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Editorial Office

Centre for Antitrust and Regulatory Studies (CARS)
University of Warsaw, Faculty of Management
PL – 02-678 Warszawa, 1/3 Szturmowa St.
Tel. + 48 22 55 34 126; Fax. + 48 22 55 34 001
e-mail: yars@uw.edu.pl
www.cars.wz.uw.edu.pl; www.yars.wz.uw.edu.pl

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RAPHAEL J. HEFFRON
MARCIN KRAŚNIEWSKI

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Editorial foreword

Legal Challenges and Opportunities in the Energy Transition

The international scientific community has reached a consensus that limiting global warming to well below 2°C, and striving to limit it to 1.5°C, above pre-industrial levels is essential to avoid the most severe impacts of climate change. As a result, the energy sector is undergoing significant transformation as the world shifts towards a more sustainable, low-carbon energy system. As outlined in the 2015 Paris Agreement on climate change, the objective of halving global greenhouse gas emissions by 2030, and reaching net zero emissions by 2050, serves as a guiding principle in this transition.

The global goal set out in the Paris Agreement was upheld by the resolutions of the United Nations' COP28 climate summit in Dubai (United Arab Emirates) held at the end of 2023. One of its results is the indication that, for the first time in UN documents, the international community's goal is to move away from fossil fuels by 2050. The UN reviewed global climate actions and outlined the steps to be taken in coming years. It should also be stressed that during the summit, twenty-two countries signed the Declaration Recognizing the Key Role of Nuclear Energy in Keeping Within Reach the Goal of Limiting Temperature Rise to 1.5 Degrees Celsius[1]. Nuclear energy was thus recognised for the first time in the UN as an essential element for the transformation of climate-changing energy, considering that nuclear power provides a quarter of the world's clean electricity. Importantly also, the International Atomic Energy Agency issued on 1 December 2023 a Statement on Nuclear Power, which reflects the critical role of nuclear power in the net zero transition – the IAEA Statement is supported by +50 nuclear operating and newcomer countries. A discussion on the ways forward in paving the way for nuclear energy in the overall pathway to net zero is ongoing[2].

Edition of that article was financed under Agreement Nr RCN/SP/0324/2021/1 with funds from the Ministry of Education and Science, allocated to the "Rozwoj czasopism naukowych" programme.

[1] Declaration Recognizes the Key Role of Nuclear Energy in Keeping Within Reach the Goal of Limiting Temperature Rise to 1.5 Degrees Celsius (https://www.energy.gov/articles/cop28-countries-launch-declaration-triple-nuclear-energy-capacity-2050-recognizing-key).

[2] Nuclear Energy Agency, COP28 recognises the critical role of nuclear energy for reducing the effects of climate change, 21.12.2023 (https://www.oecd-nea.org/jcms/pl_89153/cop28-recognises-the-critical-role-of-nuclear-energy-for-reducing-the-effects-of-climate-change).

The potential power of energy justice is clear when one considers that research shows the energy sector is responsible for the majority of carbon dioxide emissions. It has taken far too long for society to realise this and to take action. There are of course many barriers ahead that arise from corporate and personal greed, corruption and misinformation, as well as political inaction about the price and/or subsidies of and for sustainable energy sources, to name but a few.

When taking energy related decisions, the initial debate should begin with the principle of justice. Unfortunately, until now, that has not been the case as the energy field was driven primarily by corporate profiteering, revenue raising and exploitation. Energy justice ensures that all people have access to clean and affordable energy, so this issue has great impact on social prosperity[3]. This can be achieved by promoting renewable energy sources such as solar, wind, and hydropower that are sustainable and do not harm the environment. The notion of energy justice aims to distribute energy equally regardless of income, race, or location. This can be achieved by implementing policies prioritising low-income communities and those of colour, which are often disproportionately suffering from energy poverty[4].

The energy transition presents a range of legal challenges and opportunities, as policy makers, regulators, and industry leaders work to develop and implement policies that support the transition to a more sustainable energy future.

This volume of the Yearbook of Antitrust and Regulatory Studies (YARS) explores the specifics of national and global energy law. The issue opens with the article "Emerging Clean Energy Choices in Canada's Net-Zero 2050 Transition: The Role of Nuclear in the Low Carbon and Clean Hydrogen Context" written by Rudiger Tscherning. The paper argues that nuclear energy could play a significant role in decarbonizing the production of hydrogen from natural gas feedstock, with associated carbon storage. It examines regulatory readiness for Small Modular Reactors (SMRs) and in light of it, together with an increased emphasis on "net-zero" in the natural resources value chain, anticipates an opening for SMR deployment in Western Canada, specifically within the oil, gas, and mining sectors.

In the paper entitled "Energy security of Ukraine: external threats from the Russian Federation", Valeria Lymarow analyzes the main threats to Ukraine's energy security, conducts a Strengths, Weaknesses, Opportunities

[3] Yunpeng Sun, Jin Wang, Xiuhui Wang, Xinyu Wei, Achieving energy justice and common prosperity through green energy resources. Resources Policy, 2023; 81:103427, https://doi.org/10.1016/j.resourpol.2023.103427 (https://www.sciencedirect.com/science/article/pii/S0301420723001356).

[4] Marzena Czarnecka, Marcin Kraśniewski, "Solving Energy Justice in the European Union", [in:] "The Power of Energy Justice & the Social Contract", ed. Raphael J. Heffron, Louis de Fontenelle, Springer, Palgrave Macmillan 2024, p. 193.

and Threats (SWOT) analysis of the energy sector of Ukraine, and formulates recommendations on how to strengthen the resilience and potential of the Ukrainian energy system. The paper shows that fluctuations in Ukraine's energy imports can be explained by several factors, including: political; economic; technical; and climatic. Ukraine is a country that depends on imports of natural gas and other types of energy, which makes it vulnerable to changes in prices and supply volumes. Therefore, developing Ukraine's own renewable energy sources and improving energy efficiency is an important task to ensure the stability of the country's energy system and to reduce its dependence on imports.

Robert Zajdler takes an EU law perspective in his article entitled "EU energy solidarity as a way of implementing just transition in energy policy". The principle of EU energy solidarity, regulated by Article 194 of the Lisbon Treaty, has created a new dimension of energy sector developments. Indeed, the 2019 CJEU judgment in the OPAL case established energy solidarity as a principle of EU law, derived, inter alia, from the principle of justice. The concept of just transition sets out the directions of socio-economic transformation, based on a sustainable and low-carbon economy. Energy solidarity is a means of implementing the aims of a just transition, based on normative premises ensuring energy security, the competitiveness of the economy, and sustainable development.

The article "The road to energy justice as a result of interdisciplinary cooperation in the field of energy policy", by Michał Domagała and Katarzyna Maćkowiak, considers the role of law in regulating the energy market. The paper argues that justice and solidarity in this area require an extraordinary debate that cannot be disjointed but should take place in a comprehensive, interdisciplinary context. The analysis tackles the question of the role that the law should play in the area of energy transformation, and whether it should only be a tool for the implementation of political plans and strategies of energy actions, or whether it should, in itself, be a motivator, a framework setter, or a regulator of that transformation. Several problems, such as Demand Side Management (DSM), de-growth, energy poverty, Not-In-My-Backyard (NIMBY) initiatives as well as Contracts for Difference (CfD), call for interdisciplinary research and cooperation.

Jakub Kmieć analyses Energy Communities (ECs) in the next article entitled "Energy communities in EU energy regulation". The Clean Energy for All Europeans package adopted in 2019 has introduced Renewable ECs (RECs) and Citizen ECs (CECs) into the EU legal framework. Since the two instruments share some common features, but also have notable differences, the aim of this paper is to examine whether EU law provides for a single model of ECs or two distinct models, and to characterize ECs as new participants in the energy market. Interestingly, the paper contains also a case study that

puts the preceding legal analysis in a practical context. The author ultimately concludes that EU law does encompass two models of ECs (respectively for RECs and CECs); that the characterization of ECs as participants in the energy market is complex; and that the case study illustrates that significant differences can exist among different examples of existing ECs, influencing their legal characteristics.

The article "Online Platforms and Sustainable Market Regulation – a Smart Mix of Liability and Exemptions" by Katarzyna Klafkowska-Wasniowska and Katja Wecsktröm discusses the challenge of achieving sustainable regulation in digital markets, emphasizing the need for coherence and clarity. In doing so, it explores the Digital Services Act's role in balancing liability exemptions, examining how the CJEU navigates content removal obligations, while safeguarding fundamental and consumer rights, and discusses enforcement frameworks for securing rights within the DSA.

The legislative developments and case law review section of this YARS volume contains two papers: "The Court of Justice kicks around the dichotomy between data protection and competition law: Case comment on the upcoming preliminary ruling in Case C-252/21 Meta Platforms v. Bundeskartellamt" (by Alba Ribera Martínez) and "Dominant firms' behavior and the principle of equal opportunities: lessons from the SEN antitrust saga" (by Laura Zoboli).

Finally, this volume closes with the review of a book written by Ioannis Lianos, Alexey Ivanov, Dennis Davis (ed.) entitled "Global Food Value Chains and Competition Law", Cambridge University Press, 2022, 642 pages (by Magdalena Knapp).

The Editors would like to take this opportunity to thank all involved in the publication of this issue, especially our junior editors: Mateusz Kupiec, Giulia Toraldo, Lauren Murray, Paulina Korycińska-Rządca, Jérôme de Cooman, Szymon Cyban, Italo Leone, Zofia Mazur, Magdalena Knapp, Rahil Mammadov and Susanna Piccariello.

We also want to encourage those interested in energy law and regulatory matters to participate in scientific events organized by the University of Economics in Katowice within the European City of Science Katowice 2024 initiative.

Katowice – Pau, January 2024

Prof. Raphael J. Heffron (Volume Editor)
Dr Marcin Kraśniewski (Volume Editor)

A R T I C L E S

Energy Communities in EU Energy Regulation

by

Jakub Mikołaj Kmieć*

CONTENTS

Abstract

EU Directives included in the 'Clean Energy for All Europeans' package introduced Renewable Energy Communities ECs (RECs) and Citizen ECs (CECs) into the legal framework, sharing commonalities, but with distinctions. The aim of this paper is to examine whether EU law provides for a single model of ECs or, in fact, two distinct models, and to characterize ECs as new participants in the energy market. The publication focuses on the field of legal studies and includes a literature review, an interpretation of EU provisions defining ECs, a characterization of ECs as new

* Jakub Kmieć, M.A., PhD Candidate in Law, University of Silesia, Katowice (Poland); e-mail: jakub.kmiec@us.edu.pl; ORCID: https://orcid.org/0000-0003-4131-3751.

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market participants, and a case study. The paper concludes that EU law indeed encompasses two models of ECs – RECs and CECs. The characterization of ECs as participants in the energy market is complex, and the case study illustrates that significant differences can exist among different examples of ECs, influencing their legal characteristics.

Resumé

Les directives du paquet "Clean Energy for All Europeans" ont introduit les communautés d'énergies renouvelables et les communautés d'énergie citoyenne dans le cadre juridique de l'UE, partageant des caractéristiques communes mais présentant également des différences. Cette publication examine si le droit de l'UE prévoit un modèle unique ou deux modèles distincts de communautés d'énergie, et caractérise ces communautés comme de nouveaux participants sur le marché de l'énergie. Elle se concentre sur le domaine juridique, comprenant une revue de littérature, une interprétation des dispositions, une caractérisation et une étude de cas, ainsi qu'une discussion et des conclusions. Selon les conclusions, le droit de l'UE englobe deux modèles de communautés d'énergie. La caractérisation des communautés d'énergie en tant que participants sur le marché est complexe, avec d'importantes différences entre les exemples, influençant leurs caractéristiques juridiques.

Key words: ECs; renewable ECs; citizen ECs; energy regulation; renewable energy sources.

JEL: K23, K32

I. Introduction

One of the primary objectives of the European Union (EU) in implementing its energy policy is the effective execution of the energy transition, which entails a consistent shift away from emission-intensive energy sources, towards low-emission and renewable sources. Renewable energy constitutes a pivotal element of the European Green Deal's[1] commitment to achieving climate neutrality in the EU region by 2050. While the transformation goals are set at both the EU and Member State levels, the energy transition is also occurring concurrently at the local level, indicating the decentralization of energy production.[2]

The decentralization of the energy sector is closely associated with the concept of energy citizenship. This concept has been progressively gaining

[1] Communication from the European Commission, The European Green Deal, COM (2019) 640.

[2] Bartłomiej Nowak, Wewnętrzny rynek energii w UE (1st edn, C.H. Beck 2009) 64–99.

popularity[3] and, in accordance with its fundamental principle, emphasizes the active involvement of private individuals, organizations, institutions, and non-energy sector enterprises in the generation of energy, its transmission and management.[4] Citizens not only participate in technological aspects, but also contribute to democratic decision-making processes concerning energy matters.[5] Consequently, the activation of end-users forms the cornerstone of the new public policy in the energy sector, shaping regulatory trends in national legislations.[6]

Within the realm of energy citizenship, the EU's energy policy increasingly highlights the collaboration among end-users, which is further facilitated by the implementation of the European Green Deal policy. Research conducted on the legislative package titled the Clean Energy for All Europeans package[7] reveals that joint initiatives undertaken by groups of end-users can serve various purposes, including enabling energy sharing, and collectively balancing the local energy market from technical and commercial perspectives.[8]

One prominent form of such joint initiatives is the establishment of **Energy Communities** (hereinafter: **ECs**). These are defined as collective frameworks for energy generation activities, which revolve around principles of openness, democracy, and shared governance, ultimately benefiting their members and/or the local community.[9] The notion of ECs should be associated with the concept of 'community energy'. This conceptual category encompasses projects in which social groups, whether defined by geographical locations

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[3] For a more comprehensive exploration of the intensifying interest in decentralized energy, see Madeleine Wahlund and Jenny Palm, 'The role of energy democracy and energy citizenship for participatory energy transitions: A comprehensive review' (2022) 87 Energy Research & Social Science <https://doi.org/10.1016/j.erss.2021.102482> accessed 4 July 2023.

[4] Anna Dyląg, Andrzej Kassenberg, and Wojciech Szymalski, 'Energetyka obywatelska w Polsce – analiza stanu i rekomendacje do rozwoju' (2019) Instytut na rzecz ekorozwoju 11.

[5] Patrick Devine-Wright, 'Energy citizenship: psychological aspects of evolution in sustainable energy technologies' (2012) in Joseph Murphy (ed.), *Governing technology for sustainability* (Earthscan 2012) 63–86.

[6] Tomasz Długosz, 'Społeczności energetyczne z pakietu dyrektyw «Czysta energia dla wszystkich Europejczyków»' (2022) 1(69) Forum Prawnicze 44.

[7] Further information on the package can be found on the European Commission's website: <https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en> accessed 31 July 2023.

[8] Karen R.S. Hamann, Maria P. Bertel, Bozena Ryszawska et al., 'An interdisciplinary understanding of energy citizenship: Integrating psychological, legal, and economic perspectives on a citizen-centred sustainable energy transition' (2023) 97 Energy Research & Social Science <https://www.sciencedirect.com/science/article/pii/S2214629623000191> accessed 6 July 2023; Długosz (n 6).

[9] Aura Caramizaru and Andreas Uihlein, 'Energy communities: an overview of energy and social innovation' (2020) Publications Office of the European Union <doi:10.2760/180576, JRC119433> accessed 3 July 2023.

or shared interests, exhibit a high degree of ownership, control, and mutual benefits derived from project outcomes.[10]

This publication aims to examine whether EU law encompasses a single model, or in fact two distinct models of ECs, and to characterize ECs as participants in the energy market.

Preliminary research has led to the formulation of a research hypothesis suggesting that EU law provides for two models of ECs. These models share several common features, including the application of fundamental structural elements. However, they also possess distinguishing characteristics that differentiate one model of ECs from the other. Consequently, the characterization of ECs as market participants necessitates a specific approach.

The article is structured as follows: firstly, it contains a concise presentation of relevant sources on the topic, accompanied by a description of the research methodology. Subsequently, the discussion delves into the legal framework of ECs within EU law. Preliminary information is provided, encompassing the theoretical and historical aspects of regulations governing ECs. This is followed by a comparative analysis of the regulatory frameworks applicable to ECs, employing a three-element definition as the analytical framework. Part IV focuses on the characterization of ECs as participants in the energy market. The case study subsection of Part IV aims to classify the entities Ecopower CV and the Isle of Eigg Heritage Trust and its subsidiary energy company, as ECs of a particular type. The publication concludes with a comprehensive discussion and final conclusions.

II. Literature review, methodology

During the development of this article, sources such as legal acts, views and communications of EU bodies, academic publications and websites were used.

The interest in the topic of ECs has greatly increased from the end of the first decade of the 21st Century and to the present day. The issue of ECs is considered to not be fully explored by research yet. The existing state of knowledge is the result of research from various fields, including social sciences, technical sciences, and legal sciences – an area into which this article also falls. The current state of knowledge covers topics such as motivations for establishing and joining ECs,[11] social acceptance of ECs, specific technological resources installed in ECs,

[10] Gill Seyfang, Jung Jin Park, Adrian Smith, 'A Thousand Flowers Blooming? An Examination of Community Energy in the UK' (2013) 61 Energy Policy <https://doi.org/10.1016/j.enpol.2013.06.030> accessed 4 July 2023.

[11] Thomas Bauwens, Boris Gotchev and Lars Holstenkamp, 'What drives the development of community energy in Europe? The case of wind power cooperatives' (2016) 13, Energy Research & Social Science 136–147.

active actors and social networks necessary for ECs, and special cooperation in transitioning between entities, sectors, and systems.[12] The conducted legal research on ECs includes topics such as the transposition of EU rules on ECs into national legal systems,[13] the role of ECs in the energy transition process,[14] activities undertaken by ECs,[15] and business models for ECs.[16]

[12] As regards scientific papers of an overview nature, see Grigorios L. Kyriakopoulos, 'Energy Communities Overview: Managerial Policies, Economic Aspects, Technologies, and Models' (2022) 15(11) Journal of Risk Financial Management <https://doi.org/10.3390/jrfm15110521> accessed 3 July 2023; for a detailed analysis of comparative research on energy communities literature, see Maria Luisa Lode, Geert te Boveldt, Thierry Coosemans and Luis Ramirez Camargo, 'A transition perspective on Energy Communities: A systematic literature review and research agenda' (2022) 163 Renewable and Sustainable Energy Reviews <https://doi.org/10.1016/j.rser.2022.112479> accessed 3 July 2023; Lia Gruber, Udo Bachhiesl and Sonja Wogrin, 'The current state of research on energy Communities' (2021) 138(8), Elektrotechnik und Informationstechnik 515–524; in terms of future research agenda, see Julia Blasch, Nicolien M. van der Grijp, Daniel Petrovics et al., 'New clean energy communities in polycentric settings: Four avenues for future research' (2021) 82 Energy Research & Social Science <https://doi.org/10.1016/j.erss.2021.102276> accessed 3 July 2023.

[13] Maciej M. Sokołowski, 'Renewable and citizen energy communities in the European Union: how (not) to regulate community energy in national laws and policies' (2020) 38(3) Journal of Energy & Natural Resources Law 289–304; Maciej M. Sokołowski, 'European Law on the Energy Communities: A Long Way to a Direct Legal Framework' (2018) 27(2) European Energy and Environmental Law Review 60–70; Christina E. Hoicka, Jens Lowitzsch, Marie Claire Brisbois et al., 'Implementing a just renewable energy transition: Policy advice for transposing the new European rules for renewable energy communities' (2021) 156 Energy Policy <https://doi.org/10.1016/j.enpol.2021.112435> accessed 3 July 2023; Josh Roberts, 'What energy communities need from regulation' (2019) 8 <https://doi.org/10.4337/eecj.2019.03-04.01> accessed 3 July 2023.

[14] Iñigo Capellán-Pérez, Álvaro Campos-Celador and Jon Terés-Zubiaga, 'Renewable Energy Cooperatives as an instrument towards the energy transition in Spain' (2018) 123 Energy Policy 215–229; Francesca Cappellaro, Gianluca D'Agosta, Piero De Sabbata et al., Implementing energy transition and SDGs targets throughout energy community schemes' (2022) 8(1) Journal of Urban Ecology <https://doi.org/10.1093/jue/juac023> accessed 3 July 2023; Florian Hanke and Rachel Guyet, 'The struggle of energy communities to enhance energy justice: insights from 113 German cases' (2023) 13 Energy, Sustainability and Society <https://energsustainsoc.biomedcentral.com/articles/10.1186/s13705-023-00388-2> accessed 3 July 2023.

[15] E.g., energy production, energy sharing; see Lea Diestelmeier, Viola Cappell, 'Conceptualizing 'Energy Sharing' as an Activity of 'Energy Communities' under EU Law: Towards Social Benefits for Consumers?' (2023) 12(1) Journal of European Consumer and Market Law 15–23; Francesco Demetrio Minuto, Andrea Lanzini, 'Energy-sharing mechanisms for energy community members under different asset ownership schemes and user demand profiles' (2022) 168(C) Renewable and Sustainable Energy Reviews <10.1016/j.rser.2022.112859> accessed 3 July 2023; in terms of Energy management, see Sobhan Dorahaki, Masoud Rashidinejad, Seyed Farshad Fatemi Ardestani et al., 'An integrated model for citizen energy communities and renewable energy communities based on clean energy package: A two-stage risk-based approach' (2023) 277 Energy <https://doi.org/10.1016/j.energy.2023.127727> accessed 3 July 2023.

[16] Merla Kubli and Sanket Puranik, 'A typology of business models for energy communities: Current and emerging design options' (2023) 176 Renewable and Sustainable Energy Reviews <https://doi.org/10.1016/j.rser.2023.113165> accessed 3 July 2023; Inês F.G. Reis,

Currently, there is only one book available on the market dedicated specifically to ECs.[17] However, a number of reports have been published by team members of organisations such as the European Commission's Joint Research Centre[18] and REScoop.eu[19] (that is, the European federation of citizen energy cooperatives).

Information was also gathered from the Internet, using information from websites such as energy.ec.europa.eu and rescoop.eu, as well as from the websites of particular ECs. Search terms used in web browsers, databases and electronic catalogues of scientific publications include: Renewable Energy Community, Citizen Energy Community, Energy Communities, Energy cooperatives.

The research was carried out using a dogmatic-legal method allowing the analysis of EU legislation on ECs. A complementary role was played by the theoretical method, which made it possible to identify doctrinal standpoints and analyse legally non-binding documents.

The preliminary results of the research led to the conclusion that the subject of ECs generates constant scientific interest from many areas. It should be noted, however, that the topic of ECs has not been fully explored yet, including in the area of legal sciences.

III. ECs in EU law

1. Introduction to ECs

Community energy initiatives are not a new phenomenon – they date back to the 19th Century.[20] The first ECs in Europe were established as early as the 1970s. One of the first such initiatives was the non-governmental Danish

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Ivo Gonçalves, Marta A.R. Lopes et al., 'Business models for energy communities: A review of key issues and trends' (2021) 144(C) Renewable and Sustainable Energy Reviews <10.1016/j.rser.2021.111013> accessed 3 July 2023; Anne-Lorène Vernay, Carine Sebi and Fabrice Arroyo, 'Energy community business models and their impact on the energy transition: Lessons learnt from France' (2023) 175 Energy Policy <https://doi.org/10.1016/j.enpol.2023.113473> accessed 3 July 2023.

[17] Sabine Loebbe, Fereidoon Sioshansi, David Robinson, *Energy Communities. Customer-Centered, Market-Driven, Welfare-Enhancing?* (1st supp, 1th edn, Academic Press, Elsevier, 2022).

[18] <https://joint-research-centre.ec.europa.eu/jrc-mission-statement-work-programme_en> accessed 3 July 2023; Caramizaru and Uihlein (n 9).

[19] Compare, in particular, the numerous publications in the 'toolbox' section <https://www.rescoop.eu/> accessed 3 July 2023.

[20] Renewable Energy Policy Network for the 21st Century, Renewables 2016 Global Status Report <https://www.ren21.net/gsr-2016/chapter07.php> accessed 21 February 2023.

Wind Turbine Owners' Association, founded in 1978 in Denmark.[21] It is an independent association whose aim is to look after the common interests of wind turbine owners *vis-à-vis* authorities, policy makers, utilities and wind turbine manufacturers.[22] In the following years, further initiatives categorised as ECs were established in European countries.

Community energy initiatives, due to their social and environmental benefits, have been supported by the EU for decades,[23] although their development progressed for many years even without dedicated EU legislation. One of the first announcements of a change in the regulatory environment was the European Commission Communication Clean Energy for All Europeans – unlocking Europe's growth potential, announced in late 2016.[24] The Communication announced that consumers are active and central players on the energy markets of the future' and they will have 'the possibility to produce and sell their own electricity'.

These policy statements on ECs have been put into the EU legal framework by two acts, namely Directive on common rules for the internal market for electricity[25] (hereinafter: Directive 2019/944) and Directive on the promotion of the use of energy from renewable sources[26] (hereinafter: RED II Directive). Directive 2019/944 introduced **Citizen Energy Communities** (hereinafter: **CECs**) into the EU legal order, while the RED II Directive introduced **Renewable Energy Communities** (hereinafter: **RECs**). Each Member State is obliged to transpose these two Directives effectively into its national legal order, while retaining the freedom to choose the means of such transposition. The deadlines for transposing both Directives have already expired.[27] Some

[21] The entity still operates under the changed name Green Power Denmark på <https://greenpowerdenmark.dk/> accessed 21 February 2023.

[22] The website entry under the name Danmarks Vindmølleforening (Danish Wind Turbine Owners' Association) on the Energy Institute Knowledge Service <https://knowledge.energyinst.org/search/record?id=3957> accessed 21 February 2023.

[23] Lena Kitzing, Catherine Mitchell and Poul Erik Morthorst, 'Renewable energy policies in Europe: Converging or diverging?' (2012) 51(C) Energy Policy 192–201.

[24] European Commission Press release, Clean Energy for All Europeans – unlocking Europe's growth potential (2016).

[25] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158/125) (Directive 2019/944).

[26] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (OJ L 328/82) (REC II).

[27] Refer to Art. 26 RED II (transposition deadline: 30 June 2021) and Art. 71 Directive 2019/944 (transposition deadline 31 December 2020).

Member States have successfully transposed the required provisions related to ECs, while others have not yet done so.[28]

The choice of an EU directive as a legal regulatory tool results in a diversity of models for the operation of ECs in national legislation. The law of each EU Member State regulates aspects such as the permissible organisational and legal forms of operation of ECs (e.g. cooperative, foundation, limited company), the territorial scope of their activities (e.g. the area of one or several municipalities, the requirement to keep short distances between energy consumers and producers), or the requirements of technical nature (e.g. the obligation to connect member producers and consumers within one distribution network operator, the obligation to cover an appropriate share of demand with energy from renewable sources). At the same time, the EU legislature has stipulated that the required provisions on ECs do not exclude the existence of other 'citizen energy initiatives', with ECs being recognised as a category of cooperation between citizens or local actors that are subject to recognition and protection under Union law.[29]

A significant portion of the two Directives' provisions is addressed to EU Member States, obligating them to ensure minimum standards for the regulation of ECs (e.g., through rules requiring the establishment of favourable regulatory frameworks,[30] and mandating the monitoring and evaluation of existing barriers and development potential[31]). The two Directives have introduced into the EU legal framework a set of distinctive and shared characteristics for ECs.

2. Definitional elements of ECs

Both of the aforementioned Directives, which introduce the concept of RECs and CECs into the EU legal framework, contain similar definitional elements. This has created the potential for viewing these initiatives collectively. However, the interpretation of certain definitional norms of RECs or CECs suggests that they should be regarded as two distinct models of ECs.

In terms of the structural organization of these legal acts, the EU legislator provided one definitional provision and one Article (divided into points and

[28] In order to compare the state of implementation, see 'Transposition tracker – Definitions' tool <https://www.rescoop.eu/transposition-tracker> accessed 6 July 2023.

[29] Compare recital 44 to Directive 2019/944. Although the recital refers to the CEC, in view of its functional interpretation (the aim is to approve, authorize and ensure the functioning of various types of so-called citizens' initiatives), it should be equally applicable to the REC.

[30] For example, refer to Article 16(1) and (3) Directive 2019/944.

[31] For example, refer to Article 22(3) RED II.

sub-points) containing more detailed rules for each of the mentioned types of ECs, addressed to ECs themselves, to Member States, or to energy market participants.

First and foremost, the EU legislator determined that both RECs and CECs are legal entities. Each Member State legislation may regulate the rules for acquiring legal personality differently, but the effective implementation of the Directives requires equipping national ECs with the attributes of a legal personality, manifested in the ability to be subject to rights and obligations, as well as to undertake legal acts on their own behalf. Therefore, a given 'citizen initiative' cannot be assigned to the category of REC or CEC if it lacks legal personality. This is a s*ine qua non* condition for ECs.

Definitions of ECs consist of three elements:

1. Definition of the catalogue of actors participating in them, and the rules of participation.
2. Specification of the benefits catalogue ECs should provide.
3. Specification of the activities catalogue and territorial extension of ECs.

Regarding the **principles of participation**, a common aspect for RECs and CECs is the reliance on the involvement of small, local entities, including those belonging to the local government sector. In the case of RECs, eligible members or shareholders include individuals, SMEs, and local authorities, including municipalities. In the case of CECs, members or shareholders can be individuals, local government authorities (including municipalities) or small enterprises. The main difference lies in the group of entrepreneurs. Based on the literal wording of the EU provisions, so-called medium-sized enterprises cannot be members or shareholders of CECs, although they can participate in RECs. However, Recital 44 of Directive 2019/944 presents a less conservative position in this regard suggesting that membership in CECs should be open to entities of all categories. Further limitations outlined in the mentioned recital are not aimed at restricting membership based on certain categories of entities, but rather at limiting their decision-making rights if they are members of ECs.[32]

Both models are based on open and voluntary participation. Openness and voluntariness of participation are interconnected, as restricting one component negatively affects the ability to achieve the other. Participation in renewable energy projects should be open to all potential local members and be based on objective, transparent and non-discriminatory criteria.[33] ECs should be as

[32] In Recital 44 Directive 2019/944, reference is made to the decision-making powers within a CEC, which should be limited to those members or shareholders that are not engaged in large-scale commercial activity, and for whom the energy sector does not constitute a primary area of economic activity.

[33] Recital 71 RED II.

open as possible, but that does not mean there are no conditions for joining these structures.[34] The two Directives do not impose a specific numerical limit on the number of members or shareholders. The Directives also ensure the freedom to withdraw from an EC. These principles form the basis of the internal aspect of the **voluntary and open participation principle**.

The external aspect of this principle entails enabling ECs to operate within the energy system and facilitating their market integration. Other participants in the energy market, primarily those professionally involved in the energy sector (including distribution system operators and energy trading companies), should enable and support ECs in achieving their goals.

Another principle regarding ECs is the **principle of independence**. RECs should be able to remain independent from individual members and other traditional market participants, who participate in the community as members or shareholders or who collaborate with it through other means, such as investments.[35] A correct understanding of the independence principle is necessary for the prevention of abuses, and for ensuring the broad participation of local entities in ECs. Independence, however, does not imply exclusivity or separation from other energy market participants. ECs are expected to closely cooperate with other market participants, and their independence is crucial to ensure two-way collaboration, and to eliminate the possibility of influence exerted by other market participants leading to dominance and subordination.

Equally important is the **principle of effective control**. The principle of control is so significant that it constitutes a defining element within the definitions. Both CECs and RECs are required to be 'effectively controlled by their members or shareholders.'[36] Member States have implementation flexibility in this regard, ensuring 'effective control' through the most efficient legal instruments within their legal systems.

There are two aspects to consider here: the **subject aspect of control** (who possesses control rights) and the **object aspect** (which areas of ECs' activities are subject to control and what actions or legal acts constitute control activities). In terms of the subject aspect, the EU legislator determined that control rights are vested in members or shareholders. When comparing RECs and CECs, it is important to note that different criteria have been applied to identify the entities endowed with control rights. In the case of RECs, control rights are granted only to members or shareholders 'located in the proximity of the renewable energy projects that are owned and developed

[34] Maciej M. Sokołowski, 'Renewable and citizen energy communities in the European Union: how (not) to regulate community energy in national laws and policies' (n 13) 298.

[35] Ibidem.

[36] Compare the definition of REC in Art. 2(16) RED II with the definition of CEC found in Art. 2(11) Directive 2019/944.

by that legal entity' satisfying a geographical criterion. On the other hand, CECs are effectively controlled by members or shareholders who are 'natural persons, local authorities, including municipalities, or small enterprises' fulfilling a subjective criterion rather than a geographical one.

In the interpretation of the subjective criterion, Recital 44 of Directive 2019/944 plays a significant role. According to this recital, 'decision-making powers within a citizen energy community should be limited to those members or shareholders that are not engaged in large-scale commercial activity and for which the energy sector does not constitute a primary area of economic activity.' The 'decision-making powers' belong to smaller entities not involved in professional energy activities. Medium and large enterprises (both from the energy sector and beyond) can participate in a CEC and contribute to its decision-making, 'as long as their decision-making role does not amount to effective control or direction of the decision-making of the CEC.'[37]

In the definition of control set out in Directive 2019/944, the object aspect is emphasized. Control, according to Article 2(56) of Directive 2019/944, means 'rights, contracts or other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;
(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.'

This definition *per se* covers only the relationships within an EC and pertains to the means of exerting decisive influence over its activities. However, the interpretation of such defined control, in conjunction with other provisions governing the criteria for endowing individual members with control rights, as well as in conjunction with the principle of independence, also has implications for the characterization of an EC as a new market participant, and its relationships with other energy market participants.

The catalogue of circumstances that enable the exertion of decisive influence over ECs is an open list. Therefore, other circumstances, such as contractual provisions with other energy market participants (e.g. regarding distribution services, energy supply services, sale, or lease of energy generation facilities), must also be taken into account, and may determine the final composition of an EC's members, as well as the selection of partners providing complementary services to the EC.

This broader interpretation acknowledges that control over an EC is not limited solely to internal dynamics but extends to external factors and

[37] REScoop.eu, 'Energy Communities under the Clean Energy Package. Transposition Guidance' (2020) <https://www.rescoop.eu/news-and-events/press/energy-communities-under-the-clean-energy-package> accessed 5 July 2023 31.

relationships with other market participants. The specific circumstances and contractual arrangements can play a significant role in shaping the characteristics of an EC, and its interactions within the energy market.

The second element of the definition of ECs pertains to the identification of the benefits that ECs should provide. Both Directives state that the primary purpose of ECs is to provide 'environmental, economic, or social benefits to their shareholders, members, or local areas in which they operate'. It is clear that their main objective is not profit generation. In doctrine, there is a strong recommendation to adopt concrete provisions in national legislations that exclude profit-driven entities from the category of ECs.[38] However, the generation of financial profits by an EC is not excluded, and it will not determine non-compliance with the EU definitional criteria of CECs or RECs for a given entity, as long as the pursuit of financial profits is not its primary purpose.

Regarding the benefits catalogue, environmental benefits may include, for example, the reduction of CO_2 emissions and pollutants within the operational area of an EC, or the implementation of energy efficiency projects. Economic benefits can encompass reduced energy bills for community members, or the ability to purchase necessary energy resources (such as pellets) at prices lower than market rates. The range of activities generating social benefits is very broad and includes e.g. supporting individuals that are at risk of energy poverty, as well as educational meetings on energy efficiency, among other examples.

In practice, the majority of activities that generate environmental, economic, or social benefits will require financial resources. Some of these activities may reduce expenses (e.g., energy efficiency projects) or increase revenue (e.g., selling generated energy), leading to financial profits. How should an EC handle the profits generated from its operational activities?

It appears that financial profits of an EC should be reinvested in the activities of the respective community – profits should be allocated towards actions that deliver the discussed social, environmental, or economic benefits. However, it seems plausible that the profits could also be distributed among members in the form of dividends. The exact manner of profit allocation should be determined by the community's internal governance structures, ensuring a fair and transparent distribution process that aligns with the community's objectives and the interests of its members.

The third element of the definition pertains to the scope and territorial extent of the activities conducted by ECs. RECs are limited to operating within the renewable energy sector, whereas CECs have the ability to operate

[38] Sokołowski, 'Renewable and citizen energy communities in the European Union: how (not) to regulate community energy in national laws and policies' (n 14) 299.

in both the renewable energy and conventional energy sectors. This distinction is a key difference between these two types of communities.

By definition, RECs engage in 'renewable energy projects that are owned and developed by that legal entity'. Their activities can encompass areas such as renewable energy production, consumption, storage, and sale. This includes engaging in agreements for the purchase of renewable electricity, and the sharing of energy within the community. On the other hand, the scope of activities of CECs extends to energy distribution, aggregation, energy efficiency services, or electric vehicle charging. The list of activities of CECs is open-ended, in contrast to the exhaustive list applicable to REC.

Regarding the territorial scope of activities, ECs are expected to operate locally, within specific local areas (in the case of CECs), or in close proximity to projects concerning renewable energy owned and developed by a given legal entity (in the case of RECs). The EU legislator does not impose administrative territorial constraints in this regard. It is the operators and members of an EC who determine the specific scope and area of operation, as long as it falls within the defined range of activities. The choice of the operational area should be tailored and functional for each individual EC, allowing them to achieve the maximum environmental, economic, and social benefits within their territorial jurisdiction.

The outlined definitional elements allow for the assessment of whether a particular initiative can be classified as an EC or not. They also highlight the emphasis placed by the EU legislator on specific aspects of ECs, such as their activities, internal structure, and corporate framework. This sheds light on the priorities of EU law in shaping ECs, and the aspects that are promoted and encouraged.

IV. ECs as participants in the energy market

ECs are relatively new entities under EU law, and their legal nature and role in the energy market are not yet fully understood. The abovementioned EU Directives require ECs to have legal personality, making them separate entities from their members or shareholders. They are granted non-discriminatory access to all relevant energy markets, both directly and through aggregation.[39] Thus, they are recognized as participants in the energy market.[40]

[39] Art. 22(2)(c) RED II as well as Art. 16(3)(b) Directive 2019/944.

[40] Compare the definition of market participant as provided in Art. 2(25) of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity OJ L158/54.

1. Characteristics of ECs as participants in the energy market

As a new type of market entity, ECs activate, and group together previously passive market participants, such as residential consumers, small-scale consumers, and small energy producers, such as small businesses. This distinguishes them structurally from other market participants, as they bring together distinct legal entities that were primarily not active and did not engage in activities within the energy sector.

ECs operate with the purpose of providing environmental, social, and economic benefits – their primary goal cannot be financial gain. This sets them apart from other market participants in economic terms, as the primary focus of the latter are profit-oriented commercial activities. One of the activities of ECs that is not primarily focused on financial gain, but which does bring economic benefits, is energy sharing, which is a distinctive activity specific to ECs as the participants in the energy market. Energy companies provide energy supplies in exchange for remuneration for the services of distribution or energy supply. However, energy sharing is a separate activity from the regular supply of energy and does not have to take the form of a commercial transaction, because it does not necessarily imply contractual reciprocity.[41]

Another characteristic feature of ECs, distinguishing them, for example, from energy producers, is their primary focus on creating local energy self-sufficiency areas, instead of producing as much energy as possible. The goals of ECs are aligned with the sustainable development goals, such as affordable and clean energy, sustainable cities and communities, as well as responsible energy consumption and production.[42] The objectives of ECs are more oriented towards achieving sustainable development goals, rather than pursuing financial profits (which is the primary focus of energy companies – maximizing profit, for example, through maximizing the sale of generated energy, while minimizing the operating costs).

According to Directives, ECs are participants of a particular type in the energy market. They are 'treated in a non-discriminatory and proportionate manner with regard to their activities, rights and obligations as final customers, producers, suppliers, distribution system operators or market participants engaged in aggregation.'[43] At the same time, alongside provisions ensuring the participation of ECs in the energy market, as well as promoting their activities, the Directives impose obligations upon them, which also affect other energy market participants. Member States ensure that ECs are subject to non-discriminatory, fair, proportionate and transparent procedures and

[41] Diestelmeier, Cappell (n 16).
[42] Cappellaro, D'Agosta, De Sabbata et al. (n 15).
[43] Art. 16(3)(b) Directive 2019/944.

charges, including those concerning registration and licensing, as well as to transparent, non-discriminatory and cost-reflective networks, ensuring that they contribute in an adequate and balanced way to the overall cost sharing of the system.[44] In light of the participation of ECs in the energy market, the rights and obligations imposed on them must ensure the integration of this new type of market participant into the energy system. Therefore, the law must, on the one hand, support and promote these initiatives, providing incentives for their further development, and, on the other hand, balance the interests of the entire energy sector by imposing certain obligations on ECs.

RECs and CECs, on the one hand, can engage in activities related to energy generation, supply, storage, and distribution, and, on the other hand, they can link members and shareholders who themselves operate in these areas. Members of RECs and CECs can also include entities from the energy sector (although their control and decision-making powers are legally limited). This structure poses a risk of monopolization of the local energy market coordinated by an EC. Therefore, the Directives contain provisions to prevent the emergence of monopolized local energy markets. Manifesting the preventive action of the EU legislator are provisions concerning the engagement of ECs in energy distribution. The distribution activities carried out by ECs must take place without prejudice to the principles and regulations applicable to distribution system operators.[45] It seems that Directive 2019/944 implies, in particular, the application of the **unbundling principle** and the **principle of third party access** to distribution activities carried out by ECs. In addition to having access to the network, and the ability to choose service providers in the energy market, ECs themselves must adhere to these principles whenever they provide distribution services to their members or other entities.

