facilities and linepack can either be on a negotiated or regulated basis. **2.18**

Access may only be refused due to: (i) lack of capacity (Article 35 of the Gas Directive and Article 32.2 of the Electricity Directive); (ii) a public service obligation having been imposed by one of the MSs (see discussion below); (iii) a ‘sudden crisis’ (essentially a *force majeure* provision, detailed in Article 46 of the Gas Directive and Article 42 of the Electricity Directive); or (iv) serious economic and financial difficulties with a take-or-pay contract (Article 35 of the Gas Directive). Reasons for refusal must be substantiated. The Court of Justice of the EU (CJEU) has made clear that the refusal to provide access must be based on the assessment of the technical capacity of the system to meet third parties’ access demands on a case-by-case basis.²⁶ **2.19**

Article 49 of the Gas Directive and Article 44(2) of the Electricity Directive permit derogations from these requirements in the case of emergent and isolated markets. **2.20**

The TPA rules are further detailed in the two Regulations²⁷ and in the Network Codes and guidelines adopted pursuant to the two Regulations. The Network Codes are developed on **2.21**

accessed 5 September 2016; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, pp 15–35, (the ‘Electricity Regulation’) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436872070388&uri=CELEX:32009R0714>> accessed 5 September 2016; 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, OJ L 211, 14.8.2009, pp 36–54 (the ‘Gas Regulation’) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436872137591&uri=CELEX:32009R0715>> accessed 5 September 2016; and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, pp 1–14 (the ‘ACER Regulation’) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0713>> accessed 5 September 2016.

²³ Unlike in the USA and elsewhere around the world, TPA to transmission networks and pipelines is considered in the EU as pivotal for the creation of an open and competitive markets turns. It is not clear that this is in fact the case.

²⁴ According to Art 33 of the Gas Directive, ancillary services and temporary storage that are related to LNG facilities that are necessary for the re-gasification process and subsequent delivery to the transmission system are excluded from this obligation.

²⁵ Gas Directive, Art 34.

²⁶ Case C-439/06, *Citiworks AG Flughafen Leipzig v Halle GmbH, Bundesnetzagentur* [2008] ECR I-3913, para 57 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006CJ0439>> accessed 5 September 2016.

²⁷ Referred to in (n 25) above.

the basis of an annual priority list of areas for the development of harmonized electricity and gas rules drafted by the Commission with the input of ACER and ENTSOG or ENTSO-E.²⁸ Most recently, such gas network codes have been adopted on interoperability,²⁹ gas balancing of transmission networks (setting out gas balancing rules including the responsibilities of transmission system operators and users),³⁰ capacity allocation mechanisms in gas transmission systems (requiring gas grid operators to use harmonised auctions when selling access to pipelines),³¹ and congestion management procedures.³² An electricity Network Code is in force for inter-transmission system operator compensation and transmission charging.³³

C. EU Energy Regulatory Issues

(1) Unbundling

2.22 Since March 2012 ownership and operation of transmission networks must be effectively unbundled from energy supply and generation. Article 9 of the Gas and Electricity Directives gave MSs three options³⁴ of effective unbundling: ownership unbundling (OU), independent system operator (ISO) and the independent transmission operator (ITO).³⁵ The latter two options were only available to vertically integrated natural gas or electricity companies (vertically integrated undertakings, VIUs), which existed as of 3 September 2011. A VIU is a company or a group of companies where the same person or persons are entitled, directly

²⁸ For the most recent such lists, see Draft Commission Decision on the establishment of the annual priority lists for the development of network codes and guidelines for 2015 <<https://ec.europa.eu/energy/en/topics/markets-and-consumers/wholesale-market/gas-network-codes>> and Commission Decision 2013/442/EU of 21 August 2013 on the establishment of the annual priority lists for the development of network codes and guidelines for 2014, OJ L 224, 22.8.2013, pp 14–17 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D0442>> both accessed 5 September 2016.

