



Faculty of Law

Master's Thesis Title:

Bridging the Gaps in the International Climate Change Regime through Regional

Approach: The Potentials of Regulation (EU) 2018/1999 on the Dimension of Energy Transition and the Paris Agreement

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Foreword

Being part of the pioneer set of seven students (though initially eight) in this unique Joint Nordic Master Programme in Environmental Law (NOMPEL), involving three research oriented and top Universities in the Nordic region, is a dream that has come to reality with this master's thesis. Starting the journey in the beautiful city of Uppsala, Sweden and at the oldest University in Sweden, with rich history in learning, research and scholarship, I literally entered into a new environment, to begin an experience that will shape my perspectives on the natural environment for the rest of my life. The young and vibrant University of Eastern Finland (UEF), Joensuu deepened my curiosity in a long range of new topics, issues, questions and subjects concerning human environment. UiT The Arctic University of Norway, Campus Tromsø hosted the parts of the program for the Fall 2020 and Spring 2021 (3rd and 4th semester), which were unfortunately done remotely due to COVID-19 pandemic. It was nonetheless exciting, intensive and practical. UiT is where I learned about the marine environment, energy and climate change.

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Kolawole

Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
CFP	Climate Policy Framework
CJEU	Court of Justice of the EU
COM	Communication
COP	Conference of the Parties
ECL	European Climate Law
EEA	European Economic Area
EGD	European Green Deal
ENTSO	European Network of Transmission System Operators
ETS	Emission Trading Scheme
EU	European Union
EU ETS	European Union Emission Trading Scheme
EUCOM	European Union Communication
GHG	Greenhouse gas
ICAO	International Civil Aviation Organisation
ILC	International Law Commission
INDC	Intended Nationally Determined Contribution
NDC	Nationally Determined Contribution
NECP	Integrated National Energy and Climate Plan
NECPR	National Energy and Climate Progress Report
RED I	Renewable Energy Directive (2009/28/EC)
RED II	Renewable Energy Directive (2018/2001)
S-NECP	Sweden's Integrated National Energy and Climate Plan
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNFCCC	United Nations Framework on Climate Change

ABSTRACT

The gap between the amounts of greenhouse gas (GHG) emissions being produced at the global level and the adequacy of the regulatory framework that will achieve the required reduction of the global levels, commensurate to international climate targets, is one of the many uncertainties and challenges facing the international community since the twilight of the 20th century. This is further exacerbated by another gap between the level of the energy demand/supply to the ever-increasing world population, and the number of people and communities who still lack the necessary access to electricity around the world. There is no doubt that more energy production is required for the world economic growth, particularly in the developing countries. This research is an attempt to identify, inter alia, what are the factors responsible for the disparities between the objective(s) of the international climate regime and the substantive provisions requiring global actions to the attainment of the objectives of the international climate change regime. The Paris Agreement and the European Union (EU) ‘energy and climate package’ serve as the reference of this research. On the assumptions that the current climate regime may be incapable of meeting the aim of the Paris Agreement, that is: “holding the rise in global temperatures to well below 2°C and pursuing efforts to limit it to 1.5°C”; the attention is being turned to regulatory efforts at the regional and subregional levels, especially the European Union (EU), which is one of the major global emitters. The approach by the EU to operationalize the Paris Agreement into a functional legal instrument, through regional comprehensive legislative package provides a template for analyzing the potentials of the ‘internal’ and the ‘external’ impact of the regional implementation of global instrument.

KEY WORDS:

Climate change, Energy transition, Energy rights, Regional approach

Chapter 1

1 Introduction

1.1 Background

1.1.1 EU Climate-neutrality Objective by 2050

Since the adoption of the United Nations Framework Convention on Climate Change (UNFCCC),¹ as the first international legal instrument to combat climate change, the EU has become more responsive and practically progressive in ensuring the performance of treaty obligations on climate change.² The progressive approach also became apparent in the implementation of Kyoto Protocol.³ The adoption of the Paris Agreement provides the real challenge to the proponents of strong climate action, such as the EU; to take necessary measures towards emissions reduction, which may have huge impact on their energy policy.⁴

Interestingly, while this Master's thesis has progressed to an advanced stage of completion, the Council and the Parliament of the European Union's (EU) negotiators reached a provisional political agreement, on 21 April 2021,⁵ with respect to adopting new legislation⁶ that will translate the EU objective of a 'climate-neutral EU by 2050' into a legal instrument.⁷ The negotiators agreed on a collective net greenhouse gas (GHG) emissions reduction target of at

¹ United Nations Framework Convention on Climate Change (adopted on 9 May 1992, but entered into force on 21 March 1994) 1171 UNTS 107, 165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC/237/18 (Part II)/Add. 1; 31 ILM 849 (1992).

² Guruswamy, Lakshman, "Climate Change: The Next Dimension" (2000) Vol. 15 (Supplementary Issue) *Journal of Land Use and Environmental Law*, 341-382, at p. 355. For a comprehensive history of the UNFCCC, see: Bodansky, Daniel, "The United Nations Framework Convention on Climate Change" (1993) Vol. 18 Issue 2 *Yale Journal of International Law*, 451-558. See also Harris, G. Paul, "Europe and Environmental Change: Sharing the Burdens of Global Warming" (2006) 17 *Colorado Journal of International Environmental Law and Policy*, 309-355.

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997, but entered into force on 16 February (2005) 2303 UNTS 162.

⁴ "European policies on climate and energy towards 2020, 2030 and 2050", Policy Department for Economic, Scientific and Quality of Life Policies, 2019. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/631047/IPOL_BRI\(2019\)631047_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/631047/IPOL_BRI(2019)631047_EN.pdf).