However, the EU legislator did not provide a precise specification of to what extent these principles should be applied to ECs. Firstly, these principles apply to energy companies ('electricity undertakings' in the meaning of Directive 2019/944). Operating a company, including an energy company, involves conducting activities aimed at generating financial profits. The primary objective of ECs' activities cannot be the pursuit of such profits, but rather the generation of the aforementioned benefits. Secondly, a key organizational feature of ECs is their separate legal personality from their members. An EC (organized in a permissible form under the respective national legislation, e.g. a cooperative) can independently engage in activities such as energy distribution. Therefore, ECs will be obliged to maintain the unbundling principle between its distribution activities and its other activities related to generation, storage, and energy supply. That seems to be clear. However, the question is – how to apply

[44] Art. 16(1)(e) Directive 2019/944; compare also similar Art. 22(4)(d) RED II.
[45] Art. 16(4) Directive 2019/944.

the unbundling principle between the activities undertaken by an EC (having a separate legal personality from its members) and the activities undertaken by the members of that EC? Can a producer or supplier of energy be a member of such an EC? Would the membership in such an entity not circumvent the law, and violate the fundamental principles of the legal structure of the energy market? Currently, the level of development of European ECs allows them to benefit from the unbundling exemptions for entities serving fewer than 100,000 connected customers, which have been introduced in many EU Member States. However, the dynamic development of some ECs may necessitate practical solutions to the outlined problem in the future.[46]

2. Case studies

ECs form new networks of relationships among entities located within their operational areas. These entities establish ECs to pursue their energy-related interests. The formation of an EC results in these entities becoming indirect beneficiaries of the rights conferred upon ECs by the two Directives and by national legislation. By acting collectively, these entities can achieve benefits that would be unattainable if each entity were to operate individually. Such benefits include, but are not limited to, the opportunity for energy sharing, peer-to-peer trading, and joint investment ventures. However, in practice, the scope of operations, number of members, organizational structure, and activities undertaken in the energy market can vary significantly among different examples of ECs. These factors determine the classification of an institution as a specific type of ECs and have implications for its characteristics as an energy market participant. The following case study aims to illustrate these differences, which are important in understanding the profile of a particular EC as a participant in the energy market.

2.1. Ecopower

ECs are closely tied to local-level activities and the collaboration of citizens and small businesses. These initiatives arise as grassroots, voluntary actions of the local community. However, this does not diminish their significance, both from the perspective of the energy market and its participants. Ecopower CV is a cooperative company established in Belgium with the purpose of investing in renewable energy and promoting rational energy use. Its main activities in the energy market encompass energy generation and supply. The values

[46] For example, the energy cooperative Ecopower CV, based in Belgium, had over 64,000 members-shareholders in 2021.

driving Ecopower CV align with the objectives of ECs, as the cooperative aims to create social, ecological, and economic added value for its members and the community.[47] The territorial scope of Ecopower CV covers the Flanders region, thus subjecting it to regional laws and regulations. According to the data presented at the general meeting for the 2022 financial year, held in May 2023, a total of 105 GWh of electricity was supplied to 55,422 customers that had been generated from wind, photovoltaic, and hydropower installations[48] owned by the cooperative (with each member having a stake in these installations).

This EC can be classified as a REC under the definition provided by RED II and the Flemish Energy Decree.[49] The activities carried out by Ecopower CV align with the requirements set for the *hernieuwbare-energiegemeenschap* (The equivalent of REC in Flemish legislation), as its energy generation and supply activities 'relate to green electricity from an installation directly or indirectly connected via the connection of partners or members of the renewable energy community'.[50] The cooperative structure ensures that members have appropriate control rights as defined in the statutes of Ecopower CV and Belgian law. Each member holds a specified and limited number of shares, as determined by the statute. Each Ecopower CV share has a value of 250 euros, and each member can hold a maximum of 20 shares. According to Article 32 of the Statute of Ecopower CV, voting rights at the General Assembly adhere to the principle of 'one associate – one vote.'[51] The statutory objectives align with the benefits that REC aims to achieve (provision of environmental, economic or social benefits to the members).[52] Moreover, the temporary suspension of new member registrations, due to technical limitations of the energy-generating installations under the control of Ecopower CV, reflects a commitment to the realization of sustainable development goals.[53]

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[47] Art. 5 of the Statute of Ecopower CV <https://www.ecopower.be/statuten-en-intern-reglement> accessed 5 July 2023.

[48] Total capacity in use: wind – 131.25 MWe, Photovoltaic – 4.29 MWe, Hydropower – 75 kW; source – Ecopwer CV, Productie-installaties <https://www.ecopower.be/over-ecopower/productie-installaties> accessed 5 July 2023. According to the information provided on the cooperative's website, many members of the cooperative also have photovoltaic installations on the roofs of their homes.

[49] Decree containing general provisions on energy policy (Law of 15 May 2009) <https://codex.vlaanderen.be/portals/codex/documenten/1018092.html> accessed 5 July 2023.

[50] Art. 4.8.4 of the Flemish Energy Decree.

[51] Art. 32 of the Statute of Ecopower CV <https://www.ecopower.be/statuten-en-intern-reglement> accessed 5 July 2023.

[52] Compare Art. 4.8.1 of the Flemish Energy Decree with Art. 5 of the Statute of Ecopower CV.

[53] Communication 'Temporary contract stop at Ecopower' <https://www.ecopower.be/groene-stroom/aanvraag> accessed 5 July 2023; compare also Art. 4.8.2 § 1 of the Flemish Energy Decree whereby REC limits participation based on technical or geographic proximity,

The level of development of this EC can be considered as advanced, and the presented numbers are impressive. The obtained data does not indicate that Ecopower CV is engaged in energy distribution activities, and there is also no information about a specific member conducting distribution activities. However, the hypothetical inclusion of such a member in the cooperative, while providing distribution services to other cooperative members, or the provision of distribution services by the cooperative itself, raises certain concerns. In both scenarios, there is a risk of refusals to connect to the grid of non-member entities located within the territorial scope of the cooperative's activities. This entails a significant risk of applying non-competitive connection fees and distribution charges, as well as risks surrounding actual priority in connecting installations owned by the cooperative, while conflicts between particular interests of individual cooperative members are increasing. Considering the dynamic development of this EC, the occurrence of the aforementioned risks in the future could potentially pose challenges for the power system of Flanders.[54]

2.2. Isle of Eigg

A different example of a small, local, island-based EC from Scotland is the Isle of Eigg Heritage Trust, which is the sole owner of Eigg Electric Ltd.[55] The size of the community stands at just under 100 people.[56] The aim of the island community was to create an off-grid energy generation, supply and distribution system under the management of Eigg Electric Ltd. The island is not connected to the mainland electricity supply network, however, 'after decades of diesel generators, Eigg Electric provided 24-hour power for the first time in February 2008.'[57] The company generates renewable energy from three hydroelectric generators, four small 6 kW wind turbines, and a 170 kW photovoltaic array that harnesses solar power. These renewable sources meet approximately 95% of the island's electricity demand. The remaining 5% is generated by two 64 kW diesel generators. The energy is distributed through a high voltage grid, which is also managed by Eigg Electric Ltd. Additionally,

taking into account the function of the objectives or activities the renewable energy community aims to achieve.

[54] According to data from January 2020, Ecopower CV supplied approximately 1.64% of household electricity in Flanders; source Friends of the Earth Europe, 'The Belgian Community That Built Renewable Energy for the Masses' (2020) <https://friendsoftheearth.eu/news/the-belgian-community-that-built-renewable-energy-for-the-masses/> accessed 6 July 2023.

[55] Caramizaru and Uihlein (n 9) 19.

[56] About Eigg <http://isleofeigg.org/> accessed 5 July 2023.

[57] Eigg Electric <http://isleofeigg.org/eigg-electric/> accessed 5 July 2023.

the community has a coordinated energy storage system in the form of a bank of batteries, capable of supplying power to the entire island for up to 24 hours. The environmental and social goals of the Isle of Eigg Heritage Trust are clearly articulated in the statement – 'No more pouring smelly and expensive diesel into noisy generators, just clean, reliable electricity for everyone.'[58] This highlights the commitment of the community to reducing reliance on fossil fuels, improving environmental conditions, and providing a reliable and sustainable energy supply for that community.

This EC can be classified as a CEC. Its members consist of citizens and small businesses, with a maximum electricity supply cap of 10 kW.[59] The goals of the organization align with the objectives of a CEC, as they promote self-sufficiency primarily from renewable sources. However, the energy balance is complemented by conventional sources, specifically diesel generators. The members of the Isle of Eigg Heritage Trust have appropriate control rights as outlined in its Articles of Association, according to which 'all members shall have equal voting rights at any General Meeting.'[60] The commitment to realizing sustainable development goals is clearly evident. The establishment of power capacity limits within the community, along with the design of generation facilities and energy storage for self-consumption purposes (while ensuring the security of energy supply through the selection of complementary generation installations) serves as an alignment with the sustainable development goals, as well as an ideal example of a sustainable approach to local energy.

Due to the extremely limited scope of its operation and a small number of customers (residents), it is understandable that the principle of unbundling between energy generation, supply, and distribution does not apply here. Eigg Electric Ltd. effectively operates as a monopoly in the energy market, but remains under the management of the local community, providing a wide range of services to meet their needs. Due to the ownership structure of the entity managing the energy on the island, and the limited number of entities using its energy generation, supply, and distribution services, the absence of unbundling between these activities does not intuitively raise objections.

[58] Ibidem.

[59] Ibidem.

[60] Compare Art. 4(b) in fine of the Articles of Association of The Isle Of Eigg Heritage Trust <http://www.isleofeigg.org/wp-content/uploads/2016/12/IEHT-Memo-Arts.pdf> accessed 5 July 2023.

V. Discussion and conclusions

ECs are a relatively new instrument in EU energy law. They serve as a means of implementing EU energy policy by organizing the energy market at the local level, empowering citizens in energy generation and local energy market control, as well as promoting economic activity and entrepreneurship in the local energy sector.

The conducted analysis leads to the conclusion that CECs and RECs should be perceived as two distinct forms of ECs. Although they share common features, CECs and RECs should not be regarded as a single model regulated by two distinct legal acts. Both CECs and RECs have distinct attributes and focus that set them apart. RECs primarily focus on renewable energy sources and promoting their utilization, while CECs place greater emphasis on organizing community activities, and managing relationships with other market participants, such as distribution companies. Nevertheless, the interpretation of specific provisions in the Directives regulating CECs and RECs will be consistent and generally applicable to ECs as market participants.

The legal nature of ECs as participants in the energy market is heterogeneous and can vary depending on the type of activities they engage in. The legal character of participation in the energy market may be influenced by the organizational structure of an EC, as well as by the capital and decision-making relationships among its members or shareholders.

The case studies presented above lead to the conclusion that differences in terms of scale of operations, number of members, technologies employed, and organizational forms, can be significant, allowing for customization based on specific cases in order to maximize the benefits. At the same time, the characteristics of a given EC require a different perspective when considering its role as a participant in the relevant energy market, and it also influences perceptions related to the risk of monopolistic practices in local energy markets.

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Sokołowski M.Mm, 'Renewable and citizen ECs in the European Union: how (not) to regulate community energy in national laws and policies' (2020) 38(3) Journal of Energy & Natural Resources Law 289-304

Vernay A.L., Sebi C. and Arroyo F., 'Energy community business models and their impact on the energy transition: Lessons learnt from France' (2023) 175 Energy Policy <https://doi.org/10.1016/j.enpol.2023.113473> accessed 3 July 2023

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Energy Security of Ukraine: External Threats From the Russian Federation

by

Valeriia Lymar*

CONTENTS

Abstract

A country's energy security is an important component of its overall national security, as energy supply is essential for the functioning of its national economy and the livelihoods of its population. The purpose of this research is to develop practical tools for analyzing the condition of Ukraine's energy sector, and to provide practical recommendations for potential development and integration into the single European energy system. The practical value of the research findings is that the SWOT-analysis (Strengths – Weakness – Opportunities – Troubles) of the energy sector of Ukraine which makes it possible to identify the most acute problems and threats that have

* Valeriia Lymar, Associate professor, Doctor of Economic Sciences, Acting Head of International Relations and Foreign Policy Department of Vasyl' Stus Donetsk National University (Ukraine); e-mail: v.lymar@donnu.edu.ua; ORCID: https://orcid.org/0000-0002-4328-7529.

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a negative impact on the energy sector of Ukraine and its integration into the European common energy system. Based on the results of the conducted SWOT-analysis, three potential scenarios for the development of Ukraine's energy sector are proposed: a "no change" scenario (preservation of current trends and state of affairs); an "unfriendly influence" scenario (no systemic changes in energy policy combined with the escalation of aggression by the Russian Federation); and a "positive transformation" scenario (targeted efforts aimed at achieving the goals set out in this Strategy). The paper suggests the following possible ways of ensuring energy import substitution for Ukraine: development of renewable energy; development of energy efficiency; development of its own oil and gas industry; development of alternative energy sources; diversification of energy import sources; development of energy infrastructure; developing energy self-sufficiency in its individual regions.

Resumé

La sécurité énergétique d'un pays est une composante importante de sa sécurité nationale globale, car l'approvisionnement en énergie est essentiel au fonctionnement de son économie nationale et aux moyens de subsistance de sa population. L'objectif de cette recherche est de développer des outils pratiques pour analyser la situation du secteur énergétique ukrainien et de fournir des recommandations pratiques pour le développement potentiel et l'intégration dans le système énergétique européen unique. La valeur pratique des résultats de la recherche est que l'analyse SWOT (Strengths – Weakness – Opportunities – Troubles) du secteur énergétique de l'Ukraine permet d'identifier les problèmes les plus aigus et les menaces qui ont un impact négatif sur le secteur énergétique de l'Ukraine et son intégration dans le système énergétique européen commun. Sur la base des résultats de l'analyse SWOT, trois scénarios potentiels de développement du secteur énergétique ukrainien sont proposés : un scénario "sans changement" (maintien des tendances et de la situation actuelles) ; un scénario "influence inamicale" (pas de changements systémiques dans la politique énergétique combinés à l'escalade de l'agression par la Fédération de Russie) ; et un scénario "transformation positive" (efforts ciblés visant à atteindre les objectifs fixés dans cette stratégie). L'article propose les moyens suivants pour assurer la substitution des importations d'énergie pour l'Ukraine : développement des énergies renouvelables ; développement de l'efficacité énergétique ; développement de sa propre industrie pétrolière et gazière ; développement de sources d'énergie alternatives ; diversification des sources d'importation d'énergie ; développement de l'infrastructure énergétique ; développement de l'autosuffisance énergétique dans ses différentes régions.

Key words: foreign policy; military aggression; energy security; energy complex; traditional energy resources; decarbonization; synchronization of legislation; single energy market.

JEL: F510, F520, F590, K330

I. Introduction

Russia's full-scale invasion of Ukraine in February 2022 changed the political landscape in Europe and the world. The Kremlin has challenged international law, the world order and the norms of humanity. Moscow's actions threaten the Ukrainian State and nation with destruction, undermine democracy and freedom in the EU, and create conditions for a food and economic crisis in many regions of the world. Expecting to take over the whole of Ukraine in a few days, Russia hoped for a lukewarm reaction from Kyiv's international partners, including the European Union. This expectation was based on the system of hybrid influences that Moscow has been building and using in Europe over the past two decades.

Energy has played a key role in Russia's strategy of subduing EU Member States. By selling relatively cheap oil and gas to its Western partners, Moscow ensured their economic growth and guaranteed their loyalty, even during aggressive actions against third countries. In addition, having the status of a major supplier of hydrocarbons to some EU States, Russia could use it as a tool to influence the situation within the bloc. Thus, as of 2020, more than 40% of all-natural gas imported to the EU came from Gazprom. In addition, Russian suppliers provided almost a third of all crude oil, and more than half of all solid fuels, imported into the EU from outside the bloc.

A country's energy security is an important component of national security overall, as energy supply is essential for the functioning of its national economy and the livelihoods of its population. Insufficient or unstable energy supply can lead to an economic crisis, rising energy prices, reduced competitiveness of producers, and deterioration of the socio-economic situation in a country. In addition, insufficient energy supplies may lead to increased use of hazardous alternative energy sources, such as coal, which leads to environmental pollution and to the deterioration of public health. However, dependence on foreign energy suppliers can also pose a threat to national security, as it can be used as a political tool or even armed pressure. Therefore, ensuring national energy security aims to reduce dependence on foreign suppliers and developing domestic energy sources.

II. Research outline

1. Purpose

The purpose of this research project is to develop practical tools for analyzing the condition of Ukraine's energy sector and to provide practical recommendations for its potential development and integration into the single European energy system.

2. Methodology

The research methodology includes the following main steps: a review of current literature in the field of energy security, which will enable a comparison of existing approaches to understanding the concept of energy security; analysis of Ukrainian legal acts regulating the relationships in the energy sector, which will make it possible to analyze the improvement of Ukrainian legislation in this area. The next step is to conduct a SWOT-analysis of Ukraine's energy sector, which will identify the main problems and threats that have a negative impact on Ukraine's energy security, as well as offer a number of practical recommendations to improve the situation in Ukraine's energy sector in the context of its integration into the European energy system.

III. Literature review

Energy security is important for many aspects of modern life and geopolitics, and therefore it is the subject of research by many European scholars and research organizations. The energy sector is an important part of the economy of many European countries. Energy security research helps to understand what threats and opportunities exist for the energy market, and how this affects economic stability. The concept of energy security has been studied by many scientists, in particular, the three dimensions of availability, affordability and reliability.[1] Theoretical papers and international organizations have

[1] Nye, J. 'Energy and security in the 1980s' (1982) World Politics, 35(1), 121–134; Yergin, D. (1988). Energy Security in the 1990s. Foreign Affairs, 67, 110–132. https://doi.org/10.2307/20043677; Kendel, J. 'Energy security in APEC' (2018) <https://www.ief.org/_resources/files/events/ief16-ministerial/official-articles/james-kendell-article.pdf>.

added new elements to their analysis, especially, environmental acceptability.[2] Baldwin M. argues that the energy crisis has forged new linkages among national security, energy security, climate security and economic security.[3] He considers that EU Members should strive to deepen collaboration in the realm of sustainable energy development, because progress here will reinforce collective security and contribute to global environmental health. Strojny, et al. presents a comprehensive review of the concept of energy security, in the context of new trends in the development of the energy sector.[4] They identify the main differences in the perception of energy security, and point out that the "supply concept" of energy security is giving way to an approach whereby energy is a factor initiating deep transformations of social systems. It does so by changing consumption patterns, reducing energy consumption, and forcing changes in economic systems by imposing energy efficiency standards and environmental standards.

Bluszcz, Manowska, Tobór-Osadnik, Wyganowska (2023) et al. present the assessment of the level of energy independence of European Union countries, including Poland, based on selected indicators, such as: the level of final energy consumption in a household per capita, GDP per capita, GDP energy consumption, Net Import Dependency ratio (NID).[5] Samson (2019) analyzes the Polish energy market with the share of individual sources, and examines the possibility to increase the share of those alternatives to coal in the near future. Pokhodenko (2023) focuses on the main aspects of energy security, such as ensuring energy independence, stability and sustainability of the supply of energy resources, the development of energy efficiency and the use of renewable energy sources, integration into a single energy space, as well as the challenges faced

[2] Neff, T. 'Improving Energy Security in Pacific Asia: Diversification and Risk Reduction for Fossil and Nuclear Fuels' (1997) Commissioned by the Pacific Asia Regional Energy Security (PARES) project, Center for International Studies, Massachusetts Institute of Technology, Cambridge, USA; World energy assessment (2000). <https://www.undp.org/sites/g/files/zskgke326/files/publications/World%20Energy%20Assessment-2000.pdf>; World energy assessment. Overview 2004 update (2004). <https://sustainabledevelopment.un.org/content/documents/2420World_Energy_Assessment_Overview_2004_Update.pdf>; ESMAP 2005–2007 business plan – securing energy for poverty reduction and economic growth (2005). <https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/806051468175434798/esmap-2005-2007-business-plan-securing-energy-for-poverty-reduction-and-economic-growth>.

[3] Baldwin, M. 'Energy priorities of the European Commission' (2023). <https://www.eolasmagazine.ie/energy-priorities-of-the-european-commission-2/>.

[4] Strojny, J., Krakowiak-Bal A., Knaga J., Kacorzyk P. 'Energies' (2023) 16(13), 5042. doi: https://doi.org/10.3390/en16135042.

[5] Bluszcz, A. et al., 'Poland's energy security during the transformation process in comparison with the EU countries' (2023) IOP Conf. Ser.: Earth Environ. Sci. 1132 012001. doi 10.1088/1755-1315/1132/1/012001.

by both sides.[6] Suhodolia, et al. (2020) develop the methodology of a system analysis and strategic planning of energy security of Ukraine.[7]

There is thus no common consensus among scientists about the optimum model that can be used in analyzing energy security in a certain state. Consequently, every scientist presents their own vision and refers to the crucial components and indicators according to their point of view. In general, theoretical literature agrees on the controversial nature of the energy security concept, as it lies in an overlapping area between economics, politics, technical and environmental aspects, as well as the legal dimensions governing the circulation and energy transfer processes. Therefore, the analysis of current scientific papers has shown a certain fragmentation and disparity of views on the problem subject to this study. Hence, energy security is the provision of stable, reliable and uninterrupted energy supply to meet the needs of society in energy (oil, gas, coal, electricity, etc.), while ensuring economic efficiency, environmental safety and conservation of energy resources for future generations. Energy security is a key component of national security overall, and is of strategic importance for a country's development. The need to ensure energy security is becoming especially urgent due to the growing energy consumption and deteriorating environmental situation in the world.

The IEA (2023) defines "energy security as the uninterrupted availability of energy sources at an affordable price. Energy security has many aspects: long-term energy security mainly deals with timely investments to supply energy in line with economic developments and environmental needs. On the other hand, short-term energy security focuses on the ability of the energy system to react promptly to sudden changes in the supply-demand balance".[8] In accordance with the EC (2014), "energy security refers to ensuring uninterrupted energy supply within a country and between countries that are members of the European Union".[9] The American Office Of Energy Efficiency & Renewable Energy (2023) considers that "energy security means having enough energy to meet demand and having a power system and infrastructure that are protected

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[6] Pokhodenko, B. 'Review and comparative analysis of energy security concepts of the European Union and Ukraine' (2023) The Journal of V. N. Karazin Kharkiv National University (17), 56–79. https://doi.org/10.26565/2310-9513-2023-17-06 (in Ukrainian).

[7] Sukhodolia, O., Kharazishvili, Yu., Bobro, D. 'Metodolohichni zasady identyfikatsii ta stratehuvannia rivnia enerhetychnoi bezpeky Ukrainy [Methodological principles of identification and strategizing the level of energy security of Ukraine]' (2020) Ekonomika Ukrainy – Economy of Ukraine, 6 (703), 20–42. https://doi.org/10.15407/economyukr.2020.06.020 [in Ukrainian].

[8] IEA 'Energy security. Reliable, affordable access to all fuels and energy sources' (2023) <https://www.iea.org/topics/energy-security>.

[9] Communication from Commission to the European Parliament and the Council. European energy security strategy (2014). Brussels, 28.5.2014. COM(2014) 330 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0330>.

against physical and cyber threats. Together, energy independence and energy security enhance national security, American competitiveness, and economic standing".[10] The Strategy of Energy Security of Ukraine (2021) argues that energy security is understood as the protection of national interests in ensuring access to reliable, sustainable, affordable and modern energy sources, in a technically reliable, safe, cost-effective and environmentally acceptable manner, under normal conditions and in a state of emergency.[11] Different approaches to the definition of energy security lead us to the conclusion that the concept of energy security has different variations depending on the context and country. However, in all cases, energy security is an important component of national and global security overall, which aims to ensure a reliable and sustainable supply of energy to meet societal needs.

IV. Results of the study

A country's energy security is an important element of its national security that affects the economic, social and political development of the country. Ensuring reliable and sustainable energy supply, as well as reducing dependence on foreign suppliers, is thus an important task for ensuring national security.[12] As for Ukraine, it has the greatest need for these types of energy. Natural gas is the main source of energy for heating and domestic use. Gas is also used by industry, in particular for the production of chemicals, mineral fertilizers, steel, etc. Coal is an important source of energy for electricity and heat production in Ukraine. Most Ukrainian power plants are fired by coal. Electricity is an important energy carrier for various industrial sectors and for home use. Ukraine has also a large demand for transportation fuels, particularly gasoline and diesel. With the development of renewable energy and increased attention to environmental issues, the Ukrainian economy is increasingly relying on biofuels, including ethanol, biodiesel, as well as other biofuels.

Ukraine is a major producer of coal and natural gas, but its dependence on imports of these energy sources is significant. In addition, with the focus on reducing carbon emissions and increasing the use of renewable energy

[10] American office of energy efficiency & renewable energy (2023). <https://www.energy.gov/eere/office-energy-efficiency-renewable-energy>.

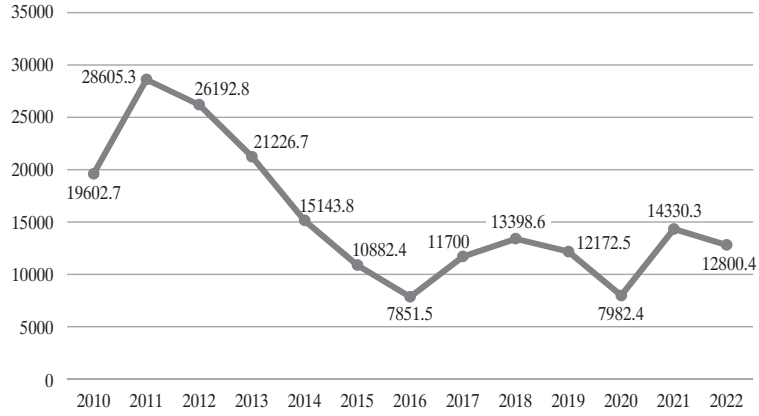
[11] Strategiia energetychnoi bezpeky [Strategy of energy security] (2021). <https://zakon.rada.gov.ua/laws/show/907-2021-%D1%80#Text>.

[12] Lymar, V. 'Ukraine's economy after the Russian Federation war invasion: global scale' (2022) Ukrainian Economy in the Aftermath of the Russian Aggression – Selected Issues, 75–82.

sources, an important task for Ukraine is to develop appropriate energy technologies, infrastructure, and import substitution. Ukraine's dependence on energy imports, especially gas and oil, is one of the main problems for its energy security. In practice, dependence on external suppliers can lead to acute energy shortages and high energy prices, which threaten economic growth and national security.[13] Import substitution of energy is important for ensuring the country's sustainable development and reducing its dependence on external suppliers. This can be achieved through the development of domestic renewable energy sources, such as solar and wind energy, as well as energy efficiency and reduction of energy consumption. It is also important to develop its own oil and gas industry and ensure diversification of supply sources.[14] Reducing energy imports can also have a positive impact on the country's balance of payments, and increase its competitiveness in the international market. In addition, import substitution can create new jobs and support the development of the domestic energy market. Thus, energy import substitution is an important task for Ukraine to ensure energy security, sustainable development and economic growth.

The figure below shows the dynamics of imports of mineral fuels, oil and oil products to Ukraine (Fig. 1).

Figure 1. Imports of mineral fuels, oil and its distillation products to Ukraine in 2010–2022, UAH million



Source: compiled by the author. Based on Commodity structure of Ukraine's foreign trade in 2010–2022. <https://www.ukrstat.gov.ua/operativ/operativ2023/zd/tsztt/arh_tsztt2023_u.html>.

[13] Lymar, V., Zveriev, O. 'Mizhnarodna ekonomichna bezpeka Ukrainy v umovah posylennia zovnishnih zagroz [International economic security of Ukraine in the context of growing external threats]' (2022) Economics and organization of management. № 1, 13–25 [in Ukrainian].

[14] Lymar, V., Zveriev, O. 'Naukovi pidhody do rozuminnia kontseptu globalnoi ekonomichnoi bezpeky [Scientific approaches to understanding the concept of global economic security]' (2023) Business Inform, № 3, 6–12 [in Ukrainian].

The data of the State Statistics Service of Ukraine on imports of mineral fuels, oil and its distillation products, demonstrate certain fluctuations in the analyzed indicator:

- in 2010–2011, Ukraine experienced a significant increase in imports (from 19602.7 to 28605.3 million UAH);
- in 2011–2016, a significant decrease in energy imports occurred (from 28605.3 to 7851.5 million UAH);
- in 2016–2018, Ukraine's imports again increased (from 7851.5 to 13398.6 million UAH);
- in 2018–2020, energy imports again showed a decrease (from 13398.6 to 7982.4 million UAH);
- in 2021, the numbers of energy imports into the Ukraine almost doubled (to 14330.3 million UAH); and,
- in 2022, imports again decreased (to 12800.4 million UAH).

Fluctuations in energy imports to Ukraine can be explained by several factors, including the following. Political factors: energy imports can be increased or decreased depending on the conditions of relations with exporting countries. For example, changes in the political course of the exporting country, conflicts on the territory of the exporting country, as well as relations with 3rd countries can all affect the volume of energy imports. Economic factors: changes in the economic situation in exporting countries, such as a decrease or increase in energy production, decrease or increase in energy prices, may all affect import volumes. Technical factors: the development of appropriate infrastructure (pipelines, terminals, ports, etc.) is an important factor in ensuring stable energy imports. Climatic factors: Changes in climate conditions, such as temperature variability, may affect the demand for certain types of energy, in particular natural gas and coal used for heating.[15]

Ukraine is a country that depends on imports of natural gas and other energy sources, which makes it vulnerable to changes in prices and supply volumes. Therefore, developing Ukraine's own renewable energy sources, as well as improving energy efficiency, is an important task to ensure the stability of the country's energy system, and reduce its dependence on imports. The largest energy demand in Ukraine is for natural gas, which is used for heating and electricity. Other important energy sources in Ukraine include oil, coal, nuclear fuel, and renewable energy.[16]

[15] Sukhodolia, O., Kharazishvili, Yu., Bobro, D. 'Metodolohichni zasady identyfikatsii ta stratehuvannia rivnia enerhetychnoi bezpeky Ukrainy [Methodological principles of identification and strategizing the level of energy security of Ukraine]' (2020) Ekonomika Ukrainy – Economy of Ukraine, 6 (703), 20–42. https://doi.org/10.15407/economyukr.2020.06.020 [in Ukrainian].

[16] Kholod, N., Denysenko, A., Evans, M., Roshchanka, V. 'Improving Ukraine's Energy Security: the Role of Energy Efficiency. Pacific Northwest National Laboratory' (2018) Richland, Washington <https://www.osti.gov/servlets/purl/1566786> [in Ukrainian].

The dangers of Ukraine's energy security have become more acute with Russia's full-scale aggression against Ukraine. Russia's manipulation of energy resources has several aspects. One of them is the construction of the Nord Stream 2 pipeline by Russian Gazprom, which allows gas to be transported to Germany bypassing Ukraine. To date, this pipeline is awaiting certification by German regulators. In this context, Russia's goal is to reduce Ukraine's role in the European gas transportation system. This resulted in a decrease in gas supplies to Europe and, accordingly, a significant increase in prices for this energy source.[17] In such circumstances, Ukraine is facing the task of reducing its energy dependence, in particular, our country is already buying gas for its own needs from Europe, and is also taking measures to further integrate the domestic energy grid into the European energy space.

The table 1 presents the main legal acts regulating relations in the energy sector, as well as certain aspects of the country's energy security. Of course, this is not the full range of relevant legal acts, but they are the main, priority ones that regulate the energy sector of Ukraine.

There may be certain conflicts or contradictions between different laws and regulations in the legal framework for Ukraine's energy security. Some of the potential conflicts include:

- dependence on energy imports – as Ukraine is dependent on imports of oil, natural gas and other energy resources. This may create a conflict between its energy security goals and foreign economic policy objectives;
- regulation of different energy sectors – Ukraine has separate laws and regulations concerning specific energy sectors, such as electricity, gas, alternative energy sources, etc. This can create conflicts in the interaction and coordination between different sectors;
- differences in strategic directions – different energy development strategies and programmes may have divergent or insufficiently coherent objectives, which can make it difficult to achieve overall energy security goals;
- energy source priorities – Ukraine faces a choice between different energy sources, such as coal, gas, nuclear, renewables, etc. Different legislative acts may set different priorities and approaches to the use of these sources, which may lead to conflicts.
- regulatory framework for energy efficiency – the introduction of energy efficient technologies and measures is an important aspect of energy security. However, there may be conflicts in regulatory provisions and in support for energy efficiency between different authorities and sectors of the economy.

[17] Lymar, V. 'Ukraine's economy after the Russian Federation war invasion: global scale' (2022) Ukrainian Economy in the Aftermath of the Russian Aggression – Selected Issues, 75–82.

Table 1. Legal and regulatory acts governing relations in the energy sector of Ukraine

Legal act	Short characteristics
The Law of Ukraine "On Energy" of 22 September 2017 [24]	This law establishes the general principles and foundations of State policy in the energy sector, as well as the legal framework for ensuring Ukraine's energy security
The Law of Ukraine "On the electricity market" of 13 June 2017 [25]	This law defines the legal framework for the functioning of the electricity sector of Ukraine, including energy security issues
the Law of Ukraine On the Principles of Functioning of the of the natural gas market of 9 April 2015[26]	This law establishes the legal framework for the extraction, transportation, supply and use of natural gas in Ukraine, in particular with a view to ensure energy security
The Law of Ukraine "On Atomic Energy" of 8 December 1995 [27]	This law establishes the legal framework for the use of nuclear energy, nuclear safety, and the protection against radiation exposure
Law of Ukraine "On Energy Efficiency of Buildings" of 22 March 2017 [28]	This law establishes requirements for energy efficiency of buildings, and contributes to reducing energy consumption, improving energy efficiency and ensuring energy security
The Law of Ukraine "On Heat Supply" of 2 June 2005 [29]	This law defines the legal framework for the organisation and operation of heating supply systems, including ensuring stable, reliable and efficient heat supply to households and industry
Law of Ukraine "On Energy Efficiency" of 21 October 2021 [30]	This Law defines the legal, economic and organisational framework for relations arising in the field of energy efficiency in the production, transportation, transmission, distribution, supply and consumption of energy

Source: developed by the author based on [24–30]. Based on Law of Ukraine On energy efficiency (2022). Bulleten of the Verkhovna Rada, 2022, № 2, ar. 8). <https://zakon.rada.gov.ua/laws/show/1818-20#Text> [in Ukrainian]; Law of Ukraine on Energy Efficiency Fund (2017). Bulletin of the Verkhovna Rada of Ukraine (BVR), 32, 344. <https://eefund.org.ua/sites/default/files/legislation/1.%20Law%20on%20EEF.pdf> [in Ukrainian]; Law of Ukraine On heat supply (2005). Bulleten of the Verkhovna Rada, № 28, ar. 373. <https://zakon.rada.gov.ua/laws/show/2633-15#Text> [in Ukrainian]; Law of Ukraine on the electricity market (2017). Bulleten of the Verkhovna Rada, № 27–28, ar. 312. <https://zakon.rada.gov.ua/laws/show/2019-19#Text> [in Ukrainian]; Law of Ukraine On the energy efficiency of buildings (2017). Bulleten of the Verkhovna Rada, № 33, ar. 359). <https://zakon.rada.gov.ua/laws/show/2118-19#Text> [in Ukrainian]; Law of Ukraine On the principles of the natural gas market functioning. <https://zakononline.com.ua/documents/show/305581___503060> [in Ukrainian]; Law of Ukraine On the use of nuclear energy and radiation safety (1995), Bulleten of the Verkhovna Rada, № 12, ar. 81. <https://zakon.rada.gov.ua/laws/show/39/95-%D0%B2%D1%80#Text> [in Ukrainian].

Resolving these conflicts and contradictions may require harmonization of legislation, increased coordination between different authorities, development of integrated strategies and policies, and consideration of the interests of different sectors and stakeholders in decision-making.

Ukraine should be a part of the mechanisms for overcoming the challenges mentioned in the previous section, as well as the EU's energy transformations. That is, as a candidate for accession to the European Union as a country with an extensive gas transmission network and numerous storage facilities, and as an additional power in ensuring the bloc's security. Joining the common European strategy of eliminating fuel dependence and decarbonization is also dictated by the need for Ukraine's post-war recovery. This process can become a framework for rapid reforms of the country's energy sector, which would be impossible to implement quickly under other conditions.

The return of Ukraine's production and generation capacities located in the territories temporarily occupied by Russia, was one of the country's biggest energy challenges until February 2022. Other challenges included maintaining the status of a transit country for Russian gas, in the face of the construction of gas pipelines bypassing Ukraine; the signing of a long-term agreement between Hungary and Gazprom; and a possible reduction in the volume of fuel transported from Russia to Romania, Slovakia, and Poland. The Kremlin's decision to launch a full-scale invasion has eliminated some of these problems, while adding new and more significant ones. In late 2021 and early 2022, Russian suppliers reduced gas transit through Ukraine by over 60%. After February 2022, these figures dropped by at least another third. At the same time, Gazprom stopped supplying fuel to Europe through Belarus and Poland. Finally, in early September, Russia shut down Nord Stream 1. Thus, the Turkish Stream and, to a lesser extent, pipelines on Ukrainian territory are now the only means of delivering Russian gas to Europe.[18]

The agreement between Gazprom and Ukraine on the transit of Russian gas is valid until 2024. The EU has decided to gradually sever its energy relations with the Kremlin, and Russia itself has reduced its share of foreign gas supplies to the European market to a record low. As for energy contacts between Kyiv and Moscow, the Ukrainian side cannot return to them for security, political and economic reasons. Any contacts in this context are not possible until Russian troops leave the territory of Ukraine, recognize the war crimes they have committed, and compensate for the damage they have caused. Therefore, the current gas transit agreement between Kyiv and

[18] Drapak, M., Kraiev, O. 'Mictse Ukrainy e spilnii energetychnii politytsi EC: retsipient praktyk chy initsiatyvnyi partner [Ukraine's place in the EU common energy policy: a recipient or a practitioner, or an initiative partner]' (2022). <http://prismua.org/560987654590-2/> [in Ukrainian].

Moscow is likely to be the last one of its kind. The same is likely to be true for Russian oil, which is transported to Europe through Ukraine. Transportation through the Druzhba pipeline is now only a temporary exception for Central European countries, which must find alternative sources of supply by the end of 2023, according to the 6th EU sanctions package.. In addition, given the continuing hostilities, Russia's temporary occupation of part of Ukraine's territory and frequent provocations by the Kremlin, Kyiv is currently unable to guarantee the security of oil (or any other fuel) passing through its territory.

As a result, Ukraine will no longer be a transit country for Russian gas and, most likely, oil in the coming years. Under these circumstances, the country will have to find a new place in the EU energy system and find new sources of fuel supply. Ukraine's gas storage facilities are the largest on the continent. They can help our European partners survive the most difficult periods of the winter season. In addition, Ukraine is already discussing possible options for supplying natural gas and increasing oil imports from the western and southwestern directions. The Polish, Slovak, and Hungarian gas transmission networks may in the future open up opportunities for Liquid Natural Gas (LNG) supplies to Ukraine, from ports on the Adriatic and Baltic Seas. Representatives of the Gas Transmission System Operator of Ukraine have previously announced their intention to start importing gas from Azerbaijan, and this year the company discussed the possibility of receiving LNG from Greek and Turkish ports. However, this requires the restoration of the Trans-Balkan Corridor's full operation, which requires agreements between Kyiv, Chisinau, Bucharest, and Sofia, as well as interest in the project from respective capital.[19]

The biggest challenge in the energy sector for Ukraine today is the need to counter Russian attacks. The response to this challenge requires urgent action. The Russian army has temporarily occupied territories with significant electricity generation capacity as well as fossil fuel deposits. These include the largest nuclear power plant in Europe, Zaporizhzhia Nuclear Power Plant, thermal power plants in the Donetsk and Luhansk regions, and the Kakhovka Hydroelectric Power Plant. In addition, the largest alternative energy capacities in Ukraine are concentrated in the Dnipro, Mykolaiv, Kherson and Zaporizhzhia regions. Some of them are located in the temporarily occupied territory. This situation is worsened by the fact that 30-40% of renewable energy power plants in the southern and eastern regions of the country were damaged.

During the first stage of the war after February 2022, the invading forces often directed their rocket and artillery fire at oil and gas storage facilities and

[19] Delivering the European Green Deal. <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en>.

enterprises, in particular in Kremenchuk, Odesa, Zhytomyr, Lviv and other cities. This created shortages, particularly on the petrol market in Ukraine. Since September 2022, Russian troops have launched repeated massive attacks on the country's power plants and distribution networks. According to the Ukrainian authorities, as of the end of November 2022, about 50% of Ukraine's energy infrastructure was damaged. The head of Ukrenergo, Volodymyr Kudrytskyi, noted that almost every thermal power plant, hydroelectric power station and hub substation in the country sustained damage. The systematic attacks by Russian troops have exhausted their stock of spare parts and equipment for repairs. At the same time, the destruction of facilities by air strikes not only disrupts electricity supply to households and businesses, but also hampers the supply of water and heating as well as communications. In addition, all of Ukraine's nuclear power plants are in a dangerous situation, as they remain de-energized due to damage to the grid. This poses a threat not only to Ukraine but also to other countries. It should also be remembered that the Russian occupiers are using the seized Zaporizhzhya NPP to blackmail and terrorize the population of Ukraine and the whole of Europe.