²⁹ Commission Regulation (EU) 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules OJ L 113, 1.5.2015, pp 13–26 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2015_113_R_0003> accessed 5 September 2016.

³⁰ Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks Text with EEA relevance, OJ L 91, 27.3.2014, pp 15–35 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.091.01.0015.01.ENG> accessed 5 September 2016.

³¹ Commission Regulation (EU) No 984/2013 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council OJ L 273, 15.10.2013, pp 5–17 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0984>> accessed 5 September 2016.

³² Commission Decision of 24 August 2012 on amending Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks OJ L 231, 28.8.2012, pp 16–20 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437122350455&uri=CELEX:32012D0490>> accessed 5 September 2016.

³³ Commission Regulation (EU) No 774/2010 of 2 September 2010 on laying down guidelines relating to inter-transmission system operator compensation and a common regulatory approach to transmission charging OJ L 233, 3.9.2010, pp 1–6 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437122387516&uri=CELEX:32010R0774>> and Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging OJ L 250, 24.9.2010, pp 5–11 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437122494369&uri=CELEX:32010R0838>> both accessed 5 September 2016.

³⁴ Unlike the provisions of a regulation which are directly applicable as part of the national law of a Member State, the provisions of the Directive must be transposed into national law and MSs have a discretion on how they ensure that the objectives of the Directive are achieved.

³⁵ For further information see EC, Commission staff working paper, Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas: The unbundling regime <http://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_the_unbundling_regime.pdf> accessed 5 September 2016.

or indirectly, to exercise control, and where such company or group of companies performs at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas or electricity.

Pursuant to the OU model, (i) an undertaking that owns the transmission system must act as the transmission system operator (TSO); (ii) the same person must not: (a) directly or indirectly exercise control over a TSO or transmission system and at the same time directly or indirectly exercise control or exercise any rights over an undertaking supplying or producing gas or electricity and vice versa; (b) be entitled to appoint members of the supervisory board, the administrative board, or bodies legally representing the undertaking of a transmission operator (the 'Boards') of an undertaking owning the transmission system and at the same time directly or indirectly exercise control or exercise rights over an undertaking performing any of the functions of production or supply of gas or electricity;³⁶ and (c) be entitled to be a member of the Boards of both types of undertakings referred to above. Accordingly a company involved in production or supply of gas can only have a passive shareholding in a transmission system or a TSO. **2.23**

Under the ISO model, a VIU can own the transmission system provided that a separate legal entity conducts all of the duties of the system operator in which the VIU does not have a majority shareholding, does not exercise any voting rights, or does not have the power to appoint members of the Boards or similar. The company acting as the TSO must comply with the (a) to (c) unbundling requirements referred to above. In addition, the company owning the transmission system must be legally and organizationally independent from other activities of the VIU relating to the production or supply of gas or electricity. **2.24**

Under the ITO model the TSO and the transmission system can remain part of the VIU provided that the TSO is set up as a separate legal entity and that detailed requirements ensuring the independence of such an operator are complied with. Article 41(5) of the Gas Directive and 37(5) of the Electricity Directive lay down a list of specific duties and powers to be assigned to national regulatory authorities where an ITO is designated including the power to issue penalties for discriminatory behaviour of the VIU, the power to monitor communications, commercial and financial relations between the TSO and the VIU and to approve all commercial and financial agreements between them. They must also have the power to carry out inspections on the premises of the VIU and the TSO and to assign specific obligations in case of a persistent breach of the Directives. Finally, national regulatory authorities must also act as a dispute settlement authority in case of a complaint against a system operator. **2.25**

Pursuant to paragraph 6 of Article 9 of the Directives, if two separate public bodies exercise control over the TSO or the transmission system and the undertakings performing the functions of production or supply of gas and electricity then the unbundling requirement as set out in points (a) to (c) in paragraph 2.23 is deemed to have been complied with. These deeming provisions enable MSs to remain the owners of both companies involved in generation, production, and transmission.³⁷ **2.26**

³⁶ The 'exercise of rights over' is defined as: (i) the power to exercise voting rights; (ii) the power to appoint members of the Boards; and (iii) the holding the majority of shares.