⁵ See the press release and statement of the European Council and Parliament dated 21 April 2021, titled: "European climate law: Council and Parliament reach provisional agreement", available at: <https://www.consilium.europa.eu/en/policies/climate-change/>. Any reference to the European Union (EU) in respect of events after 1 February 2020 should be understood, unless the context otherwise states, as excluding the United Kingdom, which withdraws from the EU and becomes a third country (non-EU country) as of 1 February 2020.

⁶ By virtue of Articles 289 and 294 of the Treaty on the Functioning of the European Union (TFEU) on the procedure for adopting EU legal acts (Regulations, Directives or Decisions-Article 288 TFEU).

⁷ The EU exercises its competences through regulations, directives, decisions, recommendations and opinions, as per Article 288 TFEU. The current EU climate and energy legislative package consists of legal acts adopted mostly in 2018, now known as the 2030 Climate and Energy Framework. The legislative intent of the package is to facilitate the achievement of the EU-wide targets and policy objectives for the period from 2021 to 2030. Full discussions on EU 2030 Climate and Energy Framework run through the subsequent chapters of the thesis.

least 55% by 2030 compared to 1990 levels, as against the current target of at least 40% for the same period.⁸ The negotiators also agreed that the Commission would propose an intermediate climate target for 2040, to be submitted, “at the latest within six months after the first global stocktake carried out under the Paris Agreement.”⁹ The objective of the above negotiations is to ultimately amend the Regulation (EU) 2018/1999¹⁰, that is barely two years in implementation, and other EU ‘legislative package’.¹¹

The April 21, 2021 provisional agreement was sequel to a buildup of events at the European Union (EU) level, particularly between 2019 and December 2020.¹² Firstly, the ‘European Green Deal’ (EGD)¹³ was proposed by the EU Commission to set a new growth strategy that aims to transform the EU into no net emissions of GHGs in 2050, particularly by ‘decoupling economic growth from resource use’.¹⁴ Thus, in order to deliver on the 2050 targets, the EU considered it expedient to increase its GHG emission reductions target for 2030 from at least 40% to at least 50% and towards 55% compared to 1990 levels.¹⁵ Secondly, the result of *ex post* evaluations of the current 2030 climate and energy framework¹⁶ is that it does not

⁸ The European Council initially agreed on the non-legislative proposal for 2030 climate and energy framework in October 2014, with four important targets for the EU. See European Council (23 and 24 October 2014) Conclusion, EUCO 169/14. The present 2030 Climate and energy framework by the EU has four main targets, which can be found Article 2(11) of Regulation (EU) 2018/1999, *infra*. This will be discussed in details in the subsequent chapters.

⁹ See note 1. Paris Agreement 2015 (December 13, 2015), in UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add.1 (January 29, 2016).

¹⁰ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ L 328, p. 1–77). In this thesis Regulation (EU) 2018/1999 is hereinafter referred to as the ‘Governance Mechanism’.

¹¹ The term ‘legislative package’ means the EU secondary acts or sectoral legal instruments to actualize the climate and energy targets for 2030 as well as the objective of the Paris Agreement. The 2030 legislative package consists of various amendments and upgrade of the 2020 climate and energy package (20-20-20) under the Kyoto Protocol.

¹² Majorly, the Communication (EU) ‘The European Green Deal’ COM/2019/640 final, of 11 December 2019; Communication (EU) “Stepping up Europe’s 2030 climate ambition: Investing in a climate-neutral future for the benefit of our people”, COM(2020) 562 final, of 17 September 2020; Communication (EU) ‘Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999’ (European Climate Law) COM(2020) 80 final, 4 April 2020. See also European Council conclusions of 12 December, 2019, EUCO 29/19, on the endorsement by the European Council (heads of state or government of the EU Member States, the European Council President and the President of the European Commission) of the objective of achieving a climate-neutral EU by 2050, in line with the Paris Agreement.

¹³ Communication (EU) ‘The European Green Deal’ COM/2019/640 final, *supra*.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ The EU 2030 climate and energy framework were predicated 2018 legislative package, which set out EU-wide targets and policy objectives for the period between 2021-2030. The framework focuses key targets for 2030 within the context on five dimensions of Energy Union.

synchronize with the climate neutrality targets by 2050.¹⁷ Thirdly, pursuant to Article 4(19) of the Paris Agreement, which obligates all Parties to formulate and communicate long-term low GHG development strategies, the EU had noted in its Annex to the submission of 6 March 2020, inter alia, that “[a]ll relevant EU legislation and policies need to be consistent with, and contribute to, the fulfilment of the climate neutrality objective”.¹⁸ Lastly, the COVID-19 pandemic has brought about a huge disruption of exceptional dimension to the economic and social situation globally;¹⁹ majorly in 2020, and has already extended to the second quarter of 2021, with no end in sight. All these rapid discussions and negotiations at the EU level, underscore the climate emergency and the need to urgently formulate enabling framework that would allow reaching climate neutrality by 2050.

1.1.2 Preliminary Issues

Some preliminary inquiries into the topic of this thesis are necessary for a start: firstly, what is the relevance of energy transition²⁰ to climate change mitigation objective; and secondly, what is the significance of the EU climate and energy policy framework to the international climate change regime? While these questions may not appear as legal issues, they provide insight into what the topic will endeavor to interrogate within the relevant legal context. Dealing with the first preliminary issue, climate change and energy transition are now considered as the major global challenges of this century.²¹ It has also been described as the “ultimate problem of the

¹⁷ COM(2020) 562 final, *supra*. The Communication observed that “[a] balanced, realistic, and prudent pathway to climate neutrality by 2050 requires an emissions reduction target of 55% by 2030.” Most importantly, the EU 2030 targets were assessed as having, not only inexplicable gaps, but also insufficient to meet the climate neutrality goal of the Paris Agreement by 2050.