V. SWOT-analysis of the energy sector of Ukraine

In 2021, the Cabinet of Ministers of Ukraine adopted the Energy Security Strategy of Ukraine until 2025 [16], which is closely linked to successful EU integration and synchronization of Ukrainian legislation with the European one. In addition, the strategy identifies the main threats to Ukraine's energy security, including the certification of Nord Stream 2, obsolete energy infrastructure, and a significant share of energy imports.

This Strategy is a component of the national security system, a strategic planning document. It contains an analysis of threats to energy security with the determination of their criticality, identifies priorities for ensuring energy security, describes strategic choices, goals and objectives aimed at preventing situations that could potentially pose threats to Ukraine's energy security.

The purpose of the State policy of Ukraine in the field of energy security is to ensure the protection of national interests in the field of 1) ensuring access to reliable, sustainable, affordable and modern energy sources for all consumers, 2) in a technically reliable, safe, cost-effective and environmentally acceptable manner, 3) under normal conditions and in crisis situations, 4) exclusively within the limits and in the manner prescribed by law. This Strategy has been developed in order to ensure a balance between the economic, social and environmental dimensions of Ukraine's sustainable development.

The current unsatisfactory technical condition of the fuel and energy sector, and the low level of energy efficiency, pose challenges to Ukraine's ability to fulfill its international obligations and adapt to ambitious EU initiatives, in particular the European Commission's European Green Deal.[20] The introduction of the carbon footprint concept by the EU will be a requirement for the Ukrainian economy to be included in the EU's overall production chain. In the future, mechanisms may be introduced to restrict access to credit financing for certain commercial projects if certain environmental requirements are not met.

Ukraine's nuclear industry is still critically dependent on resources, technologies and services from suppliers in the Russian Federation. Domestic uranium mining companies are in a financial crisis, and require significant investments to increase production. Nuclear power plants have to continue implementing measures to ensure their safe operation, and are in need of urgent upgrades, in particular to improve their technical characteristics. Decisions must also be made on the construction of new power units.

Uncoordinated actions of the entities in the energy sector management system pose a potential threat to the functioning of the management system and coordination of the State's actions to implement its energy policy. There are constant changes in the legal framework, functions and powers of the authorities when it comes to formulating energy policy. The adopted regulations are not always in line with the overall national security priorities. The State should play the role of an effective owner that sets clear and coherent tasks and directions for State-owned companies.

Structuring and analyzing the threats identified in the Energy Security Strategy make it possible to conduct a SWOT analysis of the energy sector of Ukraine (Table 2).

Taking into account the threats to Ukraine's energy sector, the Strategy sets the following tasks: to stop importing energy resources from Russia and Belarus, to physically separate Ukrainian power grids from Russian and Belarusian ones, and to synchronize the operation of the United Energy System of Ukraine and European operators.

The Strategy provides for: independence of the State in developing and implementing domestic and foreign policy in the energy sector; reducing Ukraine's dependence on energy imports; ensuring the diversification of energy resources and energy-saving technologies; stimulating the increase in domestic natural gas production; support for public-private partnership instruments to ensure national energy security.

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[20] Delivering the European Green Deal. <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en>.

Table 2. SWOT-analysis of the energy sector of Ukraine

S – strengths:	**W – weaknesses:**
• The presence of significant coal and gas reserves in Ukraine, which makes it possible to meet the country's energy needs; • High potential for the development of renewable energy in Ukraine, in particular solar and wind energy; • Availability of nuclear energy production facilities that can be used to ensure sustainable energy security; • Availability of specialized companies that can provide services for the extraction, transportation and storage of energy resources	• Outdated equipment and technologies in the energy sector, which leads to low production efficiency and increased energy costs; • Dependence on gas imports, which leads to higher import costs and reduced energy security of the country; • Lack of sufficient infrastructure for transportation of energy resources, which leads to low accessibility for consumers and increased transportation costs; • Insufficient regulatory framework and transparency of management in the energy sector, which leads to insufficient competition and inefficient use of resources
O – opportunities:	**T – threats:**
• The development of renewable energy can help reduce dependence on imports and ensure the sustainability of the energy sector; • Increasing the efficiency of energy production and reducing energy costs through the use of modern technologies and infrastructure improvements; • Developing cooperation with energy producing countries to ensure stability of supply and reduce import costs; • Increasing transparency of management and regulation in the energy sector to ensure efficient use of resources and stimulate competition	• Full-scale military aggression of the Russian Federation against Ukraine, which led to the severance of diplomatic and foreign trade relations between the two countries; • Increase in prices for imported energy resources, which leads to higher costs and reduced competitiveness of the country; • Low level of investment in the energy sector, which leads to a decline in development and lagging behind modern technologies and trends; • Changes in climate conditions and environmental safety requirements, which may lead to restrictions on the use of traditional energy sources and the need to switch to more environmentally friendly energy solutions

Source: developed by the author (based on Strategiia energetychnoi bezpeky [Strategy of energy security] (2021). <https://zakon.rada.gov.ua/laws/show/907-2021-%D1%80#Text>).

The Strategy also envisages: independence of the State in the formation and implementation of domestic and foreign energy policy; ensuring the realization of national interests, which in practice means, in particular, preventing Ukraine's increasing dependence on external suppliers; ensuring an appropriate level of diversification of energy resources and technologies; increasing domestic production of natural gas and other types of energy

resources; introducing effective mechanisms of public-private partnership to ensure energy security.

Taking into account external and internal challenges and threats to energy security, the following likely forecast scenarios of changes in the energy sector were developed, and their impact on the implementation of strategic choices in the medium term identified namely: a "no change" scenario (preservation of current trends and state of affairs); an "unfriendly influence" scenario (no systemic changes in energy policy combined with escalation of aggression by the Russian Federation); and a "positive transformation" scenario (targeted efforts aimed at achieving the goals set out in this Strategy).

Below is a scheme showing the possible scenarios and events that could likely develop in the energy sector of Ukraine, according to the specific developed scenarios. The most likely events are shown in the respective blocks, albeit not all of them (Fig. 2).

The following main points were taken into account when developing these three scenarios: historical preconditions and potential for the development of the energy sector of Ukraine and the current condition of the energy sector and threats of physical destruction and political influence from the Russian Federation. Fluctuations in energy imports to Ukraine can have a serious impact on the country's economy and national security. The following possible ways of energy import substitution for Ukraine are proposed.

Development of renewable energy: Ukraine has significant potential for wind, solar, and hydropower development that is not yet fully utilized. To achieve this goal, it is necessary to create favorable conditions for investors, ensure government support, and develop research and development in this area.

Development of energy efficiency: Ukraine is one of the countries with the highest energy consumption per unit of GDP, which means that much of the energy is used inefficiently. Fostering energy efficiency can reduce energy consumption and help replace it with wind and solar energy.

Development of the oil and gas industry: Ukraine has significant potential to develop its own oil and gas industry. In particular, it is possible to extract gas from shale deposits, which could help reduce dependence on gas imports.

Development of alternative energy sources: Ukraine has the potential to develop biomass energy, which can provide energy from agricultural and forestry waste. It is also possible to use geothermal energy, which is obtained from deep rocks.

Diversification of energy import sources: Ukraine could foster cooperation with other countries to diversify its energy imports. For example, it could consider cooperation with Central and Eastern European countries, as well as with countries with significant coal and oil reserves.

Development of energy infrastructure: Ukraine has the opportunity to develop its energy infrastructure, which can help ensure reliable energy supplies and reduce dependence on energy imports. For example, it is possible to develop electricity transmission networks, increase the number of energy storage facilities, and create new gas pipeline networks.

Developing energy self-sufficiency in the regions: Ukraine could encourage the development of internal region based energy self-sufficiency, which would help reduce dependence on centralized energy supplies and ensure an even distribution of energy resources. For example, local energy companies could be created to produce energy from wind and solar power plants or biomass plants.

Figure 2. Possible scenarios for the development of Ukraine's energy sector, taking into account its current condition and external threats from the Russian Federation

"No change" scenario (it is based on the assumption that the current trends in the formation and implementation of energy policy, as well as the principles of functioning of energy markets and business culture, will remain unchanged)	Government authorities regularly interfere in the operation of energy markets. There is a tendency to make management decisions aimed at setting prices for certain categories of consumers, which distorts the operation of markets Subsidy and cross-subsidy mechanisms in the energy markets do not allow for adequate price signals, do not help attract investment in the energy sector, and impede the realisation of the potential of energy saving measure The non-market regulation of prices for extracted energy resources leads to a further decline in their production. As a result, Ukraine's dependence on energy imports is increasing
"Unfriendly influence" scenario (it is based on the assumption that, in addition to the implementation of the "no change" scenario, there will be an increase in the external influence of the Russian Federation designed to complete re-subordinate Ukraine's energy policy)	The absence of a system of strategic planning in the field of energy security will not make it possible to identify in advance the growing threats from the Russian Federation designed to gain full control over Ukraine's energy markets. Russian capital will increase its presence by providing pro-Russian groups of influence that will implement Russian interests in Ukraine with access to "cheap" financial resources and energy technologies, energy supplies and energy. The stability of the gas transmission system and the United Energy System of Ukraine will also experience external influence, which will result in the suspension of programmes to integrate Ukraine's energy markets and systems with the European energy space

Figure 2 – cont.

"Positive transformation" scenario (it is based on ensuring the consistent and effective implementation of the country's development priorities, defined by the Constitution of Ukraine and the National Security Strategy of Ukraine, approved by the Decree of the President of Ukraine of 14 September 2020 No. 392, namely the irreversibility of Ukraine's European and Euro-Atlantic course)	➡	A full-fledged, highly competitive market environment in the energy sector is being introduced. A favourable investment environment is being created due to the availability of attractive energy markets for investment in Ukraine (technological modernisation, increased production and processing, introduction of new services and facilities). Mechanisms have been established to monitor the private sector's compliance with legal requirements for crisis responses, sustainability of the energy sector and energy security of Ukraine. The State's energy policy and the decision-making process of public authorities are becoming consistent and transparent, which builds confidence of market participants in the stability and predictability of the legal framework, and facilitates decisions on long-term large-scale investments

Source: Author's own elaboration.

Overall, energy import substitution is an important goal for Ukraine, given its dependence on energy imports. The development of renewable energy, energy efficiency, and diversification of import sources are key factors that can help Ukraine achieve this goal. The growing role of renewable energy and the reduction of energy consumption, which is responsible for a large share of imports, will allow Ukraine to reduce its dependence on foreign suppliers and ensure the stability of its energy system. Diversification of import sources, including cooperation with different countries and attracting the interest of new suppliers, will reduce political and economic risks. Finally, the development of energy infrastructure and regional energy self-sufficiency can help Ukraine ensure the sustainability of energy supplies and stimulate the development of local economies. The proposals under consideration, which include the development of renewable energy, energy efficiency, diversification of import sources, development of energy infrastructure and regional energy self-sufficiency, can help Ukraine achieve energy import substitution and ensure the country's energy security.

VI. Practical value of the research

The practical value of the research findings is that the SWOT-analysis of the energy sector of Ukraine made it possible to identify the most acute problems and threats that have a negative impact on the energy sector of Ukraine, and its integration into the European common energy system. Based on the results of this SWOT-analysis, three potential scenarios for the development of Ukraine's energy sector are proposed: a "no change" scenario (continuation of current trends and state of affairs); an "unfriendly influence" scenario (no systemic changes in energy policy combined with the escalation of aggression by the Russian Federation); and a "positive transformation" scenario (targeted efforts aimed at achieving the goals set out in this Strategy). The following possible ways of energy import substitution for Ukraine are suggested: development of renewable energy; development of energy efficiency; development of the own oil and gas industry; development of alternative energy sources; diversification of energy import sources; development of energy infrastructure; developing energy self-sufficiency in the regions. Thus, the practical significance of this study lies in the development of practical tools for analyzing the energy sector of Ukraine, and providing a number of recommendations for its future development in the context of its integration into the single European energy system.

VII. Conclusions

Thus, energy security is crucial for Ukraine for several key reasons. Ukraine is located between Russia and Europe, and has an important transit corridor for transporting energy, particularly natural gas, from Russia to Europe. This gives Ukraine a strategic role in the supply of energy to Europe, but also makes it vulnerable to possible restrictions or cuts in this transit. Ukraine is heavily dependent on energy imports, particularly natural gas and oil. Imports of energy resources make the country vulnerable to changes in global energy markets and political decisions of suppliers. In the past, Ukraine has faced problems with some energy importers, in particular Russia. Political conflicts and disputes between these countries may result in restrictions on the supply of gas and other resources.

Ukraine has significant potential to improve energy efficiency and develop renewable energy sources. Ensuring its energy security requires developing these areas to reduce dependence on imports. Ensuring a sustainable and

reliable supply of energy is essential for the country's economic development. Lack of energy, or its high cost, can negatively affect the competitiveness of businesses and the lives of citizens. Energy security is also important for national defense. Providing the necessary resources for the army and other critical infrastructure is of vital importance in the event of a conflict or threat. All of these factors make energy security extremely important for Ukraine, and the country is actively working on various measures to improve its energy resilience and independence.

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Emerging Clean Energy Choices in Canada's Net-Zero 2050 Transition: The Role of Nuclear in the Low Carbon and Clean Hydrogen Context

by

Rudiger Tscherning* and Jesse Dias**

CONTENTS

Abstract

The paper argues that nuclear energy could play a significant role in decarbonizing the production of low carbon hydrogen from natural gas feedstock with associated carbon storage, as part of a wider shift towards 'net-zero' in Canada's natural resources value chain. It examines regulatory readiness for small modular reactors in the oil, gas, and low-carbon energy sector of Canada's energy jurisdiction, and calls for the speedy design and development of a single 'go-to' regulatory framework for nuclear energy in Alberta.

* Rudiger Tscherning, Associate Professor, Faculty of Law & Research Fellow, School of Public Policy, University of Calgary (Canada); e-mail: rudiger.tscherning@ucalgary.ca; ORCID: https://orcid.org/0009-0005-1880-7085.

** Jesse Dias, Student-at-Law, Dentons Canada LLP, Calgary (Canada).

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Résumé

L'article soutient que l'énergie nucléaire pourrait jouer un rôle important dans la décarbonisation de la production d'hydrogène décarboné à partir de gaz naturel avec la conservation de carbone souterrain associé, dans le cadre d'une transition plus vaste vers la neutralité carbone dans la chaîne de valeur des ressources naturelles du Canada. Il examine l'état de préparation réglementaire des petits réacteurs modulaires dans le secteur du pétrole, du gaz et de l'énergie peu carbonée de la juridiction énergétique du Canada. Cet article appelle à la conception et au développement rapides d'un cadre réglementaire unique pour l'énergie nucléaire en Alberta.

Key words: regulation and business law; nuclear energy law; coal industry.

JEL: K32, K39

I. Introduction

International and domestic "Net-Zero 2050" climate and sustainability impulses are focusing the attention of the Canadian natural resources value chain of oil, gas, and mining operations on 'decarbonization'. Increasingly stringent calls for lower carbon life-cycle intensities of natural resources production, and the incremental increase of the cost of greenhouse gas pricing, will pose serious constraints to this high-emitting sector of the Canadian economy. For example, in November 2020 the federal government introduced the *Canadian Net-Zero Emissions Accountability Act*, which formalises Canada's commitment to a net-zero greenhouse gas emissions target by 2050. Aligned with this development, Canada's strengthened Climate Plan, released in December 2020, sets out details on an ambitious increase in the cost of the federal carbon price, increasing in annual increments of $15 from 2023 onwards, up to $170 by 2030. Presently it is $65 per tonne.

In 2021, the Supreme Court of Canada ruled that the federal government's greenhouse gas pricing regime was constitutionally valid on grounds of 'national concern', with the court noting that 'the only way to address the threat of climate change is to reduce greenhouse gas emissions'.[1] Most recently, the federal government has announced a new cap on greenhouse gas emissions from the oil and gas sector, which it is in the process of implementing.

Sustainably produced hydrogen is actively being discussed as a low carbon clean energy carrier to reduce reliance on carbon intensive diesel for mining

[1] Supreme Court of Canada, *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

operations and industrial processes (Canadian Hydrogen Strategy, 2020). There are also advanced discussions on producing hydrogen via electrolysis using clean electricity and heat generated from nuclear energy (including small modular reactors (hereinafter: SMRs). As part of a novel nuclear, carbon and hydrogen alignment advanced in this paper, SMR technology could play a significant role in decarbonizing the production of hydrogen from natural gas with associated carbon capture and storage technologies (hereinafter: CCS/CCUS), to produce low carbon hydrogen (also known as 'clean' or 'blue' hydrogen). In light of the opportunities for using nuclear energy in Canada's natural resources sector, the paper identifies the potential for a shift towards SMR deployment in Western Canada, specifically within the oil, gas, and mining sectors. Using Canada's energy jurisdiction of Alberta as a point of reference, the paper explores the role of new nuclear energy within an ongoing shift towards net-zero in the natural resources value chain. It concludes that (given the jurisdictional complexities of Canada's regulation of nuclear energy) the emerging legal and policy framework for SMR technology deployment will not only require an 'energy systems' approach, but a concerted effort at aligning regulatory matters between the federal and provincial jurisdictions. This is due to the constitutional complexities of Canada's regulation of nuclear energy (federal jurisdiction) and the provincial jurisdiction over the natural resources sector and the generation of electricity. Although a thorough exploration of these constitutional complexities is beyond the scope of this paper, they serve as important context to conclude that there is, as yet, no single 'go-to' regulatory regime to expedite the deployment of SMRs in Alberta's energy sector in order to advance the province's low-carbon energy future through the scaling-up of a clean hydrogen economy.

II. Aligning nuclear, carbon and hydrogen

The discussion of deploying nuclear energy generation in Canada's natural resources sector is not new and Canada's oil and gas province, Alberta, was in advanced stages for a Bruce Power nuclear power plant as recently as 2011. Literature has sporadically linked the potential of nuclear technologies and oil sands production in Alberta.[2] In a 2015 paper, the production of hydrogen

[2] Romney B. Duffey, S. Kuran and A. Miller, 'Application of Nuclear Energy to Oil Sands and Hydrogen Production' in IAEA, Application of Nuclear Energy to Oil Sands and Hydrogen Production (IAEA-CN-164-5S11); Hernan Carvajal-Osorio, 'Nuclear Power in Heavy Oil Extraction and Upgrading: A technical overview of the use of nuclear plants as a heat source in the oil industry' (1989) 3 IAEA Bulletin 50.

from steam methane reforming of natural gas, based on nuclear energy, was given detailed attention, albeit in a technical context.[3]

The paper sets out to examine the deployment of SMRs in Canada's natural resources sector. To start, the Canadian Minerals and Metals Plan (2019) discusses SMRs in the context of reducing greenhouse gas emissions in mining operations, increasing energy reliability and reducing costs, in particular in remote mining locations where SMRs could reduce dependence on diesel-fuelled electricity and heat generation. Canada's Hydrogen Strategy notes the potential of SMRs in the context of distributed hydrogen production. Low carbon hydrogen that is produced using electricity and heat from SMR generation could, in turn, displace fossil fuels currently used in the exploration, mining, and refining processes of the natural resources value chain, as well as a fuel to decarbonize the transportation of natural resources.

Alberta has been producing hydrogen for purposes of upgrading bitumen from oil sands production processes since the late 1960's.[4] The predominant process of producing hydrogen, using natural gas as a feedstock and steam methane reforming technologies, results in approximately 27 Mt CO_2e/yr, or 4% of Canada's total greenhouse gas emissions.[5] Without the deployment of carbon storage technologies, the resulting CO_2, as a by-product of hydrogen production, is released into the atmosphere. This raises the critical question of how emissions from hydrogen production are managed in the context of Canada's commitment to a Net-Zero 2050 economy. As a result, carbon storage technologies are an integral part of the future of a 'clean' hydrogen economy in Canada.[6] Alberta's 2021 Hydrogen Roadmap notes that to 'realize a clean hydrogen economy, CCUS needs to be in place to facilitate cost-effective, large-scale production'.[7]

One of the key challenges to the scaling-up of blue hydrogen production, as the Alberta Hydrogen Roadmap notes, is the fact that the anticipated rates of CO_2 capture may not yet comply with emerging low carbon hydrogen thresholds, such as the one set by the European-based CertifHy guarantee of origin programme. The rate of CO_2 capture is critical to CCUS development. As Howarth and Jacobson conclude, CO_2 capture is very energy intensive and 'to capture more carbon dioxide takes more energy, and if the energy comes

[3] G.L. Khorasanov, V.V. Kolesov and Korobeynikov, 'Concerning Hydrogen Production Based on Nuclear Technologies' (2015) 1(2) Nuclear Energy and Technology 126.

[4] The Canadian Association of Petroleum Producers (CAPP), A History of Alberta's oil sands, undated.

[5] David B. Layzell, 'Towards Net-Zero Energy Systems in Canada: A Key Role for Hydrogen' (2020) 2(3) Transition Accelerator Reports 16.

[6] Rudiger Tscherning, 'Developing a Canadian Clean Hydrogen Economy: Maximising the Export Potential' (2021) 2 Oil, Gas & Energy Law (OGEL), www.ogel.org/article.asp?key=3965.

[7] Alberta Hydrogen Roadmap, November 2021, 46.

from natural gas, the emissions of both carbon dioxide and fugitive methane emissions from this increase in such proportion as to offset a significant amount of the reduction in carbon dioxide emission due to carbon capture'.[8] This raises the central question of this paper, namely what role can nuclear energy, specifically new-built SMR technology, play in providing a net-zero opportunity to the Canadian natural resources value chain as part of a nuclear, carbon and hydrogen alignment? Alberta is home to one of only two commercial blue hydrogen operations in the world. The paper anticipates an increased attention on SMR's role in Alberta's natural resources value chain based on: recent investment announcements for additional blue hydrogen projects, an ambitious hydrogen strategy centred on the aggressive expansion of CCUS infrastructure, and the announcement of funding by the Alberta government to study the role of SMRs in oil sands-focused steam production.

As noted, there is no single 'go-to' regulatory regime in Alberta dedicated to the deployment of SMRs in the energy sector. Accordingly, this paper argues that as part of a wider focus on the clean energy transition in Alberta, nuclear energy should take a central role in an 'energy systems' regulatory and policy framework, where all available or future energy sources (renewables, nuclear, and fossil fuels) are drawn upon to advance the clean energy transition.[9] By pursuing a systems approach, and advancing the future deployment of nuclear energy as part of it, it may be more feasible to design and develop a regulatory framework for nuclear energy in Alberta. Without taking a whole energy systems approach, any nuclear regulatory regime will have to navigate two key hurdles. One, as noted, the jurisdictional complexities of nuclear energy in Canada, and two, the multiple regulatory frameworks for oil and gas development, electricity generation, the capture and storage of CO_2, which may all see the deployment of new nuclear energy technologies going forward.

Indications of potential SMR deployment in Alberta are further underlined when one considers that the lifecycle emissions of blue hydrogen consist of both external and internal emissions.[10] *External emissions* relate to the production of natural gas and the transport of natural gas feedstock for the initial hydrogen production. *Internal emissions* are generated through the combustion of natural gas that is necessary to supply heat and pressure for the steam methane reforming process. Whilst CO_2 capture from the flue gases for steam/pressure generation

[8] Robert W. Howarth and Mark Z. Jacobson, 'How Green Is Blue Hydrogen?' (2021) 9(10) Energy Science & Engineering 1.

[9] For a helpful overview of the theory of energy systems and systems thinking in the clean energy policy context, see Fiona Robertson Munro and Paul Cairney, 'A systematic review of energy systems: The role of policymaking in sustainable transitions' (2020) 119 Renewable and Sustainable Energy Reviews 109598.

[10] Howarth and Jacobson (n 8). See also generally, Khorasanov (n 3).

of steam methane reforming is technically possible, it is not presently employed (i.e., there is currently no *secondary* carbon capture and storage). Efforts to reduce greenhouse gas emissions, resulting from the energy cost necessary to run the carbon storage operations to treat this flue gas, may open up a future opportunity for nuclear energy, especially if one considers the energy intensity of capturing and permanently storing carbon underground.

CO_2, released as a by-product of steam methane reforming of natural gas, requires capture (*primary* carbon capture and storage). If the electricity grid, like in Alberta, is predominantly based on natural gas and coal (the latter phased out by 2023), then the electricity generation required to power the primary capture process of compression as well as the transportation of the CO_2 to the site of CCUS injection, generates further CO_2 emissions, which are added to the CO_2 emissions associated with the energy required to inject the CO_2 into underground storage. If the carbon emissions from natural gas at the feedstock, internal emissions, primary carbon capture and storage, (future) secondary carbon capture and storage, and the electricity generation stage of blue hydrogen production are all replaced using zero carbon nuclear energy generated by SMR technology, then the *cumulative* lifecycle carbon intensity of blue hydrogen production could be drastically reduced. The increased focus on hydrogen's role in decarbonizing energy-intensive sectors of the Canadian economy, only serves to underscore the importance of deploying nuclear energy to produce hydrogen for the value chain of natural resources. This is especially relevant given that Canada's recently reformed environmental impact assessment process for energy project approvals (examined further below) is highly sensitive to how a proposed project may affect Canada's ability to meet domestic and international climate change and sustainability commitments.

III. An effective regulatory framework

What role, then, can Canada's regulatory framework for nuclear energy play in order to expedite the deployment of SMR technologies in the provincial natural resources value chain, such as in Alberta? Owing to the history of nuclear (atomic) energy development in Canada, and the federal jurisdiction over nuclear materials and activities in Canada, as enshrined in the constitution, the Canadian Nuclear Safety Commission (hereinafter: CNSC) acts as Canada's sole and dedicated nuclear energy regulator. This is the first reality of nuclear energy development in Canada, in that the CNSC is the federal body with ultimate regulatory oversight over nuclear energy. A second critical context to keep in mind is that the CNSC has extensive experience of regulating

large nuclear energy projects in Ontario, New Brunswick and (historically) Quebec for the generation of electricity. The question of designing an effective regulatory framework for SMR deployment, in the context of Alberta's energy sector, thus raises two key issues. One, a regulatory regime in an entirely 'new nuclear' jurisdictions[11], and two, a regime for nuclear energy that must operate within an established and complex regulatory landscape service a multi-faceted energy sector (which may or may not involve the generation of nuclear energy for electricity and/or heat, and steam). Unlike the gradual development of Canada's regulatory regime for nuclear electricity generation in, for example, Ontario, the Alberta scenario is entirely new and without precedent and comes at a time of heightened focus on SMR deployment to achieve Canada's Net-Zero 2050 goals.

As part of a general shift towards new nuclear energy, the CNSC has undertaken extensive steps so that it is ready 'to accept and evaluate' licensing applications of SMR technologies.[12] For example, Canada's Small Modular Reactor Action Plan (December 2020) identifies actions on developing policies and standards in support of the deployment of SMRs as a priority. Ongoing regulatory changes have focused on increasing 'regulatory efficiency', in particular on nuclear safety, increasing engagement with communities and Indigenous peoples, and fostering international collaboration (especially with the USA and UK regulators).

At a high level, the CNSC regulates in a 'risk-informed' manner and permits, where possible, the use of a 'graded approach' pursuant to Section 24 of the *Nuclear Safety and Control Act* for nuclear licences applications. The graded approach is 'a method in which the stringency of the design measures and analyses applied are commensurate with the level of risk posed by the reactor facility. Designs using the graded approach shall demonstrate that the safety objectives and the requirements... are met'.[13] The CNSC applies its technology neutral requirements in a risk-informed manner, placing primary responsibility for nuclear safety on the licensee.[14]

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[11] Feasibility of Small Modular Reactor Development and Deployment in Canada, Ontario Power Generation (OPG), Bruce Power, NB Power and SaskPower for the governments of Ontario, New Brunswick and Saskatchewan (2021).

[12] Kevin W. Lee, 'The Canadian Nuclear Safety Commission's Readiness to Regulate Small Modular Reactors' (2020) 9(1) CNL Nuclear Review 99, 99.

[13] Canadian Nuclear Safety Commission, Design of Small Reactor Facilities, RD-367, June 2011, Graded Approach, 3.

[14] Canadian Nuclear Safety Commission, 'Information Session on Regulatory Readiness: Enhancing Efficiency and Effectiveness in the Regulation of Small Modular Reactor Projects,' CMD 21-M5, January 2021, Slide 18, available at https://www.nuclearsafety.gc.ca/eng/the-commission/meetings/cmd/pdf/CMD21/CMD21-M5.pdf (accessed 18 July 2023).

In 2014, the CNSC issued a specific regulatory document on SMR technology, RD-367, which sets out that SMRs 'shall be designed and operated in a manner that will protect the health, safety, and security of persons and the environment from unreasonable risk'.[15] As part of the CNSC's radiation protection safety objective, the SMR facility 'shall be designed to ensure that...radiation exposures within the reactor facility are kept below the limits prescribed in the *Radiation Protection Regulations* and as low as reasonably achievable (ALARA)'.[16]

In response to increased interest in SMR technologies, in 2016, the CNSC published a discussion paper on Small Modular Reactors: Regulatory Strategy, Approaches and Challenges (DIS-16-04). This document, together with extensive stakeholder consultations undertaken by the CNSC (What We Heard Report), observed a general consensus that 'SMRs do not pose an insurmountable challenge to existing regulatory requirements in Canada'.[17] The consultation did, however, identify a number of regulatory modifications that the industry urged the CNSC to undertake so as to address the novel nature of SMRs. This included amendments to regulations, particularly to the *Nuclear Security Regulation* on site security provisions by design measures.[18] The need for further clarity on the application of the graded approach as well as the risk-informed approach to SMR designs was also identified by the industry, as was a clarification on the SMR licensing process for 'first of a kind' (hereinafter: FOAK) reactors.[19]

Consultations on the CNSC's proposal to amend the *Nuclear Security Regulation* closed in June 2021 and remain under consideration by the CNSC. In the context of SMR technologies, the proposed amendments would remove current prescriptive requirements on nuclear security requirements, and would replace these with provisions for 'performance-based regulatory approaches' designed 'to provide flexibility for licensees to introduce new technologies, processes and procedures'.[20] Concerns on how the graded approach would apply to novel SMR technologies, and how the CNSC may consider FOAK licensing applications, were considered by the CNSC, which noted that 'additional discussions are necessary to further reinforce how the graded approach may be

[15] Canadian Nuclear Safety Commission (n 13) 3.

[16] Ibid., Radiation protection safety objective, at 4. See also Lee (n 12) 100.

[17] Canadian Nuclear Safety Commission, DIS-16-04, Small Modular Reactors: Regulatory Strategy, Approaches and Challenges, What We Heard Report, September 2017, at 2. See also Lee (n 12) 102.

[18] Ibid., Site security provisions, 9.

[19] Ibid., Greater clarity on licensing of SMRs 11.

[20] Canadian Nuclear Safety Commission, Proposal to Amend the Nuclear Security Regulation, Discussion Paper DIS-21-02, April 2021, a3.

applied in the development of safety cases for SMR projects'.[21] A new regulatory document, REGDOC-1.1.5 (August 2019) sets out additional guidance on how to apply the graded approach. A licensing application 'is to address CNSC requirements in a manner that is commensurate with the novelty, complexity and potential for harm that the activity represents'.[22]

In order to expedite the deployment of SMR technologies in Canada, and to make the regulatory process more attractive to novel SMR vendors, the CNSC offers an optional 'vendor design review process' (hereinafter; VDR). The primary objective of the VDR is to provide feedback and to inform a vendor of the design's acceptability under Canada's regulatory requirements. Strictly separated from the CNSC licensing process, the review offers an 'early identification and resolution of potential regulatory and technical issues in the design process' before the formal licensing process commences.[23] The VDR process also acts as an important 'measure of early assurance'[24] to the public that new nuclear technology will meet Canadian regulatory requirements.

Canada's SMR Roadmap 2018 noted that the modernization of Canada's federal (environmental) impact assessment regime should be aligned with initiatives to expedite the deployment of SMRs. Recent reforms on how environmental impacts of energy projects are assessed, pursuant to the new *Impact Assessment Act* regime, make an important contribution to regulatory preparations for future SMR applications that are classified as 'designated' facilities pursuant to Section 27 of the *Physical Activities Regulation* (that is, for example in the context of SMR development in Alberta, the proposed activity is not located within a currently licensed facility, and the reactors have a combined thermal capacity of more than 200 MWth). The new regime has made a number of changes to the regulatory environment for nuclear energy projects. From a practical perspective, the most significant change to note is a re-allocation of regulatory powers away from the CNSC. Under the previous regime, the CNSC acted as the sole regulator to determine environmental impacts of nuclear facilities. This power is now with a new agency called the Impact Assessment Agency of Canada (hereinafter: IAAC). In addition, final project approval (based on the recommendation report of the Agency) is now a political one, with the federal government issuing the relevant decision. Conditions of the decision may be formulated by the Minister as conditions

[21] Canadian Nuclear Safety Commission (n 17) 2.

[22] Canadian Nuclear Safety Commission, Supplemental Information for Small Modular Reactor Proponents, REGDOC-1.1.5, August 2019, Development of the Licence Basis for an SMR Facility, at 17.

[23] Ibid., The role of the VDR process, 20.

[24] Canadian Nuclear Safety Commission, Pre-Licensing Review of a Vendor's Reactor Design, REGDOC-3.5.4, November 2018, Benefit to the public, 4.

that are to be included in the Section 24 licensing decision.[25] The goal of the new regime is to offer a single process that follows the assessment requirements of both the IAAC and the CNSC, on the basis of 'one project, one review'.[26] As part of this, the CNSC and the IAAC share important roles and responsibilities (e.g. powers related to information, notification, public engagement, participation, and Crown and Indigenous consultation), and representatives of the CNSC are appointed as members of an IAAC review panel.

The CNSC plays an important role at the five stages of the IAAC process. One, commencing with a planning phase, the CNSC participates in the engagement with both public and Indigenous groups through respective participation, engagement and partnership plans. Two, the CNSC also plays a critical role in developing the terms of reference for the integrated review panel, in particular in defining the Section 24 licence application which the review panel (as the CNSC) will make. Three, the formal impact assessment phase consists of the appointment of review panel members (with a cross-appointment of a minimum of one CNSC member to the IAA panel). The panel holds public hearings on both the impact assessment and on the applicable nuclear licence consideration. Four, the integrated review panel then prepares an impact assessment report, which is then referred to the federal cabinet for a 'public interest' determination. Five, if the Minister issues an approval decision, the review panel (as the CNSC) makes the licensing decision and any conditions specified by the Minister form part of the nuclear licence.

Another change is that the recent reforms have significantly expanded the concept of the 'effect' of a proposed project beyond its narrow environmental impacts.[27] The regime now considers both the positive and negative social, health and economic impacts of a proposed SMR project, and takes into account a number of prescribed factors. In the discussion of a closer alignment of nuclear, carbon and hydrogen, the most pertinent factors relate to mitigation measures, which are technically and economically feasible, to address the effects of malfunctions and accidents that may occur in connection with a project. The impact of the project on climate change is also essential, as is the extent to which the project may contribute to sustainability. Further pertinent issues are economic considerations and considerations of 'alternatives to' the proposed SMR project.

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[25] Canadian Nuclear Safety Commission, Impact Assessment Act, September 2020, Slide 9. available at: https://www.nuclearsafety.gc.ca/eng/pdfs/impact_assessment_act_presentation_2020_en.pdf (Accessed 18 July 2023).

[26] Ibid., Slide 14.

[27] David V. Wright, 'The New Federal Impact Assessment Act: Implications for Canadian Energy Projects' (2021) 59(1) Alberta Law Review 67.

IV. Future incentives and conclusions

The production of blue hydrogen will drastically have to be scaled-up in order to support future demand for low carbon hydrogen, ammonia, liquefied natural gas (hereinafter: LNG), marine fuel or mining exports from Canada. To achieve this objective, a concerted nuclear, carbon and hydrogen alignment, as proposed in this paper, will play a critical role towards achieving Canada's Net-Zero 2050 commitments. Already there are indications that Canada's focus on producing goods using low carbon hydrogen may improve the access of its exports to 'carbon conscious' markets such as the European Union. This discussion is driven by a renewed focus on 'carbon border adjustment mechanisms', which may be imposed at the point of import to take account of the carbon-intensity of goods produced in jurisdictions with lower climate regulation. Presently, there are no uniform methods for calculating the carbon intensity of produced goods, but as international standards on low carbon intensity are implemented, it can be expected that Canadian exports will increasingly be focused on low carbon natural resources exports. In turn, this will increase reliance on hydrogen, and with it the potential for nuclear energy in hydrogen production. Such a development will further cement the nuclear option, within the context of low carbon and clean hydrogen, and act as a strong incentive to investors.

To this extent, the December 2021 announcement by Ontario Power Generation (OPG) stating that it will work with GE Hitachi Nuclear Energy to deploy one SMR at Darlington, and most recently, the Ontario provincial government's announcement that OPG will build three additional SMRs at Darlington (for a total of four SMRs), sends very encouraging 'SMR impulses' in the direction of Western Canada.[28] For example, a March 2021 Feasibility Study on SMR Development and Deployment in Canada noted that the federal government, together with provincial governments, should provide funding to cost-share with the industry on SMR demonstration projects, and to implement risk-sharing measures to incentivize commercial deployment of SMRs. The study also noted that considerations should be given to how an engagement with Indigenous peoples and communities on nuclear energy can be advanced. If SMR deployment in Alberta is indeed to become a reality, additional policies and consultation practices must be developed as part of a 'front-loaded' engagement pursuant to the new impact assessment regime.

[28] Ontario Power Generation, Darlington New Nuclear, Ontario is Leading North America's Clean Energy Future, 7 July 2023 available at: https://www.opg.com/powering-ontario/our-generation/nuclear/darlington-nuclear/darlington-new-nuclear/ (accessed 8 July 2023).

Given the importance of the natural resources sector to the Canadian economy, deploying SMRs in a low carbon and clean hydrogen economy will make sizable contributions to achieving Canada's net-zero commitments. Bringing SMRs to Western Canada, and the future lessons and experiences gained from such a step, will also play an important role in ongoing efforts to decarbonize the global natural resources sector. Through the responsible deployment of SMRs in a future clean energy 'system' in Alberta, the natural resources sector could make a significant contribution to achieving Canada's Net-Zero 2050 goals. At the same time, there is (as yet) no single 'go-to' regulatory regime to expedite the deployment of SMRs in support of Alberta's low-carbon energy future. Much can be gained from the expertise and credibility of the CNSC on nuclear regulation in Canada. At the same time, important work lies ahead on the swift design and development of a regulatory framework for nuclear energy in Alberta's energy sector, which will require a collaborative effort by all levels of government.

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EU Energy Solidarity as a Way of Implementing Just Transition in Energy Policy

by

Robert Zajdler*

CONTENTS

Abstract

The principle of EU energy solidarity, regulated by Article 194 of the Lisbon Treaty, has created a new dimension of energy sector developments. Initially, it was treated as an abstract, purely political concept with no particular normative significance. However, the CJEU judgment in the OPAL case established energy solidarity as a principle of EU law, deriving, *inter alia*, from the principle of justice. The concept of *just* transition, based on the same foundations of justice, creates directions for socio-economic transformation based on a sustainable and low-carbon economy.

* Robert Zajdler, dr hab., Associate Professor, Faculty of Administration and Social Sciences, Warsaw University of Technology (Poland); e-mail: robert.zajdler@pw.edu.pl; ORCID: https://orcid.org/0000-0002-4258-8979.

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Energy solidarity is, in fact, a way of implementing the assumptions and directions of the development of *just* transition, based on normative premises ensuring energy security, economic competitiveness and sustainable development.

Résumé

Le principe de solidarité énergétique de l'UE, régi par l'article 194 du traité de Lisbonne, a donné une nouvelle dimension aux développements du secteur de l'énergie. Initialement, il était considéré comme un concept abstrait, purement politique, sans signification normative particulière. Cependant, l'arrêt de la CJUE dans l'affaire OPAL a fait de la solidarité énergétique un principe du droit de l'UE, découlant, entre autres, du principe de justice. Le concept de transition juste, basé sur les mêmes fondements de justice, crée des orientations pour la transformation socio-économique basée sur une économie durable et à faible émission de carbone. La solidarité énergétique est en fait un moyen de mettre en œuvre les hypothèses et les orientations du développement de la transition juste, sur la base de prémisses normatives garantissant la sécurité énergétique, la compétitivité économique et le développement durable.

Key words: energy solidarity; just transition; internal market; energy policy; sustainable development; competition.

JEL: K230

I. Introduction

Just transition refers to a systemic approach to economic transformation that ensures a transition to a low-carbon economy in a sustainable manner, minimising negative impacts on society and the environment. *Just* – as in 'fair' – transition is a process aimed at changing the socio-economic model, towards one where political, social and economic aspects are taken into account. This holistic approach has a multifaceted dimension. From the point of view of the **geographical scope** of influence, one can speak of a global, regional, national or local dimension. Each has its own conditions, goals, and means of achieving them. Although global strategy sets certain directions, national and regional measures, such as those within the European Union, are key. Within these frameworks, conditionality is important, because it determines what needs to be achieved and by what means. National specifics depend on a number of variables, namely the level of economic development, the structure of the economy, the shape of the labour market, and social and environmental challenges. The sector in which the economic activity takes

place is also important, as its operation is based on specific conditions and therefore the determinants of its functioning and development aimed at a just transition may be different.