³⁷ This provision has meant that in many countries of the EU unbundling has been merely presentational. For a discussion on whether TEP has resulted in the liberalization of the EU energy market, see V Pakalkaite, 'Central and Eastern European Governments go on a utility shopping spree', 25 June 2015 <<http://www.naturalgaseurope.com/central-and-eastern-european-governments-utility-shopping-spreec-24294>> accessed 5 September 2016.

- 2.27** The legal and functional unbundling of a gas storage system operator from other activities not relating to transmission, distribution, and storage is imposed pursuant to Article 15 of the Gas Directive.³⁸
- 2.28** Article 26 of the Electricity and Gas Directives allows an MS not to apply the unbundling requirements on integrated electricity or natural gas undertaking serving fewer than 100,000 connected customers.³⁹
- 2.29** In 2013, the CJEU held in the Joined Cases C-105/12 to C-10 that the principle of unbundling was so vital to the internal market that it superseded the four fundamental freedoms enshrined in EU law and in particular, the free movement of capital.⁴⁰

(2) Certification

- 2.30** Article 10 sets out the procedure for designating a TSO owned or controlled by an EU national or company. All TSOs existing at the time the TEP was adopted are required to comply with Article 9 and be certified under Article 10. Paragraph 4 of Article 10 requires national regulators to continuously monitor that TSOs comply with Article 9 requirements. A TSO must notify the regulator of ‘any planned transaction which may require a reassessment of their compliance with the requirements of Article 9’.⁴¹ The certification process must be reopened if the requirements of Article 9 are no longer complied with. Certification decisions by national regulators must be notified to the EC. The process of certification process should not take more than eight months.⁴²
- 2.31** Article 11 of the Electricity and Gas Directives sets out the certification requirements for a TSO controlled by non-EU nationals.⁴³ It provides that a request for certification must be refused if the TSO has not demonstrated that: (1) the effective unbundling requirements of Article 9 are complied with; and (2) the granting of the certification will not put at risk the security of energy supply of MSs and the Community. When considering the latter question the national regulator must take into consideration: (i) the rights and obligations of the EU arising under international law, including any agreement between the EU and third countries which addresses the issue of security of energy supply ; (ii) the rights and obligations of an MS under agreement with a third country but only if such agreement complies with *EU*

³⁸ For guidance on issues of access to storage facilities, see EC, Commission Staff Working Paper, Interpretative Note on directive 2009/73/EC concerning Common Rules for the Internal Market in Natural Gas Third-Party Access to Storage facilities, 22 January 2010 <https://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_third-party_access_to_storage_facilities.pdf> accessed 5 September 2016.

³⁹ For a discussion on the arbitrariness of the 100,000-customer threshold, see K Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013) 93.

⁴⁰ Joined cases C-105/12 to C-107/12, *Staat der Nederlanden v Essent NV (C-105/12)*, *Essent Nederland BV (C-105/12)*, *Eneco Holding NV (C-106/12)*, and *Delta NV (C-107/12)* [2013] ECR 2013 -00000, para 55 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437343101136&uri=CELEX:62012CJ0105>> accessed 5 September 2016.

⁴¹ Art 11, para 3.

⁴² This, however, has not been so in the case of Socar’s purchase of DESFA, the Greek TSO. For the latest developments, see <<http://www.naturalgaseurope.com/syriza-implications-for-azerbaijans-desfa-purchase-22491>> accessed 5 September 2016.

⁴³ This provision is known as the Gazprom clause. For a critical account of this provision, see K Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013). In June 2014, the EC sent letters to Austria, Bulgaria, Greece, Croatia, Hungary, Italy, Romania, Slovenia, and Slovakia expressing concerns about the compatibility of fifteen IGAs with EU law, and, in particular, with this provision and competition law. The EC provided the author with this information by email on 28 October 2014.

acquis; and (iii) other specific facts and circumstances of the case and the third country concerned. Paragraph 9 requires the national regulator to send a draft of its decision to the EC, to ‘take utmost account of the EC’s opinion’ and in the case of divergence from such opinion provide reasons for such divergence.