¹⁸ See European Council Conclusions of 12 December 2019 (EUCO 29/19), annexed to the submission by Croatia and the European Commission on behalf of the European Union and its Member States, ‘Long-term low greenhouse gas emission development strategy of the European Union and its Member States’, 6 March 2020. Available at: <https://unfccc.int/sites/default/files/resource/HR-03-06-2020%20EU%20Submission%20on%20Long%20term%20strategy.pdf>.

¹⁹ European Council conclusions 17-21 July, 2020, EUCO 10/20.

²⁰ The working definition for the term ‘energy transition’ in this thesis is understood as the “change from a fossil-fuel-dominated energy system to one based on sustainable and low (or zero) emissions, which is also able to mitigate climate change.” See Colantoni, Lorenzo *et al*, “Energy and Climate Security Priorities and Challenges in the Changing Global Energy Order”, 2017, p. 2. Available at: http://www.iai.it/sites/default/files/feuture_op_6.pdf.

Although the definition of the term ‘energy transition’ is not static, depending on regional or national circumstances, the central theme is the shift towards sustainable and low-emissions energy system. It involves global energy mix, influenced by many factors, including economic, technological, role of interconnections, integration of alternative energies and climate change among others. See Lorenzo Colantoni *et al*, cited above.

²¹ Sovacool, K. Benjamin, “History and Politics of Energy Transition: Comparing Contested Views and Finding Common Ground”, in Douglas Arant, Channing Arndt, Mackay Miller, Finn Tarp, and Owen Zinaman (eds), *The Political Economy of Clean Energy Transition*, Oxford University Press, 2017, pp. 16-17.

commons”²² and a complicated global problem of diffuse nature,²³ requiring simultaneous and collective responses at all level of governance, in all sectors of the economy across the globe. The language and context of the environment differ from that of energy. While the former speaks of conservation, protection, precaution and sustainability; the latter speaks of production, supply, consumption, and economic growth.²⁴ However, dealing with the real drivers of high emissions will continue to generate different perspectives and present difficult challenges to the formulation of appropriate all-encompassing international legal instruments on its own; ²⁵ because, energy use is intractably connected to economic growth and development.²⁶ This thesis is not really about why or whether the international climate regime²⁷ adequately contextualized the energy transition in its provisions, but how can the regime provisions be applied to support or implement clean energy transition through the regional governance approach.

The second preliminary issue is the significance of the EU regional climate and energy policy framework to the international climate change regime. The EU is ranked as “one of the three biggest polluters responsible for the majority of the current global emissions of greenhouse gases (alongside China and the USA).”²⁸ The EU climate and energy policy is the focus of this

²² Lewis, B. Paul and Coinu, Giovanni, “Climate Change, the Paris Agreement, and Subsidiarity” (2019) Vol. 52 Issue 2 *UIC John Marshall Law Review* 257-326, at p. 259.

²³ Malafray, Melina, “Biodiversity Protection in an Aspiring Carbon-Neutral Society: A Legal Study on the Relationship between Renewable Energy and Biodiversity in a European Union Context”, *Department of Law, Uppsala University, SE-75120 Uppsala, Sweden, 2016*. Available at: <https://uu.diva-portal.org/smash/get/diva2:1039053/FULLTEXT01.pdf>. P. 45. According to Melina, the problem of climate change is diffused because, by the nature of greenhouse gas (GHG) emissions, “it is difficult to determine which states are responsible for causing harm in other states.”

²⁴ Tomain, P. Joseph, “The Democratization of Energy” (2015) Vol. 48 No. 4 *Vanderbilt Journal Transnational Law*, 1125-1145, at 1132.

²⁵ Fisher, Liz, “Challenges for the EU Climate Change Regime” (2020) Vol. 21 No. 1 *German Law Journal*, 5-9, at p. 6.

²⁶ Harris, G. Paul, “Collective Action on Climate Change: The Logic of Regime Failure” (2007) Vol. 47 No. 1 *Natural Resources Journal*, 195-224, at p. 215.

²⁷ It is important to contextualize the term: ‘international climate change regime’ as understood by this author. The author uses the term as representing “a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches” as agreed by the international community, mainly under the United Nations Framework Convention on Climate Change (UNFCCC) (1992); Kyoto Protocol to the UNFCCC (1997); and the Paris Agreement (2015). See the definition of ‘regime’ by the International Law Commission, “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’: An outline”, p. 9. Available at: https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf.