The development of the energy sector in the European Union (EU)[1] is also characterised by such special conditions.[2] The quest for clean and safe energy, as well as consumer protection, has been the rationale behind the development of EU policy for the energy sector since the beginning of the current EU. Energy solidarity was neither explicitly stated in binding EU acts, nor in practice as a principle of EU energy law or policy. The Lisbon Treaty uses the concept of a "spirit of solidarity between Member States", which was seen as a political goal. Importantly however, the Court of Justice of the European Union (hereinafter: CJEU) ruled in the *OPAL case* (C-848/19P) that solidarity is an underlying legal principle of EU energy policy. This ruling has significantly changed the perception of this principle, also having relevance to the implementation of the *just* transition concept.

The aim of this article is to confirm the claim that EU energy solidarity is a way of implementing the *just* transition concept. The determinants of energy solidarity, that is, security, competition or sustainability, govern how it is implemented. In order to achieve its goal, this article is divided into four parts. The first introduces the concept of *just* transition. In the second, the determinants of *just* transition in EU energy policy are outlined. The third part presents the concept of energy solidarity, based on the EU system framework. In the fourth part, the determinants of EU energy solidarity and their relevance from a *just* transition perspective are noted. The results of these analyses are summarized in the conclusions.

[1] The European Union (EU) was created by the Maastricht Treaty, which entered into force on 1 November 1993. It is the result of the transformation of the European Economic Community (EEC), which had been created by the Treaty of Rome in 1957, and subsequently renamed the European Community (EC). For the sake of simplicity, this article adopts a uniform name encompassing all iterations of this international organisation – "European Union" or "EU", without distinguishing between the changes that have occurred in the historical process. These issues are important, but not of major relevance to this paper.

[2] Robert Zajdler (2020), *The role of capacity in the EU internal electricity market in the context of the General Court's judgment of 15 November 2018 in case T-793/14 2020 Tempus Energy* (2020) 143 Energy Policy; Dorota Chwieduk and Robert Zajdler, 'Clean energy transition in NEB' in Robert Zajdler (eds), *Solutions for Modern Society of the Future. The New European Bauhaus Manual* (WUT Publishing House 2023).

II. The essence of Just Transition

There are many definitions that refer to different aspects of *just* transition. By analyzing them, one may be tempted to identify four key elements around which conceptual models of *just* transition are built – public support, funding, social support, economic benefits.

Public support means creating a legal and policy framework for targeted actions. The creation of this framework takes place within several areas: industrial policy, including energy policy in particular, employment policy, education policy, or financial policy. **Industrial policy** focuses on supporting and promoting the development of low-carbon economic sectors. This can include incentives for companies to invest in sustainable technologies, support for research and development, and the promotion of production patterns with lower environmental impact. Within, **energy policy** provides mechanisms to support the energy transition – the move away from fossil fuels, towards more environmentally and climate-friendly ways of producing, transporting and consuming fuels and energy.

Energy policy includes targets for renewable energy sources, energy efficiency, reduction of greenhouse gas emissions, and support for innovative low-carbon technologies. **Employment policies** ensure that the transition does not lead to massive job losses. **Education policy** focuses on promoting knowledge of sustainability, low-carbon technologies and environmental protection. **Financial policy** means financial support from the state to stimulate investment in low-carbon technologies and economic transformation projects. These elements of public support are essential for the successful implementation of *just* transition that takes into account the whole economy, and aims to achieve sustainable development and environmental protection. All this requires the creation of appropriate regulations at regional, national or European Union level in order to support sustainable development, and reduce the impact of carbon-intensive sectors on the functioning of the economy and societies.

Dedicated funding for equitable transformation means allocating specific funding or resources to support the transformation of the economy towards sustainable, low-carbon development, which minimizes negative impacts on workers and communities that depend on carbon-intensive sectors. This is important because transformation, and the fight against climate change, require significant investments in new technologies, infrastructure, vocational training and social support. Appropriate allocation of financial resources for related purposes helps to accelerate the transition process, increase the efficiency of relevant actions, and balance environmental goals with the protection of

communities and jobs. This can include a variety of funding models, such as: public funds; support from international funds; financial mechanisms such as fees and taxes that offset the final cost of a good or service taking into account its climate impact; or public-private partnerships. The latter are collaborations between the public and private sectors that allow funding to be focused on investments related to low-carbon technologies and social projects.

Social support refers to the formation and engagement of strong, diverse coalitions (alliances) between different stakeholders meant to realize equitable economic and social transformation. Such coalitions bring together diverse groups and organizations that share common goals and aspirations. These can take the form of: cross-sectoral partnerships, inclusion of workers and local communities, or cooperation at regional and international levels.[3]

Economic benefit means building diversified economic opportunities, that is, seeking and promoting diverse economic opportunities for companies investing in the transformation towards a sustainable model. It can consist of introducing innovative technologies and developing economic sectors relevant to *just* transition – renewable energy, energy efficiency, recycling, electromobility and sustainable agriculture. It can consist of supporting entrepreneurship and innovation, by encouraging the development of entrepreneurship and innovative solutions. This can be combined with the development of local initiatives. Local communities may have a variety of resources and potential that can be harnessed in the transformation process.[4] Economic benefits can come from the development of projects by companies that ensure a collaboration with local communities, and/or local entrepreneurs. This means seeking diverse and sustainable economic development pathways, which minimize the negative impacts of transformation, as well as balance economics with environmental and climate protection.

[3] Interesting aspects of social contracts, see: Raphael J Heffron and Louis De Fontenelle 'Implementing energy justice through a new social contract' (2023) 41(2) Journal of Energy & Natural Resources Law 141; Aspect related to education: Raphael J Heffron and others, 'Pathways of scholarship for energy justice and the social contract' (2023) 41(2) Journal of Energy & Natural Resources Law 211.

[4] Interesting aspects of the business approach model, see: Maciej M Sokołowski and Madeline Taylor, 'Just energy business needed! How to achieve a just energy transition by engaging energy companies in reaching climate neutrality: (re)conceptualising energy law for energy corporations' (2023) 41(2) Journal of Energy & Natural Resources Law 157; Raphael Heffron and others, 'The identification and impact of justice risks to commercial risks in the energy sector: post COVID-19 and for the energy transition' (2021) 39(4) Journal of Energy & Natural Resources Law 439.

III. The importance of energy for just transition

Therefore, *just* transition is an umbrella term for a certain model of socio-economic transformation, including the energy sector. The mere fact that the concept is relatively recent, both in legal acts and policy documents, does not mean that this way of thinking and acting has been alien to the European Union.

An analysis of historical documents shows that the development directions of the current EU are rooted in a number of documents dating from the 1960s and 1970s, where the directions of EU development were noted.[5] They pointed to the need for clean and safe energy, consumer protection, or building the communities international position.[6] The foundations for the EU's current *just* transition efforts began in the late 1980s and early 1990s, with the creation of the legal basis for environmental and climate protection action within the Treaty, and intensified after the Lisbon Treaty came into force. The energy transition currently underway is a natural continuation of these processes. A certain model of thinking about transformation, including energy transformation, is closely linked to the EU's model of socio-economic development. Sensitivity to social and environmental aspects has been present in its thinking, in many cases practically from the beginning of the current EU.

In this context, the question thus arises as to what has changed. First, the distribution of burdens on different aspects of socio-economic activity has changed. Second, environmental-climatic aspects have gained in importance as a key aspect of the direction of socio-economic development. The key directions

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[5] Terence Daintith and Leigh Hancher, *Energy Strategy in Europe: The Legal Framework* (De Gruyter 1986) 148–149; Kim Talus, *EU Energy Law and Policy, A Critical Account* (Oxford University Press 2013); N Green, 'The implementation of Treaty Policies: the energy dilemma' (1983) 8 EL Rev; Marcin Nowacki, *Prawne aspekty bezpieczeństwa energetycznego w UE* (Wolters Kluwer Polska 2010); Robert Zajdler, (2019), *Electricity and natural gas market network codes in the legal order of the post-Lisbon European Union, Publishers* (WUT Publishing House 2019).

[6] Bartłomiej Nowak, *Energy Policy of the European Union. Chosen legal and political aspects and their implications for Poland* (Wydawnictwa Akademickie i Profesjonalne 2009); Barry Barton and others, *Energy Security – Managing Risk in a Dynamic Legal and Regulatory Environment* (Oxford University Press 2004); Mirosław Pawełczyk (eds), *Współczesne problemy bezpieczeństwa energetycznego. Sektor gazowy i energetyczny* (Ius Publicum 2018); Christopher Jones (eds), *EU Energy Law Volume I: The Internal Energy Market – The Third Liberalisation Package* (3rd edn, Edward Elgar Publishing Limited 2010); Jones, (eds), *EU Energy Law Volume XI: The Role of Gas in the EU''s Energy Union* (1st edn, Edward Elgar Publishing 2017); Leigh Hancher and Francesco Maria Salerno, 'Energy Policy after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012) 368; Hancher and Adrien de Hauteclocque, 'Manufacturing the EU Energy Markets, The Current Dynamics of Regulatory Practice' (2010) 11(3) Competition and Regulation in Network Industries 307.

of this change were initiated in a comprehensive EU policy – the **European Green Deal**.[7] Its strategic objective was to implement the UN 2030 Agenda for Sustainable Development, under the 5 goals (people, planet, prosperity, peace, partnership), to strengthen international action on climate change, and to facilitate EU leadership in this aspect. This is the EU's horizontal strategy aiming to create a zero-carbon economy by 2050. Within, actions should be taken primarily in the areas of: creating ambitious climate targets for 2030 and 2050; creating a regulatory framework to ensure the provision of clean, affordable and secure energy; preparing industry for a circular economy; increasing energy efficiency and energy savings in construction in order to move towards sustainable and intelligent mobility; creating a fair, healthy and environmentally friendly food system ("from farm to fork"); protecting and restoring ecosystems and biodiversity; as well as ensuring zero emissions for a non-toxic environment.

Exporting such a thinking model to other countries outside the EU, including other continents, is also part of the European Green Deal. This "exportation" is supposed to be a certain model for the development of the EU, and a suggestion of what direction other countries might take, for instance, African States. Its adoption is to be combined with EU support for such processes. This kind of thinking raises the issue of what *just* transition models actually are. For it is not a policy that can be "brought in the backpack", but must be a natural part of the socio-economic evolution of local communities. Hence, the discussion takes place in terms of *just* transition models, and is only indirectly relevant for the purposes of this article. It is relevant to the extent that, regardless of the locally adopted solutions, *just* transition must be the result of a deliberate and socially accepted change and requires solidarity. Instead, the aim of this article is to show that the principle of EU energy solidarity is, in fact, a means of realizing *just* transition, which now forms the framework for its application in practice.

What emerges from the above is a picture of a multifaceted approach to so-called "*just* transition". The social aspect of transformation has been taken into account by the EU since its inception. Historically, the essence of the EU is based on strengthening the role of society in the integration process. A certain additional element was the aspect of transformation, which includes climate-environmental aspects, which developed since the early 1980s and gained great importance in recent years. A *just* transition is, in fact, an increased sensitivity to certain aspects within the following socio-economic

[7] Francesca Colli, *The EU's Just Transition: three challenges and how to overcome them, European Policy Brief* (Egmont Institute 2020) <www.jstor.org/stable/resrep24705> accessed 5 September 2023; Heffron 'Energy law for the next generation, towards 2030 to 2050' (2023) 41(2) Journal of Energy & Natural Resources Law 131.

changes. It is defining a certain set of designations separately, and directing further socio-economic development towards strengthening in this direction. The mechanism for achieving these goals in energy is the principle of EU energy solidarity, which is both the heart and the brain of these changes.

A key industry for *just* transition is precisely the energy sector, due to its socio-economic impact, but also because it is one of the main sources of greenhouse gas emissions. Both the production of electricity and the use of fuels in the economy cause emissions of GHGs and negatively affect the environment and human health. Its transformation towards low-carbon energy sources, energy efficiency and distributed generation is the direction of transformation.

However, the impact of this sector is not only on climate, but also other aspects of the environment, namely soil, water, air, biodiversity, noise or landscape. In each of these, there is an environmental impact of energy, which is, in many areas, negative as the damage it generates causes environmental degradation. However, continued energy production is a necessity, which implies the so-called economic use of the environment. Hence, the essence of *just* transition in the energy sector is to strike the right balance and create mechanisms that will ensure that energy needs are met in a more sustainable manner in the long term.

Energy transition is opening up new employment opportunities in sectors related to increasingly more sustainable energy generation, transport and use technologies. Investment in the development of these sectors creates new jobs, requiring different skills and qualifications. A *just* transition offers opportunities for workforce retraining and community development. Finally, there are many regions with communities whose economies and employment options are closely linked to fossil fuel-based energy sectors, such as coal mining or the oil industry. Withdrawal from these sectors can have negative social impacts, including job losses and economic hardship. A *just* transition requires a specific look at these conditions, taking action against energy poverty.

IV. The concept of solidarity in the EU

To define what energy solidarity is, it would first be necessary to define what solidarity is in European Union law since the solidarity principle lies at the heart of the EU legal system[8].

[8] See more: Markus Kotzur, 'Solidarity as a Legal Concept' in Andreas Grimmel and Susanne M Giang (eds), *Solidarity in the European Union, A Fundamental Value in Crisis* (Springer 2017); Peter Hilpold, 'Understanding solidarity within EU law: An analysis of

According to Article 2 TUE

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

According to Article 3(3) TEU,

> "(…) It shall promote economic, social and territorial cohesion, and solidarity among Member States. (…)".

Solidarity is a rationale for the common development of the Member States within the EU. Its essence comes down to a case-by-case confrontation and balancing of interests, by the Member States and the EU, in the process of making and applying laws in line with social expectations. It obliges Member States to cooperate within the EU, and places a general obligation on the EU and Member States to consider the interests of other actors in the exercise of their respective competences. In this context, the development of the EU, which would take the form of *just* transition, is nothing other than a development that fulfills all those objectives referred to in Article 2 TEU (above). In turn, the implementation of these objectives is to be carried out, inter alia, in a manner of solidarity.

In this context, there have been divergences in doctrinal assessment as to how much solidarity is merely a moral or political basis for acts of EU law, and how much it is an autonomous source of rights and obligations. The multifaceted nature of solidarity has been pointed out on various occasions, requiring interpretation in line with the objectives and values of the proposed legal solutions.[9] In the Robert Schuman Declaration of 1950, it was noted that "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements, which first create a de facto solidarity".[10] Solidarity is the basis of EU rules.

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the "islands of solidarity" with particular regard to Monetary Union' (2015) 34 YEL 257; Biondi A, Dagilyte E and Küçük E (eds), *The solidarity in EU Law. Legal principle in the making* (Edward Elgar Publishing 2018).

[9] Kotzur (n 9); Hilpold (n 9); Malcolm Ross, 'Solidarity: A new constitutional paradigm for the EU?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010).

[10] Robert Schuman Declaration, 9 May 1950; See also: Ben Rosamond, *Theories of European Integration* (Palgrave Macmillan 2000).

There have been views giving this principle a certain legal dimension, as part of a combination of intergovernmental and supranational regimes, which has the effect of going beyond strictly intergovernmental arrangements towards the construction of certain constitutional values within the EU.[11] This has caused difficulties in defining the application of solidarity in EU law. In this sense, solidarity is a concept which relates both to horizontal relationships (between Member States, between institutions, between peoples or generations, and between Member States and third countries) and to vertical relationships (between the Union and its Member States), and in a variety of areas.[12] There seems to be a consensus that solidarity as a legal concept is based on the concept of justice, which is regarded by some as a legal principle with normative effects, but seen by others as having no binding legal implications. It either creates values for legal acts, or is an enforceable legal basis as a legal principle or defined legal norm.[13]

The principle of the EU energy solidarity is expressed in Article 194(1) TFEU, whereby:

> "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market, (b) ensure security of energy supply in the Union, (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy and (d) promote the interconnection of energy networks."

Speaking of solidarity in EU energy policy, the Lisbon Treaty uses the concept of "spirit of solidarity between Member States". When interpreting this concept, it had been pointed out that it had a general nature, and could

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[11] Jan F Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a new policy and business as usual' (2011) 31 EPIN Working Papers <www.files.ethz.ch/isn/127164/EPIN%20WP31%20Braun%20on%20EU%20Energy%20Policy%20under%20Lisbon.pdf> accessed 5 September 2023; Irina Ciornei and Ettore Recchi, 'At the Source of European Solidarity: Assessing the Effects of Cross-border Practices and Political Attitudes' (2017) 55(3) Journal of Common Market Studies 468.

[12] Case C-848/19P *Federal Republic of Germany v. Republic of Poland* [2021] ECR II-218, Opinion of Advocate General Campos Sánchez-Bordon, para 60.

[13] In terms of being a legal concept, see: Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); Hilpold (n 9). For more on the treatment of a legal concept as a legal principle, see: Catherine Barnard, 'Solidarity and New Governance in Social Policy' in G de Burca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006); Malcolm Ross, 'SSGIs and Solidarity: Constitutive Elements of the EU's Social Market Economy?' in U Neergaard and others (eds), *Social Services of General Interest in the EU* (TMC Asser Press 2013). With respect to the treatment of a legal concept as having no binding legal implications, see: Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014).

not have been regarded as anything more than a declaration of a political kind, that indirectly materialized in specific acts of EU law. Solidarity had been only a certain value, which inspires the development of EU law, and the content of those acts. No rights or obligations could have been derived directly from it for the EU and the Member States.[14]

However, this historical interpretation has notably changed in recent years, due to the ruling of the Court of Justice of the European Union (CJEU) in the so-called OPAL case (case C-848/19P). CJEU stated therein that "the spirit of solidarity between Member States (…) constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law".[15] Energy solidarity "forms the basis of all of the objectives of the European Union's energy policy (…)".[16] For that reason, all acts adopted by EU institutions within its energy policy must be interpreted, and their legality assessed, in the light of the principle of energy solidarity. The principle of energy solidarity "can be relied on in matters of EU energy policy in the context of the establishment and functioning of the internal market in natural gas".[17] And the principle of solidarity itself should not be equated with energy security aspects only, but with all EU energy policy objectives, as set out in Article 194(1) TFEU.[18]

This principle means that the EU and the Member States must strive, in the exercise of their powers conferred upon them by that policy, to avoid taking measures which could damage the interests of the EU and of its other Member States. It requires the creation of balance between different interests.[19] The CJEU has clearly indicated that the "spirit of solidarity between Member States" stated in Article 194(1) TFEU is part of the general principle of

[14] Ruven Fleming, 'A legal perspective on gas solidarity' (2019) 124 Energy Policy 102, 107; Pieter van Cleynenbreugel, 'Typologies of solidarity in EU law: a non-shifting landscape in the wake of economic crises' in Andrea Biondi, Eglė Dagilyte and Esin Küçük (eds), *The solidarity in EU Law. Legal principle in the making* (Edward Elgar Publishing 2018), 25, 36; Nicolas E Farantouris, 'La Nouvelle base juridique de la politique énergétique de l'UE' (2011) 599 Revue de l'énergie 18; Rafael Leal-Arcas and Andrew Filis, 'Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective' (2013) 36(5) Fordham International Law Journal 1225; Kaisa Huhta, 'Too important to be entrusted to neighbours? The dynamics of security of electricity supply and mutual trust in EU law' (2018) 43 EL Rev 920, 927; Johann-Christian Pielow and Britta Janina Lewendel, 'Beyond "Lisbon": EU competences in the field of energy policy' in Bram Delvaux, Michael Hunt and Kim Talus (eds), *EU Energy Law and Policy Issues* (3rd vol, Intersentia 2011).

[15] Case C-848/19P *Federal Republic of Germany v. Republic of Poland* [2021] ECR II-598, para 38.

[16] Ibid., para 41.

[17] Ibid., para 46.

[18] Ibid., para 47.

[19] Case T-883/16 *Republic of Poland v European Commission* [2019] ECR II-567, para 77.

solidarity, which is one of the principles of EU law. This principle relates thus to the regulation of energy policy in all its aspects, and not only to energy security issues, extending to, for example, climate change, environmental protection or competition. However, the CJEU did not specify the application principles of the principle of energy solidarity.[20]

However, what derives from the above is that the concept of energy solidarity must take into account socio-economic development considerations, such as: human dignity, freedom, democracy, equality, rule of law, and the respect of human rights, including the rights of minorities. These values are common to the societies of EU Member States, which are shaped by pluralism, non-discrimination, tolerance, justice, solidarity and the equality of genders. Furthermore, the concept of energy solidarity must also consider economic, social and territorial cohesion, as these are the basis of the development of the EU.

V. Determinants of just transition

Therefore, energy solidarity brings together all those aspects of *just* transition that are relevant to socio-economic development. It provides a certain normative dimension for transformative solutions aimed at *just* transition. At this stage, however, the question arises of what conditions such *just* transition should have in the EU energy sector. These conditions can be divided into three groups, which relate to the different premises of energy development in the EU – security, competition and sustainability.

1. Security

According to Article 194(1) TFEU, security is understood as "*ensuring security of energy supply in the Union*". The key here is the consumer and their expectations regarding the continuity of supply and its affordability. This provision does not refer to the security of individual EU Member States, but that of the EU. At the same time, the interdependence between EU Member States is part of security understood as such. Improved energy security lies in a more collective approach, through the functioning of the internal market

[20] The relevance of indicating the scope of that principle was pointed out by Advocate General Sanchez-Bordony in his opinion, noting that "the obligation to rule on the existence of the principle of solidarity and, possibly, on its nature and scope", see *Federal Republic of Germany* (n 15), para 5.

and greater cooperation among Member States. This rationale is particularly relevant in the context of the current geopolitical situation in Ukraine, and its resulting effects on the security and continuity of natural gas supplies (and indirectly electricity) and maintaining them at a socially acceptable price. This is evident in the measures taken to mitigate the social and economic impact of the war, where the rationale for action is the pan-European approach, resulting in the pursuit of such a course of action by the Member States.[21]

EU rules have so far introduced several mechanisms to integrate security within the energy market model, safeguarding social interests. In the wholesale market, and indirectly in the retail market, it is based on the so-called Network Codes that regulate, in a uniform way, the day-to-day cooperation between the participants of the energy market in terms of capacity allocation, congestion management, balancing, interoperability of energy systems, and data exchange.[22] From the more horizontal policy perspective, EU secondary legislation supports moderating energy demand (savings, efficiency, fuel shifts); increasing internal energy production (e.g. renewable sources of energy, hydrogen); and diversifying external energy supplies, combined with increased coordination of national energy policies within the EU.[23] There are also additional measures – recently under scrutiny and being modified due to the war in Ukraine – regulating the common approach in a crisis situation.[24]

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[21] See: Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage [2022], OJ L 173, 17–33; 'Commision, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU external energy engagement in a changing world' JOIN (2022) 23 final, 18 May 2022; Commision, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU «Save Energy»' COM (2022) 240 final, 18 May 2022; Commision, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Short-Term Energy Market Interventions and Long Term Improvements to the Electricity Market Design – a course for action' COM (2022) 236 final, 18 May 2022; Commision, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions «Save gas for a safe winter»' COM (2022) 360 final, 20 July 2022.

[22] For more information about legal acts, see: Acer Europa 'Network Codes' www.acer.europa.eu/gas/network-codes accessed: 7 September 2021.

[23] See for example: Commision, 'Communication from the Commission to the European Parliament and the Council: European Energy Security Strategy' COM (2014) 330 final, 28 May 2014; Commision, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A hydrogen strategy for a climate-neutral Europe' COM (2020) 301 final, 8 July 2020

[24] See for example: Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration [2017] OJ L312/54; Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October

EU rules provide cooperation mechanisms that create a framework for sharing risks and costs within the EU. However, the EU energy market is still more regional than pan-European, a fact that influences the model approach to assess energy solidarity (and also *just* transition). There is also a divergence between the security of energy supply and the socially unacceptable price to achieve such security, which the model should consider. This creates variations among the preferences of energy consumers and each decision may affect different consumers in different ways, creating a divergence between short and long-term adverse effects. This divergence is inevitable, and no model solution can change it, at least until the full implementation of the EU single internal energy market. However, the model approach can take into account this perspective as well as deviations from the model, which can be remedied by shielding measures as part of an intergovernmental action. This is the case if negative consequences for some consumers cannot be avoided. At this level of development of the internal energy market, it is not possible to create a single benchmark; thus, it is necessary to weigh the rationales and expectations through dialogue. The stronger the integration of the market, the less necessary such measures may prove to be. However, this does not detract from the need to create a model benchmark for energy solidarity in this aspect.

The recent energy crisis triggered by Russia's armed aggression against Ukraine demonstrates that such a crisis influences all EU countries, although not uniformly – raising the prices for natural gas, electricity, and heat in each EU Member State and raising the insecurity level with respect to energy supplies. Weighing the rationale of supply security and diversification, on the one hand, and prices on the other, results in a practical focus on stability and security of supply. Mechanisms are also being introduced on the national level to mitigate prices, both through market mechanisms (platforms for consumption reduction) and through administrative action (caps on energy prices for consumers). This shows that although the position of the average consumer among the EU Member States may differ, the EU point of reference is similar, if not uniform. What differs are national remedies, but the difference is more the consequence of the regionalization of the EU energy market than divergences in consumer expectations. This confirms that the model solution, for the solidarity approach related to security, is possible, but still requires some national adjustments.

This shows that *just* transition in terms of security cannot be applied uniformly, because conditions, and thus societal expectations, may be different. Energy solidarity, however, dictates that these diverse circumstances must be taken into account, and that, drawing on their diversity, the models of *just* transition must be built in accordance with the principle of European solidarity.

2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 [2017] OJ L280/1, fn 45.

2. Competitiveness

The provisions of Article 194(1) TFEU do not directly address the competition and competitiveness aspects. However, they are at the heart of the construction of the EU internal market, including those for electricity and natural gas. The close link between these two sectors, and the policies of each Member State, has meant that, over several decades, activities in these sectors have been open to less market risk. Member States have adopted a range of regulations aimed at protecting their markets and safeguarding revenues for the operators. Political risk, although relatively higher than in other sectors, was also at a predictable level. However, this market model has gradually changed because of the progressive liberalization of the electricity and natural gas markets in the EU, and the increased importance of environmental and climate protection in the day-to-day operation of these sectors. The increasing use of new and renewable energy technologies has changed the cost and risk-pricing model, necessitating a new approach to competitiveness, and the rational pricing of external operating costs of different technologies, including those based on coal and lignite, as well as natural gas. The operating model of both markets is also changing, in a direction that takes into account: carbon pricing with the aim to decarbonize energy supply; fair allocation of system costs to the technologies that cause them; and the development of short-term markets for the cost-efficient dispatch of resources. The operating model is also changing towards the development of adequate levels of capacity and flexibility of the system, in particular with respect to the transportation infrastructure and back-up electricity production as well as the development of a stable investment framework in all low-carbon technologies.

It is crucial for the consumer of electricity, heat, and natural gas that these commodities are supplied continuously and at an acceptable price. The adopted regulatory market model is to ensure that their functioning mechanisms guarantee both the long-term and short-term adequacy of resources, ensuring secure and stable supply at an acceptable price, from the perspective of both normal market conditions and crisis situations. Energy solidarity ensures that such mechanisms are built-in and function both regionally and at the EU level. Any analysis of whether the conditions of solidarity are met in this regard, should include an answer to the question: To what extent do the introduced solutions ensure access to electricity and natural gas at a price acceptable to EU consumers, both in the short and long term? The analysis of both time frames is important, as lowering prices for certain groups of consumers as part of the State's social policy may, in the long run, result in their actual practical increase. Also, the subsidization of some consumer groups by others, because of State policy, can have a long-term impact on prices.

Hence, the essence of the competitive rationale is consumer price. All other variables are *de facto* included in the price. There is no need to look at the market more broadly in this context. However, the price need not be uniform within the entire EU. As statistics show, electricity and gas prices vary significantly between the Member States, which is particularly noticeable now, during Russia's armed aggression against Ukraine. The purpose of the investigation under this premise is to determine to what extent the price will change because of the legal solutions introduced. This does not preclude different wholesale or retail prices between national (and regional) markets within the EU from continuing.

The key here is a price that is socially acceptable. A fair transition can influence prices. Societies may accept these changes to varying degrees. Acceptance depends on the actual cost that energy represents in consumer budgets, but also on their awareness and acceptance of the direction of change. This acceptance can vary. The essence of EU energy solidarity comes down to identifying and accepting differences in approach, while seeking solutions so that these differences do not derail the long-term direction of change towards a sustainable and low-carbon economy.

This is exemplified by the EU's efforts where the Commission supports Member States that put in place a national strategy for the progressive reduction of existing coal and other solid fossil fuel generation and mining capacity, in order to enable *just* transition in regions affected by structural change. The Commission assists Member States in addressing the social and economic impacts of the clean energy transition, working in close partnership with the stakeholders in coal and carbon-intensive regions (Article 4 of Regulation Eu 2019/944).

3. Sustainability

The sustainability rationale does not appear in the text of Article 194(1) TFEU, which uses a narrower concept – "with regard to the need to preserve and improve the environment". Nevertheless, sustainable development as a direction of EU development is set out in Article 3 TEU,[25] and the direction of environmental policy development is set out in Article 11 TFEU[26].

[25] Due to Article 3 TUE: "(…) the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth".

[26] Due to Article 11 TFEU: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".

Sustainability is also the aim of long-term EU energy policy indicated in its secondary legislation.[27]

Sustainability is commonly referred to in three dimensions: environmental, economic and social.[28] They are all closely interlinked, forming a *de facto* single environment-society approach. The economic sustainability approach, which combines sustainability in economic terms with long-term consumer well-being, seems the most appropriate in the proposed model.[29] However, the concept of "consumer well-being" is defined in different ways, with the broadest sense including, in addition to aspects relating to consumption and the production of goods and services, environmental and climate change aspects, as well as social cohesion. This definition, however, raises problems in terms of its treatment of aspects that have a non-economic value, which are very often linked with the environment and climate change. Because their influence is only partial, problems with their assessment remain, resulting in some uncertain externalities.[30] Additionally, when markets do not function properly, for example due to lack of effective competition, or the market is incomplete due to externalities that are not included in the price, the well-being of consumers cannot reach its full potential. This has a particular impact on the adequate consideration of non-economic considerations, such as the impact on climate change.

As the EU energy solidarity principle relates not only to the security of supply, but to all aspects of EU energy policy, the question of properly considering climate change issues is of primary importance. The fact that Member States have a diversified energy mix, based on one hand on fossil fuels such as coal, and on the other on renewable energy sources, makes it more important to ensure energy solidarity from the perspective of sustainability. The question arises as to whether legal solutions allowing a greater use of fossil fuels in some Member

[27] "Our vision is of the Energy Union as a sustainable, low-carbon and climate-friendly economy that is designed to last", see: preamble to the Commision, '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, 25 February 2015.

[28] Herman Daly, *Ecological Economics and Sustainable Development* (Edward Elgar Publishing 2007).

[29] For more on the economic interpretation of sustainability, see: Partha Dasgupta and Geoffey Heal, 'The optimal depletion of exhaustible resources' (1974) 41 Review of Economic Studies 3; Joseph Stiglitz, 'Growth with exhaustible natural resources: Efficient and optimal growth paths' (1974) 41 The Review of Economic Studies 123.

[30] This problem is evident in the revision of the methodology for examining mergers and state aid, currently being examined by the European Commission, where the difficulty lies in how to quantify non-economic aspects such as higher levels of environmental or climate protection.

States (as part of the so-called "*just* transition") is the right solution. A certain balancing of the costs of transition, for consumers in the most vulnerable Member States, seems justified within the scope of energy solidarity. However, the problem of how to define the limits remains. A kind of "trade-off" could meet the expectations of consumers in other EU Member States. There is thus a need to define the conditions of EU consumers from the point of view of energy solidarity first, and then to investigate the facts and find appropriate remedies or trade-offs. There are several sustainability metrics, both general and more generic, including the sustainability of energy use in the economic approach.[31] These metrics allow for additional dimensioning of the magnitude of the impact and the resulting consequences. However, the practical application of energy solidarity requires that policy makers take an active role to mitigate these determinants, in line with *just* transition expectations from the societies.

VI. Summary and policy implications

A new world order attempts to prioritize security and climate change. The European Union wants to achieve strategic autonomy and economic security in order not to suffer negative consequences of its development. However, the EU society expects the transition to be *just*, that is, to take account of differing social circumstances and needs, but with the far-reaching goal of changing the socio-economic model towards a low-carbon and sustainable economy in the future.

Solidarity is a "perspective" tool helping to achieve these goals, providing the rationale for achieving *just* transition. Solidarity is a multi-dimensional concept, where social, political, and legal aspects intermingle. Solidarity refers to a unity based on a community of interests, objectives, and standards; it may result from generosity (altruistic or ethical imperatives) or self-interest (insurance). Solidarity is more of a "mindset", but States are adopting this concept to build institutions around a model of justice. A *just* transition is an emanation of this principle.

The implementation of EU energy solidarity towards *just* transition, requires an approach combining different policy objectives and measures (security, competition, sustainability). In case of conflict between different objectives, there is a need for "trade-offs" to be made, in order to balance competing interests and rationales. Balancing the latter requires a view that takes into account the diverse circumstances of local communities. EU energy solidarity is, in a sense, a bracket that binds these diverse circumstances together, giving them long-term goals, and providing a rationale for determining how to achieve them.

[31] L Suganthi, 'Sustainability indices for energy utilization using a multi-criteria decision model' (2020) 10 Energy, Sustainability and Society 1; and the publications listed therein.

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The Road to Energy Justice as a Result of Interdisciplinary Cooperation in the Energy Policy Field

by

Michał Domagała* and Katarzyna Maćkowska**

CONTENTS

Abstract

This article pertains to the role of law in regulating the energy market. Justice and solidarity in this area require a debate that should not be fragmented but must, instead, take place in an interdisciplinary manner. The key question that arises relates to the role that the law should play in the area of energy transformation, and thus, whether it should only be a tool for the implementation of political plans and action strategies, or whether it should, in itself, stimulate or determine the transition framework, or be a regulator of transformation. The article tackles selected problems related to Demand Side Management (DSM), de-growth, energy

* Michał Domagała, dr hab., John Paul II Catholic University of Lublin, Faculty of Law, Canon Law and Administration (Poland); e-mail: michal.domagala@kul.pl; ORCID: https://orcid.org/0000-0001-6792-6850.

** Katarzyna Maćkowska, dr hab., John Paul II Catholic University of Lublin, Faculty of Law, Canon Law and Administration (Poland); e-mail: kzasepa@kul.pl; ORCID: https://orcid.org/0000-0002-1744-931X.

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poverty, Not In My Back Yard (NIMBY) initiatives and Contracts for Differences (CfD), in order to call for interdisciplinary research and cooperation in this context.

Résumé

Cet article porte sur le rôle du droit dans la régulation du marché de l'énergie. La justice et la solidarité dans ce domaine exigent un débat qui ne doit pas être fragmenté mais doit au contraire se dérouler de manière interdisciplinaire. La question clé qui se pose concerne le rôle que le droit devrait jouer dans le domaine de la transformation énergétique, et donc, s'il devrait être seulement un outil pour la mise en œuvre des plans politiques et des stratégies d'action, ou s'il devrait, en lui-même, stimuler ou déterminer le cadre de la transition, ou être un régulateur de la transformation. L'article aborde certains problèmes liés à la gestion de la demande, à la décroissance, à la pauvreté énergétique, aux initiatives «Not In My Back Yard» (NIMBY) et aux contrats pour les différences (CfD), afin d'appeler à la recherche et à la coopération interdisciplinaires dans ce contexte.

Key words: energy law; regulation of energy market; DSM; de-growth; energy poverty; NIMBY; CfD.

JEL: K29, K32

I. Introduction

Undoubtedly, humanity once again faces groundbreaking challenges of energy transition, which will determine the future of mankind. This process has not only been framed by the issue of access to energy, climate change, and solidarity but also by overall wisdom, rationality, and critical thinking. The law seems to be at the center of such fundamental debates and remains both a direct and indirect means of shaping, organizing, and stimulating the most demanding energy expectations of current times.

However, the question arises as to the role that the law should play in the area of energy transformation. Should the law be a tool for the implementation of political plans and action strategies only? Or should the law, in itself, stimulate and determine the framework, or even a direct regulator of the energy transformation process.

This article does not relate to particular problems of energy transformation. It aims to remind us that the law can, or should be recognized as heavily influencing such transition, provided that it is not limited to normative frameworks only constructed out of a wide social context. The thesis of this paper pertains to a statement that without cooperation and consultation with

economists, engineers, behaviorists, psychologists, sociologists, and political scientists, the law cannot meet the demands of smoothing the transformation process, which has been impacted by various, and frequently antagonistic visions, presuppositions, beliefs, analysis and understandings.

In pursuing the aim of this study, one should first refer to the issue of what role law plays in shaping social and economic relations and what purpose it should fulfill in this area. At the very beginning, however, it should be noted that to describe the role of law in the energy transformation, it seems crucial to talk about the mutual relationship between the law and the economy, rather than about the impact of the law on the economy. Law always functions in a certain reality (economic reality determines its content by indicating axiological foundations), which it captures in a certain normative order. Therefore, the law reflects a certain system of values relevant to the society, which should also be taken into account in the framework of economic relations.[1] Referring to the above considerations as to the role of law in the sphere of the functioning of the energy sector, it should be noted that the law, as such, should include in its normative framework current social expectations in the energy field. In other words, the law should reflect the content of public interest in this area, including applicable variables. This applies both to current events, and to the implementation of plans and strategies directed towards the future. As a result, the question should be answered: what are the current energy goals and what role should the law play in their implementation? Should it be a source of change, or should it merely reflect these changes?

Currently, one can even risk saying that regardless of which economy is affected, we are dealing with a change (or replacement) of energy priorities. In fact, instead of technical accessibility, environmental protection, security of supply, and energy justice are in the foreground here as three basic elements that underpin most energy activities.

II. Energy justice and solidarity – challenging definitions

The issue of environmental protection and security of energy supply has already been the subject of extensive scientific research undertaken based on national and European regulations.[2] It is thus justified to try to address the

[1] Rafał Blicharz, and Jan Grabowski, 'Prawo a gospodarka' in Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel (eds.), *Public Economic Law. System Of Administrative Law*. (2nd edn, Vol. 8A, Warsaw 2018).

[2] See Kamil Olczak, 'Odnawialne źródła energii jako przesłanka prawna bezpieczeństwa energetycznego' (2020) 117 Studia Prawno-Ekonomiczne 115; Mirosław Pawełczyk,

specific issue of energy justice and the way in which it is included in legal standards. At the same time, this applies both to the method of regulation and to the methods and process of determining its essence.

First, most academic discussions were held under the themes of energy justice and solidarity, and both terms have already been defined at a sufficient level. Nevertheless, they may remain as quasi-slogans due to the demanding and ambitious conflict of interest that characterizes the market.

It should be noted, however, that each of the relevant market participants (undoubtedly also politicians), acting in pursuit of their market mission (duties), should not stop at considering energy justice as a mere slogan, within their competencies (tasks), but should take specific actions in this context. Moreover, it should be assumed in advance that, in principle, each of the indicated groups, to which consumers and energy companies are added, will, or may represent different and sometimes even contradictory interests in the energy market.

One of the fields of discussion refers to the temporal aspect of the energy transformation, indicating that it should be carried out as soon as possible. Among economic and technological factors, legal professionals themselves are accountable for raising the question of whether regulation of the energy market can or should force consumers to swiftly transform, as well as whether imposing such regulation would result in a change in consumers' mental attitudes or habits towards energy consumption.

Additionally, it is fair to say that Artificial Intelligence (AI) can become a game-changer in this field. While it may accelerate the transition, on the one hand, its learning stage would dramatically increase the appetite for energy, on the other. Moreover, it is very likely in this case that there will be disproportions in access to appropriate algorithms and, consequently, differences in the speed of energy transformation processes and the related energy justice.

The only thing that is certain is the general demand of society for affordable and unlimited energy. However, one should not overlook that there are societal groups that strongly support environmental protection, and that these groups are recognized by behavioral economics as being more willing to accept higher energy costs in order to minimize their consumption. In addition to such "green" motivation, new altruistic inspirations have appeared because of the Russian invasion of Ukraine and the resulting solidarity movement in support of Ukraine. Regardless of how strong and long-term these feelings will be, European consumers have become more aware of energy-centered geopolitics. In parallel,

'Bezpieczeństwo energetyczne jako fundament bezpieczeństwa kraju. Zakres pojęciowy' in Mirosław Pawełczyk (ed.), *Współczesne problemy bezpieczeństwa energetycznego. Sektor gazowy i energetyczny* (1st edn, Warsaw 2018).

observation of EU law has shown that regulations initially focused on energy security, subsequently on competitiveness, energy effectiveness and renewables,[3] and finally, due to the tense geopolitical environment, on energy security again.