(3) New infrastructure

Pursuant to Article 17 of the Electricity Regulation and Article 36 of the Gas Directive, new direct current interconnectors and any major new piece of gas infrastructure, such as interconnectors and LNG storage facilities, can be exempt for a defined period of time from *inter alia* TPA, tariff systems, and unbundling obligations. **2.32**

For an exemption to be granted, the following conditions have to be complied with: (a) the investment must enhance competition in gas or electricity supply and enhance security of supply; (b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted; (c) the interconnector or the gas infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built; (d) charges must be levied on users of that interconnector or infrastructure; and (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas and electricity, or the efficient functioning of the regulated system to which the infrastructure or the interconnector is connected. **2.33**

(4) Public service obligations (PSOs)

(a) General

Article 3 of the Electricity and Gas Directives enables an MS to impose PSOs on electricity and gas companies relating ‘to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection’. In respect of security of gas supply, it may provide incentives ‘for the maintenance and construction of the necessary network infrastructure, including interconnection capacity’.⁴⁴ A PSO must be well defined, transparent and cannot discriminate between companies. The PSOs adopted by MSs are discussed in each of the chapters on MSs in Part 2. An MS is required to inform the EC of PSOs imposed and⁴⁵ any compensation payable to companies in respect of PSOs must comply with the requirements of state aid.⁴⁶ **2.34**

Derogations from the requirements of the Gas Directive based on PSOs are more limited than under the Electricity Directive. Article 3(10) of the Gas Directive only permits derogation from the requirement to establish a non-discriminatory authorization procedure in case of the construction or operation of natural gas facilities used for distribution, whereas **2.35**

⁴⁴ Art 3 para 7.

⁴⁵ Given the implications of this exemption it is surprising that the information provided to the EC is not available to the public. MSs do not seem to have websites where such information can be obtained and rarely have any information available in any language other than their own.

⁴⁶ Case C-280/00, *Altmark Trans GmbH Hand Regierungspräsidentium Magdeburg v Nabverkehrsgesellschaft Altmark GmbH* ECR I-07747 <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62000CJ0280&from=EN>> accessed 5 September 2016. Confirmed in Case C-265/08, *Federutility and Others* [2010] ECR I-0000 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437126505205&uri=CELEX:62008CJ0265>> accessed 5 September 2016.

Article 3(3) of the Electricity Directive allows an MS not to apply this requirement also in respect of tendering procedures for new capacity (Article 8), the rules on the implementation of a system of TPA (Article 32), and the obligation imposed by Article 34 on electricity producers and electricity supply undertakings to supply their own premises, subsidiaries, and eligible customers through a direct line and, in particular, in relation to the criteria for granting authorizations for the construction of direct lines.

(b) Protection of vulnerable customers

- 2.36** Pursuant to Article 3(3), an MS is permitted to adopt measures to protect vulnerable customers as such concept may be defined in its national law. Typically, MSs define it by reference to energy poverty. Usually, gas companies are prohibited from disconnecting such customers at critical times. For further details, see discussion in some of the chapters on MSs in Part 2.