²⁸ Mazur-Kumric, Nives and Zeko-Pivac, Ivan, “The EU as a Global Trendsetter in the Fight against Climate Change: Is a Climate-Neutral Europe by 2050 Feasible?” (2020) No. 2 *Pecs Journal of International and European Law*, 9-30, at p. 10. The three major economies, together, are responsible for the majority of global emissions of greenhouse gases. The three economies collectively contribute to “around 55 per cent of global greenhouse gas emissions, measured by domestic production.” See European Commission, “EU Energy in Figures”, Statistical Pocketbook, *Publications Office of the European Union*, 2019, at p. 18; Averchenkova, Alina, *et al*, “Climate policy in China, the European Union and the United States: Main Drivers and Prospects for the Future”, *Policy Paper, ESRC Centre for Climate Change Economics and Policy & Grantham Research Institute on Climate*

thesis, because the EU is the first major economy to translate its collective promises under the Paris Agreement into a set binding legal instruments,²⁹ which are now undergoing review. In addition, the EU has also made it a general principle to ensure that all its “expenditure should be consistent with Paris Agreement objectives.”³⁰ The ambition of EU European for transition to a ‘climate-neutral society’ by 2050,³¹ has been strengthened by its declaration of a climate and environment emergency,³² which has resulted into flurry of legislative activities towards the objectives of the Paris Agreement.³³

However, the ‘self-imposed’ obligation of controlling climate change by the EU, is not necessarily a gratuitous act of global leadership, but the fact that energy security has become vital to both the economic development and political stability of the EU region.³⁴ As recently acknowledged by the EU Commission that “ambitious climate action is not just a way to confront the climate crisis”,³⁵ but also stimulate growth and sustainability.³⁶

1.2 Research Objectives

The core objective of the thesis topic includes: clear identification of gaps in the international climate regime,³⁷ as they relate to pathway to achieving the “global average temperature below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C

Change and the Environment, London, 2016, p. 6. Available at: <https://www.bruegel.org/wp-content/uploads/2016/12/Averchenkova-et-al-2016.pdf>. See also European Commission, “EU Energy in Figures”, supra, at p. 18.

²⁹ European Commission, ‘Clean energy for all Europeans’, p. 14, published on 26 September 2019. Available at: <https://op.europa.eu/en/publication-detail/-/publication/b4e46873-7528-11e9-9f05-01aa75ed71a1>.

³⁰ European Council Conclusions 17-21 July, 2020, EUCO 10/20; ‘The update of the nationally determined contribution of the European Union and its Member States’, submitted by European Commission on behalf of the EU and its Member States on 17 December 2020.

³¹ Conclusions adopted by the European Council at its meeting on 12 December 2019, EUCO 29/19, CO EUR 31, CONCL 9. See also European Parliament resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP)).

³² European Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)).

³³ COM(2018) 773 (In-depth Analysis in support of the Communication), 28 November 2018, p. 28. Available at: https://ec.europa.eu/clima/sites/clima/files/docs/pages/com_2018_733_analysis_in_support_en_0.pdf.

³⁴ Leal-Arcas, Rafael and Rios, Juan Alemany, “The creation of a European Energy Union” (2015) Vol. 5 Issue 3 *European Energy Journal*, p. 24.

³⁵ Update of the NDC of the European Union and its Member States, submitted on 17 December 2020, supra.

³⁶ Ibid.

³⁷ It is important to contextualize the term: “international climate change regime” as understood by this author. The author uses the term as representing “a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches” as agreed by the international community, mainly under the United Nations Framework Convention on Climate Change (UNFCCC) (1992); Kyoto Protocol to the UNFCCC (1997); and the Paris Agreement (2015). See the definition of “regime” by the International Law Commission, “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’: An outline”, p. 9. Available at: https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf.

above pre-industrial levels”.³⁸ Even though there appears to be scientific consensus on the causes and effects of growing global emissions, one critical question is whether the Paris Agreement has a clear characterization of the specific obligations that will lead to the achievement of its overall objectives; in the absence of due regard to energy sector, and its contribution to the greenhouse gas emissions. This research, therefore, seeks to consider the implication of the regional approach by the EU, through the application of the integrated national energy and climate plans (NEPCs) under the EU Regulation 2018/1999,³⁹ in bridging the gaps in the global legal regime. Other EU legal instruments, particularly the Directive (EU) 2018/2001 (RED II)⁴⁰ for the share of energy from renewable sources in gross final consumption of energy, will be considered in order to evaluate the impact of regional approach to the achievement of the objective of the Paris Agreement.

1.3 Research Questions

The research focusses on whether regional approach to global climate change governance has the potential to addressing some of the gaps that are inherent in the international climate change legal instruments. This will, inevitably, require some discussions on the interplay between the international climate change regime and the EU climate and energy framework. The main research question will revolve round the issue of: whether the EU’s Regulation 2018/1999 (Governance Mechanism) has the legal character to enhance the implementation of the Paris Agreement with respect to emissions reduction through energy transition? In order to answer this principal question, it is expedient to discuss the following related sub-questions:

- What is the legal justification for adopting the Governance Mechanism for the implementation of the Paris Agreement at the EU level?
- Can the coordination of the implementation of the emission reduction objective of the Paris Agreement by the EU, through the Governance Mechanism, affect the exercise of Member States’ energy rights? If yes, how and to what extent?
- What is the legal justification for dichotomy on binding renewable energy targets between the EU and its Member States?

³⁸ Article 2(1)(a), Paris Agreement.

³⁹ Article 3(1) of the Governance Mechanism makes comprehensive provisions for the preparation and submission of integrated national energy and climate plans (NECPs) by the EU Member States to the Commission.

⁴⁰ 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 (OJ L 328, p. 82–209), hereinafter referred to as ‘Renewable Energy Directive-RED II’.

- Could Sweden have achieved national climate and energy ambitions without the reporting obligations under Governance Mechanism or Paris Agreement?

1.4 Methodology

The methodology for this thesis will focus on content and contextual analysis of climate change legal regime, principally: The United Nations Framework Convention on Climate Change (UNFCCC); the Kyoto Protocol; Paris Agreement; and the EU legislative package on climate change and energy transition. The research will also include extensive review of journals, articles, declarations, and case law, where applicable. Accordingly, the research will adopt a doctrinal analysis of legal concepts; with the aid of judicial interpretations through the case law, where applicable.