In the context of a potential field of conflict between individual interest groups in the energy market, one should consider which postulates and courses of action (assuming that the basic determinant of their actions will be the common good) should be adopted by them in relation to the postulate of energy justice. It is in fact the politicians (public administration) who implement, or at least should implement, the strategies developed by the respective interest groups. It is thus fair to say that they are the ones who should strive to balance the interests of consumers (not the professional stakeholders) and energy companies (professionals), in the name of the common good. At the same time, the balancing interests should not only be understood horizontally, but also vertically, that is, balancing interests within these groups. On the other hand, energy companies, in pursuit of profit, and given the provision of services of general economic interest, should take care of the quality of the services provided, their equal and unlimited availability to all customers, and the security of supply. The role played by both industry and consumers is also not insignificant. Having said that, the actions taken by these groups, as well as their motivations, may be quite different, balancing between economic and environmental motives.

Still, the effect of achieving the objectives of different market participants will undoubtedly lead to an energy transformation understood as a change in the market structure, its functions, and rules of operation. The question arises as to what principles (including in particular legal principles) this transition should be based on in order to ensure energy justice.

III. Demand Side Management, De-growth, Energy Poverty, NIMBY and CfD as interdisciplinary phenomena

So how are the aforementioned problems referred to by scientists? In recent years, researchers have focused on Demand Side Management (hereinafter: DSM) in the energy transformation process in an interdisciplinary context claiming that values, beliefs, and norms have a great impact on the effectiveness of both financial and non-financial DSM methods.[4] Bernadeta Gołębiewska

[3] See more: Piotr Lissoń, 'Energetyka obywatelska jako nowy etap rozwoju prawa energetycznego' (2022) 4101 Acta Universitas Wratislaviensis, 801.

[4] Bernadeta Gołębiowska, 'Psychologiczne aspekty zarządzania popytem na energię elektryczną' (2020) 64(5) Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 85, 86–99.

noted that the realization has been widely agreed upon that new solutions must be identified when it comes to encouraging final energy receivers to take an active role in the process of energy management.[5] Clearly, such goals are difficult to reach and must not generate additional costs for consumers, so as not to discourage them from taking action. Energy transformation, a worldwide phenomenon, must thus be guided by observations from various scientific fields. Among the postulates of Geoffrey Garver from 2013, one unquestionable issue has been stressed, namely that the rule of ecological law "must permeate legal regimes and other disciplines like economies in a systemic, integrated way, and not be seen as a specialty area of the law that applies to isolated problems".[6] What response would be reasonable for the law to react to economic circumstances, support psychological changes, and mitigate political dangers in the context of energy security? The Authors formulate this question due to the need for a deeper, multilateral, and perhaps even more sincere discussion on the role of law.

Many are of the opinion that the fundamentals of energy transformation are determined by different circumstances, so it can be said that the law itself is not and never will be the only game changer in this process. The number and gravity of the varied dependencies should not allow legal practitioners who stand behind the politicians, or politicians with armed jurists, to believe in their diving force. The truth is, however, that legal professionals have historically supported the basic concept of power in a twofold way, i.e., *princeps legibus solutus est* and *lex est rex*. If the energy transition is still to be held according to a detailed, arbitrary, central-governed path, the role of legal professionals will increase not only in prescribing this path, but also in removing the hurdles encountered. If the process mitigates the dominant position of the public government, the law should remain the organizing factor. Both solutions can be conceptually referred to as the new social contract governing the energy sector.[7] However, because of the inequalities in the energy markets, the workability of the "social contract" may remain infeasible. To quote a recent outstanding publication on Energy Poverty: "[…] should researchers and policymakers only aim to address the problems of the (energy) poor or should they also begin to challenge the rich? Rising inequalities and injustices are at the core of the contestation movements. The blurring lines between need

[5] Ibid., 87.

[6] Geoffrey Garver, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics' (2023) 5(1) Sustainability 316, 326.

[7] See more: Raphael J Heffron and Louis De Fontenelle, 'Implementing Energy Justice Through A New Social Contract' (2023) 41(2)2 Journal of Energy & Natural Resources Law, 141155; Raphael J Heffron and others, 'Pathways Of Scholarship For Energy Justice And The Social Contract' (2023) 41(2) Journal of Energy & Natural Resources Law 211, 211–232.

and comfort have driven up the overconsumption of resources, which is now at the core of growing economies, particularly in abundant countries. Energy has been at the heart of this dynamic, and inequalities concerning energy are sometimes the most striking precisely because energy is so intimately intertwined with the quality of life".[8]

In this sense, the idea of a social contract would be considered as another cliché or slogan, a simplistically vague ideological frame. Regardless of the final answer, at this moment we can classify basic areas in which the law may influence the energy transition, accentuating that groups of interdisciplinary researchers should work together in order to evaluate the pros and cons of two different approaches: supporting and mandating. As we live in the era of technological revolution, which is inseparably connected to the reality of energy transition, legal professionals should include scientists of related areas to participate in the legal discussions that focus more on a vision and strategy for the future. The importance of the energy transformation process requires cooperation with economists, political scientists, social behaviorists, sociologists, and engineers. It is necessary for governments to organize and financially support such discussions. Obviously, geopolitical reasons will play a fundamental role in the transition, but this does not exclude meritocracy. In the context of international energy solidarity – as long as it is agreed upon that it is closer to real life than to an utopia – interdisciplinary academic discussions, in connection to business and political circumstances, should weigh whether energy transition is one-sided, only focused on green energy, or if it is in fact diversified, that is, a long term mix between fossil fuels and renewables.

In shaping different energy programmes, we now refer to economic equal opportunities, redistribution, axiology, and energy solidarity, the academic community seems to be obliged to pursue the answers to the following questions: Should the more developed countries allow those less developed to use fossil fuels and, as a result, place the transition burden on wealthier states, with faster transition into green energy? So should we be talking about regional diversification as part of the transition, rather than the immediate and mandated implementation of green energy by particular States? What are the atypical examples of solidarity in the energy transition process? Does the energy transformation rely on energy saving and how can the final recipients of energy be motivated to participate in this part of the process?

Clearly, these questions are currently related to the policy of sanctions imposed on Russia after its invasion of Ukraine. On the one hand, it has forced many countries to re-frame the aims of their energy strategies. It can

[8] George Jiglau and others, 'Looking back to look forward: Reflections from networked research on energy poverty' (2023) 26(3) iScience 106083.

therefore be argued that those supply changes based on importers of fossil fuels, should be called atypical transitions, as opposed to the increasing shift to available renewable energy sources, seen as a typical transition. In the dynamic world of geopolitical determinants, the subjective transformation should also be recognized as the early stage of the energy transition process.

An issue that currently surfaces in different narratives is the recently published call by the European Energy Agency, modified in April 2023, that asks: "Could the European Green Deal, for example, become a catalyst for EU citizens to create a society that consumes less and grows in other than material dimensions? As global decoupling of economic growth and resource consumption is not happening, real creativity is called for: how can society develop and grow in quality (e.g. purpose, solidarity, empathy), rather than in quantity (e.g. material standards of living), in a more equitable way? What are we willing to renounce to meet our sustainability ambitions?".[9] The European Energy Agency takes seriously into consideration publications claiming that the EU is not capable of achieving its 2050 goals only by way of a transition to renewables. This illustrates how many dependencies shape the energy transition, which we are becoming more aware of, and which must be consequently and deeply analyzed by EU legislators in order not to require people to try to achieve the unachievable.

Furthermore, awareness of the energy gamble may encourage politicians to refer to democracy, and even more importantly to local democracy to pass-on the burden directly to citizens. As Roman Mauger has noticed: "Applying the logic of degrowth to the whole society would require an overhaul of the existing legal framework".[10] De-growth, as a concept, may not be introduced by legal provisions that would oblige individuals to limit their energy consumption. But such rules can allow for local energy self-government, such as Citizens Energy Communities (hereinafter: CECs) or Renewable Energy Communities (hereinafter: RECs).[11] This approach is essentially better than forcing consumers to change, even though it may shift part of the burden of the costs of energy transition to local decision-makers. Furthermore, CECs and RECs embrace another interesting social issue, namely the willingness of energy consumers to

[9] 'Growth without economic growth' (European Energy Agency 20 April 2023) <www.eea.europa.eu/publications/growth-without-economic-growth> accessed 18 August 2023.

[10] Romain Mauger, 'Finding A Needle In A Haystack? Identifying Degrowth-Compatible Provisions In EU Energy Law For A Just Transition To Net Zero By 2050' (2023) 41(2) Journal of Energy & Natural Resources Law 183.

[11] On the postulates on how to regulate CECs and RECs see: Maciej M Sokołowski, 'Renewable And Citizen Energy Communities In The European Union: How (Not) To Regulate Community Energy In National Laws And Policies' (2020) 38(3) Journal of Energy & Natural Resources Law 289.

save energy when their neighborhood does.[12] For legal professionals, it seems necessary to elaborate on the potential solutions in cooperation with sociologists, in view of the fact that currently, de-growth is not a method of reconciliation but basically it is contrary to many social demands.

At this moment, CECs and RECs have been recognized as empowering the prosumer movement, and in the near future, EU Member States will grant them specific legal frameworks within a more or less regulatory approach. The new Polish legislation on energy law and renewables,[13] which implements EU directives, defines CECs as legal entities based on voluntary and open access, in which the decision making and controlling powers are performed by members and shareholders. Significantly, membership in CECs is limited to: individuals, local governments, micro-enterprises, and small businesses, whose actions in the energy sector do not constitute their core activities. The main purpose of CECs is dedicated to:

- in the field of electric energy: production, distribution, sale, turnover, aggregation and storage;
- undertakings that are focused on the improvement of energy efficiency;
- providing services in relation to charging of electric vehicles (EVs);
- providing other services in the energy market, including system services and flexibility services;
- production, use, storage, or sale of biogas, agricultural biogas, biomass, and agricultural biomass.[14]

Without a doubt, energy citizenship has gradually become a legal concept, as opposed to large–scale corporate energy systems.[15] Additionally, such legal forms should accelerate local awareness of the energy transformation. The question is whether they would balance another social challenge of introducing new energy sources into a neighborhood. Renewables and new technologies raise a question of safety among local residents when it comes to building windmills or small modular reactors (hereinafter: SMRs). Therefore, many projects encounter long-term obstacles caused by so called NIMBY – that is, NOT IN MY BACKYARD – responses. Even though the situation should be clearer about SMR as a passive technology, grassroots movements would still appear. Therefore, the law on such technology should, to some extent, but also

[12] See more Christina Kaliampakou, Lefkothea.Papada and Dimitris Damigos, 'Are Energy-Vulnerable Households More Prone to Informative, Market, and Behavioral Biases?' (2021) 11(4) Societies, 126.

[13] The new regulations were introduced by the act of July 28, 2023, amending the Energy Law and certain other acts (Dz. U. 2023:1681).

[14] Art. 3(13)f Energy Law Act, (Dz. U. 2022:1385).

[15] Lissoń (n 3), 801.

in advance, take into account an analysis of the influence of the game between a weak NIMBY and a cooperate non-NIMBY approach.

Quoting Anne Schwenkenbecher: "In short, empirical evidence seems to suggest that stakeholder engagement and procedures that allow for non-standard decision-making will eventually play in favor of a shift to renewables. It seems that people are just not that concerned with wind farms if they consider them 'their own' project. Not only can community consultation ensure that wind turbines are erected where they least disturb local residents, but it seems that if locals become decision-makers or even co-owners, they find them less objectionable. Therefore, the practical conflict between conservation and mitigation concerns seems – at least in principle – resolvable. To the extent that values change during such processes, the theoretical conflict – as to which concern is morally weightier – is resolved, too".[16]

On the other hand, however, extraordinary political circumstances and voters' expectations have led to the enactment of energy allowances, which *per se* remain in breach of the idea of energy saving. This is the illustration of the conflict of interests in the process of energy transition when it comes to final social attitudes in situations when energy prices experience a sudden price hike. Such a rapid change would not motivate users to save energy but would ignite demands for price freezes and allowances. Today – especially in politically polarized societies – politics itself begins to dominate the energy transformation field. Paradoxically, the regulation of energy prices does limit the risk of Energy Poverty (hereinafter: EP) escalation, which seems to be fundamental not only as a form of social solidarity, but as an indispensable prerequisite for an effective and smooth energy transition. It has led to a debate on how to define energy poverty and it is only a matter of time when legal professionals settle on one of the subjective indicators for EP, namely the "inability to keep the home adequately warm".[17]

In 2018, Radosław Mędrzycki and Mariusz Szyrski noticed: "Energy poverty is a multifaceted issue of great complexity. Such phenomena often cannot be easily defined by law, whereas it is difficult to express their nature unambiguously. Unfortunately, this leads to a fragmentary legal approach to such issues and a so-to-speak, patchwork type of regulations that focus on the most critical areas one at a time, which is quite understandable. Such

[16] Anne Schwenkenbacher, 'What Is Wrong With Nimbys? Renewable Energy, Landscape Impacts And Incommensurable Values' (2017) 26(6) Environmental Values 711.

[17] Departament for Business, Energy, & Industrial Strategy, 'Contracts for Difference for Low Carbon Electricity Generation Consultation on policy considerations for future rounds of the Contracts for Difference scheme' (December 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1124050/considerations_for_future_Contracts_for_Difference_CfD_rounds.pdf> accessed 18 August 2023.

an approach, however, leads to a lack of complementarity of various legal regulations and, in effect, creates clear absurdities in the interpretation of the regulations".[18] Since then, brief legal definitions of Energy Poverty have appeared in selected EU directives, but, generally, it is up to the Member States to determine how EP is to be understood.

All this shows that a revolution in the transformation process will make it more fragile, compared to the evolutionary approach, and it is therefore incumbent on legal professionals to carefully observe what must not be regulated. This view is at odds with those who state that "legal regimes should support a radical re-focusing of the economy on reduction of its throughput of material and energy".[19]

Another important issue that needs to be resolved through interdisciplinary research relates to dynamic electricity prices. It is certain at this point that econometrics essentially support the law in formulating both suggestions and conclusions. On the basis of the aforementioned reports, the market is aware that to amplify the practical meaning of such contracts, consumers need to deeply understand how to achieve throughput in the transition to dynamic electricity prices. Specifically, consumers should be provided with the following information: seasonal variations in prices, daily demands for energy, effectiveness depending on a flexible use of appliances, and numbers in past energy consumption.[20] A less obvious question is whether dynamic electricity prices would shape new habits in energy savings, and whether such a change may be recognized as part of the de-growth concept. At first sight, and with consumers fully understanding how this structure works, the system should gradually modify the way in which consumers use energy, as they are directly motivated by the reduction in the cost of their energy bills. Overall, it will have an impact on the efficiency of energy use. Another consideration is the potential instability of consumer incentives since in theory, with a reduction in energy prices, consumers may return to the everyday convenience of higher energy consumption. How can the law contribute to a long-term change in consumer behavior without forcing consumers to change? This question remains open for discussion between legal professionals and sociologists.

Similarly, widely popularized Contracts for Differences (hereinafter: CfD), which support renewables, have recently been re-discussed in the UK,

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[18] Radosław Mędrzycki and Mariusz Szyrski, 'Energy Poverty as a European Union and Polish Legal Issue' (2018) 23(3) Białostockie Studia Prawnicze 125, 128.

[19] Garver, (n 6).

[20] Iakov Frizis and Stijn Van Hummeln, *Research on Consumer Risks and Benefits of Dynamic Electricity Price Contracts. A Risk or an Opportunity to Save*? (1st edn, Cambridge Econometrics 2022) <https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-033-report_risks-and-benefits-of-dynamic-electricity-pricing.pdf> accessed 18 August 2023.

a country, which has hugely leaned on such agreements in order to ensure that CfD "evolves to keep pace with the wider sector and the Governmental priorities".[21] At the same time, energy law has to constantly and dynamically adapt to new circumstances. The UK debate on CfD confirms what J. Liu, J. Wang, and J. Cardinal concluded in 2022: "Moreover, CfD and CM both use long-term contracts (15 years or more) to provide stable electricity prices and encourage enough investment. However, the history of electricity market reforms in the UK tells us that reforms have been increasingly frequent: the first reform (The Pool) lasted for ten years, the second reform for nine years, and the ongoing reform now is only for seven years. It is still debatable whether this long-term concordance of incentives will actually stimulate more RESs. Should the growth of RESs in the UK be attributed more to scientific and technological developments or government policies?".[22]

In the abovementioned context, there are no doubts that legal provisions are pivotal drivers for the future, in the process of creating prosumers. However, without interdisciplinary backup, the law may only end up with short-term experiments.

IV. Conclusions

To conclude, this article clearly shows that legal disputes about the energy transition would not motivate or organize the process of effective energy transformation in the long term, unless they have the backup or equal support from the representatives of the economic, political, and social sciences. Legislative power that rests with legal professionals must remain rational in the regulatory process, also when deciding whether to force or merely encourage change, and it must rely on a wide analytical spectrum regarding the mentality and habits of individuals. The energy transition, apart from its practical and fundamental meaning, refers to unique and exceptional social phenomena that should be strategically and intentionally researched in an interdisciplinary way. The law itself must not be instrumentally used by some of the energy market participants to the detriment of others. Legal professionals should not determine how the interests of consumers, energy companies and individual nation states can be balanced without interdisciplinary assessments.

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[21] Department for Business, Energy, & Industrial Strategy (n 17).

[22] Jinqi Liu, Jihong Wang and Joel Cardinal, 'Evolution and Reform of UK Electricity Market' (2022) 161 Renewable and Sustainable Energy Reviews <https://doi.org/10.1016/j.rser.2022.112317>.

This is particularly true because there have so far been many difficulties in formulating what balance and harmony in the energy sector actually mean. Technological progress and a dynamic energy environment require pragmatic actions, but the transition – as a fragile social issue – also reminds us that the law is not a technical instrument in the economic laboratory.

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Online Intermediaries and Sustainable Market Regulation – a Smart Mix of Liability and Exemptions

by

Katarzyna Klafkowska-Waśniowska* and Katja Weckström**

CONTENTS

* Katarzyna Klafkowska-Waśniowska, Prof. UAM dr. hab., Faculty of Law and Administration of the Adam Mickiewicz University in Poznań (Poland); e-mail: kwasn@amu.edu.pl; ORCID: https://orcid.org/0000-0003-4164-979X.

** Katja Weckström, Prof. docent, UEF Law School, University of Eastern Finland (Finland); e-mail: katja.weckstrom@uef.fi; Research Gate: https://www.researchgate.net/profile/Katja-Weckstrom/research.

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Abstract

The Commission has advanced sustainable and responsible behaviour of business operators in the digital environment since the adoption of the Strategy for the Digital Single Market of 2015. The question remains, how can we reach the normative goal of ensuring a safe, secure and fair online environment, where fundamental rights are protected, and responsibilities of platforms, especially large players and gatekeepers, are well defined? A "smart mix" of mandatory and voluntary rules, in combination with industry self regulation, is applied to address business and fundamental rights. This paper asks how the Digital Services Act (DSA) answers the call for sustainable market regulation. Ideally, sustainable market regulation may respond to specific risks, and impose tailored duties for "diligent economic operators", without setting liability enhanced policy or enforcement targets for normal business activity.

The paper discusses what has changed in the approach adopted in the DSA; what is the role of intermediaries in the information flows online; and how this is linked to information and data, important from the perspective of energy consumption as a parallel sustainability goal. It analyses briefly the CJEU case law on balancing liability exemptions with fundamental rights, including the right to information and its impact on the interpretation of the DSA. The paper also considers how the DSA fosters the concept of diligence in the online environment, as well as consumer empowerment, as an important feature of sustainable market regulation.

Résumé

Depuis l'adoption de la stratégie pour le marché unique numérique en 2015, la Commission encourage les opérateurs économiques à adopter un comportement durable et responsable dans l'environnement numérique. La question reste de savoir comment atteindre l'objectif normatif consistant à garantir un environnement en ligne sûr, sécurisé et équitable, où les droits fondamentaux sont protégés et où les responsabilités des plateformes, en particulier des grands acteurs et des gardiens, sont bien définies. Un «mélange intelligent» de règles obligatoires et volontaires, en combinaison avec l'autorégulation du secteur, est appliqué pour traiter la question des entreprises et des droits fondamentaux. Le présent article s'interroge sur la manière dont la loi sur les services numériques répond à l'appel en faveur d'une régulation durable du marché. Dans l'idéal, une réglementation durable du marché peut répondre à des risques spécifiques et imposer des obligations adaptées aux opérateurs économiques diligents, sans fixer d'objectifs de responsabilité, de politique ou de mise en œuvre renforcés pour l'activité commerciale normale. L'article examine ce qui a changé dans l'approche adoptée dans le DSA ; quel est le rôle des intermédiaires dans les flux d'informations en ligne ; et comment cela est lié à l'information et aux données, ce qui est important du point de vue de la consommation d'énergie en tant qu'objectif de durabilité parallèle. Il analyse brièvement la jurisprudence de la CJUE sur

l'équilibre entre les exemptions de responsabilité et les droits fondamentaux, y compris le droit à l'information, et son impact sur l'interprétation du DSA. Le document examine également la manière dont le DSA favorise le concept de diligence dans l'environnement en ligne, ainsi que l'autonomisation des consommateurs, en tant que caractéristique importante de la réglementation du marché durable.

Key words: digital single market; EU market regulation; online intermediaries; platform liability; liability exemptions; sustainability.

JEL: K2

I. Introduction

The European Green Deal and Europe Fit for the Digital Age are leading EU priorities[1] that translate into autonomous EU legislative initiatives responding to UN sustainability goals.[2] The objectives of making Europe a carbon-neutral, modern and resource-efficient economy, alongside the preservation of the natural environment and achieving sustainability goals, dominate the discussion on sustainability. However, fostering innovation through digitalization should not be overlooked. The EU action plan for the digitalization of the energy sector is a prominent example of complementary actions under the two priorities.[3] Actions include empowering consumers, and increasing their control over energy consumption, as well as strengthening cybersecurity of digital energy services. The systemic risks are discussed in the context of digitalization and energy: cybersecurity, privacy, and the protection of fundamental rights and economic disruption.[4] Empowering consumers entails discussing sustainable market regulation, relating to the use of connected devices, the Internet of Things (hereinafter: IoT), sharing data, as well as developing algorithms advancing tailored energy consumption, such as in smart homes. It requires reflection on the rules governing online information flows.

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2020 A Union that strives for more, 29.01.2020, COM (2020) 37 final.

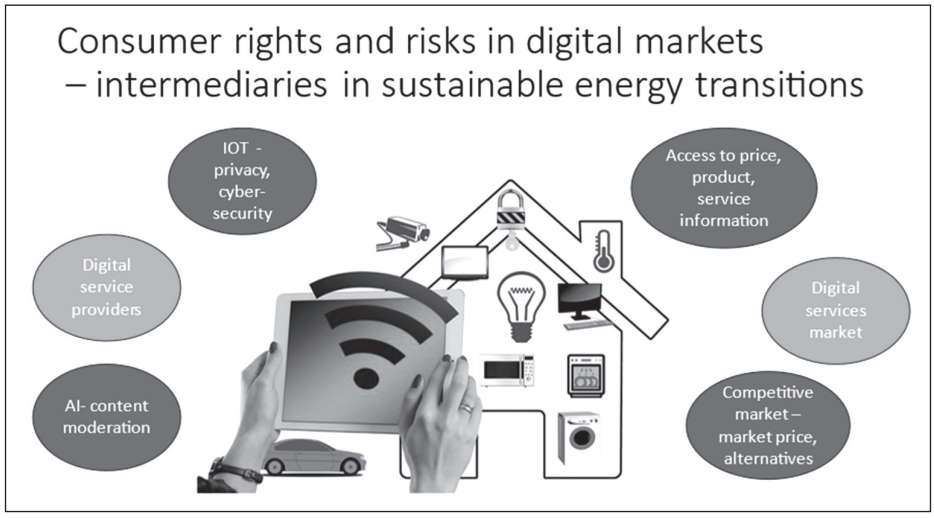
[2] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution of General Assembly 25 September 2015 <https://documents-ddsny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement> accessed 25 January 2024.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Digitalizing the energy system – EU action plan, 18.10.2022, COM (2022) 552 final.

[4] International Energy Agency, Digitalization and Energy (2017), 123 (hereinafter: Digitalization and energy).

Our focus is on the regulation of intermediaries controlling market infrastructure that are capable of intercepting or releasing information provided by users, or technically altering and redirecting traffic flows online. We discuss these issues primarily in the context of the EU Regulation of 19 October 2022 on a Single Market For Digital Services – known as the Digital Services Act of 2022 (hereinafter: DSA), with its expressed ambition to create "a safe, predictable and trusted environment".[5] Starting from the Digital Single Market (hereinafter: DSM) Strategy of 2015[6], the European Commission advances sustainable and responsible behaviour of diligent business operators in the digital environment. The DSA aims to provide a "smart mix" of horizontal liability exemptions – essentially, exempting service providers from liability for the [illegal/unlawful] acts of the users of their services – and new "due diligence" obligations, subject to administrative liability. Furthermore, the "smart mix" we are discussing includes obligations directly imposed on service providers, that is, intermediaries, as well as incentives for them to take voluntary actions in the public interest.

Figure 1. Protecting rights and securing risks in smart home digital services



Source: Figure created by Katja Weckström.

[5] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) OJ L 277, 27.10.2022, p. 1–102.

[6] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM (2015) 192 final, 12.

Sustainable regulation for digital markets is directed at the objectives of fostering innovation (as a sustainability goal) as well as of the protection of "user rights", in the context of fundamental rights (privacy or freedom of expression) and consumer rights. Sustainable regulation needs to be clear and coherent to offer legal certainty to all market actors. At the same time, it needs to avoid over-regulation, yet be flexible enough to respond to evolving technologies and new practices that emerge on the market. The DSA fosters two complementary regulatory goals: i) preserving liability exemptions to offer space for the development of innovative services; and ii) engaging intermediaries in safeguarding user rights and preventing risks, by complex due diligence obligations specified within the DSA.

We, therefore, discuss what is new in the approach adopted in the DSA (Section I). In Section II, we discuss the role of intermediaries in information flows online and how is this role linked to information and data important from the perspective of energy consumption. We then move on to discuss the impact of CJEU case law on balancing liability exemptions with fundamental rights, including the right to information, and its impact on the interpretation of the DSA (Section III). As diligent behaviour of intermediaries is part of the goal of sustainable market regulation, subsequently the paper discusses the obligations imposed in the DSA, which aim to engage intermediaries in protecting user rights, without losing the protection of liability exemptions (Section IV).

II. The EU Legal Framework for Liability Exemptions for Intermediaries

1. From the E-commerce Directive to the Digital Services Act

The E-commerce Directive (hereinafter: ECD) was adopted in the year 2000 and seeks to contribute to the proper functioning of the internal market by ensuring free movement of information society services between the Member States (Article 1). An information society service is defined as any service normally provided for remuneration, at a distance, by electronic means, and at the individual request of a recipient of such service.[7] It includes harmonizing

[7] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce). For this purpose: "at a distance" means that the service is provided without the parties being simultaneously present; "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing and storage of data, and entirely transmitted, conveyed or received by wire, by radio, by optical means or by other electromagnetic means; "at the individual request of a recipient of services" means that the

provisions on the establishment of information society services, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements and court actions, as well as cooperation between Member States. The ECD took important steps towards securing the freedom to provide services in the European Union, by introducing the country of origin principle (that is, point of first contact or home-country control). However, its practical impact was greatly affected by Article 1(3) ECD, which removed business-to-consumer (B2C) relationships from its sphere of harmonization. Thus, Member States were free to maintain national consumer laws at respective levels of protection.[8]

The EU position has since changed with the introduction of the Unfair Commercial Practices Directive of 2005 and the Consumer Rights Directive in 2011, as well as several subsequent measures that harmonize consumer protection across the EU.[9] Unlike the E-commerce Directive, the DSA has the form of an EU Regulation, and is, therefore, directly applicable in Member States. Hence, it can also be viewed as one arm of the general regulatory effort to improve online consumer protection across the EU. Although both the ECD and the DSA constitute market regulation and focus on the role of internet service providers as market actors, the hybrid feature of the DSA is novel.

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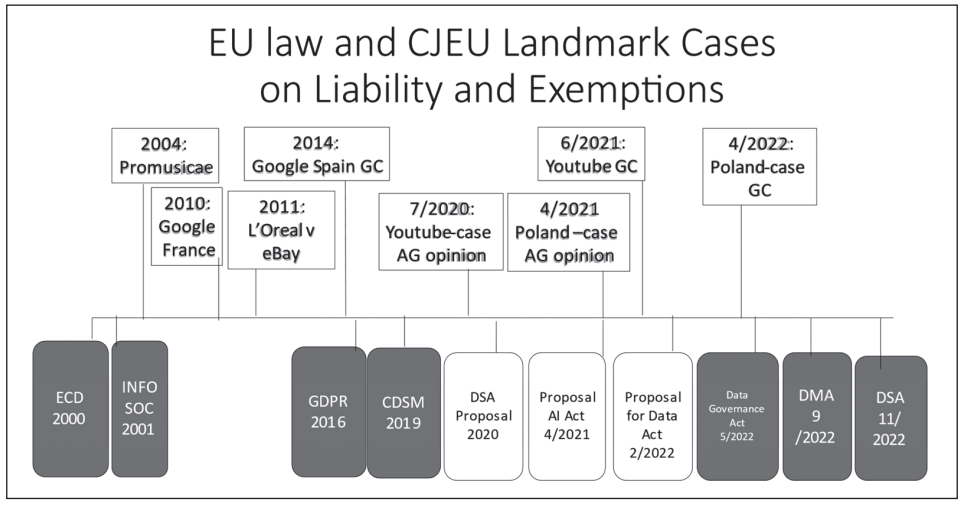
service is provided through the transmission of data on individual request. Art. 2(a) of the ECD refers to Art. 1(2) of the Directive 98/34/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217/21, 5.8.1998. The definition provision remains unchanged in codifying Directive (EU) 2015/1535 of the European Parliament and Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification).

[8] Thus, the Directive applies to internet service providers in both business-to-business and business-to-consumer e-commerce, but national law may place additional obligations upon internet service providers based on national consumer law. First Commission report at 4. Likewise Art. 1(5) exempts taxation, cartel law and questions relating to personal data law from the sphere of application of the ECD. Art. 1(5(b)) explicitly exempts questions relating to information society services covered by Directives 95/46/EC and 97/66/EC, which regulate the right to privacy of personal data.

[9] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (Text with EEA relevance) [2005] OJ L149/22. Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L304/64.

The European Union regulated the issue of liability of internet service providers from the perspective of e-commerce, as opposed to that of an infringement of a specific intellectual property right. Hence, the normative focus was not on defining specific illegal content, but on measures to remove clearly illegal content. The text of the ECD is, nevertheless, strongly influenced by copyright concerns, which were pressing at the time of the adoption of the ECD. The inter-relationship with copyright law was explicitly mentioned in the recitals of both the ECD and the Copyright and Information Society Services Directive (hereinafter: INFOSOC Directive).[10] As a consequence, the ECD applies to all types of illegal activity in a horizontal manner, that is, it covers civil, administrative and criminal liability for all types of illegal activities initiated by third parties online, including: copyright piracy, trademark counterfeiting, defamation, misleading advertising, unfair commercial practices, child pornography etc."[11]

Figure 2. Development of EU Law on Liability and Exemptions 2000–2022



Source: Figure created by Katja Weckström.

[10] Recital 50 of the ECD and Recital 16 of the Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10. See also Study on the Liability of Internet Intermediaries Markt/2006/09/E, 12.11.2007 12.

[11] However, the safe harbors do not apply to injunctions aiming at removal of illegal information or disabling access to it. Ulys, T.V. et al. Study on the Liability of Internet Intermediaries, Markt/2006/09/E, 12.11.2007, 4.

Figure 2 shows how EU law has developed relating to liability, and liability exemptions, for providing online services in the EU. It also gives a chronological reflection of central pieces of EU legislation and CJEU preliminary rulings, to re-create the context for the debate on liability and exemptions. While the text of the legal provisions is static, the substantive debates introduce reflections of technological development, and how innovative business models or services raise fundamental legal questions. It shows how the normative fabric becomes layered, when new legislation is introduced to co-exist with existing laws. Yet the interpretations of core provisions remain fairly consistent in CJEU case law.

2. A Dynamic Legal Context – the DSA Proposal

While confirming the principles set out in the ECD, the original DSA proposal[12] presented in 2020 made a clear effort to control the future actions of providers of digital services, and shift their role towards securing other societal interests, such as protecting fundamental rights of users and removing illegal content.[13] In essence, the DSA proposal targeted intermediaries because they have provided services that "chang[e] the daily lives of Union citizens and shap[e] and transform […] how they communicate, connect, consume and do business."[14]

> "The proposal defines clear responsibilities and accountability for providers of intermediary services, and in particular online platforms, such as social media and marketplaces. By setting out clear due-diligence obligations for certain intermediary services, including notice-and-action procedures for illegal content and the possibility to challenge the platforms' content moderation decisions, the proposal seeks to improve users' safety online across the entire Union and improve the protection of their fundamental rights."[15]

In addition, the proposal set clear responsibilities for Member States to ensure compliance of service providers in meeting EU imposed obligations, and to ensure swift and effective enforcement of citizen rights.[16] The most significant aspect of the proposal related to the deletion of Articles 12–15

[12] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15.12.2020, COM (2020) 825 final (hereinafter: COM (2020) 825 final).

[13] COM (2020) 825 final, 1.

[14] Ibid.

[15] COM (2020) 825 final, 2.

[16] COM (2020) 825 final, 3.

of the ECD (liability exemptions for intermediaries), and their "reproduction" in the DSA. While the ECD and the principles underpinning it had remained in force, the DSA was meant to complement it. Moving Article 15 ECD, which includes a prohibition placed on Member States against imposing a duty on intermediaries to monitor content, from the ECD to the DSA, would have changed the balance of the principles underpinning the ECD – from general market regulation, towards the specific regulation of providers of services.[17] Normatively speaking, the 2020 DSA proposal sought to cement the role of digital service providers as agents of government instead of independent private actors in a free market economy. It would have constituted a clear shift in EU policy, of abstaining from regulation of e-commerce, towards the EU taking an active role in public regulation of the digital economy.

3. The Normative Context of Platform Liability in the Adopted Text of the DSA

In response to criticism, the Commission proposal was changed during the legislative process relating to the subject matter and the scope of the DSA. Three significant alterations were made that changed the interpretive framework. The wording and word order of the original proposal was modified in its final draft relating to the regulatory aims and its scope.

First, the order of Article 1(2) and 1(1) DSA was changed to set the general aim of contributing to the proper functioning of the internal market first, and the objective of laying down uniform rules second. The scope of the DSA thus upholds the general framework for EU e-commerce rules set in the ECD, despite shifting the text of Articles 12–15 of the ECD to the DSA.[18] Second, the addition of Article 2(3) DSA includes specific wording whereby the DSA does not affect the application of the ECD. This change sets the status of the DSA as co-existing with the ECD, rather than replace it. Third, a key addition lies in Article 1(1) DSA, where the wording "The aim of this Regulation is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected" replaces the original draft's aim which was to "set out uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected".

[17] Ibid.
[18] Recital 16 DSA.

However, the DSA constitutes a measure of full EU harmonization, and so Member States may not maintain or introduce additional liability exemptions for intermediaries.[19] Although Article 3 of the ECD remains in effect (in relation to national regulation in other fields of law), EU rules relating to safe harbours for intermediaries are now harmonized. Under Article 3 ECD, national measures tasking intermediaries to act against illegal acts of users, or to provide information, are limited in scope, by necessity, and by the principle of proportionality.[20] Article 3 ECD limits measures setting obligations on specific intermediaries to the areas of: public policy (preventing serious crimes), public health, public security and consumer protection. Articles 9–10 DSA now set codified standards in relation to the field of application of such measures, which may apply, if there is a rational basis for such an order in any EU or national legislation.

The DSA was introduced together with EU Regulation of 14 September 2022 on contestable and fair markets in the digital sector – the Digital Market Act (hereinafter: DMA). Together, they constitute parts of the EU Digital Agenda with the aim of protecting users of digital services across the EU. The DMA identifies *core online platforms* as *gatekeepers* in the online market, and imposes duties designed to curb their market power to secure a fair environment for business operators and end users.[21] For our purposes, it is important to note that the DMA focuses on gatekeeper obligations that are designed to ensure market *access* on fair terms. In the context of competition law, actors that are in a dominant position are routinely subject to stricter standards and scrutiny of their actions that may have anti-competitive effects on future markets.[22] Gatekeepers can be understood as entities that have market power, that is, those that can manipulate market prices or demand and supply levels, without normal competition constraints. From a perspective of sustainability, we can assess whether the balance of regulation creates *systemic* risks while it attempts to remove *some* risks.

To illustrate the difference, modern state-owned enterprises (limited liability companies, LLCs), or private providers of essential services, are market actors that operate within a set regulatory framework. They do, however, operate *autonomously in terms of decisions* on future actions and investments, as long

[19] Recital 4 DSA.

[20] This is closely mirrored in how the CJEU approached the question in case C-401/19, *Republic of Poland v European Parliament and Council of the European Union* OJ C70/24 (hereinafter: Case C-401/19 *Poland)*. See infra.

[21] Art. 1 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance) [2022] OJ L265/1.

[22] Art. 102 TFEU.

as they provide services on equal terms to all. If the role for digital service providers mirrors traditional publicly-controlled companies, which *must take account of public policy in operative decision-making,* rather than basing such decisions on supplying market demand, then this presents a sustainability risk for market regulation. Legal risk of liability affects decision-making on research, development and investments, that is, decisions to change or maintain the operations of the enterprise. Shifting the **status** of market-leader companies, to serve set public interests (securing fundamental rights of users), de-prioritizes serving unknown and undefined public interests, such as developing essential facilities for digital commerce, and propelling growth of the digital economy. A systemic reduction of free market-based R&D investments, slows down the platform economy. As a result, it impacts availability of new digital services that enable transitions towards more sustainable consumption habits. Change (innovation, market renewal, R&D investments) is needed to reach sustainability goals. Over-regulation, which in effect stagnates rather than fosters innovation, must be viewed as unsustainable market regulation.

A strong guiding principle of EU trade policy and law is towards market liberalization, and moving away from governments wielding significant policy power in a way that may disrupt markets. The key lies in developing the digital economy through *freedom of competition* and acquired market power, rather than using political power for economic gain. Ideally, sustainable market regulation may respond to specific risks and impose tailored duties for diligent economic operators, without setting liability enhanced policy, or enforcement targets for normal business activity.

III. Information governance and content moderation

The goal of the DSA looks promising: creating a safe, predictable and trusted environment for digital services[23], with effective protection of fundamental rights. The concept of "digital services" potentially covers the whole digital market, yet the DSA targets not all information society services[24], but only those of intermediaries. Three categories of intermediaries are listed in the DSA: "mere conduit", "caching" and "hosting" services, following the categories of service providers potentially within the scope of liability exemptions regulated in Articles 12–14 ECD. All categories of service providers are subject to regulation, because of the role they play in the transmission and storage of

[23] Art. 1(1) DSA.

[24] As the services addressed by the ECD.

information.[25] "Online platforms" are hosting services but they not only store information, but also disseminate it to the public at the request of the service recipient.[26] This definition highlights the media aspect of online platforms, and integrates content moderation as an inherent feature of an "online platform" service.[27] Social media and online marketplaces are examples of popular platforms. As may be concluded from the DSA provisions, the "dissemination" of information, and the impact on platform users, raises the most problematic issues when it comes to regulating platforms. The regulatory answer is thus based on a graduated approach, depending on whether the core of the platform service is the transmission, the storage, or the storage and dissemination of information. In the latter case, another layer of regulation is imposed on so-called Very Large Online Platforms (hereinafter: VLOPs) and Very Large Online Search Engines (hereinafter: VLOSEs), based on the potential impact on users.[28]

Dealing with "information" is the basis for the categorization of services covered by the DSA. Along these definitions, the DSA recitals point to an increasingly complex ecosystem *for the transmission, "findability" and storage of data online*.[29] To make it even more complex, the discussion and analysis of the DSA focuses on "content" and its moderation, aiming at fighting "illegal content", and guarding the freedom of expression. None of these key terms: information, data or content is defined in the DSA itself. However, certain clues can be found, for example, in its definition of "content moderation", making it possible to identify typical types of content: posting text, photos, videos, sales offers or advertisements.[30] "Data", on the other hand, is defined for the purpose of the Data Governance Act as *any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording*[31].

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[25] The definition of an "intermediary service" in Art. 3(g) DSA.

[26] Art. 3(i) DSA.

[27] Gillespie, T. 'Custodians of the Internet. Platforms, content moderation and the hidden decisions that shape social media' (2018) 21.

[28] Section 5 DSA imposing additional obligations on VLOPs and VLOSEs to manage systemic risks.

[29] Recital 28 DSA.

[30] Inferred from the definition of content moderation, and general examples of online platforms-Art. 3 t and rec. 13 DSA.

[31] Art. 2(1) Regulation (EU) 2022/868 on European data governance and amending Regulation (EU) 2018/1724 Regulation (Data Governance Act) [2022] OJ L152/1 (hereinafter: Data Governance Act). The same definition proposed in the draft for a Regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data (Data Act) COM (2022) 68 final (hereinafter: Data Act).