(5) Security of supply

(a) Security of gas supply

- 2.37** To help prevent and respond to potential gas supply disruptions if they happen in an MS or across the EU, Regulation (EU) No 994/2010 on Security of Gas Supply⁴⁷ creates a common indicator to detect and mitigate serious threats to gas security. Article 3 notes that the security of gas supply is a ‘shared responsibility’ of natural gas undertakings, MSs, and the EC. Pursuant to Article 6, all MSs (except from Luxembourg, Slovenia, and Sweden) must ensure that ‘in the event of disruption to the single nearest gas infrastructure the capacity of the remaining infrastructure is able to satisfy the total gas demand of the calculated area during a day of exceptionally high gas demand occurring, being a day which has a statistical probability of once in 20 years’. The N-1 formula is intended to ensure that in the case of a disruption in gas supply from a single nearest gas infrastructure the remaining gas infrastructure can cover the gas demand. Article 8 imposes an EU-wide common supply standard for protected customers under severe conditions and in the case of an infrastructure disruption under normal winter conditions. The standard requires an MS to ensure that it is able to supply private households and other vulnerable consumers like hospitals with at least 30 days’ worth of gas in these above-mentioned circumstances. Pursuant to Article 4, competent authorities in the MSs are required to draw up emergency plans for dealing with a crisis, as well as preventive action plans assessing supply risks and proposing preventative measures (such as investment in new pipelines).⁴⁸ The latter are adopted on the basis of a risk assessment, detailed in Article 9, and aim at removing or mitigating the risks identified. In order to improve the interoperability of the gas infrastructure in the EU and thereby enhance energy security, an obligation is imposed on TSO under Article 6(5) to enable ‘permanent bi-directional capacity on all cross-border interconnections between Member States as early as possible and at the latest by 3 December 2013 except permanent bi-directional capacity on all cross-border interconnections between distribution networks’. The grounds for seeking an exemption from this reverse flow obligation is set out in Article 7. Pursuant to Article 11, the EC may declare an EU-wide or a regional emergency at the request of a competent

⁴⁷ Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295, 12.11.2010, pp 1–22 (‘Security of Supply Regulation’) <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32010R0994>> accessed 5 September 2016.

⁴⁸ Art 5 details what a preventive action plan should contain.

national authority that has declared a national emergency.⁴⁹ The Gas Coordination Group is established under Article 12 and tasked with coordinating the actions and the exchange of information between these national authorities and the industry.

(b) Security of electricity supply

Unlike in the case of gas the rules concerning the security of electricity supply is set out in a directive. Directive 2005/89/EC on Electricity security of supply sets out measures to safeguard the security of electricity supply, to ensure an adequate level of generation capacity that will guarantee an adequate balance between supply and demand, and to set up an appropriate level of inter-connection between MS.⁵⁰ **2.38**

In particular, Article 3 of the Directive requires MSs to define general, transparent, and non-discriminatory policies on security of electricity supply and to define and publish the role and responsibilities of competent authorities and different players in the market. Article 4 requires the TSOs to set minimum operational rules and obligations on network security and quality of supply and network security performance objectives. Article 5 requires MSs to maintain a balance between the demand for electricity and the availability of generation capacity, essentially by taking additional measures in order to facilitate new generation capacity, remove barriers to interruptible contracts, and encourage energy conservation. Article 6 requires MSs to ensure that the national regulatory frameworks facilitates investment signals for both the transmission and distribution system network operators to enable them to develop their networks to meet foreseeable demand from the market. **2.39**

(6) Infrastructure

Regulation 347/2013 on guidelines for trans-European energy infrastructure⁵¹ (the ‘TEN Regulation’) defines four gas and four electricity trans-European priority corridors in the EU and sets out the procedure for identifying energy projects which will be designated as projects of common interest (PCIs) under the Regulation. Article 7 of the Regulation permits PCIs to benefit from accelerated permitting procedures and more advantageous regulatory conditions. Such projects are also eligible for EU funding. **2.40**

In order to become a PCI a project must meet a number of general and sector-specific requirements. The general requirements are that (i) the project is necessary for at least one of the energy infrastructure priority corridors and areas; (ii) its potential overall benefits must outweigh its costs, including in the longer term; and (iii) it has a significant impact on the energy markets of at least two EU countries. Specific criteria are set for electricity transmission and storage projects, gas projects, and electricity smart-grid projects. **2.41**

⁴⁹ At the of writing this article an amendment to this Regulation was being discussed before the Council of Ministers. It is not expected to be adopted until early 2017 since the draft wording proposed by the EC in February 2016 is proving highly controversial.

⁵⁰ Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L 33, 4.2.2006, pp 22–27 (the ‘Security of Electricity Supply Directive’) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437064453799&uri=CELEX:32005L0089>> accessed 5 September 2016.