My thesis will engage, mainly, in the internal approaches to the legal problems; by analysing the perspectives of the policy makers, legal draftsmen, jurists and legal scholars. I do not intend to consider the law from external standpoints; first, because it is an unfamiliar terrain for me, and second, it may detract from my research questions. While the analysis of the language of the various legal instruments relating to climate change mitigation and energy sector will be the key component of this research, I will engage in the comparative legal examinations through: the consideration of the judicial interpretations as well as the implementation mechanisms of the EU climate and energy framework, within the context of international climate change regime.

1.5 Delimitation and Scope

The substratum of this research has already been defined by the research question and the sub-questions. The main research focus primarily is analyzing how the EU, through Regulation (EU) 2018/1999 and the legislative package on climate and energy transition, seeks to concretize the provisions of the Paris Agreement, within the context of the climate change legal regime. Though the current energy and climate legal package of the EU has many dimensions, this research will focus on the aspect of energy transition as a mean of achieving the EU regional emissions reduction obligations, in line with the energy trinity objectives.⁴¹ The thesis will also consider the legal effect of Articles 192 and 194 of the Treaty on the Functioning of the

⁴¹ EU energy trinity focuses on “increasing security of supply; ensuring the competitiveness of European economies and the availability of affordable energy; and promoting environmental sustainability and combating climate change.” See COM(2007)1, Council of Council of the European Union, Conclusions of the Presidency, March 2007, para. 28. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/93135.pdf.

European Union (TFEU), and other related EU primary sources, that provide legal bases and competences for environmental protection and energy policy between the EU and Member States. Even though the phrases: ‘EU 2030 climate and energy framework’ and ‘EU 2030 legislative package’ will be freely referred to in the course description and analysis, the thesis does not intend to discuss the ‘full package’ beyond mere references to some specific instruments within the package, where the context so admits.

1.6 Research Focus and Structure

The focus of this research is, primarily, to evaluate the state of the present international climate change regime, particularly within the framework of Paris Agreement, through the eye of the EU regional approach. The ‘EU regional approach’ in this context, means the ‘the legislative package’⁴² through which the EU and its Member States seek to ensure their ‘joint fulfilment of commitments’⁴³ of aiming to limit the global temperature within the range of ‘1.5°C to well below 2°C’ above pre-industrial levels, the ultimate goal of the Paris Agreement.⁴⁴ The legal transition of the EU to implement the objective of the Paris Agreement offers a good setting, as the introductory chapter to this thesis. In all, the thesis consists of seven chapters.

Chapter 1 begins with the climate-neutral target of the EU by 2050. The chapter also provides basic structural background to the entire thesis. In the next chapter (chapter 2), the thesis considers the complex state of EU Climate Change Framework and its interactions with the international climate change regime. It will also discuss the provisions of EU Treaties on integration and mainstreaming climate and energy, through its environmental objectives. Chapter 3 is devoted to the discussions on the contentious interactions between Articles 192 and 194 of Treaty on the Functions of European Union,⁴⁵ as well as the Renewable Energy Directive (RED II). Renewable concept of Europeanization and Externalization of EU Climate

⁴² The term: ‘legislative package’ has been adopted to describe several legal acts on different subject matters, but with ‘connected objectives’, which seek to align with a particular reference legal instrument. In the context of the ‘EU energy and climate legislative package’, it means several legal acts adopted by the EU, in form of Regulations and Directives, under Article 288 of the Treaty on the Functioning of the European Union (TFEU), which are adopted at the EU level to implement the provisions the Paris Agreement.

⁴³ The term ‘joint fulfilment’ has been adopted in relation to Article 4 of the Kyoto Protocol, which allows any group of Annex I Parties to ‘fulfil their commitments under Article 3 jointly.’ In effect, the concept permits the combined emissions of greenhouse gases (GHGs) listed in Annex A and the reduction commitments in Annex B to be redistributed through internal agreement for the purpose of their ‘joint fulfilment’. The term has been described as a crucial part of the EU’s climate change strategy, regardless of the EU’s internal struggles. The EU and its Member States also adopted the concept of ‘joint fulfilment’ in respect of their ‘self-imposed’ binding target of domestic reduction of GHGs emissions under the Paris Agreement, as contained in the EU’s submission of the intended nationally determined contributions (INDCs).

⁴⁴ Paris Agreement, Article 2(1).

⁴⁵ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) OJ C 326, 26.10.2012, p. 47–390.

and Energy Policy. Chapter 4 focuses on how EU's 2030 climate and energy framework has operationalized the Paris Agreement. The content analysis of these legal instruments also focus on how the EU has domesticated or implemented the Paris Agreement, through internal measures and secondary legal instruments. Chapter 5 examines Regulation (EU) 2018/1999 as a procedural link for the achievement of substantive objectives of Energy Union.⁴⁶ The chapter also considers the substantives provisions of the Governance Mechanism. Chapter 5 concludes with the examination of the proposed European Climate Law (ECL), which seeks to amend of Governance Mechanism. The final substantive chapter (chapter 6), examines the Nordic perspective of the EU climate and energy framework, by analyzing the Sweden's Integrated National Energy and Climate Plan (S-NECP), adopted pursuant to Regulation (EU) 2018/1999. It also considers the relevance of the Swedish Climate Act (2017:720), which regulates the Government's climate policy on the long-term emission targets set by the Riksdag (Swedish Parliament). Since the Swedish climate and energy policies rank among the most ambitious in the EU,⁴⁷ they provide insight into how a national government within the EU navigate the EU's climate and energy policy, without losing sight of its national circumstances as well as other international commitments. Chapter 7 draw lessons from analysis of the previous chapters and make considered suggestions, moving forward.

