

FIDE 2012

QUESTIONNAIRE

The Interface between Energy, Environment and Competition Rules of the European Union

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The EU Third Energy Package, which included a Directive and a Regulation aiming at completion of the single electricity market, is currently attracting a great deal of attention, not least because of the establishment of ACER, the first EU energy regulatory agency. For different reasons, the new Renewable Energy Directive, which is largely aimed at promoting the use of one particular set of sources of electricity (RES-E), is also attracting attention. Both the internal energy market legislation and the RES-E legislation strive to combine energy policy aspirations with legally binding obligations upon EU Member States. Although each of these initiatives was originally conceived within one DG of the European Commission, they have been shaped by different people, at different times. Their implementation moves in parallel, yet with few signs of coordination.

In the background, there is a continuing tension between the competition law and sector-specific energy legislation, evident at EU and national levels and in their interaction. There is also a new Energy Chapter in the Treaty on the Functioning of the EU, which underscores the importance that energy policy now has in the EU and in its agenda-setting. For the national and EU courts, all of the above will raise new issues in the near future. This questionnaire is designed to permit rapporteurs a broad scope to address the above issues, drawing upon their knowledge of national contexts and their wider effects, and particularly how these tensions are being addressed (to the extent that they are being recognised at all so far).

A. *Regulation and Competition Policy*

1. Will the limited powers of ACER and the responsibilities placed upon ENTSO-E and ENTSO-G require greater cooperation between national regulatory authorities (NRAs) *inter se* and with the EU to open up the European power and gas sectors to greater cross-border competition, at least at the wholesale supply level?
2. Or will increased competition turn out to be mainly a task for the competition authorities to ensure progress in dismantling predominantly national markets, for example by stopping discriminatory congestion management practices of transmission system operators, as in the *Svenska Kraftnät* case?
3. In this context, what is the position of your Member State with respect to enforcement of Competition Law (EU and national) in the energy sector, whether by sector-specific NRAs, by NCAs or a combination of the two?

4. With respect to NRA roles, powers and duties, are there any peculiarities or difficulties in the position of your Member State (for example, limiting or promoting cooperation with other Member States' NRAs or with respect to the EU Network of Competition Authorities)?
5. Considering that exemptions from the regulatory regimes for gas and electricity are permitted, what safeguards are in place at the Member State level for protecting 'process' rights such as the right to be heard and access to justice, and which national bodies are responsible in ensuring that these rights are respected?
6. Are the latest proposals (COM(2010) 726) on market abuse in the energy sector likely to present challenges for the NRAs whether in their sole capacity or as a hybrid with national financial regulatory bodies at Member State and/or EU level?

B. Promotion and Subsidy of Renewable Energy

7. Are Directive 2009/28/EC and the purely national subsidy schemes and national RS consumption targets it perpetuates fully compatible with principles and rights established in the Treaty, as interpreted by the Court? For example, does the preclusion of the exchange of instruments evidencing renewable power output between suppliers and generators in different Member States, as a means of proving compliance with minimum renewable electricity consumption quotas or earning feed-in tariffs, interfere with internal trade and distort competition in the electricity market?
8. More specifically, would the Court's decision in the case of *Preussenelektra* still be valid in 2012, given both the substantial expansion of wind and solar power generation output, and the maturing of the EU liberalised markets in power and gas, in the meantime?
9. Are there notable features of your Member State's implementation of the RES 2009 Directive that present challenges and difficulties with respect to cross-border cooperation, if they are provided for at all (joint projects, for example, whether between governments and their authorities or between private parties, and statistical transfers under the Directive)?

C. Climate Change

10. To what extent has the choice of the emissions trading scheme (the EU ETS) to deliver climate change targets had the final word vis-à-vis alternative methods such as carbon and energy taxation?
11. Have differences in viewpoints on the above been reflected in legal measures in your Member State and how have they been resolved?

Security

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

The Treaty

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