⁵¹ Regulation 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115, 25.4.2013, pp 39–75 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437065527259&uri=CELEX:32013R0347>> accessed 5 September 2016.

2.42 As of November 2015 195 energy infrastructure projects have been declared as PCIs, a reduction from the 248 declared when the Regulation was first adopted. The majority of PCIs relate to gas. The list of PCIs is updated every two years. The Commission has set aside EUR 800 million in grants for PCIs in 2016.⁵²

(7) EU's external energy policy

2.43 Asserting that it has exclusive competence in respect of foreign direct investment, including in the field of oil, gas and electricity, the EU has, in recent years, adopted legislation concerning EU external energy policy.⁵³ Pursuant to the Decision 994/2012/EU establishing an information exchange mechanism with regard to intergovernmental agreements between MSs and third countries in the field of energy, MSs were required to submit all existing intergovernmental agreements (IGAs) they had entered into with non-EU countries in the field of energy to the EC for assessment of their compatibility with EU law by 17 February 2013.⁵⁴ The obligation extended to all other agreements, including host government agreements typically entered into between an energy company and the MSs in respect of a large energy investment if they were referred to in the IGAs and 'contain[ed] elements which have an impact on the functioning of the internal energy market or on the security of energy supply in the [EU]'.⁵⁵

2.44 Article 3 requires all IGAs in the field of energy agreed between MSs and non-EU countries to be submitted to the EC for assessment of their compatibility with EU law. The MSs are not required to notify the EC that they have commenced negotiating an IGA with a non-EU state; however, they run the risk that a ratified IGA will be considered by the EC as incompatible with EU law. Should the EC find that the terms of an IGA are incompatible with EU law, it may bring infringement proceedings against an MS pursuant to Article 258 TFEU.⁵⁶

2.45 Article 351(1) TFEU requires an MS to take steps to eliminate any incompatibility between the terms of an IGA which an MS entered into before it joined the EU, and EU law. In *Commission v. Slovakia*, the CJEU clarified that Article 351 'does not impose [an] obligation

⁵² Commission, Projects of Common Interest <<https://ec.europa.eu/energy/en/topics/infrastructure/projects-common-interest>> last accessed August 2016.

⁵³ Under Art 3(1)(e) TFEU, the EU has been accorded exclusive competence in respect of common commercial policy. Reading this article in conjunction with Arts 206 and 207 TFEU, the EC argues that it now has exclusive competence in respect of foreign direct investment.

⁵⁴ 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, OJ L 299, 27.10.2012, pp 13–17 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437347068942&uri=CELEX:32012D0994>> accessed 5 September 2016.

⁵⁵ See penultimate sentence of Art 3(1) of the Decision.

⁵⁶ Even before the adoption of the Regulation, the EC brought infringement proceedings pursuant to Art 258 TFEU against Finland, Sweden, and Austria before the Court. In 2006 and 2007, the EC alleged that the provisions concerning the free transfer of capital contained in the BITs which these countries had entered into with non-EU states breached EU law. The Court found that the states were in breach and ordered them to take steps to the remedy the breach by renegotiating the terms of the relevant BITs. See C-249/06, *Commission of the European Communities v Kingdom of Sweden* [2009] ECR 2009-I-01335 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437347663450&uri=CELEX:62006CA0249>> accessed 5 September 2016; C-118/07, *Commission of the European Communities v Republic of Finland* [2009] ECR 2009 I-10889 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0118>> accessed 5 September 2016 and C-205/06, *Commission of the European Communities v. Republic of Austria* [2009] ECR I-01301 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006CJ0205>> accessed 5 September 2016.

to achieve a specific result in the sense of requiring them, regardless of the legal consequences and political price, to eliminate the incompatibility'.⁵⁷ Accordingly, an MS will not be found to be in breach of EU law if it takes steps to renegotiate a pre-accession and incompatible IGA even if in the end it does not succeed in renegotiating it. More importantly, the obligation to provide TPA will not be imposed on a TSO if this would result in an MS breaching its obligations under a bilateral investment treaty which it had entered into with a third country prior to joining the EU.