⁴⁶ Energy Union is the strategy in which the EU aims to balance energy security with environmental sustainability. It has five mutually-reinforcing and interrelated dimensions of: energy security; a fully integrated European energy market; energy efficiency; decarbonising the economy, and research, innovation and competitiveness. See EU Communication on Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM/2015/080 final.

⁴⁷ The content of Sweden climate and energy ambitions in comparison with EU targets is fully discussed in Chapter 6.

Chapter 2

2 EU Legal Framework and the International Climate Change Regime

2.1 Interactions between the EU Climate and Energy Framework and the International Climate Change Regime

The EU, as a subject of international law, is considered to combine the features of an international organisation and of a State; closer to an international organization or of a *sui generis*.⁴⁸ EU is an actor of international law,⁴⁹ and enjoying the full complements of a State. EU is an international organisation created and functions by its Treaties.⁵⁰ Ever since the adoption of the international climate change regime, the EU has not only participated in the climate change negotiations as a ‘Party’, but has also progressively adopted several legal acts,⁵¹ pursuant to the provisions of Article 3(5) TEU, in order to ensure the attainment climate change objectives within the EU region. In order to assess how the EU legal framework on climate change has evolved alongside the international climate change regime, it is important to understand how international law has impacted the legal structure of the European Union. By Article 3(5) of the Treaty on the European Union (TEU),⁵² the EU undertakes to ensure “strict observance and the development of international law, including respect for the principles of the United Nations Charter.”⁵³ Also, by virtue of Article 216(1) TFEU, the EU has the competence to conclude agreements and Treaties with third countries⁵⁴ or international organisations, where such agreements or Treaties are necessary in order to achieve, within the framework of the EU policies. And, where such agreements or Treaties have been concluded by the EU, they are “binding upon the institutions of the Union and on its Member States.”⁵⁵

⁴⁸ It has been stated that the “EU is a complex *sui generis* example of inter-state cooperation.” See Leal-Arcas, Rafael and Filis, Andrew, “Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective” (2013) Vol. 36, Issue 5 *Fordham International Law Journal*, pp. 1225-1301, at 1226. See also Ziegler, S. Katja, “The Relationship between EU law and International Law”, Paper No. 13-17, *University of Leicester School of Law Research*, p. 2. Available at: https://www.researchgate.net/publication/303786095_The_Relationship_between_EU_Law_and_International_Law. The term *sui generis* is a Latin phrase that means: “of its own kind, unique, in a class by itself.” See Black’s Law Dictionary, Eight Edition, 1475.

⁴⁹ Ibid (Leal-Arcas, Rafael and Filis, Andrew, “Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective”), p. 4.

⁵⁰ Treaty on European Union (TEU) and Treaty on the Functioning of European Union (TFEU). The EU derives its (international) legal personality from TEU.

⁵¹ Article 288 TFEU, empowers the EU to exercise its competences, through the adoption of regulations, directives, decisions, recommendations and opinions.

⁵² Consolidated version of the Treaty on European Union (TEU), (OJ C 326/13, 26.10.2012, p. 47–390).

⁵³ Ibid, Article 3(5) TEU.

⁵⁴ The term ‘third countries’ are countries who are not Member States of the European Union.

⁵⁵ Article 216(2) TFEU.

Within the context of the EU legal framework, the international climate Treaties are regarded as ‘mixed agreements’, that is: “agreements that are signed and concluded by the EU and (some of) its Member States on the one hand, and by one or more third parties on the other hand.”⁵⁶ Where competence is shared between the EU and the Member States,⁵⁷ any negotiation and implementation of the agreement require joint action by both the EU and the Member States.⁵⁸ In this light, the international climate treaties fall into the categories of ‘mixed agreements’, because they were jointly negotiated and being jointly implemented by the EU and its Member States.⁵⁹

There is another layer of validity of international law or treaty concluded by the EU, particularly where such international treaty has been approved by the EU, pursuant to a ‘Decision.’⁶⁰ Such a ‘Decision’ renders the provisions of international treaty to form an integral part of the legal order of the EU from the date of its entry into force.⁶¹ In *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*,⁶² the Court of Justice of the EU (CJEU), stated that: ‘by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union.’⁶³ It therefore means that the “validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law.”⁶⁴ However, where the invalidity of an act of EU against rules of international law is pleaded before a national court, the Court of Justice is entitled to ascertain whether, by virtue of Article 267 TFEU, the validity of the act of EU law concerned may be assessed in the

⁵⁶ Maresceau, Marc, “A typology of mixed bilateral agreements” in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*. Hart Publishing Oxford 2010, p. 12. See also Opinion of 19 March 1993, Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, 2/91, EU:C:1993:106, para 12.

⁵⁷ It is said that “any areas of EU competence which are not explicitly listed as ‘exclusive’ or ‘supportive’ are deemed to fall within the category of shared competences.” See Mańko, Rafał, “EU Competence in Private Law: The Treaty Framework for a European Private Law and Challenges for Coherence” (2015) *European Parliamentary Research Service*, 1-21, at p. 4. Available at: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/545711/EPRS_IDA\(2015\)545711_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/545711/EPRS_IDA(2015)545711_REV1_EN.pdf).

See also Kaczorowska, Alina, *European Union Law* 2nd ed. Routledge 2011, pp. 78-79.

⁵⁸ Opinion of 19 March 1993, Convention N° 170 of the International Labour Organization, *supra*.