It is clear that the distinction between information, data and content is difficult to draw in the normative context. What amounts to "content" under the DSA, can at the same time be considered "data" in the data regulation context. An example can be found in the chart illustrating the impact of digitalization on energy demand in buildings.[32] Energy apps developed, among others by Google,[33] are key facilitators for smart homes and energy savings. The combination of apps (services) and connected devices (such as thermostats) is based on the exchange of data and information, though not necessarily made publicly available, as in the case of online platforms. Furthermore, some of the content/data is disseminated by the intermediaries at the request of the users (so a service provider performs the true role of an intermediary) and some, on its own initiative. Meta, for example, makes Electrical Distribution Grid Maps available to the public under the general Data for Good project.[34] This activity may test the limits of the term "content moderation", as distinct from "content publication", while its essence is to provide data for planning of infrastructure and community development projects.

The efforts to keep the regulation of content services, intermediaries and data services separate are obvious. For example, the Data Governance Act regulates the selected categories of data intermediaries: data intermediation services[35], and expressly excludes services that focus on the intermediation of copyright-protected content, as well as services, the main goal of which is to ensure the functionality of objects and devices connected to the Internet of Things (IoT).[36] The proposal for a Data Act, on the other hand, aims to harmonize rules on making data generated by the use of a product or related service available to the user of that product or service (IoT)[37]. It thus covers not only manufacturers, but also suppliers of related services, and users of the products and services in question. It also aims to reinforce user rights in relation to data processing service providers. The category of the data processing services encompasses "digital services", within the meaning

[32] Digitalization and Energy, 42–44.

[33] See Google Nest <https://play.google.com/store/apps/details?id=com.nest.android&hl=en_US>.

[34] Electrical Distribution Grid Map <https://dataforgood.facebook.com/dfg/tools/electrical-distribution-grid-maps>; an interesting example indicated in the doctoral dissertation of Adrianna Michałowicz Data Altruism in the European Union Law (2023), University of Łódź, unpublished.

[35] Art. 2(11) Data Governance Act *a service which aims to establish commercial relationships for the purposes of data sharing between an undetermined number of data subjects and data holders on the one hand and data users on the other, through technical, legal or other means, including for the purpose of exercising the rights of data subjects in relation to personal data*.

[36] Art. 2(11)(b) and (c) Data Governance Act.

[37] Art. 1(1) Data Act.

of the proposed Data Act.[38] The term expressly excludes online content services within the meaning of the Portability Regulation,[39] which focuses on audiovisual media services (AVMS) and providers of access to, and the use of, works and other protected subject matters such as broadcasts. These exclusions do not mean that "digital services" are not covered by the DSA, if they fall within the scope of regulated intermediaries.[40] Unlike the express mention of the relation of the DSA to the ECD in Article 2 DSA, there are no express references to the Data Governance Act,[41] or other data related legislation in the DSA.

The regulatory landscape for the digital market is thus dominated with EU laws addressing selected problems of multiple categories of online service providers. Although digital service providers often operate in several sectors, the regulatory choice may be justified by the attempt to avoid over-regulation, and leave space for innovation. Against this backdrop, the DSA appears to address the overarching problem of securing a safe environment and promoting due diligence of intermediaries. The clear objective of the DSA is to fight "illegal content", that is, any content not in compliance with EU law, or national law,[42] while, at the same time, preserving liability exemptions for intermediaries and fostering the responsible behaviour and diligence of intermediary service providers.

[38] Art. 2(12) Data Act: "data processing service" means a digital service other than an online content service as defined in Art. 2(5) of Regulation (EU) 2017/1128, provided to a customer, which enables on-demand administration and broad remote access to a scalable and elastic pool of shareable computing resources of a centralized, distributed or highly distributed nature; Art. 2(12) of the draft Data Act.

[39] Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market [2017] OJ L168/1.

[40] M. Husovec points to the term "digital services" as not relevant in the DSA Regulation, and explains the applicability of DSA to hybrid platforms. See: Martin Husovec, 'The DSA's Scope Briefly Explained' (2023). Available at SSRN: <https://ssrn.com/abstract=4365029>, 4.

[41] Preceding the Digital Services Act, see Figure 2.

[42] Subject to the conformity with EU standards; Illegal content is defined in Art. 3(h) DSA and "content moderation" means the activities, whether automated or not, undertaken by providers of intermediary services, that are aimed, in particular, at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility, and accessibility of that illegal content or that information, such as demotion, demonetization, disabling access to, or removal thereof, or that affect the ability of the recipients of the service to provide that information, such as the termination or suspension of a recipient's account Art. 3(t) DSA.

IV. Liability exemptions in the DSA and CJEU case law

1. DSM policy proposals and Case C-401/19 *Poland vs Parliament and Council*

The DSA contains conditional exemptions from liability of intermediaries, for illegal actions of their users, with respect to the mere conduit of data (Article 4 DSA), for caching services (Article 5 DSA), and for hosting services (Article 6 DSA). Platforms that supply a variety of digital services generally fall within the category of hosting services, since they store information provided by the recipient of the service, that is, users of the service.

Chapter II of the DSA also contains limitations on the ability of Member States to impose further liability on intermediaries for the activities of their users, or third party content, on their sites. Importantly, according to Article 8 DSA, Member States may not impose upon intermediaries a general obligation to monitor the information, which providers of intermediary services transmit or store, nor to require intermediaries to actively seek facts or circumstances indicating the illegal activity of users. Article 7 DSA ensures that intermediaries may not lose the safe harbour protection granted to them under Articles 4–6 DSA for taking voluntary action to ensure compliance with legal obligations. In practice, the question of liability under Articles 4–6 DSA centres on whether intermediaries possess *actual knowledge* of illegal activity by their users. Thus, if intermediaries were to face full liability for gaining knowledge of such illegality through their own voluntary investigations, the legal framework would incentivize intermediaries to stay passive to prevent being found liable for the acts of others.[43] Such open-endedness and uncertainty relating to the liability for one's actions could qualify as a systemic risk arising from the regulation itself, and thus indicating the unsustainability of that regulation. Article 7 DSA removes such ambiguity, provides certainty, and creates an incentive for intermediaries to make voluntary efforts to fight illegality of user behaviours, that is, a "smart-mix" of sustainable market regulation.

[43] The 2011 decision in case C-324/09 *L'Oreal vs eBay* relating to the removal of counterfeit merchandise from eBay signaled that a duty to act could be triggered when intermediaries gain "actual knowledge" either via their own investigations, or when receiving a specific notification of infringing content by the right holder. Unlike copyright law, the trademark right does not contain exclusive rights to refer to the trademark in commerce, since it could create a barrier for a thriving secondary market in branded goods as well as comparative advertising by competitors (*Google France*). Subsequent case law relating to content that infringes copyright has emphasized that the duty to act to remove specific content requires a notification by the right holder. Art. 7 DSA clarifies that liability may not incur based on knowledge acquired during the exercise of best efforts to combat illegal activity on the platform.

Over two decades, the Court of Justice of the European Union (hereinafter: CJEU) has issued preliminary rulings on how to thread the line between platform liability and safe harbour exemptions in several cases relating to potentially infringing behaviour. The normative framework for the liability exemptions has developed over the last 20 years, since the introduction of the ECD. Table 1 shows the general categorizations of liability exemptions and links the past and future statutory placement of said provisions. It also links to CJEU case law where the interpretative context for the liability exemptions in EU law was developed.

In an action for annulment, Case C-401/19 *Poland vs the European Parliament and Council*[44], the CJEU was asked to assess liability imposed on online platforms in Article 17(4) of Directive 2019/790 on copyright and related rights in the digital single market (hereinafter: CDDSM) against fundamental rights protected in Articles 11 and 17(2) of the EU Charter of Fundamental Rights (hereinafter: EU Charter). The issue at hand was whether Article 17(4) CDDSM infringed user rights to freedom of expression and information, as guaranteed in Article 11 of the EU Charter. The concern arises, since online platforms, to avoid liability, are likely to use automatic filtering tools that can remove user access not only to illegal but also, albeit unintentionally, to legal expression. Over-regulation that impacts material covered by freedom of expression, indicates a systemic risk of unsustainable market regulation.

Prior to the introduction of Art 17(4) CDDSM, the exemption from liability for copyright infringements had been governed by Article 14 ECD (now Article 6 DSA), and the corresponding Article 3 of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: INFOSOC Directive).[45] At the time of the Opinion of the Advocate General Saugmandsgaard Øe of 15 July 2021, and CJEU Grand Chamber ruling on 26 April 2022, the DSA had been proposed, but not yet introduced as amended and passed.[46]

The CJEU reiterated its case law that links the interpretation of Article 11 of the EU Charter with that of the European Court of Human Rights' interpretation of Article 10 of the European Convention of Human Rights.[47] The guaranteed freedom of expression and information applies to both the

[44] Case C-401/19 *Poland*.

[45] Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[46] The DSA was published in the Official Journal as of 27 October 2022 and came into force on 16 November 2022.

[47] Case C-401/19 *Poland*, para. 46 citing ECtHR, *Cengiz and Others v. Turkey* App no 48226/10 and 14027/11 (ECtHR, 1 December 2015), § 52; and *Vladimir Kharitonov v. Russia* App no 10795/14 (ECtHR, 23 June 2020), § 33 and the case law cited.

Table 1. Liability safe harbor provisions for internet service providers in EU law

General framework for liability exemptions in EU Law		
Provision in force	**Previous provision or case law**	**Scope and subject matter**
ECD Art. 3 EU Fundamental Rights Charter National constitutions	Case C-275/06 *Promusicae*, Case C-401/19 *Poland*	general proportionality test for national measures placing obligations to secure rights on information society services
DSA Art. 4	former ECD Art. 12	liability exemption for mere conduit service providers
DSA Art. 5	former ECD Art. 13	liability exemption for caching service providers
DSA Art. 6	former ECD Art. 14 interpreted in Cases C-268/08 & C-237/08 *Google France*; Cases C-282/18 & C-683/18 *Youtube*; Case C-401/19 *Poland*	liability exemption for hosting service providers (platforms)
DSA Art. 7	new, overturning in part Case C-324/09 *L'Oreal vs eBay*	general exemption for diligent investigation into illegal activity
DSA Art. 8	former ECD Art. 15 interpreted in Cases C-268/08 & C-237/08 *Google France*; Cases C-282/18 & C-683/18 *Youtube*; Case C-401/19 *Poland*	general prohibition on national measures imposing general monitoring obligations
CDSM Art. 17	new, interpreted in Case C-401/19 *Poland*	specific liability regime for large online content moderation platforms
GDPR	codifying in part Case C-131/12 *Google Spain*	specific liability regime relating to the protection of personal data for all business activity
DMA		due diligence obligations for gatekeepers to allow market access

Source: Data assembled by Katja Weckström.

content of information and the means of its dissemination. Any restriction of the means of dissemination necessarily interferes with the guaranteed freedom of expression. The internet and online content-sharing platforms have become an important means for enhancing public access to news and public dissemination of free expression. It is both an important vehicle for exercising freedom of expression as well as gaining access to the expression of others.

The CJEU referenced its interpretation of the hosting exemption (at that time, Article 14 ECD) and clarified that the interpretation of any liability regimes needs to take account of the particular importance of the internet for the freedom of expression and information when implementing the regime.[48] In the context of this case, the CJEU noted also that the specific liability regime at issue in Article 17(4) CDDSM only applies to some large online-content sharing service providers whose main, or one of the main purposes is to store and give public access to a large amount of copyright protected works, or other protected subject matter uploaded by its users, which the provider organizes and promotes for profit-making purposes.[49]

The CJEU stated that the contested provision does not impact intermediaries in general, or the interpretation of the liability exemption for hosting services under Article 14 ECD (now Article 6 DSA), but is a specific liability regime designed for online-content sharing platforms with a particular purpose, and the particular problem of curbing end-user copyright infringements.[50] The CJEU further assessed the specific liability regime, its justifications, and the proportionality of the measure, against the requirement of service providers to exercise best efforts to remove unlawful content from their service, based on specific notifications by right holders.

The CJEU concluded that as such, Article 17(4) CDDSM requiring online content-sharing service providers to make best efforts to ensure the unavailability of specific protected content, constitutes a limitation on the fundamental right to the freedom of expression and information, because available means for employing best efforts (algorithmic enforcement), may also categorically remove lawful content from the service. Hence, any restrictive measure must be provided for by law and satisfy the proportionality test. Limitations may only be made if they are necessary, and genuinely meet objectives of general interest recognized by EU law, or the need to protect the rights and freedoms of others. In the event of a collision of rights, a fair balance must be struck between the interests at stake. Where there is a choice between alternative appropriate measures, the one that limits other rights the least must be chosen, and the disadvantages caused may not be disproportionate to the aims pursued.[51] The CJEU clarified also that, when assessing national measures implementing Article 17(4) CDDSM

[48] Case C-401/19 *Poland*, para. 47. Joined cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG* (hereinafter: *Youtube*) ECLI:EU:C:2021:503, paras 64, 65, 113.

[49] Case C-401/19 *Poland*, para. 30.

[50] Case C-401/19 *Poland*, paras 30–31. The Court notes tailoring measures in Art. 2(6) defining online sharing platforms and Art. 17(6) that limits these obligations only to intermediaries with an annual turnover larger than 10 million Euros.

[51] Case C-401/19 *Poland*, paras 63–68 and the ECtHR case law cited.

and other liability regimes, each EU Member State must make their own assessments in relation to the specific measures advanced.[52] Thus, the CJEU set strict criteria for tailoring measures in fundamental rights sensitive activities, in order to prevent practices that could lead to a systematic removal of lawful content from platforms.[53] It remains to be seen if Member States have headed the call to tailor-make safeguards when implementing Article 17 CDMSD.

2. Interpreting the DSA in Light of Landmark Preliminary Rulings

The reasoning in Case C-401/19 *Poland* is in line with established CJEU case law, since the *Promusicae* ruling from 2008[54], whereby Member States are responsible when implementing EU law to strike a fair balance between the various fundamental rights protected by the EU Charter. The factual risk of measures over-blocking lawful expression is recognized by the CJEU. In essence, online platforms are not obligated to produce a specific result (preventing illegal content being accessed via their service), but "the filtering measures which sharing providers are required to implement must comply with two cumulative obligations: They must seek to prevent the uploading of content which unlawfully reproduces the works identified by right holders while not preventing the making available of content which lawfully reproduces that subject matter. Hence, measures that systematically undermine the right of users to make use of protected works are not proportionate".[55] Hence, Member States may not systematically require blocking content that falls within the limitations of the Copyright Act, but must take account of the position of the intermediary to act diligently in relation to both right holders and end-users of their service.[56]

This leads us to CJEU case law indicating the bounds of Article 8 DSA (former Article 15 ECD), that prohibits Member States from imposing a general obligation on intermediaries for them to monitor content or data. The CJEU has introduced the concept of "diligent economic operator" to help define when the actions of an intermediary are sufficient in terms of

[52] Case C-401/19 *Poland*, paras 71 and 99. See to this effect also Communication from the Commission to the European Parliament and the Council, Guidance on Art. 17 of Directive 2019/790 on Copyright in the Digital Single Market, 4.06.2021, COM(2021)288 final at 2–3.

[53] Case C-401/19 *Poland*, para. 99.

[54] Case C-275/06 *Promusicae*, ECLI:EU:C:2008:54, para. 68.

[55] Case C-401/19 *Poland*, para. 85 citing Opinion of the Advocate General in paras 164, 165 and 191–193.

[56] Case C-401/19 *Poland*, Opinion of the Advocate General Saugmandsgaard Øe, paras 192–193.

remaining exempt from liability for the illegal activity of others online.[57] This concept distinguishes "no fault" – intermediaries, from platform operators that facilitate, or turn a blind eye to illegal activity online.[58] The mere fact that the operator knows, in a general sense, that some content is made available illegally on its platform, is not sufficient grounds to conclude that it acts with the purpose of giving internet users access to that content.[59] Liability cannot be inferred from the persistence of illegal activity, instead, intermediaries are exempt from liability, unless specific conditions for liability are in fact met.[60]

In the *Google France* case, relating to keyword advertising and the operation of the Google search engine, the CJEU faced the question whether trademark owners could prevent Google from displaying competitors' ads or search results, when consumers searched for a specific brand. The Court concluded that a service provider cannot be held liable for the data, which it stores at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned. A service provider remains exempt from liability if it has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.[61]

Hence, the content and interpretation of safe harbours for intermediaries have not changed substantially with the incorporation of the provisions into Articles 4–6 DSA.[62] The *acquis* on Articles 12–14 ECD, on the limited liability of information society services for acts of its users, remains.[63] New technologies that allow increased consumer empowerment will continue to disrupt markets and propel digitalization. Smart regulation secures access to data and information to allow for competitive markets to develop, and give consumers price information. Less concentration (gatekeepers) in new markets allows consumers to make informed decisions and choose between quality digital services (high reward). The energy market has recently been liberalized, which

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[57] Case C-324/09 *L'Oreal and Others*, ECLI:EU:C:2011:474, para. 120. While the concept remains valid, the DSA expressly overturns the conclusion (para. 122) in that case that intermediaries should be liable when acquiring knowledge when information is uncovered based on their own investigation into matters (DSA Art 7). Art. 7 DSA confirms and codifies CJEU preliminary rulings in subsequent case law e.g. *Youtube*, paras 84–86.

[58] Case C-610/15, *Stichting Brein*, ECLI:EU:C:2017:456, paras 36, 45 and 48.

[59] *Youtube*, para 85.

[60] *Youtube*, para 87; distinguishing an interpretation of previous case law in case C-160/15, *GS Media*, ECLI:EU:C:2016:644.

[61] Case C-237/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA and Luteciel SARL*, ECLI:EU:C:2010:159 (hereinafter: *Google France*), para 120. See also Recital 22 DSA.

[62] Recital 19 DSA.

[63] Recital 16 DSA.

allows consumers greater choice between operators and prices. Smart home technologies rely on applications that collect, arrange and display information to consumers. Collection of data may occur inside consumer homes or outside, which immediately trigger both cybersecurity and privacy concerns (high risk). The key is to limit the risk without stifling the reward.

V. Fostering responsible behaviour of diligent economic operators

DSA complements liability exemptions with a general framework enhancing responsibility of intermediaries, particularly online platforms. The focus in the DSA is on transparency in relations with service recipients, procedural safeguards in the case of content moderation, and holding service providers accountable for the decisions they make, as well as their activities in the area of advertising.

The Declaration of Digital Rights and Principles,[64] recently adopted by EU Institutions, stresses, in the context of safety, security and empowerment, "a high level of confidentiality, integrity, availability and authenticity of the information processed", and accessed by EU citizens. Platform services, including social media, are the main source of information, essential for informed and responsible choices in the context of sustainability and energy consumption[65]. The role of online intermediaries is discussed also as part of cybersecurity and Internet of Things (IoT); how to foster data flows and access to information with safety and ensuring the control of users. Energy consumption can be mitigated with the use of smart home appliances and connected devices, for example, in buildings.[66] This poses risks to cybersecurity that can be countered by the manufacturers or applications developers. Based on the large number of customers they serve, intermediaries are recognized to have power derived from their access to the contact details of their customers. This puts them in a position to inform users about infected IoT devices, which could prevent cyber attacks (especially Distributed Denial-of-Service, DDoS,

[64] European Declaration on Digital Rights and Principles, <https://digital-strategy.ec.europa.eu/en/library/european-declaration-digital-rights-and-principles>.

[65] Sustainability Principle 24, European Declaration of Digital Rights and Principles; examples could include YouTube videos on how to save energy 5 amazing ways to save energy at home <https://www.youtube.com/watch?v=37kLS0uW16I>; or TikTok life-hacks on energy savings <https://studyfinds.org/tiktok-energy-saving-life-hacks/>; Instagram ideas for smart homes <https://www.instagram.com/explore/tags/smarthome/>; products offer at online marketplace allegro smart home <https://allegro.pl/kategoria/wyposazenie-inteligentny-dom-251242?string=smart%20home>.

[66] Digitalization and energy, 41–48.

and botnets). As noted, "intermediaries are not part of the IoT market, so they have low interest in detecting infected IoT devices via DNS and notifying users since they might incur in costs and personnel to deal with notifications." This poses questions on how to incentivize the intermediaries to engage in protecting their users.[67]

The DSA obliges intermediaries (service providers) to provide more information to their users (service recipients). All intermediary services must, in the terms and conditions of the service (ToS), inform users of any restrictions that the service provider imposes on the information that is provided by the users. It includes an obligation to explain the policies, procedures, measures and tools used for content moderation[68]. Service recipients should be made aware of the algorithmic decision-making and the human review process.[69] When actually restricting access to content deemed unlawful, users of hosting services, including platforms, should be presented with a statement by the service provider clarifying the reasons why the intermediary imposed an access restriction. This includes explaining what kind of a decision (removal or reduction of the visibility of content) was taken, whether there was a notice according to Article 6 DSA, or the decision was taken based on the service provider's voluntary investigation, if automated means were used and why the information was found to be illegal.[70] DSA provisions list in more detail not only what information should be provided to secure user rights, but how this information should be provided, apparently building on the experience with the application of information obligations in consumer related areas. Hence, required information should be provided to users in plain language, in easily comprehensible, clear and user-friendly manner.[71]

Due diligence obligations include establishing adequate means of redress for platform users. Redress mechanisms form an important pillar of the general framework for business responsibility in the area of human rights.[72] The DSA introduces certain mechanisms that business operators generally are

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[67] E.lsa Rebeca Turcios Rodriguez' One thing after another. The role of users, manufacturers and Intermediaries in IoT Security' (2023) <https://doi.org/10.4233/uuid:64e15692-06d7-4e3a-9d51-97f4a07b403f>, Delft University of Technology, 17.

[68] See João Pedro Quintais, Naomi Appelman and Ronan Fahy, 'Using Terms and Conditions to Apply Fundamental Rights to Content Moderation' (2022), available at SSRN <https://ssrn.com/abstract=4286147> on the detailed analysis of the relations between ensuring freedom of expression and art. 14 DSA addressing the terms of service.

[69] Art. 14 DSA.

[70] Art. 17 DSA.

[71] Art. 14(1) and 17(4) DSA.

[72] UN, Guiding Principles for Business and Human Rights. Implementing the protect-respect-remedy framework, New York–Geneva 2011 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

advised to provide and obliges online platforms to establish effective internal complaint-handling systems. Member States are also obliged to establish out-of-court dispute settlement mechanisms external to platforms.[73] It is clear that the service recipients addressed by a complaint are entitled to select any out-of-court dispute settlement certified according to the rules set in the DSA.[74]

The new oversight architecture for the platform environment includes administrative bodies, such as the Digital Services Coordinator, entities like "trusted flaggers" or academics requesting access to data[75], and the general public. The role of the Digital Services Coordinator in the certification process, as well as awarding the status of a "trusted flagger"[76] to selected entities and prioritizing internal review of the notices that trusted flaggers submit, aims to increase trust in balanced content moderation. Achieving balance is also guiding the provisions on the suspension of accounts of those who, on the one hand, frequently provide manifestly illegal content, and, on the other, frequently file notices that are manifestly unfounded.[77] Transparency and accountability are advanced with the obligations of reporting on **content moderation** that are made available to the public.[78].

Fighting illegal content and provision of illegal products and services is reinforced in the DSA in a number of ways. Special obligations are imposed on online marketplaces, that is, online platform services allowing consumers to conclude distance contracts with traders. The "know your business customer"[79] rule is encoded in Article 30 DSA, to allow for the pre-check of traders offering products and services in the EU. This, as well as rules that oblige platform service providers to inform consumers who purchased illegal products or use illegal services, about the illegality of that action, and about the identity of the trader engaged in illegal actions, as well as informing consumers of relevant means of redress, help prevent trade that is not in compliance with

[73] According to Art. 21(6) DSA, new mechanisms are not necessary: "Member States may establish out-of-court dispute settlement bodies for the purposes of paragraph 1 or support the activities of some or all out-of-court dispute settlement bodies that they have certified in accordance with paragraph 3".

[74] Art. 21 DSA.

[75] Recitals 92, 96–97 DSA, art. 40 DSA.

[76] Art. 22 DSA.

[77] Art. 23 DSA.

[78] Art. 15, 24 and 42 DSA addressing all intermediaries, online platforms and VLOPs respectively; Decisions and statements of reasons of online platforms shall be made available in the public database managed by the Commission Art. 24(5) DSA currently in the preparatory stage after the public consultations: https://digital-strategy.ec.europa.eu/en/news/digital-services-act-commission-launches-public-consultation-transparency-database-content.

[79] KYBC explained <https://www.kybc.eu/>.

EU law.[80] This could potentially be linked to the ongoing efforts in advancing cybersecurity in ICT services and products.[81]

Social media, such as YouTube or TikTok, online marketplaces, such as AliBaba, AliExpress or Amazon Store, as well as search engines, like Google Search, are subject to a special set of obligations, if they fulfil the criteria for being qualified as a Very Large Online Platform (VLOP) or Very Large Search Engine (VLOSE).[82] Due to their impact on a substantial number of users,[83] VLOPs are required to actively track and mitigate systemic risks to public security, among others.[84] The concept of "systemic risk" has been thoroughly developed in the financial services sector. It is understood as a risk, which will result in such a significant materialization of imbalances, that it will spread on the scale impairing the functioning of (in this case) the financial system, and will adversely affect economic growth.[85] VLOPs are required to conduct risk assessments, including taking into account service structure and organization, design of its recommender and algorithmic systems, as well as data related practices of the provider.[86] Furthermore, the DSA establishes the general framework for crisis management, with the concept of a "crisis" as occurring *where extraordinary circumstances lead to a serious threat to public security or public health in the Union or in significant parts of it*.[87] Established for the case of an extraordinary situation, it may be applied in the case of military aggression, hybrid cybersecurity attacks, or terrorist attacks beyond borders.

[80] If we apply, *per analogiam*, the conditions from the definition of 'illegal content'.

[81] Developing cybersecurity certification is conducted with the effort of the European Agency on Cybersecurity, and includes initiatives such as ICT products certification scheme, Cyber resilience Act (Proposal for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending regulation (EU) 2019/1020, COM (2022) 454 final) or the AI Act (Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, COM (2021) 206 final). <https://certification.enisa.europa.eu/>. Voluntary and compulsory certificates need, however, to be distinguished in this context. For example, not all products need a CE marking in the internal market. Decision No 768/2008/EC on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC [2008] OJ L2018/82.

[82] VLOPs/VLOSEs, designated according to Art. 33 DSA; the list was published in April 2023, <https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops>.

[83] 45 million active users per month.

[84] Art. 34 DSA; for the preliminary analysis see: Paddy Leerssen, 'Counting the days: what to expect from risk assessments and audits under the DSA- and when?' (2023) DSA Observatory <https://dsa-observatory.eu/2023/01/30/counting-the-days-what-to-expect-from-risk-assessments-and-audits-under-the-dsa-and-when/>.

[85] Paweł Smaga, 'The concept of systemic risk' (2014) SRC Special Paper No 5, 19.

[86] Four categories of systemic risks are listed in Art. 34 DSA, with more details on conducting risk management in Art. 34(2), and on the risk mitigation measures in Art. 35(1) DSA.

[87] Art. 36 DSA.

With the risk mitigation system in place, service providers should potentially be ready to offer a quick and adequate response, under the scrutiny of the European Commission.[88]

An overview of the DSA provisions associated most closely with safety and predictability in the online environment, shows that DSA pushes service providers not only to be active in content moderation, but also to organize their services in a transparent way, and to react adequately to orders or notices. Diligence is expected in both, fighting illegal content and services and protecting the right to receive and impart information, as well as consumer rights and other fundamental rights of users.

VI. Conclusion

The purpose of EU Single Market law is to ensure free movement of, and access to markets for new products and services. Fostering innovation is a sustainability goal that should be promoted together with building resilient infrastructure, advancing sustainable cities and climate actions, as well as the digitalization of the energy sector. We have analyzed the features of sustainable market regulation that aims to achieve the abovementioned goals associated with the digital single market.

The DSA, for example, addresses a broad scope of intermediaries, and advances a novel approach to market regulation, bringing together the goals of free movement, facilitating innovation, and the effective protection of fundamental rights and consumers. The scope of services covered by the DSA has the potential to resonate throughout the digital market. They include, for example, services of collecting and publishing data related to the energy sector, informing consumers on energy saving options, or developing smart home applications. The text of the DSA reflects the long debate on diligent operation of digital infrastructure services. The discussion on the removal of unlawful content by intermediaries, featured prominently in CJEU case law, is reflected in the DSA and the normative framework for diligent intermediaries. Other regulations, for example, in the data sector, address specific risks, while the DSA provisions can be used to foster a general concept of diligence in EU law.

In the DSA, liability exemptions for intermediaries coexist with a more active role of intermediaries in organizing the safe, secure and predictable online environment. The aforementioned "smart-mix" of obligations and incentives for intermediaries, includes preserving existing liability exemptions, and reinforcing

[88] Art. 36(1) DSA.

the prohibition of a general monitoring obligation now codified in the DSA Regulation, which does not require implementation into national law.

At the same time, the DSA codifies established case law on sustaining the protection of fundamental rights, including the gist of the reasoning in Case C-401/19 *Poland*. Several future regulatory measures are associated with this right: safeguards for the freedom of expression inherently linked to the ability to inform others and getting informed, which depends on information provided to service recipients and consumers, and, if the process works, eventually, results in consumer empowerment. The ambition to sustainably regulate digital markets, and to enhance responsible business behaviour, is articulated in the DSA. It remains to be seen if the implementation of the DSA in practice maintains a balance that allows the set sustainability goals to be achieved.

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The Court of Justice Kicks Around the Dichotomy Between Data Protection and Competition Law

Case Comment of the Preliminary Ruling in Case C-252/21 *Meta Platforms v. Bundeskartellamt*

by

Alba Ribera Martínez*

CONTENTS

* Alba Ribera Martínez, PhD Student at University Carlos III of Madrid and Lecturer in Competition Law at University Villanueva (Spain); e-mail: alba.ribera@villanueva.edu; ORCID: https://orcid.org/0000-0002-9152-0030.

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Abstract

Data protection and competition law have been at a crossroads in terms of their integration. Antitrust authorities as well as data protection supervisory authorities have grappled with the question of whether both fields of law should be combined into the same analysis. The German competition authority, the Bundeskartellamt, was the first to fuse them in its landmark case against Facebook's data processing terms and conditions.

The exploitative theory of harm put forward by the German NCA is the first of its kind to integrate data protection considerations into the antitrust analysis, namely by drawing a line between an infringement with the General Data Protection Regulation (GDPR) and anti-competitive harm. This case comment outlines its key developments at the national level, to then address the questions that have been answered by the Court of Justice of the European Union, CJEU, in Case *C-252/21* concerning the interpretation of the GDPR in the context of competition law.

Resumé

La protection des données et le droit de la concurrence sont à la croisée des chemins en ce qui concerne leur intégration. Les autorités antitrust et les autorités de contrôle de la protection des données ont été confrontées à la question de savoir si les deux domaines du droit devaient être repris dans la même analyse. L'autorité allemande de la concurrence a été la première à les fusionner dans le cadre de l'affaire qui a fait jurisprudence contre les conditions générales de traitement des données de Facebook.

La théorie du préjudice d'exploitation avancée par le Bundeskartellamt est la première du genre à intégrer des considérations relatives à la protection des données dans l'analyse antitrust, notamment en établissant une distinction entre une infraction au règlement général sur la protection des données (RGPD) et un préjudice anticoncurrentiel. Ce commentaire d'affaire présente les principaux développements au niveau national pour ensuite aborder les questions qui ont été repondues par la Cour de justice de l'Union européenne dans l'affaire C-252/21 concernant l'interprétation du GDPR dans le contexte du droit de la concurrence.

Key words: Competition Law; Exploitative Abuse; Data Protection; GDPR.

JEL: K21, K23, K42

I. Introduction

The collection, processing, and cross-use of personal and non-personal data in the hands of a few players in the digital market has posed major questions in the realm of antitrust, namely whether an undertaking may gain a competitive advantage via the exploitation of user data.[1] Public enforcement of competition law responded negatively in a twofold manner, through analysis under merger control and via the scrutiny of unilateral conduct exerted by dominant players.

Up until this moment, the European Commission and the US Federal Trade Commission have followed this idea but have made efforts to avoid drawing inferences between the fields of data protection and competition law.[2] Even though prominent players amassing great troves of data might be problematic under antitrust, an infringement in the field of data protection may not automatically entail anti-competitive harm. Competition authorities have not yet struck the right balance in terms of integrating data protection considerations into the antitrust analysis, without incurring an extra limitation

[1] A range of competition authorities and reports have been issued and analysed this topic, namely Competition and data protection in digital markets: a joint statement between the CMA and the ICO, Competition & Markets Authority and Information Commissioner's Office (2021), Competition Law and Data, Autorité de la Concurrence and Bundeskartellamt (2016), and Julie Brill, 'The Intersection of Consumer Protection and Competition in the New World of Privacy' (2011) 7(1) Competition Policy International 7.

[2] On the side of the European Commission, these efforts have focused on merger control in *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239 final, *Microsoft/LinkedIn* (Case M.8124) Commission Decision C(2016) 8404 final, *Apple/Shazam* (Case M.8788) Commission Decision C(2018) 5748 final and *Google/Fitbit* (Case M.9660) Commission Decision [2021] OJ C194/7. Regarding the prohibition contained in Article 101 TFEU (Article 81 EC), the Court of Justice of the European Union resolved in Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125. On the side of the Federal Trade Commission, the endeavours have also been centred on merger control, especially in *Google/DoubleClick* (FTC File No. 071-0170). Statement of Federal Trade Commission. Renewed efforts in the US agencies attempt to find infringements of competition of the Big Tech regarding their data processing activities, such as Department of Justice, 'Justice Department Sues Monopolist Google For Violating Antitrust Laws' (*The United States Department of Justice*, 20 October 2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 8 March 2023; 'FTC Sues Facebook for Illegal Monopolization' (*Federal Trade Commission*, 9 December 2020) <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> accessed 9 March 2023, and 'Justice Department Sues Google for Monopolizing Digital Advertising Technologies: Through Serial Acquisitions and Anticompetitive Auction Manipulation, Google Subverted Competition in Internet Advertising Technologies' (*The United States Department of Justice*, 24 January 2023) <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies> accessed 9 March 2023.

on their competences.[3] Recently, there have also been attempts from the side of private enforcement to make these associations in light of user exploitation in the UK and the US.[4]

Against this background, the German competition authority (hereinafter: the German NCA or the Bundeskartellamt)[5] faced the challenge and performed an analysis integrating data protection and competition considerations under the same analysis.[6] The Bundeskartellamt found that Facebook (hereinafter: Facebook or FB) had infringed its national competition regime through the imposition of exploitative data processing terms and conditions upon its users.[7] The singularity of the case at hand has influenced the subsequent analysis of the decisions of the appealing courts in the stage of assessing whether interim measures were to be imposed suspending the FCO's decision's effects. The case was resolved based on the application of the competition rules of the national competition law regime,[8] rather than on the basis of Article 102 TFEU.[9] The decision of the German NCA did not base its finding of abuse of a dominant position on an exclusionary theory of harm. Instead, it chose to build its case on the exploitation of FB's users when they consented to use the social network upon their registration, by analysing whether those terms and conditions complied with the legal requirements set out in the General Data Protection Regulation (hereinafter: GDPR).[10] Finally, the Bundeskartellamt exerted its wide margin

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[3] Wolfgang Kerber, 'Taming Tech Giants: The Neglected Interplay Between Competition Law and Data Protection (Privacy) Law' (2022) 67(2) The Antitrust Bulletin 280 and Torsten Körber, 'Is Knowledge (Market) Power? – On the Relationship Between Data Protection, 'Data Power' and Competition Law' (2018) Social Science Research Network.

[4] In the UK, *Dr Liza Lovdahl Gormsen v. Meta Platforms, Inc. and Others* [2022] CAT 1433. Although the Competition Appeal Tribunal did not certify the case at first, on 15 February 2024, the case was finally certified based on a completely different theory of harm in Dr Liza Lovdahl Gormsen v. Meta Platforms Inc. [2024] CAT 11. In the US, *Societe Du Figaro, SAS v. Apple Inc.*, 22-cv-04437-YGR (TSH) (N.D. Cal. Jan. 17, 2023).

[5] The German competition authority is addressed as the Federal Cartel Office (hereinafter: the Bundeskartellamt or German NCA) and as the Bundeskartellamt throughout the text.

[6] BKartA, Feb. 6, 2019, B6-22/16, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5 (B6-22/1 herein).

[7] B6-22/1 (n 6), paras 871–913.

[8] Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 2 of the Act of 19 July 2022 (Federal Law Gazette I, p. 1214).

[9] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/1.

[10] Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1. The Bundeskartellamt takes the parameters of the GDPR in B6-22/1 (n 6), paras 525–534.

of discretion to impose behavioural remedies of its choice to restore the existing competitive conditions prior to the conduct, in the sense that no fine was issued against the market player. Alternatively, the Bundeskartellamt imposed a range of behavioural remedies directed at separating the different sources of data obtained as a consequence of the exploitative conduct.[11]

Each of these elements was appealed before the German Courts, which analysed the complexity of the case in light of the German competition statute when determining whether interim measures at the judicial stage were to be imposed against the NCA's final decision. The Higher Regional Court of Düsseldorf (hereinafter: OLG or the Appellate Court) ruled against the Bundeskartellamt and granted Facebook interim measures of suspending the effects of the final decision of the NCA. By contrast, on further appeal of the interim measures, the Federal Court of Justice (hereinafter: BGH or the Federate Court) revoked the findings of the OLG and the subsequent interim measures (suspending the effects of the antitrust decision) that had been adopted by the OLG.[12] Later on, whilst deciding on the legality of the final decision of the Bundeskartellamt (during the main appeal proceedings against that decision), the Appellate Court upheld its original position and again granted the interim suspension of the effects of the final decision of the NCA.[13]

Due to the complexity of the case and the reasonable doubts that the Appellate Court, the OLG, had to answer regarding the interpretation of the German competition rules, it raised seven separate questions to the CJEU for its resolution via a preliminary ruling.[14] Surprisingly, the questions concerned

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[11] B6-22/1 (n 6), paras 915–949. This remedy also influenced the Digital Markets Act prohibition engrained in Article 5(2) and substantiated the German competition authority's newly passed Section 19a via a sanctioning proceeding imposed upon Google's processing of personal data, see BKartA, Oct. 10, 2023, B7-70/21, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2023/B7-70-21.html?nn=3591568.

[12] OLG-Düsseldorf, Aug. 26, 2019. Case VI-Kart 1/19 (V), juris (Ger.) https://openjur.de/u/2179185.html. Translation to English in 'Facebook ./. Bundeskartellamt. The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V)' (*D'Kart*, 28 Sie 2019) <https://www.d-kart.de/wp-content/uploads/2019/08/OLG-D%C3%BCsseldorf-Facebook-2019-English.pdf> accessed 8 March 2023. Bundesgerichtshof [BGH] [Federal Court of Justice] June. 23, 2020, KVR 69/19 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] (Ger.). Translation to English in Bundeskartellamt 'Courtesy translation of Decision KVR 69/19 rendered by the Bundesgerichtshof (Federal Court of Justice) on 23/06/2020 provided by the Bundeskartellamt' (*Bundeskartellamt*, 23 Cze 2020) <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/BGH-KVR-69-19.html> accessed 8 March 2023.

[13] OLG-Düsseldorf, Mar. 24, 2021. Case Kart 2/19 (V), openJur 2021, 16531 (Ger.) <https://openjur.de/u/2337584.html>.

[14] 'Case C-252/21: Request for a preliminary ruling' (*Curia*, 22 April 2021) <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=242143&pageIndex=0&doclang=EN&mode=lst&

the interpretation of the GDPR and not the interpretation of competition law.[15] However, the CJEU covertly addressed the issue of the potential integration of data protection considerations in the antitrust analysis.

This case comment addresses the route that the case has followed throughout the national proceedings against the final decision of the Bundeskartellamt as well as the CJEU's preliminary ruling regarding the interpretation of competition rules when they are considered in relation to data protection. To do that, this article is divided into three sections. The first addresses the back-and-forth between the German courts regarding the main points of contention surrounding the interplay between data protection and competition law, which are the basis to most of the questions addressed to the CJEU. The second section considers the questions addressed in the preliminary ruling, as well as Advocate General Rantos' Opinion[16], insofar as it introduces novel considerations into the debate on the interaction between both fields of law. Finally, the case comment provides an overview of the answers upheld by the Court of Justice in interpreting the GDPR under the antitrust framework in light of the discourse brought forward by the German courts at the national level.[17]

II. The case at hand: the German NCA's decision against Facebook

The German NCA found that Facebook had infringed its national competition provisions, in particular Section 19(1) GWB, by imposing the use and implementation of its terms of service on its private users in the context of its social network service. The imposition of these data processing activities constituted an abuse of a dominant position on the market for social networks, taking the form of the imposition of abusive business terms, given that those same terms violated the principles set out in the GDPR.[18] Ultimately, the German NCA found an infringement of its competition law regime since Facebook had forced its users to consent to the processing of their data not only on Facebook-related

dir=&occ=first&part=1&cid=679631> accessed 8 March 2023.

[15] 'Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 – Facebook Inc. and Others v. Bundeskartellamt (Case C-252/21)' (*InfoCuria*, 22 April 2021) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244555&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=679631> accessed 8 March 2023.