D. Enforcement

(1) Role of the EC

Pursuant to Articles 258 and 260 TFEU, the EC can bring infringement proceedings against an MS for a (i) failure to incorporate EU directives into its national law and to advise the EC of the measures it has taken; and (ii) breach of EU law.⁵⁸ **2.46**

In addition, the EC has investigative powers with respect to breaches of Article 101 and Article 102 TFEU by energy companies as well as the power to impose fines in cases where it determines that breaches have occurred. It also has powers to examine mergers of energy companies that have a European dimension when the turnover of the merging firms exceeds a specified threshold.⁵⁹ In addition, it has been given strong investigative powers in respect of state aid pursuant to the 2013 Revision of Regulation No 734/2013,⁶⁰ as well as power to approve state aid notified under Article 107(3) of the Utilities Directive.⁶¹ **2.47**

The role of national energy regulators (NRAs) and courts in enforcing EU law are discussed in Chapter 3 of this book.

(2) The Agency for the Cooperation of Energy Regulators (ACER)

Pursuant to Article 4 of the ACER Regulation, ACER has power to issue opinions and recommendations to TSOs, to the national regulatory authorities, and to the EC. It has also been accorded powers under the Gas and Electricity Directives in relation to exemptions for new infrastructure. **2.48**

Under the Regulation on wholesale energy market integrity and transparency (REMIT), ACER is tasked with monitoring the wholesale energy trading markets to prevent market

⁵⁷ C-264/09, *European Commission v Slovak Republic* [2011] ECR 2011 I-08065 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437347977684&uri=CELEX:62009CA0264>> accessed 5 September 2016.

⁵⁸ For a discussion of the enforcement measures adopted by the EC in respect of the internal energy market, see EC, Commission staff working document, *Enforcement of the Third Internal Energy Market Package*, SWD(2014) 315 final <http://ec.europa.eu/energy/sites/ener/files/documents/2014_jem_communication_annex6.pdf> accessed 5 September 2016.

⁵⁹ For the most up-to-date information on the EC's activities with respect of mergers, see <http://ec.europa.eu/competition/mergers/procedures_en.html> accessed 5 September 2016.

⁶⁰ Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 204, 31.7.2013, pp 15–22 <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0734>> accessed 5 September 2016.

⁶¹ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014 (the 'Utilities Directive'), pp 243–374 <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0025&from=EN>> accessed 5 September 2016.

abuses and market manipulation and with notifying NRAs of any market manipulation and abuse it detects.⁶² REMIT is currently not fully implemented, although ACER has already set up a REMIT Portal for compilation of information that is made available to market participants and other stakeholders. After REMIT is fully functioning, ACER will be responsible for notifying NRAs about any detected market manipulation and abuse, and the latter will investigate the case.⁶³

- 2.49** Under the TEN Regulation, ACER provides an opinion to the EC for the preparation of the list of PCIs and participates in the monitoring of the implementation of PCIs. It also contributes, if necessary, to the assessment of proposed projects by national regulatory authorities and ensures cross-regional consistency.

(3) Competition law

- 2.50** As discussed in Section A, the EC has used competition law to affect change in the energy industry since the early 2000s when the first competition cases in the energy sector were brought against GDF, ENI, and ENEL.⁶⁴ Articles 101 and 102 of the TFEU are the core provisions of EU competition law. By way of example, (i) destination clauses are seen as hard core restrictions on competition, (ii) delaying investment, which would increase capacity in one of its subsidiaries as an abuse of dominant position and (iii) long-term contracts, which tie-up a substantial proportion of demand may be regarded as an abuse of dominant position unless objectively justified. The EU has to date not adopted any special competition rules with regard to energy pursuant to Article 103(2)(C) TFEU.