⁵⁹ The EU and Member States jointly negotiated and adopted UNFCCC, Kyoto Protocol and the Paris Agreement, and have always operated on the principle of ‘Joint Fulfilment’ of the obligations arising from the international climate Treaties.

⁶⁰ A ‘Decision’ is one of the means by which the EU exercises its legislative function, within its legal competence. According to Article 288, ‘A decision shall be binding in its entirety.’

⁶¹ Case C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, para 73; Case 181/73 *Haegeman*, para 5.

⁶² *Ibid* (Case C-366/10 *Air Transport Association of America and Others*).

⁶³ *Ibid*, para 50. See also Case C-61/94 *Commission v Germany*, para 52; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht*, paragraph 25; Case C-308/06 *Intertanko and Others*, para 42; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, para 307.

⁶⁴ *Ibid* (Case C-366/10 *Air Transport Association of America and Others*), para 51.

light of the rules of international law relied upon.⁶⁵ The tests for the ascertainment of the validity of the EU act or measures concerned in the light of all the rules of international law, are: first, whether the the Community must be bound by those rules;⁶⁶ second, the Court can examine the validity of EU law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this;⁶⁷ and, finally, where the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise.⁶⁸ The last element of 'unconditionality and sufficiently precise' is further explained to mean that such rules of international law "contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."⁶⁹

Furthermore, since "an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives",⁷⁰ the test of the validity of EU law must be determined in the light of its compatibility with the objectives of the international law, the content of which is to be unconditional and sufficiently precise. These tests or elements were applied by the Court of Justice in assessing the validity of Directive 2008/101⁷¹ in the light of Article 2(2) of the Kyoto Protocol.⁷² The Court of Justice, however, determined that Article 2(2) of the Kyoto Protocol, which provides that the parties are to pursue limitation or reduction of emissions of certain greenhouse gases from aviation bunker fuels, working through the ICAO "cannot in any event be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity of Directive 2008/101."⁷³

⁶⁵ Ibid. See also Shaw, N. Malcolm, *International Law*, Cambridge University Press (Eight Edition), 2017, p. 137.

⁶⁶ Case C-308/06 *Intertanko and Others*, paras 43-44. See also Joined Cases 21/72 to 24/72 *International Fruit Company and Others*, para 7.

⁶⁷ Ibid (Case C-308/06 *Intertanko*, para 45). See also Case C-344/04 *IATA and ELFAA*, para 39.

⁶⁸ Ibid.

⁶⁹ Case C-366/10 *Air Transport Association of America and Others*, para 55. In Case 12/86 *Demirel*, para 14, the Court of Justice stated that: 'A provision in an agreement concluded by the community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.'

⁷⁰ Case C-344/04 *IATA and ELFAA*, supra, para 40.

⁷¹ Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, (OJ L 8, p. 3–21). Under Directive 2003/87/EC of 13 October 2003, the EU established a scheme for GHG emission allowance trading within the EU, and a scheme for GHG emission allowance trading in order to promote reductions of GHG emissions in a cost-effective and economically efficient manner.

⁷² See Case C-366/10 *Air Transport Association of America and Others*, para 74. Article 2(2) of Kyoto Protocol provides: "The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively."

⁷³ Case C-366/10 *Air Transport Association of America and Others*, para 77.

2.2 Integration and Mainstreaming of EU Climate and Energy Policy

The approach of the EU with respect to energy and climate change mitigation is one of ‘integration’.⁷⁴ This approach is also clearly expressed under Article 191 of TFEU, which underscores the policy of the EU that: “the environment shall contribute to pursuit of the ... objectives” set out in Article 191(1) TFEU. Under Article 37 of the EU Charter of Fundamental Rights,⁷⁵ it provides that “high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union”.⁷⁶ It is not in doubt that environmental protection is one of the essential objectives of the EU, and constitutes a limitation to free trade or free movement of goods in the EU.⁷⁷

The principle of environmental integration has become one of the cornerstones of the EU policy.⁷⁸ The establishment of internal market within the EU also recognized that sustainable development of EU should be based on balanced economic growth that aims at a “high level of protection and improvement of the quality of the environment”.⁷⁹ The reason behind the principle of environmental integration, as expressed in Article 11 TFEU, Article 37 of the EU Charter of Fundamental Rights, and differently worded in Article 3(3) TEU, is the acceptance of the fact that sustainable development is unattainable without environmental protection.⁸⁰ Since the nexus between energy production and use (consumption) are the main sources for greenhouse gas emissions have now been firmly established,⁸¹ the EU had considered the pursuit of the “integrated approach to climate and energy policy”,⁸² but which fully respects the “Member States’ choice of energy mix and sovereignty over primary energy sources and underpinned by a spirit of solidarity amongst Member States”.⁸³ As will be shown in the

⁷⁴ See Article 3(3) TEU; Article 11 TFEU; and Article 37 of the EU Charter of Fundamental Rights. These are the primary sources of EU law.

⁷⁵ Charter of Fundamental Rights [2007] OJ C 303/17.

⁷⁶ *Ibid.*, Article 37.

⁷⁷ Case C-341/95, *Gianni Bettati v. Safety Hi-Tech Srl (Bettati’s Case)*, para 62. See also Case 240/83 *Procureur de la République v Association de Défense des Brûleurs d’Huiles Usagées*, para 13; Case 302/86 *Commission v Denmark*, para 9. Note: These cases were considered under Article 30 EEC, now Article 34 TFEU.”