[16] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* [2022], Opinion of AG Rantos.

[17] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social* EU:C:2023:537.

[18] B6-22/1 (n 6), para. 523.

websites and apps, but also through those websites where Facebook collected user's personal and non-personal data outside of the provision of its services.

In appearance, this conduct would potentially indicate that Facebook failed to implement its safeguards regarding the protection of the personal data of its users, following the (then applicable) Directive 95/46[19] or the (soon-to-be applicable) GDPR. The German NCA had no competence to find an infringement based on these provisions alone. Instead, the Bundeskartellamt integrated into the antitrust analysis the legal requirements set out in the GDPR, in order to assess whether those potential infringements could infer the existence of anti-competitive harm. However, the methodology to do so was quite unorthodox from the antitrust perspective, insofar as the Bundeskartellamt did not acknowledge that it engaged in an analysis from the perspective of an exploitative abuse following the unfair trading conditions clause under Article 102(a) TFEU.[20] To the contrary, it applied an idiosyncratic balancing of interests which stemmed from the Federate Court's, BGH, case law in the field of constitutional law.

1. The constitutional balancing of interests as the legal basis for assessing the conduct

The abuse of a dominant position by Facebook was analysed under the lens of Section 19(1) GWB, which prohibits any abuse of a dominant position by one or several undertakings. Unlike the EC, the German competition law regime covers the protection of the competitive conditions of the market, and, in certain instances, the German NCA may also pursue the protection of consumers.[21] The manifestation of FB's market power through the design and content of the terms and conditions imposed on the social network's users was analysed to establish whether abusive business terms had been prescribed. Nevertheless, the Bundeskartellamt did not adopt the narrower interpretation provided for in Section 19(2) no. 2 of the GWB, which prohibits an abuse by a dominant undertaking that takes the form of demanding business terms that differ from those that would very likely arise if effective competition existed (as-if competition).

[19] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 is no longer in force because it was repealed by the GDPR. However, it was applicable until 24 May 2018, i.e., within the German competition authority's scope of action at the case at hand.

[20] Indeed, the Bundeskartellamt acknowledges that it has regulatory space to apply its national provisions in B6-22/1 (n 6), para. 914. An in-depth analysis in Marco Botta and Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10(8) Journal of European Competition Law & Practice 465.

[21] B6-22/1 (n 6), para. 525.

The Bundeskartellamt opted to apply the case law of the Federal Court where an infringement of Section 19(1) GWB could be found when the general business terms imposed are found inadmissible under the legal principles in Sections 307 ff. of the German Civil Code.[22] The finding of an infringement of competition law was contingent on the admissibility of the conduct in the realm of civil law. Sections 307 to 310 of the German Civil Code deal with the reasonableness of the terms imposed by the party on its counterparty. For instance, Section 307(1) of the German Civil Code states that standard business terms are ineffective if they unreasonably disadvantage the other party to the contract with the user, or if the provision is not clear or comprehensible enough for the user.

Moreover, the Bundeskartellamt declared that constitutionally protected rights were relevant here and, as such, an extensive balancing of interests was necessary to consider whether the overbearing position held by Facebook prompted an unnecessary interference with its users' fundamental rights. To the contrary, no competition law-based balancing of interests was performed when assessing the undertaking's conduct.[23] Instead, FB's capacity to dictate contractual terms was relevant to establishing whether it fully eliminated the counterparty's contractual autonomy. If this was the case, German case law required the NCA to analyse the fundamental rights involved, and consider whether the restriction caused by the conflicting positions of the parties was admissible from a constitutional perspective.[24]

The test of reasonableness under the German Civil Code was contingent on the appropriateness principle applied to the balancing of constitutional values. On one side, Facebook held the constitutionally protected right of contractual freedom. On the other hand, the rights of Facebook users' was recognised – the right to informational self-determination and the fundamental right to data protection – protected by the EU data protection regimes, which in turn can be traced back to its recognition in Article 8 of the Charter.[25] Therefore, the appropriateness principle in the balancing of these constitutional rights had to consider the GDPR's provisions in the context of the conduct.[26] In turn, the GDPR also contains a range of provisions regarding the existence

[22] B6-22/1 (n 6), para. 527. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 307 <http://www.gesetze-im-internet.de/englisch_bgb/index.html> (Ger.). The cited case-law includes cases from the Federal Court of Justice such as BGH, Nov. 6, 2013, KZR 58/11, openJur 2013, 48037 (Ger.) <https://openjur.de/u/661479.html>, BGH, Jan. 24, 2017, KZR 47/14, openJur 2018, 2166 (Ger.) <https://openjur.de/u/2116703.html> and BGH, Jun. 7, 2016, KZR 6/15, openJur 2016, 7218 (Ger.) <https://openjur.de/u/892001.html>.

[23] Peter George Picht and Cédric Akeret, 'Back to Stage One? – AG Rantos' Opinion in the Meta (Facebook) Case' (2023).

[24] B6-22/1 (n 6), para. 527.

[25] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[26] B6-22/1 (n 6), paras 529 and 531.

of power asymmetries between the data controller and the data subject, and the legal consequences inferred by these types of relationships.[27] For instance, the data subject cannot grant consent in a free and informed way when there is no genuine or free choice, or when the data subject is unable to refuse or withdraw consent without detriment to the provision of a particular service online, according to Recital 43 of the GDPR.[28]

Against this background, the manifestation of FB's market power on the national market for social networks for private users (the anti-competitive strand of the conduct) was prompted through the lens of civil law (the reasonableness test). The latter was, in turn, inferred through the balancing of constitutionally recognised fundamental rights (the appropriateness test), which was sequentially followed by the degree of compliance with the legal requirements set out in EU law – the GDPR. Although many steps were taken to draw a direct legal connection between the finding of anti-competitive behaviour under Section 19(1) GWB, and the finding of an infringement of the GDPR, the Bundeskartellamt did exactly that, given that the larger part of its analysis was directed at assessing whether FB's terms and conditions complied with GDPR rules.

Stemming from its theory of harm, the Bundeskartellamt had to identify what causal link united the finding of a lack of compliance with the GDPR, with conduct that was unacceptable from an antitrust perspective. The Bundeskartellamt acknowledged that strict causality of market power was not required. Therefore, it was not required to show that those data processing conditions could be solely formulated because of market power. Instead, normative causality was enough to demonstrate that a sufficient connection was drawn from the infringement of the GDPR provisions with antitrust.[29] The German NCA found it sufficient to prove that the conduct was anti-competitive as a result of market dominance, regardless of the fact that other circumstances could influence the same outcome.[30]

[27] Ibid., para. 530.

[28] The interpretation of consent has also been explored by the author in, Alba Ribera Martínez, 'The Circularity of Consent in the DMA: A Close Look into the Prejudiced Substance of Articles 5(2) and 6(10)' (2023) 29 Rivista Concorrenza e Mercato: Numero Speciale Concorrenza e Regolazione nei Mercati Digitali 191–212.

[29] Ibid., para. 873. On the differences between both, Rupprecht Podszun, 'The Facebook Decision: First Thoughts by Podszun' (D'Kart, 8 February 2019) <https://www.d-kart.de/en/blog/2019/02/08/die-facebook-entscheidung-erste-gedanken-von-podszun/> accessed 9 March 2023 and Thibault Schrepel, 'Repeal Continental Can' (Network Law Review, 20 December 2019) <https://www.networklawreview.org/repeal-continental-can/> accessed 9 March 2023.

[30] B6-22/1 (n 6), para. 874. An in-depth analysis in Viktoria H.S.E. Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (2020) 57 Common Market Law Review 161 and Anne C. Witt, 'Excessive Data Collection as a Form of Anticompetitive Conduct: The German Facebook Case' (2021) 66(2) The Antitrust Bulletin 276.

2. The interim proceedings leading to the preliminary ruling

Following the final decision of the Bundeskartellamt, the OLG, as the Appellate Court that reviewed this decision, decided whether there were serious doubts as to the legality of the resolution of the NCA. The OLG's ruling agreed with Facebook and suspended the effect of the decision of the Bundeskartellamt – the OLG concluded that FB's data processing activities did not give FB any relevant and artificial competitive advantage. Contrary to the finding of the Appellate Court, the Federal Court upheld the execution of the decision of the Bundeskartellamt that imposed behavioural remedies on Facebook. Hence, the BGH revoked the suspensive effects, approved by the OLG, concerning the terms of the remedies originally imposed by the NCA. Facebook appealed the final decision of the Bundeskartellamt, and requested, once again, the suspension of the execution of the decision, which was ultimately granted by the OLG during the main proceedings.

This section analyses the three sets of contentious arguments that were disagreed on throughout the proceedings by the Appellate Court and the Federal Court, which ultimately resulted in the Appellate Court referring seven questions to the CJEU to be settled via a preliminary ruling.

2.1. The application of Section 19(1) GWB rather than Section 19(2) no. 2 GWB

The Appellate Court, OLG, criticised the choice of the NCA to apply the prohibition under Section 19(1) GWB, rather than the more specific provision contained in Section 19(2) no. 2 GWB. In this regard, the OLG highlighted that the Bundeskartellamt should have performed an analysis of the 'as-if competition' test (similar to the counterfactual exercise in EU competition law) to demonstrate whether the same data processing terms would have been applicable in a state of competition not hindered by the manifestation of FB's abusive market power.

Following this line of reasoning, the Appellate Court, OLG, analysed whether its users were exploited by Facebook through the imposition of these terms and conditions, i.e., whether the alleged 'loss of control' over their personal data occurred. The Court brought forward an anecdotal fact to support its finding that FB's users were, in fact, in control when granting their consent: as opposed to the 32 million monthly German Facebook users, 50 million on-line users in Germany had not opted to accept FB's data processing conditions and, thus, had not registered for FB's service. Given the fact that users had a sufficient degree of choice to opt out of Facebook altogether, the logical consequence was to think that they decided not to accept FB's terms in a completely autonomous manner without being influenced by others. Therefore, the same principle applies to those users who opted into the service.

Although the Federal Court, BGH, did not directly examine the choice of which instrument, from the German competition law regime, to use to counteract FB's conduct, it did make an effort to respond to the OLG's anecdotal review of the case. Therefore, the Federal Court discarded the fact that genuine choice may be derived from the existence of potential users who are not registered on Facebook. Instead, it set out how FB's conduct must be observed in relation to its existing users, insofar as the terms and conditions of the use of Facebook services were imposed upon them, and they could not choose the degree of protection of their own data, which they wanted to benefit from throughout their online interactions. For instance, it is possible that a segment of FB's existing users would have chosen a more personalised experience if they had been given a choice. Another segment of FB's users might have preferred to enjoy a less personalised experience by providing more limited access to their personal data. Hence, the relevant notion from an antitrust perspective does not necessarily rely on the bigger part of German online users that are not registered on Facebook, but rather on the mandatory expansion of FB's service – from the provision of a social network to other services. The latter would include the collection, processing, and harvesting of user data, which these users could simply not want, data the aggregation of which was not necessary for shaping user experience but was nevertheless collected in order to cater to FB's services.

The approach of the Federal Court, BGH, towards the conduct and potentiality of FB's abuse is characterised by its acknowledgment that data processing policies can be placed at a range of points on a continuum when they interact with antitrust. The fact that the data processing activities of the main digital players are data-intensive, to enable the processing and collection of data from a wide range of services, does not imply that the current situation should remain the same in the future. Consequently, in a competitive environment, one could imagine that a privacy-preserving data processing policy could be attractive to users encouraging their decision to register for a particular service. As opposed to the current situation, one could also think about the possibility conferred upon Facebook users to adjust their privacy settings before they register to the actual service. Even though these policies are not directly available on Facebook, this does not necessarily imply that other alternative privacy-preserving business models, regarding the processing of data, could not be successfully applied in the digital arena. Consumer choice is factored into this line of reasoning as a whole set of possible states of the world that could be developed in the absence of abusive conduct.

2.2. The constitutional balancing of interests contested in the case at hand

Regarding the reasoning of the Bundeskartellamt relating to the inferences between different fields of German law, the Appellate Court, OLG, concluded that the NCA's judgment assumed that a simple legal violation (even if it existed) was harmful to competition. Aside from the lack of compliance with the law, the finding of abusive conduct had to require damage to competition. The German competition law regime places different standards on the different manifestations of abusive conduct. In the case of Section 19(2) no. 2 GWB, the standard of "as-if competition" is required to assert whether the premise of abuse is, in fact, true. Although the OLG considered the former should have applied to this case, it also emphasises the role of the standard placed by Section 19(1) GWB, requiring a comprehensive balancing of interests, considering the objective of the GWB is directed towards the protection of the freedom of competition.[31]

The Appellate Court engaged with this argument in a detailed manner, by analysing the precedents pointed out by the German NCA in its decision, in order to signal that not every ineffective provision in the sense of the German Civil Code constitutes an abuse of market power.[32] The OLG remarked that those cases concerned scenarios where the damage to competition by the conduct of the dominant company was obvious and apparent. For example, the terms and conditions imposed in those cases made it inappropriately difficult for the counterparty to terminate the contractual relationship. This led to (i) a considerable impairment of the end users' freedom over their economic disposition, and (ii) an impairment of horizontal competition because alternative providers were unfairly restricted from establishing their contractual relationships with the customers concerned. Therefore, the OLG invalidated the first step of the analysis of the Bundeskartellamt – the connection between an infringement of Section 19(1) GWB and the reasonableness test set out in the German Civil Code.

The OLG also questioned the connection drawn by the NCA between the reasonableness test (civil law) and the appropriateness test (constitutional law approach). The Appellate Court observed that a disregard for fundamental rights-relevant positions by a dominant undertaking is not necessarily harmful to competition. Again, the Appellate Court examined the case that the

[31] The case law that is highlighted here is BGH, Jun. 7, 2016, KZR 6/15, openJur 2016, 7218 (Ger.) https://openjur.de/u/892001.html, BGH, Jan. 23, 2018, KZR 3/17, openJur 2018, 4854 (Ger.) https://openjur.de/u/971140.html and BGH, Oct. 24, 2011, KZR 7/10, openJur 2015, 23849 (Ger.) https://openjur.de/u/772399.html.

[32] The main case analysed is BGH, Jan. 24, 2017, KZR 47/14, openJur 2018, 2166 (Ger.) https://openjur.de/u/2116703.html, para. 35.

Bundeskartellamt rendered instrumental to make its point by drawing out the differences with FB's data processing activities.[33] Under the case law, the plaintiff's exercise of their freedom of economic activity was contingent on the existence of an agreement, whereas that same consequence did not apply to the Facebook case. Surprisingly, the Federal Court, BGH, did not directly engage in this discussion, but did confirm the Bundeskartellamt had enforced the existing case law correctly and with precision.

2.3. Causality between an infringement of the GDPR and competition law

As opposed to the German NCA, the Appellate Court's position when interpreting the case law of the Federal Court entailed that upholding normative causality was not enough to demonstrate the existence of anti-competitive harm caused by Facebook, and that strict causality was required instead. In the particular case of the abusive exploitation of consumers, as upheld by the OLG, the reason for exploitation lies on the agreed-upon conditions being disadvantageous to consumers, because of the IR content, rather than on the fact that an unfavourable market outcome is produced by a dominant company. Then, it should follow that the standard of causality in results should apply, given that an impairment of competitive market conditions will not always derive from the conduct of the dominant undertaking.

Nevertheless, the Federal Court, BGH, steered the debate away from strict causality and highlighted that the Bundeskartellamt was right in requiring normative causality between the abuse and the manifestation of market power. In this regard, the BGH justified a less stringent causality requirement applied in this particular case, in light of FB's objective ability to impede competition due to FB's great superiority in power when imposing the terms and conditions upon its users. Following this argument, the mere expectation that different terms would be used under the conditions of effective competition is enough to back up the finding of normative causality, as opposed to the requirement of a higher probability threshold.

All in all, the Appellate Court's and Federal Court's conflicting views set out a narrow and broad interpretation of the German competition law regime regarding exploitative abuse. In light of the large distance dividing the OLG's and BGH's criteria of interpretation, the Appellate Court brought the terms of the discussion to the attention of the CJEU to be addressed in the form of a preliminary ruling. Without directly touching upon the competition law considerations, the OLG requested the CJEU to indicate the contours and limitations of the scope of the GDPR in the EU corpus of law. The matter

[33] The remarked case is BGH, Jun. 7, 2016, KZR 6/15, openJur 2016, 7218 (Ger.) <https://openjur.de/u/892001.html>.

of causality was dropped from the questions submitted to the CJEU, given that three months prior to the request, the GWB had been amended. Therein, the German legislator directly acknowledged that no qualified requirements in the sense of strict causality could be derived from the wording of the provision contained in Section 19(1) GWB.[34] The explanatory memorandum to the 10th amendment of the GWB even brought forward the arguments set out by the Bundeskartellamt and the Federal Court, BGH, in this particular case, in order to demonstrate the validity and effectiveness of the revision of the German competition law regime.

III. The preliminary ruling in Case *C-252/51* (*Meta Platforms and Others v. Bundeskartellamt*)

The Appellate Court, OLG, submitted its request for a preliminary ruling in April 2021, in relation to the case decided by the Bundeskartellamt against Facebook in the area of antitrust, although the CJEU would have to resolve the interpretation of the terms of the GDPR.

1. The questions addressed to the Court of Justice

When the CJEU decided on the content of its preliminary ruling, it considered two groups of questions: (i) those strictly related to the interpretation of the GDPR in the context of FB's data processing (questions II to VI), and (ii) those questions covertly addressing the interaction between data protection and competition law (questions I and VII).

On one side, Questions II–VI of the OLG's request to the CJEU related to the nuanced and comprehensive interpretation of the requirements of the GDPR, as applied by the Bundeskartellamt in its antitrust analysis, namely, whether the data collected and processed by Facebook was to be considered in light of the provisions relating to the special categories of personal data under Article 9 GDPR (Question II), and the lawfulness of the legal bases chosen by Facebook to process its data under the requirements set out in Article 6 GDPR (Questions III–VI). On the other hand, questions I and VII of the

[34] On the 10th amendment to the German Competition Act, see Bundeskartellamt, 'Amendment of the German Act against Restraints of Competition' (*Bundeskartellamt*, 19 January 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html;jsessionid=D7DE4ECE438ABD3122EA85541B569E80.2_cid390?nn=3591568> accessed 20 April 2023; Picht and Akeret (n 23).

request directly addressed the ability of the NCA to rule on the existence of exploitative abuse from the perspective of data protection. The Appellate Court formulated the above questions concerning Article 51 GDPR, which sets out the existing competences and the coordination mechanisms between data protection supervisory authorities across the Member States to contribute to the consistent application of the GDPR throughout the Union.

In light of the debate surrounding the question of causality, and the legal basis of the Bundeskartellamt's decision against FB's data processing activities, these two questions were overtly directed at defining the existing borderlines regarding competition authorities' and data protection supervisory authorities' powers to decide on cases related to the collection, processing, and harvesting of personal data performed by the main digital players.

2. The Opinion rendered by Advocate General Rantos

As opposed to the discussion surrounding normative and strict causality under the German competition law regime, in his Opinion, Advocate General Rantos (hereinafter: AG or AG Rantos) stretched out Questions I and VII to resolve whether the German NCA could intervene, in the particular case at hand, as far as competition law is concerned.

Regarding Question I, AG Rantos discarded the argument that the German NCA penalised a breach of the GDPR directly in its final decision. Instead, he asserted that the Bundeskartellamt reviewed FB's alleged abuse of its dominant position while considering the undertaking's non-compliance with the GDPR. In his view, the German NCA did not decide, as the main issue of the case on the finding of an infringement of the GDPR.[35] The Bundeskartellamt cannot be faulted for its analysis in this aspect. Nonetheless, AG Rantos highlighted that a NCA does not have the competence to make a ruling, primarily based on the GDPR, insofar as that regulatory space is reserved for data protection supervisory authorities, according to Articles 51 to 67 of the GDPR, which provide for the mechanism of the one-stop-shop principle.[36] Hence, AG Rantos legitimised the Bundeskartellamt's enforcement actions as far as the finding of an infringement of an abuse was concerned – the NCA did not interfere with the competences solely attributed to data protection supervisory authorities and, thus, cannot be condemned for doing so.

This first statement brought forward by AG Rantos is quite detached from reality. Aside from the constitutional and nationally idiosyncratic theory of harm

[35] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* Opinion of AG Rantos (n 16), paras 17 and 18.

[36] Ibid., footnote 11.

presented by the Bundeskartellamt, one can establish that the NCA's analysis was anything but a direct application of the GDPR. Throughout the Bundeskartellamt's decision, the GPDR's provisions – which are carefully analysed by AG Rantos in his Opinion – constitute the main corpus and reasoning leading to the finding of an abuse. If one operates the counterfactual of the case's rationale, if that data protection considerations were to be completely precluded from the NCA's antitrust analysis, the German NCA's line of reasoning would completely collapse. In the absence of an extensive analysis by the Bundeskartellamt of the requirements set out by the GDPR to find an infringement, the only relevant and substantive provisions left would be Sections 307 and following of the German Civil Code and Section 19(1) GWB, which provide ample space for bringing consumer protection and antitrust considerations under the same analysis.

Moreover, the VII question addressed to the CJEU considers whether a NCA is entitled to assess the undertaking's degree of compliance with the GDPR, in data processing terms, as an incidental question and not as a main finding in its final decision. Since the GDPR only provides for the coordination mechanisms for the different data protection supervisory authorities in the Member States, AG Rantos highlighted that the GDPR's application is not automatically precluded from every intervention pursued by a competition authority.[37] Indeed, the GDPR may be considered a key element in the fact-sensitive analysis of the individual competition law case.

AG Rantos proposed that this incidental knowledge may be incorporated into the consideration of the legal and economic context in which the conduct takes place. That is, the undertaking's degree of compliance may be adopted as the ratio decidendi to determine whether its conduct deviates from merit based competition. To this statement, AG Rantos re-directed the points of contention (present in the interim proceedings following the final decision of the Bundeskartellamt) away from causality and the applicable legal test, and towards the procedural aspect of the competences granted upon the NCA's and the data protection supervisory authority's assessments of the data processing activities of dominant undertakings. AG Rantos covertly advocated for the integration of both fields of law in an abstract manner, insofar as the limitations between the capacity to intervene of the former and the latter are not spelled out from a substantive perspective.

Instead, the AG's Opinion took a procedural stance on the dichotomy based on the principles of sound administration and the NCA's duty to cooperate in good faith pursuant to Article 4(3) TEU. Given the fact that an NCA can undermine the coherent application of the GDPR, as opposed to its direct interpretation from the side of data protection supervisory authorities, NCAs

[37] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* Opinion of AG Rantos (n 16) para. 22.

must act in accordance with an extensive duty of diligence and care when analysing data processing activities covered by the GDPR. In the absence of these clear rules on cooperation mechanisms between NCAs and data protection supervisory authorities, a NCA's duty of diligence comprises, at least, a duty to inform and cooperate with data protection supervisory authorities, even in those cases where these authorities have not begun any investigation concerning similar practices. At its highest, this duty of care entails considering (both formally and informally) previous decisions or ongoing proceedings in the realm of the data protection supervisory authorities so that an NCA's decision, incidentally applying the GDPR, does not deviate from the findings of the competent data protection authorities. Caution could translate into waiting for the moment when the data protection supervisory authority issued its own decision, in order to avoid the duplication of proceedings in two parallel assessments, in line with the theory and substance of prejudicial effect.[38] Nonetheless, the legal basis and modality of cooperation introduced by AG Rantos, concerning the relationships and duties imposed on NCAs in relation to data protection supervisory authorities, is quite extraordinary. Given that secondary EU law has not provided an adequate response to the forced interaction between both fields of law, AG Rantos proposed instead a theoretical construction based on primary law to tackle the scenario.

In line with the European Commission's opposition to requiring causation between any type of conduct and its anti-competitive effects, to demonstrate the existence of an abuse of a dominant position, causality is still a pending matter for the antitrust field as a whole.[39] One can only turn to the *Hoffmann-La Roche* and *Tetra Pak* rulings, which require that a mere link between the dominant position and the alleged abusive conduct exists, to establish an abuse.[40]

For the particular case of the analysis of the GDPR, AG Rantos cautioned against drawing direct inferences from one field of law onto the other one. First, an infringement of Article 102 TFEU is not directly apparent from conduct deriving from the lack of compliance with the GDPR. The finding of an infringement of competition law coming from the interpretation of the GDPR cannot be directly linked and considered as an automatic theoretical stance as anti-competitive conduct. Second, the concepts of market power and

[38] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* Opinion of AG Rantos (n 16) paras 28–32.

[39] European Commission, Competition policy brief (Issue 1, March 2023) accessed 20 April 2023.

[40] Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR I-461, para. 91; Case C-333/94 *Tetra Pak International SA v. Commission of the European Communities* [1996] ECR I-5951, para. 27.

dominance must not be combined in any case, and especially in relation with the dichotomy between competition law and the application of the GDPR. The exertion of market power below the threshold of dominance can lead to the existence of a clear imbalance between the data 'subject' and the data 'controller' in the sense of the GDPR. The Advocate General saw market power as relevant from the GDPR's perspective, and dominance as a factor to assess whether the requirements of the consent granted by the data subject have been complied with. However, they are not pre-requisites to the finding of an infringement of the GDPR, either. The opposite does not seem to be true: market power and dominance are undeniable elements to establish abuse, even if they are associated with additional elements, which do not directly ascribe to the competition-related elements normally considered in antitrust analysis.

At face value, AG Rantos's Opinion is quite adamant in advocating in favour of integrating both legal fields, even if that requires differentiating the application of the GDPR into two artificial categories (incidental and direct), as well as introducing a procedural backdoor to enable NCAs and data protection supervisory authorities to cooperate.

3. The Court of Justice's ruling

The Court of Justice resolved all of the discussion revolving around the interplay between data and competition law in a nuanced and tempered manner. Although it built onto most of AG Rantos' narrative surrounding the case, the Court presented its view on how both fields of law should interact. It did not respond in an all-or-nothing fashion to Questions I and VII. Instead, it chose to interpret the mechanisms established in the GDPR as co-existent with the prohibition of an abuse of a dominant position established under Article 102 TFEU.

The CJEU set in the foreground that Article 55(1) GDPR provides that each data protection supervisory authority is competent for the performance of the tasks assigned to it and the exercise of the powers conferred on it.[41] Those tasks include the monitoring and enforcing of the GDPR, which is materialised, in some of the cases brought to the data protection supervisory authorities' attention, via the cooperation mechanisms enshrined under EU data protection regulation. The one-stop-shop mechanism compels the data protection supervisory authorities to exchange information and to provide each other with mutual assistance in ensuring consistency in the GDPR's application.

[41] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) paras 37 and 38 with reference to Case C-645/19 *Facebook Ireland Ltd and Others v. Gegevensbeschermingsautoriteit* EU:C:2021:483, para. 47.

The mechanism only binds data protection supervisory authorities and not national competition authorities, even if they decide to apply the GDPR as a benchmark to the finding of an infringement of competition law. In a similar vein, there is no provision under EU data protection regulation or competition law prohibiting a national competition authority from applying such a theory of harm as the one presented by the Bundeskartellamt.[42] In the absence of such rules, the Court of Justice glances over to Article 5 of Regulation No 1/2003.[43]

To produce a finding of an abuse of a dominant position in the sense of Article 102 TFEU the competition authority must have regard to the consequences of such an abuse for consumers in that market to establish whether the dominant undertaking's conduct departs from competition on the merits. In this context, the Court of Justice asserts, that the compliance or non-compliance of the potentially abusive conduct with the provisions of the GDPR may be a vital clue among these relevant circumstances of the case to establish whether the dominant undertaking resorted to methods governing normal competition.[44] The Court plays out with this argument and upholds that ignoring the processing of personal data performed by FB on its business model would be tantamount to keeping oneself blind from the real functioning of digital markets and ultimately undermining the effectiveness of competition law altogether. Framing the argument in the reverse implies, in the Court's own words that the access and processing of personal data has become a significant parameter of competition between undertakings in the digital economy.[45]

These bold statements are subsequently tempered by the rest of paragraphs in the ruling, insofar as the interplay (posed in the narrow terms already established by the Court) will only be admissible when the rules on the protection of personal data are necessary for the competition authority to examine whether the conduct departed from competition on the merits.[46] Hence, the Court adds to the case an additional layer of complexity by establishing a new threshold of necessity in the appraisal of the interplay between data protection and competition law.[47] Not every single antitrust

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[42] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) paras 42 and 43.

[43] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[44] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) para. 47.

[45] Ibid., para. 51.

[46] Ibid., para. 48.

[47] On the introduction of this additional threshold, see Alba Ribera Martínez, 'A Threshold Can Take You Further Than a Statement – The Court of Justice's Ruling in *Meta Platforms and Others (Case C-252/21)*' (*Diritti Comparati*, 13 September 2023) <https://www.dirritticomparati.

case that considers EU data protection regulation in its analysis is accepted, which is a welcome limitation on the side of the Court of Justice.[48]

Furthermore, a competition authority must not only check that it has surpassed the threshold of necessity, but it shall also examine whether it has respected the duty of sincere cooperation enshrined in Article 4(3) TEU when applying EU data protection regulation – without taking recourse to the assessment of a data protection supervisory authority. The Court paves the way for competition authorities that wish to apply – albeit narrowly – the GDPR in their antitrust analyses and establishes a group of steps that must be followed to ensure that the competition authority does not endanger the consistency of the GDPR's application throughout the Union.[49] First, the national competition authority must ascertain whether the same conduct has already been subject to a decision by the competent national supervisory authority, the lead supervisory authority or the Court. If that were to be the case, then the national competition authority is bound by their conclusions as far as their interpretation of EU data protection goes, whereas they remain free to draw their own conclusions in applying competition law.

Second, where the national competition authority has doubts on the interpretation of the conduct in light of data protection regulation it shall consult and seek the cooperation of the corresponding data protection supervisory authorities. If there was an ongoing procedure under the terms of the GDPR, depending on the circumstances of the case, the national competition authority may have to wait for the supervisory authority's findings before it takes its own decision. In the absence of an ongoing procedure, the national competition authority is only expected to wait for a reasonable period of time to dispel its doubts about the interpretation of EU data protection regulation. In the extreme case that the national supervisory authority does not respond, the national competition authority may continue its own investigation.

Therefore, NCAs are compelled to abide by their duty of sincere cooperation by asking first whether the data protection supervisory authorities have any valuable insight for them. If they do not, nothing else binds a competition

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it/a-threshold-can-take-you-further-than-a-statement-the-court-of-justices-ruling-in-meta-platforms-and-others-case-c-252-21/> accessed 14 October 2023.

[48] The case has also been analysed in depth by the author previously in Alba Ribera Martínez, 'Getting Clued Into the Interplay Between Data Protection Regulation and Competition Law in Case C-252/21 Meta Platforms and Others (Conditions Générales d'Utilisation d'un Réseau Social)' (*Kluwer Competition Law Blog*, 5 July 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/07/05/getting-clued-into-the-interplay-between-data-protection-regulation-and-competition-law-in-case-c-252-21-meta-platforms-and-others-conditions-generales-dutilisation-dun-reseau-social/> accessed 14 October 2023.

[49] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) paras 52–63.

authority when interpreting the GDPR under the antitrust framework. On the other side, when the data protection supervisory authority provides its views to the competition authority, the latter is not bound in any substantive way by its conclusions, given that the Court only establishes this binding effect in the presence of an ongoing investigation.

Regarding the tenet of causality in the finding of an abuse of a dominant position in relation to the interpretation of the GDPR, the Court of Justice remains silent, just as AG Rantos did in his opinion. However, an implicit recognition against it may be inferred via the Court's ruling on the case. Against the background of the Court's appraisal that the dominant undertaking's degree of compliance with the GDPR may be factored into the all-relevant circumstances analysis, it discards that a direct correlation may be directly drawn from one field of law to the other. Both elements are disconnected factually and legally, and they remain in that particular form after the Court's preliminary ruling resolving the Bundeskartellamt's case against FB.

IV. Conclusions

The Bundeskartellamt's Facebook case is paradigmatic in the sense that it has forced national courts to contest and put forward their arguments on the admissibility of the integration between data protection and competition law considerations. Taking it a step further, it has also forced the CJEU to express its own opinions regarding the potential integration of both fields of law into a unified analysis. However, a bottom-up approach towards the 'to and fro' of the judicial review of the case – before the Appellate Court and Federal Court through its interim proceedings – shows that the ramifications of this preliminary ruling will be more profound than expected.

Even with the CJEU's finding that the GDPR can, to some extent, be appraised into the same analysis, these conclusions – when they travel back to the national courts – may be drawn out and expanded upon into a re-statement of the applicable threshold of causality between abuse, and the manifestation of market power towards the legal standard place by causality of results.

The CJEU has deviated in substance but not so much in form from AG Rantos' Opinion, by constructing a nuanced theory of its own regarding the separation between both fields of law. Nonetheless, the CJEU shies away from providing any definitive answers in light of the singularity of the case on which the preliminary ruling is based, and the inferences that may be directly drawn from the perspective of Article 102 TFEU to the relevant analysis under the national provisions. The Facebook case is not the rule for

considering data processing activities at large within the antitrust analysis, given its idiosyncratic nature and narrow scope in relation to the application of the German competition law regime. As such, the Facebook case should not be attributed with the characteristics of an enforcement blueprint, but as a stop sign to assess whether the current interpretation of the competition law analysis may easily adapt to the data-intensive business models which shape the digital arena.

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The Behaviour of Dominant Firms and the Principle of Equal Opportunities: Lessons From the *SEN* Antitrust Saga

Case Comment to the Servizio Elettrico Nazionale Judgment of the Court of Justice of 12 May 2022, Case C-377/20

by

Laura Zoboli*

CONTENTS

Abstract

This commentary concerns the *Servizio Elettrico Nazionale* (SEN) case that stems from the conduct of an incumbent operator – Enel S.p.A. – called upon to confront the liberalization process of the Italian electricity market. In particular, the former legal monopolist allegedly worked to consolidate its dominant position in the electricity production market, by denying its rivals access to a resource that would

* Dr. Laura Zoboli, Scientific Coordinator, Centre of Antitrust and Regulatory Studies, Faculty of Management, University of Warsaw (Poland); e-mail: l.zoboli@uw.edu.pl; ORCID: https://orcid.org/0000-0001-5410-1489.

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have been non-replicable and of strategic importance to compete in the liberalized electricity distribution market. This ruling is of fundamental importance as the Court of Justice discusses therein the objectives of antitrust law and the notion of exclusionary abuse. Moreover, in light of the practical interpretation of the ruling, it is important to ask whether the CJEU would have developed the same reasoning if the relevant market had not concerned an industry undergoing liberalization, such as the electricity sector. The commentary closes by referencing the more recent *Unilever* case, where the Court of Justice seems to confirm the opportunity of applying the "as efficient competitor test" to non-price practices even, in the absence of a market liberalization process.

Résumé

Ce commentaire concerne l'affaire Servizio Elettrico Nazionale (SEN) qui découle du comportement d'un opérateur historique – Enel S.p.A. – appelé à faire face au processus de libéralisation du marché italien de l'électricité. En particulier, l'ancien monopoleur légal aurait travaillé pour consolider sa position dominante sur le marché de la production d'électricité, en refusant à ses rivaux l'accès à une ressource qui aurait été non reproductible et d'une importance stratégique pour être compétitif sur le marché libéralisé de la distribution d'électricité. Cet arrêt est d'une importance fondamentale car la Cour de justice y discute des objectifs de la législation antitrust et de la notion d'abus d'exclusion. De plus, à la lumière de l'interprétation pratique de l'arrêt, il est important de se demander si la CJUE aurait développé le même raisonnement si le marché pertinent n'avait pas concerné un secteur en cours de libéralisation, tel que le secteur de l'électricité. Le commentaire se termine par une référence à l'affaire Unilever, plus récente, dans laquelle la Cour de justice semble confirmer l'opportunité d'appliquer le test du concurrent aussi efficace aux pratiques non tarifaires, même en l'absence d'un processus de libéralisation du marché.

Key words: liberalization; abuse of dominant position; 102; exclusionary effects; equally efficient competitor.

JEL: K21, K23

I. Introduction

The *Servizio Elettrico Nazionale* (hereinafter: **SEN**) judicial "saga" occurred in the context of the progressive liberalization of the Italian electricity market.[1] The saga comprises its Italian part – the *SEN* decision, issued by the Italian

[1] On the relationship between antitrust law and liberalized markets, see M. Armstrong – D.E.M. Sappington, *Regulation, Competition, and Liberalization*, *in Journal of Economic Literature*, 44, 2006, 325–66.

Competition Authority in 2018, its subsequent appeal to the competent administrative court, TAR Lazio, which upheld the SEN decision in 2019, and a further appeal to the *Consiglio di Stato*. It was the latter that sent, in 2020, several preliminary questions to the Court of Justice – the resulting CJEU *SEN* ruling of May 2022 constituting the EU segment of the saga. The *SEN* case was concluded by the ruling of the *Consiglio di Stato* of December 2022.

In particular, since March 1999, Italian institutions have taken several regulatory actions to open the domestic energy market to competition. They forced the partial privatization of Enel SpA (hereinafter: **Enel**), the former state-controlled statutory monopolist; required the unbundling of its activities, to guarantee transparent and non-discriminatory conditions of access to the essential infrastructures it controlled; and supported the entry of new private competitors (alternative operators) into the markets for power generation and power distribution. At the same time, however, Italian institutions felt that, in the newly liberalized market, some customers, such as households and small and medium-sized enterprises (SMEs), were unable to choose energy supply contracts that were best suited to their needs. Therefore, the Italian authorities decided to design the retail electricity distribution market as follows: on the one hand, large businesses were allowed to purchase energy under market conditions from any distributor active in the free market; on the other hand, households and SMEs – so-called "protected customers" – had to purchase electricity from territorially competent distributors, at a regulated price, and under the supervision of a regulatory authority.

Against this backdrop, the first step of the SEN saga dates to 2018 and the *SEN* decision of the Italian Competition Authority, the AGCM (hereinafter: **NCA**). Enel, as the former legal monopolist, was already integrated into all stages of the energy chain in Italy. The NCA found in its decision that, between January 2012 and May 2017, Enel had abused its dominant position in the electricity generation market by "nudging" protected customers of Servizio Elettrico Nazionale SpA (hereinafter: **SEN SpA**), its operator in the protected market, to migrate toward Enel Energia SpA (hereinafter: **EE SpA**), its operator in the free market.

Enel, when asking its protected customers to consent to the processing of their personal data, to receive commercial offers related to the free market, SEN SpA did so *separately* for its own EE SpA, and separately for EE SpA's rivals. According to the NCA, this act of submitting two separate requests gave EE SpA a competitive advantage: it induced SEN SpA's customers to give their consent only to EE SpA and, thus, allowed the latter to be privy to *strategic* and *unrepeatable* lists – the SEN lists – of customers[2] to whom it could

[2] Case C-377/20 *Servizio Elettrico Nazionale (SEN)* ECLI:EU:C:2022:379, para. 12.

offer customized supply contracts. Enel's rivals in the free market could not match such tailor-made offers, *because they lacked the aforementioned personal data*. Although the lists were, indeed, available to buy on Enel's website, EE's rivals rarely bought them.

The second step in the saga can be found in the appeal of all three companies of the Enel Group, against the decision of the NCA on the basis that SEN's contested conduct would not have been able to produce any exclusionary effects. They stated that the mere inclusion of customers on telemarketing lists, to promote certain services, did not bind those customers to buy the offer. Nor did it prevent them from appearing on other lists, and receiving advertising from EE SpA's rivals, or changing suppliers at any moment, even repeatedly.

Furthermore, Enel maintained that more comprehensive and lower-priced lists of protected customers were already available on the market so its SEN lists were neither strategic nor non-replicable. In addition, the three companies of the Enel Group showed that, by using these telemarketing lists for launching customized offers between March and May 2017, SEN SpA managed to obtain only 478 new customers, representing 0.002% of the protected customers, and merely 0.001% of all electricity users. Therefore, they argued that the growth of EE SpA's market share was due not to the (abusive) compilation and use of SEN lists, but to legitimate factors, such as the quality of EE SpA's services, and the attractiveness of Enel's brand.

The appeal was rejected in October 2019 by the competent administrative court (TAR Lazio)[3] and then reached the second level of administrative proceedings – the *Consiglio di Stato* (the Italian Council of State), which referred for a preliminary ruling to the Court of Justice of the EU (hereinafter: **the Court** or **CJEU**). The referral was meant to clarify what interests Article 102 TFEU protects, and whether monopolistic conduct, which produces only potential restrictive effects, can be classified as abusive, given that the conduct of SEN has produced neither direct harm to consumers nor actually had a significant impact on the competitive structure of the market.

Following the ruling of the Court of Justice of 12 May 2022 (hereinafter: ***SEN* ruling**), the *Consiglio di Stato* upheld the appeal in December 2022.