(4) The Public Procurement Rules

- 2.51** To create a level playing field for all businesses across the EU in key sectors of the economy, the Utilities Directive provides that gas, electricity, or oil undertakings over which MSs exercise directly or indirectly a dominant influence, as well as privately owned gas, oil, and electricity undertakings which operate on the basis of special or exclusive rights granted by an MS and which perform one of the activities listed below, are required to comply with public procurement rules set out in the Directive in respect of supply, work, and service contracts which exceed the thresholds set out therein. The activities referred to in the Directive are: (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport, or distribution of gas; (b) the supply of gas or heat to such networks; (c) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport, or distribution of electricity; (d) the supply of electricity to such networks; and (e) extracting oil or gas.
- 2.52** Article 34(1) enables an MS to notify the EC if it considers that the Utilities Directive does not apply to one of the above-mentioned activities provided it can show that such activity is directly exposed to competition. Provided the EC agrees, the procurement rules will not have to be complied with.

⁶² Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, OJ L 326, 8.12.2011, pp 1–16 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF>> accessed 5 September 2016.

⁶³ *ibid.*

⁶⁴ Case COMP/38.662-GDF/ENI and GDF/ENEL.

(5) State aid

Article 107 TFEU prohibits MSs from granting state aid which distorts competition affecting intra-EU trade. Pursuant to Article 107(3), the EC can grant an exemption in respect of state aid given to electricity and gas companies provided such aid is notified. The procedural provisions are laid down in Article 108 TFEU and further detailed in Regulation 659/1999.⁶⁵ In 2014 the EC adopted new guidelines on public support for projects in the field of environmental protection and energy.⁶⁶ The guidelines provide for a gradual introduction of competitive bidding processes for allocating public support and set out criteria for supporting energy infrastructure, focusing on projects that improve cross-border energy flows and promote infrastructure in Europe's less developed regions. **2.53**

(6) End-user market

Directive 2008/92/EC concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users aims to protect household and non-household customers.⁶⁷ It requires undertakings which supply gas or electricity to industrial end-users to communicate the prices and terms of sale to such undertakings, the price systems and the breakdown of consumers as well as corresponding volumes by category of consumption to the Statistical Office of the European Communities (Eurostat). **2.54**

E. Conclusions

(1) General

This chapter sets out EU energy law concerning the gas and electricity sectors. Since the adoption of the Lisbon Treaty and the granting to the EU of an express competence in respect of energy, the nature and scope of EU *acquis* affecting the above-mentioned sectors has grown. At the end of 2015 the EC announced a major overhaul of most of the energy law adopted to date. In February 2016 it put forward proposals to amend the regulation concerning the Security of Supply Regulation and Decision 994/2012 on IGAs. Proposals to amend EU law concerning electricity are expected to be put forward by late 2016 or early 2017. **2.55**

(2) Future directions

As this book goes to publication the discussions are underway in both the Council of Ministers and the EU Parliament as EC's proposals are proving controversial. It is difficult **2.56**

⁶⁵ Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Art 93 (now Art 1080) of the EC Treaty, OJ L 83/1, 27.3.1999, pp 1–9 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437400864924&curi=CELEX:31999R0659>> accessed 5 September 2016.

⁶⁶ Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020 OJ C 200, 28.6.2014, pp 1–55 <[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01))> accessed 5 September 2016.

⁶⁷ Directive 2008/92/EC of the European Parliament and of the Council of 22 October 2008 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users OJ L 298, 7.11.2008, pp 9–19 <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32008L0092>> accessed 5 September 2016.

to predict at this point what the outcome of the discussions will be. What is clear is that EU law is in a state of flux and that this is exacerbating the difficulties facing the energy sector hit by low oil and gas prices.

- 2.57** As noted in paragraph 2.01 above, the Commission adopted an Energy Union Strategy in February 2015. The law and policy to realize the Energy Union is expected to be drawn up over the 2016–2019 period and therefore it is beyond the scope of this chapter to speculate on its developments. The developments in the Energy Union strategy and the future of EU energy law is discussed in the conclusion of this book in Chapter 34.