The paper aims to analyze the points of interest raised within the SEN saga, which stands out for the relevance of the interpretative questions it produced, regarding the application of Article 102 TFEU to exclusionary practices of

[3] The decision is available at the following link: https://www.giustizia- amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=201902707&nomeFile=201911957_01.html&subDir=Provvedimenti

dominant firms.[4] Among these, the commentary will focus in particular on the possible risks in applying the "as efficient competitor" test ("equally efficient competitor" test) to non-price practices. In doing so, the paper will also refer to the more recent *Unilever* ruling.[5]

II. The EU component of the SEN saga

In the *SEN* case, the CJEU was asked, in essence, to clarify:[6] (*i*) which are the interests that Article 102 TFEU protects and, in particular, whether it shelters the (competitive) structure of the market *and*/*or* consumers, and their well-being/welfare;[7] (*ii*) what distinguishes normal competition from distorted competition[8], and, in particular, whether a behaviour, otherwise lawful, can be prohibited just because it is likely to produce exclusionary effects; and (*iii*) whether the intent of the dominant firm under scrutiny, and the actual effects of its practice, should matter at all, and, if so, for what purpose.[9]

At first, these questions might sound pedantically theoretical. In reality, establishing the requirements that any exclusionary practice of dominant firms must meet, to be abusive under the provisions of Article102, provides legal certainty and prevents arbitrary application of competition law. Furthermore, as the Italian referring court observed, establishing the legal boundaries

[4] Namely, *Servizio Elettrico Nazionale* does not deal with what makes the exploitative practices that go under Art. 102(a) abusive. On this topic, see P. Akman, *The concept of abuse in EU competition law. Law and economic approaches*, Oxford, Hart Publishing, 2015. On a national perspective see also M. Siragusa, *Italy – new forms of abuse of dominance and abuse of law*, in *Abuse of Dominance in EU Competition Law. Emerging Trends*, P.L. Parcu – G. Monti – M. Botta (a cura di), Edward Elgar Publishing, 2017, 119.

[5] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (Unilever)*, ECLI:EU:C:2023:33.

[6] Case C-377/20 *Servizio Elettrico Nazionale (SEN)* ECLI:EU:C:2022:379.

[7] While reading the French and Italian versions of the ruling, as well as the English translation of the opinion of AG Rantos, one cannot help but come across these three expressions – protection of consumers, protection of consumer welfare, and protection of consumer well-being – used synonymously. This is unfortunate because these expressions do not refer to the same legal interest. Anyway, they can be put together and used as synonyms when opposed to the protection of the competitive structure of the market.

[8] As AG Rantos wrote, over the years, the CJEU has referred to non-abusive competition with different equivalent expressions, such as "fair competition", "competition on the merits" and "competition on the basis of quality" – see Opinion case C-377/20 ECLI:EU:C:2021:998 para. 53 (hereinafter: Rantos Opinion).

[9] The CJEU was also asked to specify the conditions under which parent liability holds. However, this issue falls out of the scope of this insight.

of the notion of abuse is useful when, like in the *SEN* case, the practice in question neither corresponds to the examples listed in Article 102 itself nor is it a type of conduct that the European Commission and National Competition Authorities have systematically analyzed over the years.[10]

In addition, answering the above questions might, first, clarify if the Court intends to fully endorse the effect-based approach, already adopted in many recent cases, such as *TeliaSonera*, *Post Danmark I* and *II*, *Intel*, *Generics (UK)* and *Deutsche Telekom II*.[11]

Second, in light of the debate about the principle of the "as efficient competitor",[12] it might specify if that approach can be applied to inform and analyze not only price conduct but also non-price behaviours, such as the one originally prohibited in the *SEN* case.

Finally, in its Opinion on *SEN*, Advocate General Rantos remarked that the decision that the Italian referring court will ultimately make in the *SEN* case, based on the Court of Justice's preliminary ruling, will mark a new frontier.[13]

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[10] For a more detailed analysis see L. Zoboli, *Prestazioni e dotazioni iniziali: il rischio di applicare il test del "concorrente altrettanto efficiente" alle pratiche non di prezzo*, in Riv. Dir. Ind., 5/2022, 418 ff.

[11] Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83; case C 209/10 *Post Danmark I* EU:C:2012:172; case C-23/14 *Post Danmark II* EU:C:2015:651; case C-413/14 P *Intel v Commission* EU:C:2017:632; case C-307/18 *Generics (UK) and Others* EU:C:2020:52; case C-152/19 P *Deutsche Telekom II* EU:C:2021:238.L

[12] For an overview of the European debate, see Mandorff and Sahl, "The Role of the 'Equally Efficient Competitor' in the Assessment of the Abuse of Dominance", Konkurrensverket Working Paper Series in Law and Economics, 1/2013; Gaudin and Mantzari, "Google Shopping and the As-Efficient-Competitor Test: Taking Stock and Looking Ahead", 13 *Journal of European Competition Law & Practice* (2022), 125–135; de Ghellinck, "The As-Efficient-Competitor Test: Necessary or Sufficient to Establish an Abuse of Dominant Position?", 7 *Journal of European Competition Law & Practice* (2016), 544–548.

[13] Rantos Opinion delivered on 9 December 2021, Case C-377/20, ECLI:EU:C:2021:998. In a commentary on the opinion, see P. Ibañez- Colomo, *AG Rantos's Opinion in Case C-377/20, Servizio Elettrico Nazionale:* a clean framework capturing the essence of the case law (I) and (II), in *Chilling Competition*, 2021, https://chillingcompetition.com/2021/12/10/agrantoss- opinion-in-case-c-377-20-servizio-elettrico-nazionale-aclean-framework-capturing-the-essence-of-the-case-law-i/ and https://chillingcompetition.com/2021/12/29/ag-rantossopinion-in-case-c-377-20-servizio-elettrico-nazionale-a-cleanframework-capturing-the-essence-of-the- case-law-ii; M. Komninos, *Competition Stories: November & December 2021*, in *Network Law Review*, 2022, https://leconcurrentialiste.com/ competition- stories-nov-dec-2021/; C. Puscas, *AG Rantos: What is the Legal Framework for Analysing Data Leveraging Abuses under Article 102 TFEU?*, in *Kluwer Competition Law Blog*, 2022, http://competitionlawblog.kluwercompetitionlaw.com/2022/01/03/ag-rantos- what-is-the-legal-framework-for-analysing-data-leveraging-abuses-under- article-102-tfeu/; M. Cole – L. van Kruijsdijk – A. Betancor Jiménez de Parga, *Advocate General Rantos Provides Sound Guidance for Non Pricing Abuse of Dominance Analysis (Case C-377/20)*, in *Covington Competition*, 2022, https://www.covcompetition.com/2022/01/advocate-general-rantos-provides- sound-guidance-for-non-pricing-abuse-of-dominance-analysis-case-c-377-20/; I. Herrera Anchustegui, L. Hancher,

The decision adopted by the Consiglio di Stato on 17 November 2022 will be commented on in paragraph IV. As it was in previous cases concerning liberalized markets, the *SEN* decision concerns a former legal monopolist seeking to obstruct the liberalization process by preventing its potential competitors from enjoying the same opportunities as the incumbent. However, the resulting decision does not concern a price strategy related to the use of essential infrastructure that the incumbent controls.[14] Rather, the *Consiglio di Stato* decision in the *SEN* case concerns a non-price strategy related to the use of a database, the essentiality of which cannot be taken for granted.

1. The interests that Article 102 TFEU protects

The question of whether Article 102 TFEU shelters consumers and their well-being/welfare, *and*/*or* the (competitive) structure of the market, gives rise to two deep fears and a misunderstanding among antitrust scholars.

The first fear has to do with the idea that an application of Article 102 focused too much on the protection of consumers, could lead antitrust decision-makers to use Article 102 instead of the rules about contracts, torts, and consumer protection, which are less cumbersome and time-consuming than Article 102. However, this fear underlies the debate about exploitative abuses and, thus, falls outside the scope of the *SEN* case.

The second fear instead underpins the debate about exclusionary abuses and thus lies at the heart of this *insight*. This fear is rooted in the idea that an application of Article 102 that focuses too much on the protection of market structures, could lead to the sheltering of competitors from competition and, hence, to the preservation, on the market, of competitors that are less efficient and innovative than the dominant firm. This was probably the case in the past.[15]

However, in *SEN*, as well as in its most recent rulings,[16] the CJEU has repeatedly specified that Article 102 TFEU cannot punish the practices of dominant firms that, while producing exclusionary effects, and thus undermine market structure, also cause effects in terms of price, choice, quality, and innovation that are *beneficial to consumers*, and that can offset those

Competition on the Merits in Liberalised Electricity Markets: a Regulatory Reading of AG Rantos' Opinion in Servizio Elettrico Nazionale, Utilities Law Review, 2022.

[14] Case C-202/07 P *France Télécom v Commission* EU:C:2009:214; case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603; case T-336/07 *Telefónica and Telefónica de España v Commission* EU:T:2012:172; and case T-486/11 *Orange Polska v. Commission* EU:T:2015:1002.

[15] Rantos Opinion cit. para. 93.

[16] See, e.g., *Post Danmark* cit. paras 41–42; *Intel* cit. paras 134 and 140; and *Generics (UK)* cit. para. 165.

exclusionary effects.[17] In other words, the CJEU is crystal clear in affirming that protecting market structure does not mean protecting inefficient and obsolete competitors, even if they are rivals of dominant firms. Rather, the aim of Article 102 is to prevent dominant firms from undermining the *structure of effective competition*[18] or – to use the expression that the *Consiglio di Stato* used in its referral – *the competitive structure of the market*.

Finally, the misunderstanding that the above question builds upon is the idea that the protection of the competitive structure of the market is something detached from the protection of consumers and their interests. It is not: EU competition law has always been based on the premise that the protection of the competitive structure of the internal market serves the protection of consumers. This is so because competitive markets – that is, markets selecting efficient and innovative firms – are expected to produce economic growth and prosperity for the good of the whole society, including consumers.[19] True, protecting market structures could be detrimental to consumers, if Article 102 was to be used to shelter inefficient and obsolete competitors, just because they are rivals of dominant firms. However, according to the most recent rulings of the CJEU – protecting market structures means preventing dominant firms from harming the structure of effective competition – it means protecting the *competitive* structure of the market. Thus, such a goal is not independent from, or alternative to, the goal of protecting consumers and their welfare/well-being.[20] Indeed, the CJEU confirms in the *SEN* ruling that Article 102 sanctions, not only practices that may cause *direct* harm to consumers, that is exploitative practices,[21] but also those that harm consumers – both intermediate and final ones[22] – *indirectly*, that is exclusionary practices that undermine the structure of effective competition.[23]

The clear ruling that Article 102 TFEU protects consumers and their welfare/well-being, by protecting the competitive structure of markets, rather than inefficient and obsolete rivals of dominant firms, affects both what marks the exclusionary practices of dominant firms as abusive, and the evidence necessary to show it.

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[17] *SEN* cit. paras 45–46, 48 and 73.

[18] *SEN* cit. paras 44 and 68.

[19] *SEN* cit. paras 41–43 and, to this effect, cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* EU:C:2008:504 para. 68; *TeliaSonera Sverige* cit. paras 21–22; *France Télécom* cit. para. 103; *Deutsche Telekom* cit. paras 170 and 180.

[20] Rantos Opinion cit. paras 93–100 and 103.

[21] Rantos Opinion cit. para. 89.

[22] *SEN* cit. para. 46.

[23] *SEN* cit. para. 44 and, in this sense, Case C-95/04 P *British Airways v. Commission* EU:C:2007:166 paras 106–107 and *TeliaSonera Sverige* cit. para. 24.

2. The "evil" that distinguishes abusive conduct from normal, merit-based competition

Courts, authorities, and scholars have always been struggling with the notion of abuse, that is, with the need to draw a clear line between dominant firms' practices which come within the scope of normal, merit-based competition, and those that do not and should, therefore, be prohibited.[24]

In this regard, the CJEU makes three clear statements in its *SEN* ruling.[25] First, in light of established case law, the notion of abuse cannot depend on whether dominant firms' practices are compliant with rules other than Article 102 TFEU.[26] This provision would have no legal autonomy if it banned automatically only those practices that other laws already qualify as illegal. Second, under the economic-based approach embraced over the last 30 years, the illegality of dominant firms' practices does not depend on the *form* they take,[27] but on their *effects*. Third, the notion of abuse is objective and does not depend on the intent of dominant firms,[28] albeit their intent may serve as a piece of evidence of abuse.[29]

In *SEN*, the CJEU seeks to offer a single notion of what abuse is – unfortunately, the long and complex sentences used are not known for their clarity.[30] However, by putting together different passages of the judgment, it emerges that in *SEN*, the CJEU considers an exclusionary practice to be abusive when it is (*i*) *capable* of producing (*ii*) *exclusionary effect*s that are (*iii*) *not counterbalanced* by effects that are beneficial to consumers in terms of price, quality, variety and innovation – the variables, on which consumer welfare indeed depends.

Going in order, following previous case law,[31] the CJEU confirms that Article 102 TFEU shall find application even when the restrictive effects associated with the conduct at stake are merely *potential*.[32] To enforce

[24] For a neutral definition, see Akman, *The concept of abuse in EU competition law. Law and economic approaches* (Bloomsbury, 2015).

[25] In this regard, see also A. Komninos, *A Steady Course Towards the Effects-Based Approach: Case C-377/20 Servizio Elettrico Nazionale*, Journal of European Competition Law & Practice, 2023, 292; J. Lindeboom, *Towards a Unified Judicial Philosophy of Article 102 TFEU? Servizio Elettrico Nazionale SpA* (C-377/20), EU Law Live, 6 June 2022.

[26] *SEN* cit. paras 67 and 103 and, to this effect, case C 457/10 P *AstraZeneca v. Commission* paras 74 and 132.

[27] *SEN* cit. para. 72 and Rantos Opinion cit. para. 55.

[28] *SEN* cit. paras 60–62.

[29] *SEN* cit. paras 63–64.

[30] See, e.g., *SEN* cit. para. 68.

[31] *TeliaSonera* cit. para. 64; *Intel* cit. para. 138 and *Generics (UK)* cit. para. 154.

[32] *SEN* cit. paras 50–51, 53, 69 and 71. See, in addition, Rantos Opinion cit. para. 42 stating that "the capacity to produce a potential restrictive effect on the relevant market,

Article 102, antitrust authorities and judges shall not wait for competitive harm to occur. They are entitled to apply the prohibition even when the restrictive effects of dominant firms' practices have not yet taken place.[33] Otherwise, Article 102 could not be applied when the restrictive effects of the contested conduct are purely hypothetical. As exemplified by the CJEU, this may be the case when, in fact, the dominant firm did not carry out the practice in question, or when the occurrence of the practice's restrictive effects would depend (or would have depended) on the occurrence of specific circumstances that, at the time of the implementation of the practice, were unlikely (or did not occur).[34]

Furthermore, the CJEU is clear in affirming that any assessment of the capability of a dominant firm to produce exclusionary effects must be done at the moment in which the firm puts the contested conduct in place, and in light of all the relevant circumstances existing at that point.[35] The absence of actual restrictive effects may be one of the relevant circumstances demonstrating the inability of the conduct in question to produce restrictive effects.[36] However, it cannot, alone, exclude the application of Article 102. Even if a long time has passed since the contested conduct occurred, the fact that it did not produce actual restrictive effects cannot *conclusively prove* its lawfulness, if the conduct was found to have been capable of restricting competition at the time when it was implemented. After all, the absence of actual restrictive effects may result from causes other than the anti-competitive nature of the conduct under assessment, for example, it may be due to changes in the market, or due to the dominant firm's inability to fully implement a strategy that it has put in place.[37]

Turning to the notion of exclusionary effects,[38] while going through previous case law on price and non-price practices,[39] the CJEU makes clear in several paragraphs of its ruling that antitrust authorities and judges must focus on the exclusionary effects that occur in detriment to competitors *as efficient as* the dominant firm,[40] also when they deal with non-price practices. The Court is

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such as an anticompetitive exclusionary (or foreclosure) effect, is the essential factor in the characterization of conduct as abusive".

[33] Rantos Opinion cit. para. 110 stating that, "it would be contrary to the *ratio* of [Art. 102 TFEU], which is also preventive and forward-looking in nature, if it were necessary to wait for the anticompetitive effects to occur in the market before a finding of abuse could lawfully be made".

[34] *SEN* cit. para. 70 and, to this effect, *Post Danmark II* cit. para. 65.

[35] *SEN* cit. para. 72.

[36] *SEN* cit. para. 58 and, to this effect, case C-538/18 P, *České dráhy*/*Commissione*, para. 70.

[37] *SEN* cit. paras 54–55.

[38] *SEN* cit. paras 50, 55 and 61.

[39] *SEN* cit. paras 80–82 and 83, respectively.

[40] *SEN* cit. paras 71, 76, and 78–79.

clear in affirming the principle that there is no competitive merit in excluding rivals that are as efficient as the dominant firm. Moreover, in relation to non-price practices, the CJEU argues in paragraph 78 that to exclude equally efficient rivals, a dominant firm can only exploit its market position, and the assets it holds because of this position. Otherwise, its rivals would be able to match the offerings of the dominant firm, by resorting to resources equivalent to those of the dominant firm.[41] At the same time, however, the Court also specifies that the "as efficient competitor" test is only one of the possible tools that antitrust authorities and judges can use to identify harmful exclusionary effects.[42] Indeed, the CJEU mentions other possible tests, including the "no economic sense" test where a dominant firm abuses its position when it implements a (price) practice whose sole justification is the exclusion of competitors.[43]

Finally, the Court affirms that a dominant firm's practice that can produce exclusionary effects is not abusive if it is also capable of producing effects that are beneficial to consumers. The reader will not find this specification surprising. Consistent with what it said about the interests that Article 102 TFEU protects, the CJEU confirms that Article 102 is by no means intended to disincentivize efficiency gains and the innovations that dominant firms may realize based on their own merits. It is also not meant to ensure that less efficient competitors remain on the market.[44] Therefore, under Article 102, dominant firms are allowed to compete fiercely, even by adopting practices that yield exclusionary effects, if, and only if, such practices also produce *countervailing advantages* in terms of price, choice, quality, or innovation.[45] In sum, for the CJEU, if the practices of dominant firms increase, on balance, consumer welfare, then they can be seen as proper means of normal, merit-based competition, and, thus, do not constitute an abuse of their dominant position.[46]

Therefore, for the Court, the "evil" distinguishing abusive conduct – from normal, merit-based competition – has to do with the exclusion of equally efficient rivals, as well as with the inability of the conduct at hand to produce countervailing effects that are beneficial to consumers.

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[41] Also, *SEN* cit. paras 83 and 91. Therefore, it is possible to argue that in speaking of replicability, the CJEU is not referring to the replicability of dominant firms' practices, but to the replicability of their assets.

[42] *SEN* cit. para. 81.

[43] *SEN* cit. para. 77 and, to this effect, case C-62/86 *AKZO v. Commission* EU:C:1991:286 para. 71.

[44] *SEN* cit. paras 84–86.

[45] *SEN* cit. paras 45 e 73.

[46] *SEN* cit. para. 75.

III. Indications for the Italian Referring Court

In light of the interests that Article 102 protects, and of the conduct it prohibits, the CJEU gives some guidelines to the Italian *Consiglio di Stato*. It specifies that, while collecting the consent of its protected customers, SEN SpA should have sought not to discriminate between EE SpA and its rivals. The CJEU indeed clarifies that in markets that are undergoing a liberalization process – and that are subject to specific information-sharing obligations, although within the limits fixed by data protection rules[47] – the means available to the incumbent because of its former statutory monopoly must be available to newcomers on equal footing.[48] Therefore, in such markets, an incumbent that uses those assets to favor the firms of its corporate group – against their potential rivals – does not compete on merits.[49]

At the same time, however, the Court acknowledges that the information provided in the discussed referral does not enable the CJEU to understand whether SEN SpA's conduct was, in fact, discriminatory. For example, it is not clear whether the *separate* requests for consent were separate because they occurred at different times, or because they were placed in different parts of the same document. Nor is the referral clear whether the same request for consent covered all third-party firms, other than EE SpA, in a non-discriminatory way, or only some of them individually. The referral is also not clear whether the consent to EE SpA's rivals was conditioned on the consent to EE SpA.[50]

According to the CJEU, therefore, if the referring court were to find that the Italian NCA, the AGCM, has indeed demonstrated, based on evidence such as behavioral studies, that the procedure used by SEN SpA was capable of favoring EE SpA against its rivals (a self-preferencing case?), then the referring court would have to conclude that even EE SpA's rivals were as efficient as EE SpA were prevented from matching EE SpA's offer *because they were deprived of a strategic and non-replicable resource*.[51] Therefore, granted the lack of countervailing positive effects for consumers, SEN SpA's conduct would be considered abusive, regardless of any considerations of legitimate factors that may explain the growth of EE SpA's market share.[52]

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[47] *SEN* cit. paras 88 and 95.
[48] *SEN* cit. paras 91–93.
[49] *SEN* cit. para. 96.
[50] *SEN* cit. para. 97.
[51] *SEN* cit. para. 101.
[52] *SEN* cit. para. 102.

IV. Final decision of the Italian referring Court

In light of the elaboration of the CJEU, the *Consiglio di Stato* takes a straightforward decision that is hardly surprising.[53] First of all, it stresses that the decision and judgment under appeal appear not to have adequately considered and assessed certain factual aspects of the case, which are likely to undermine the views of AGCM, namely that: (i) SEN SpA offered the mentioned lists both to EE SpA and to its competitors on the same terms, in compliance with the consent expressed by the individual concerned; (ii) the number of contacts collected and included in SEN lists was modest – on average about 500,000 per year in the period 2012–2015 – for markets with tens of millions of users; (iii) similar customers contact lists were available on the market; and that (iv) the allegedly abusive conduct challenged by the AGCM resulted in the acquisition of an insignificant number of customers when compared to the size of the relevant market identified. It should also be mentioned that SEN SpA, in the context of the first ground of appeal, has argued that leaving the persons concerned free to give separate consents (even in favor of third companies or only in favor of companies in the Enel group) is not an inherently discriminatory way of collecting consent, but a lawful way of allowing users to express their preferences as extensively as possible.

Considering these factual data, and in light of the specific clarification coming from the CJEU, the *Consiglio di Stato* upheld the appeals as anticipated. In its view, the AGCM had not demonstrated on the evidentiary basis, such as behavioral studies, that the procedure used by SEN SpA – to collect the consent of its customers to the transfer of their data – was likely to favor EE SpA/SEN SpA. In other words, the decision of the Italian Competition Authority should have provided evidence as to why SEN SpA's collection of differentiated privacy consents, for future marketing proposals, was discriminatory. Instead, it merely criticizes the choice to require double consent. In the absence of an investigation into the manner (in the sense indicated by the Court) of collecting consent, the collection of two privacy consents cannot, therefore, constitute proof that the procedure used by SEN SpA was, in fact, likely to favor the lists intended to be sold to EE SpA. Consequently, there is no evidence that the contested conduct was likely to constitute abuse of dominance. Essentially, the investigative and motivational deficiencies of the decision issued by the NCA led the Consiglio di Stato to hold that the objective existence of the unlawfulness of the contested conduct had not been proven.

[53] *Consiglio di Stato*, Sixth Section, Decision 10571/2022, ECLI:IT:CDS:2022:10571SENT. The decision is available at the following link: https://www.giustizia-amministrativa.it/

V. A quick look at the *Unilever* case

Less than a year after the CJEU's *SEN* ruling, the Court of Justice delivered another ruling on 19 January 2023 that concerns, once again, questions raised by the *Consiglio di Stato*. This procedure follows Unilever's appeal against the decision of the Administrative Court of Lazio, which upheld the decision of the Italian Competition Authority wherein the appellant was condemned for an abuse of its dominant position. In particular, Unilever is alleged to have abused its dominant position on the Italian market for the marketing of ice cream in individual packs, intended for consumption in certain commercial establishments (that is, "outside" of what is considered as the "home" environment), such as swimming pools or bars, through exclusivity clauses and discount practices adopted by its distributors. Those practices were seen by the NCA, and by the Italian Administrative Court, to have anti-competitive effects. In their view, the contested practices have prevented, or severely restricted, competing operators from competing with Unilever on the merits of their products. This was caused by the specific characteristics of the relevant market, such as, for example, limited space available in the relevant points of sale, and of the decisive role, when it comes to consumer choices, of the extent of Unilever's offer in those points of sale. In doing so, AGCM – and consequently the Italian Administrative Court – failed to take into account studies provided by Unilever showing that the practices in question did not foreclose "equally efficient" competitors.[54]

The Unilever ruling of the CJEU is of significance in several respects, such as, in attributing liability for the conduct of distributors to the dominant firm, based on the theory of indirect liability, instead of relying on the single economic unit doctrine.[55] In this commentary, however, we will only comment on its relevance concerning the abovementioned SEN debate.

Indeed, in responding to the questions raised, the Unilever ruling also addresses the matter of the "as efficient competitor" test. It states that in assessing the infringement of Article 102 TFEU, the national authorities can use that criterion on an optional basis – unless it is used by the defendant to prove that the practices in question do not have anti-competitive effects. In such a case, the NCA itself must adopt this test, as in the present case.

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[54] Case C-680/20, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (Unilever)*, ECLI:EU:C:2023:33.

[55] M. Maggiolino, *When an ice cream case provides antitrust experts with food for thought: Unilever Italia*, 60 Common Market Law Review, 2023, 1447.

Moreover, in certain circumstances, this test may also be applied to non-price practices, as recently stated in the context of the *SEN* case.[56]

In doing so, the *Unilever* judgment specifies that the "as efficient competitor" test refers "to various tests which have in common the aim of assessing the ability of a practice to produce anti-competitive exclusionary effects by reference to the ability of a hypothetical competitor of the undertaking in a dominant position, which is as efficient as the dominant undertaking in terms of cost structure, to offer customers a rate which is sufficiently advantageous to encourage them to switch supplier, despite the disadvantages caused, without that causing that competitor to incur losses."[57]

The CJEU does not fail to note later that such a criterion, although focused on the cost-price relationship – as an expression of the more economic approach – may only in some cases be relevant to non-price practices. That is, for example, in the case of the exclusivity clauses adopted by Unilever's distributors, where this criterion may be used to establish whether "a hypothetical competitor with a cost structure similar to that of the undertaking in a dominant position would be able to offer its products or services otherwise than at a loss or with an insufficient margin if it had to bear the compensation which the distributors would have to pay to switch supplier or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts".[58]

Moreover, the assessment of exclusivity clauses, and other possible non-price conduct, in the light of the "as efficient competitor" test, is not only necessary when it is the defendants that base their defence on the application of this test. More generally, the use of this test is desirable in all those cases where the use by a dominant undertaking of means other than those proper to competition on the merits. The test may be sufficient, in certain circumstances, to indicate the existence of such an abuse. In this sense, the *Unilever* ruling seems to confirm that authorities may consider the initial assets enjoyed by an undertaking in a dominant position, even in cases where they do not derive, as in the *SEN* case, from a previous position of a legal monopoly, but are the result of investments made by the company.[59]

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[56] For a review of the debate on the mandatory nature of the criterion, see Gaudin, Mantzari, *Google Shopping and the as-efficient-competitor test: Taking stock and looking ahead*, 13 JECLAP, 2022, 125 ss.; De Ghellinck, *The as-efficient-competitor test: Necessary or sufficient to establish an abuse of dominant position?*, 7 JECLAP, 544 ss. On the applicability of the criterion to non-price practices see de Cominck R., *The as-efficient competitor test: Some practical considerations following the ECJ Intel Judgement*, 4 Competition Law & Policy Debate, 2018, 73 ss.

[57] *Unilever*, para. 56.

[58] *Unilever*, para. 59.

[59] M. Maggiolino, *When an ice cream case provides antitrust experts with food for thought: Unilever Italia*, cit.

VI. Food for thoughts

As mentioned at the beginning of this *insight*, the *SEN* ruling – in its EU component – is notable for the interpretive issues it clarifies.

It establishes – hopefully once and for all – that: (*a*) the protection of the competitive structure of markets is a means to protect consumers, and their welfare/well-being; (*b*) Article 102 TFEU is not intended to protect inefficient and obsolete firms, even when they are rivals of dominant firms, which is why a dominant firm can always defend itself by proving that its conduct has produced countervailing positive effects in terms of prices, quality, variety, and innovation; (*c*) a dominant firm's practice is abusive not because of its form, but because of the effects it produces, even when these are only potential; (*d*) the ability of a dominant firm's conduct to produce exclusionary effects must be assessed at the time the firm engaged in that conduct, and on the basis of all circumstances existing at that time; (*e*) facts such as the intent of the dominant firm, the actual effects of its practices, and the possibility that such practices may be illegal under rules other than Article 102 TFEU, are among these circumstances, but they can neither prove, nor disprove the abusive nature of the practices at hand in a conclusive way – their standing is only as pieces of evidence; (*f*) antitrust authorities and judges may rely on the criterion of the hypothetical "equally efficient competitor" when dealing with both price and non-price practices, and, as a result, there may be exclusionary effects that are not anti-competitive, and thus unlawful, because they are not detrimental to rivals that are as efficient and innovative as the dominant firm.

Still, there are a few issues that still need to be clarified.

First, the CJEU argues that the "as efficient rival" test and the "no economic sense" test can both be used to figure out whether a practice is likely to produce exclusionary effects, to the detriment of consumers, that are greater than their possible pro-competitive effects. However, the two tests operate in different ways. The "equally efficient rival" test focuses on whether the contested practice can exclude even a hypothetical firm that is "as good as the dominant firm" at keeping costs low. Thus, using the "as efficient rival" test, the anti-competitive nature of the practice in question is inferred from the characteristics of the "ideal" rival of the dominant company that would be excluded by that practice. In contrast, the "no economic sense" test shows that the conduct in question will never produce pro-competitive effects, because it can have no pro-competitive justification. In other words, this test derives the anti-competitive nature of the practice from the effects it is expected to produce.

Second, the Court asks to balance the anti-competitive and the pro-competitive effects of SEN SpA's practice. At first, this seems correct. However,

is it possible that the application of the "as efficient rival" test already selects the exclusionary effects that are *also* anti-competitive, that is, detrimental to consumers? Suppose in other words, that an antitrust plaintiff – be it public or private – demonstrates exclusionary effects occurring at the expense of equally efficient rivals. Will the dominant firm really be able to show that its behaviour is nonetheless capable of producing countervailing benefits in terms of price, quality, variety, and innovation? Once an authority or a judge has applied the "equally efficient rival" test, isn't testing the potential pro-competitive effects of the practice at hand redundant? This is the case, with price practices where antitrust decision-makers are satisfied with showing that the price at hand is lower than a certain level of costs. Why is it not the same with non-price practices? Should it be?

Third, the CJEU is right in stating that Article 102 TFEU must punish dominant firms that are successful in outperforming their rivals by resorting to anything other than their market position. Moreover, the Court is correct in establishing that this *principle* must apply to both price and non-price behaviours. However, if antitrust authorities and judges apply the "equally efficient" *test* in relation to a price practice, they compare the *performance* of the dominant firm with that of its (hypothetical) rivals. Differently, as the *SEN* ruling shows, if antitrust decision-makers apply the "equally efficient" test about a non-price practice, they end up comparing the *initial endowments* of the dominant firm with those of its (hypothetical) rivals. Indeed, the *SEN* case focuses on the non-replicable nature of a resource – the SEN lists – that the dominant firm makes hard to access for its competitors. The conduct of SEN SpA is "evil" because depriving EE SpA's rivals of a strategic and non-replicable resource does not guarantee that they have the same competitive *opportunities* as EE SpA enjoys. Therefore, one should be aware that applying the same test in two different scenarios means focusing on two different features – performance *vs* initial endowments – pertaining to the world of the dominant firm.

While the duty of equal treatment is perfectly consistent with the rationale underpinning liberalization processes, traditional antitrust law is not very familiar with such duty. More correctly, beyond the very recent self-preferencing cases the duty of equal treatment only arises in essential facility cases. Therein, the notion of "essentiality" grasps precisely the idea that the resource at hand must be shared, specifically because it gives the dominant firm a competitive advantage that even its "as efficient and as innovative rivals" could not match. Thus, had *SEN* not been a case about an incumbent in a de-regulated market, the CJEU would have reached the same conclusion only by ruling that SEN lists were an essential facility – a fact that would have been difficult to prove.

Thus, in applying the "equally efficient rival" test to non-price practices, antitrust decision-makers must bear in mind that traditional competition law does not intend to guarantee equal opportunities to market players – at least not outside the scope of the essential facility doctrine. However, the Unilever ruling seems to confirm the possibility of applying the "equally efficient competitor" test about non-price practices also in liberalized markets.

Finally, one should consider the recent revision of *the Article 102 Guidelines* by the European Commission in March 2023.[60] First, the Guidelines now clarify that, as has emerged from the Commission's enforcement practice and clarifications provided by CJEU case law, the "as efficient competitor" test is only one of several methods to assess, together with all other relevant circumstances, whether a scrutinized conduct is capable of producing exclusionary effects. In other words, the use of the "equally efficient competitor" test is optional, and such a test may be inappropriate depending on the type of practice at hand, or the dynamics of the relevant market.[61] Moreover, the Commission recognizes in its new *Guidelines* that in some circumstances a "less efficient competitor" may also exert a constraint that should be considered when assessing whether a particular price-based conduct of a dominant firm leads to anti-competitive foreclosure.

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[61] In particular, the Communication recalls the following decisions: Judgment of 3 July 1991, *AKZO Chemie v Commission*, Case 62/86, EU:C:1991:286, para. 72; judgment of 10 April 2008, *Deutsche Telekom v Commission*, T-271/03, EU:T:2008:101, para. 194, upheld on appeal by the Court of Justice (see judgment of 14 October 2010, *Deutsche Telekom AG v Commission*, C-280/08 P, EU:C:2010:603); judgment of 6 September 2017, *Intel Corp. v Commission*, C-413/14 P, EU:C:2017:632, para. 134, and judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, para. 37.

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B O O K R E V I E W S

Ioannis Lianos, Alexey Ivanov, Dennis Davis (ed.), *Global Food Value Chains and Competition Law*, Cambridge University Press 2022, 642 p.

The book *Global Food Value Chains and Competition Law* introduces its readers to the issue of the food economy in a very compelling way. The publication shows the intricacies of food production from the economic perspective that is complemented by a regulatory overview. It is uncommon to encounter a study of a complex matter that is both articulated with such clarity, and remains easily comprehensible for general readers.

Edited by Ioannis Lianos, Alexey Ivanov, Dennis Davis, with contributions by academics as well as authors from regulatory agencies and consumer organizations, the book presents a timely analysis of the agri-food sector. The publication is divided into 21 chapters, each devoted to different agriculture policy challenges. The editors divided the book into six parts. The first begins by introducing its readers to the power dynamics in global value chains, the influence of financial actors at the origin of food chains, and the rise of technological tools and their utilization in agriculture (chapters 2–5). The book then moves on to competition law issues that occur within the framework of food supply chains, with emphasis on the consolidation of the food chains (chapters 6–11) and the analysis of the imbalances in power in the sector (chapters 12–16). The book proceeds to discuss the food industry in the broader context of human rights and international standard settings (chapters 17–18). The subsequent part focuses on how innovation is driven by intellectual property law, which, however, at the same time contributes to the rise of market giants (chapters 19–20). The book finishes with a case study on the grain market illustrating the need to reinvent trading mechanisms (chapter 21).

The book provides a detailed insight into the inner workings of the various food chains. It distinguishes food value chains from supply chains, specifying the characteristics of both. The resulting picture is that of a highly concentrated downstream market, with continued vertical integration in agri-food chains, followed by the disappearance of small-scale farming and traditional practices, with retail being the segment of food supply chains that represents the biggest value. The transformation of value chains lead to a situation where some markets comprise of only a few actors, for instance, the global seed or fertilizer trade upstream market. Examples of downstream markets with a high concentration ratio can be found in

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food retail markets[1]. The authors argue that vertically integrated companies wield more economic power over more specialized producers and, in turn, may subject entire value chains to their interests. There is no denying that statement and its repercussions. The problem of power asymmetry has gathered much attention from regulators in recent years. In response to the shift in the food system, many countries subjected food related mergers and other relevant market activities to closer scrutiny under competition law. States decided to strengthen public enforcement to prevent abuses and to restore balance in food supply chains, in addition to employing other legal measures beyond the competition law toolkit[2].

Apart from analyzing the interplay between competition law and food value chains, the authors present a spectrum of diverse perspectives stemming from various legal disciplines. In doing so, they break down the complexity surrounding agriculture policy and make it clear and easily understandable. In essence, the book enables readers to trace food production "from farm to fork".

Other topics well-presented in the book focus on technological developments in the agri-food sector, that is, digitization and process automation with the use of big data, sensors, IoT, smartphone usage and cloud computing. Right now, we are observing the next step of the technological revolution in the sector, namely the emergence of so-called *smart farming* or of *e-agriculture* based on the analytics of data collected from the crop fields. However, as it is often stressed, we live in an information economy. It is therefore no wonder that agriculture closely follows overall trends, despite the fact that most of the society associates this sector with more traditional techniques. In this regard, the authors point to the role of farmers in agricultural production, aided by cutting edge high-tech. The harsh truth is that with their diminishing contribution, the role of farmers is continually being reduced to a labor force. On that note, the authors argue whether consumer welfare goals, or an efficiency focused approach, should give way to other public interest aims, such as fair distribution of surplus along the value chain.

The application of big data technology also gave rise to "precision agriculture", which is about supporting the decision-making processes of farmers, that is applied by large farms, rather than small ones, due to high costs of installation and maintenance. This development seems consistent with the pattern seen in various other sectors, such as healthcare, where personalized medicine strives to deliver tailor-made interventions for individuals and also, the much-debated, recently developed concept of personalized law.

The implementation of new technologies is mostly aimed at improving the efficiency and yield of crops. This is similar to conventional agriculture, which encourages the use of means that lead to high returns, while decreasing operational costs. The reader is faced with the grim reality that food chains are operating with underlying goals of

[1] E.g., Scandinavian or Baltic countries where only few largest retailers have majority of market shares.

[2] Other measures like ban of unfair trading practices (UTPs) in EU, regulation on superior bargaining power or unfair competition law.

profit maximization and risk reduction, rather than, what is most socially or ethically desirable, biodiversity, the production of healthy and nutritious food, or preserving the land and the ecosystem. That is where the State comes into play by adopting agriculture policies that recognize and give precedence to goals other than economic. Tragic historical events, such as the Arab Spring, taught policy-makers to prioritize food safety and agricultural reforms. Governments have a vital interest in the proper functioning of the agricultural sector. Therefore, there is direct State involvement in this sector in the form of financial support and competition law exemptions, among others. The book provides apt descriptions of selected jurisdictions in this regard, covering some of the biggest raw material producers in the world: Brazil, China, India, Russia, and USA. At the same time, it highlights the different strategies adopted by food producers in those countries and their varying farm models. It would have been beneficial if more data was provided on the lower levels of food value chains in Australia, but this omission is not significant and does not diminish the overall quality of the book's reasoning.

The reviewed publication also discusses the change in consumption habits influenced by evolving consumer preferences, which directly affect the supply, and in turn the demand side of the food industry – the "what and how" of food production. Accordingly, the rising popularity of organic food and fair trade is noted, as some of the consumer trends reflected in new agriculture policies. The EU is the leader in the push towards a "green revolution", with most stringent regulatory demands in this context, focusing its strategy on sustainable agriculture[3]. Other countries set similar goals: on one hand, introducing bans on hazardous pesticides in order to improve food safety; on the other, encouraging the use of innovative fertilizers to fight environmental degradation. This implies that companies must come up with new products to meet newly imposed public policy requirements[4]. Having said that, the authors warn, and rightly point out, that a strictly technocratic approach to addressing these problems might fail, without gaining societal acceptance of such innovation first.

The value of this book lies also in its references to the economic and specialistic literature on the agri-food sector, which is supported by extensive data on, for example, yields, the volume of raw material produced, or market shares. It substantiates the findings, builds credibility, and helps readers to see the "big picture" of the industry. The choice of issues covered in this publication is not always clear when it comes to why some markets were not included. It is understandable, though, that attempting to cover each and every relevant product or geographical market would be overwhelming and fruitless, the size of the book already being impressive as it spans several hundred

[3] See goals of the European Green Deal, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en; and Strategic Foresight Report 23 – 'Sustainability and wellbeing at the heart of Europe's Open Strategic Autonomy', https://commission.europa.eu/document/f8f67d33-194c-4c89-a4a6-795980a1dabd_en.

[4] For example, one of the goals of the Green Deal established by the European Commission in proposal for a regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115 is to reduce the use of chemical pesticides by 50% and move growers into organic farming.

pages. Despite the size, the contributions are written in a matter-of-fact manner, where each chapter can be read as a stand-alone scientific analysis. However, it would have been extremely interesting if a single chapter was included dedicated entirely to the exploration of latest regulatory trends, instead of dispersing their analysis throughout the text.

The reviewed publication can serve as a wake-up call for policy-makers, experts and business, urging them to take a more proactive stance in facing climate change, resource scarcity, or power imbalances that contribute to distortions of food chains, in order to do more about driving the agri-business sector towards more sustainable and responsible practices.

This book will appeal to scholars, professionals and ordinary readers. In particular, *Global Food Value Chains and Competition Law* deserves to be read by any legal professional. The title does not do justice to the array of topics covered in the book. I highly recommend it to anyone curious to know more about one of the oldest, and still the biggest, industry in human history. The real value of the book lies in its versatility. It allows readers to peek into the food system, understand how it works, and the challenges it is facing in the 21st Century.

Magdalena Knapp
Assistant Professor, University of Warsaw, Faculty of Management
e-mail: mknapp@wz.uw.edu.pl
ORCID: https://orcid.org/0000-0003-0147-3056

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