⁷⁸ Marin-Duran, G & Morgera, E 2013 “Commentary on Article 37 of the EU Charter of Fundamental Rights: Environmental Protection”, Europa Working Papers, no. 2013/02, Europa Working Paper. Available at: At p. 5. Accessed and downloaded on 6 March 2021.

⁷⁹ Article 3(3) TEU.

⁸⁰ The concept of sustainable development entered world stage at the Declaration of the United Nations Conference on Human and Environment, 1972 (Stockholm Convention, 1972), UN Doc A/CONF.48/14/Rev.1,3, reprinted in 11 ILM 1416 (1972). See also Langlet, David and Mahmoudi, Said, *EU Environmental Law and Policy*, Oxford University Press, 2016, pp. 42-43; Jans, H. Jan, “Stop the Integration Principle?” (2011) Vol. 33 No. 5 *Fordham International Law Journal*, p. 1533- 1547.

⁸¹ See COM(2007)1, Conclusions of the Presidency, March 2007, 7224/1/07 REV 1, para. 28.

⁸² *Ibid.*

⁸³ *Ibid.*

subsequent chapters, the coming into effect of the Treaty of Lisbon in 2009⁸⁴ and the adoption of the Paris Agreement seem not to alter this approach.

The application of the principle of environmental integration to EU policies raises the question of not only its definition, but also of its legal enforceability. While the definition of environmental integration is closely related to the concept of sustainable development,⁸⁵ it is still far from having a conclusive characterization. Generally, the links between energy and climate policies revolve around the concept sustainable development.⁸⁶ Under the EU law, policies and measures that have the potentials of having effect on the environment are required to be subject to public consultation by virtue of Directive 2001/42/EC,⁸⁷ the objective of which is “to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development”.⁸⁸ The second consideration is the question of the legal enforceability of environmental integration under the EU law. The EU case law offers some guidance in this regard. In the case of *Greece v. Council*,⁸⁹ the Court of Justice noted that shall be environmental protection shall be integrated in the Community’s policies, not just because the policies require it. Beyond the requirement of its integration, there are many uncertainties that have been identified by scholars, which blur its application.⁹⁰ The uncertainties include: how is the requirement implemented or integrated to policies and measures; what constitutes the actual substance of the environmental protection; is the requirement merely procedural or substantive in nature or both?⁹¹

⁸⁴ The Treaty of Lisbon established a formal shift for energy policy from being within the exclusive competence of Member States to a shared competence (i.e., between the EU and the Member States). It has a separate section (Title XXI), on energy, that is Article 194 in the TFEU. See also Petric, Davor, “The Global Effects of EU Energy Regulation” (2018) Vol. No. 2 *European Journal of Legal Studies* 165-208, at p. 173. See the fuller discussions of Article 194 in Chapter 3 of this thesis.

⁸⁵ For instance, Article 37 of the EU Charter of Fundamental Rights states, inter alia, that “environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

⁸⁶ Sustainability development is measured through some of the indicators adopted by the EU, known as sustainable development indicators (SDI). These include: socioeconomic development; sustainable consumption and production; social inclusion, demographic changes, climate change and energy; sustainable uses of natural resources; and global partnership. See “Archive: Sustainable Development- Climate Change and Energy”, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:Sustainable_development_-_climate_change_and_energy. Accessed on 27 May 2021. See also

⁸⁷ Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, p. 30–37), (otherwise known as SEA Directive).

⁸⁸ *Ibid*, Article 1.

⁸⁹ Case 62/88 *Greece v. Council*, para 20.

⁹⁰ Veinla, Hannes, “Scope and Substance of the Integration Principle in EC Law and Its Application in Estonia”, pp. 4-5 available at: https://www.juridicainternational.eu/public/pdf/ji_2008_2_4.pdf. Accessed on 27 May 2021. See also Jans, J.H. and Vedder, H.B., *European Environmental Law: After Lisbon*, 4th Edition, Europa Law Publishing, Groningen 2012, p. 27.

⁹¹ *Ibid*.

2.3 Externalization of EU Climate and Energy Policy

The important role of the EU in the international climate change regime is predicated on its significant influence through economic and social regulation to generate external effects, outside the EU.⁹² First, the EU is energy import-dependent region, that rely on third countries for its energy security of supplies.⁹³ The fact that there have been series of internal readjustments within the EU, upon the entry into force of the Treaty of Lisbon in 2009, allowed the EU to share competence with Member States in the area of energy, the extent of which is open to continuous debates.⁹⁴ Second, the EU also pursues its energy policy by exporting its internal regulations and standards to the third countries.⁹⁵ Chad Damro,⁹⁶ described the EU as “more of a foreign policy actor in the various market-related policies”,⁹⁷ because the concept of ‘single market’ provides sufficient platform and “considerable regulatory capacity for externalising internal policies and regulations.”⁹⁸ Even though the degree of influence is open to debate and subject to independent variables, the existence is never in doubt.⁹⁹ Because of its ‘heterogeneous energy realities’,¹⁰⁰ resulting from lack of sufficient internal resources, highly import-dependent, and the rights of Member States to pursue different energy policies; the EU is incapable of directly exerting energy diplomacy.¹⁰¹ The EU, however, substitutes its deficiency in energy sufficiency with the ‘power of other sectoral internal policies and

⁹² Petric, Davor, “The Global Effects of EU Energy Regulation”, supra, at p. 167.

⁹³ Ibid, 172. See also “Climate policy in China, the European Union and the United States: Main Drivers and Prospects for the Future”, supra, p. 18.

⁹⁴The EU approaches to energy (energy *acquis*) cover different pieces of legal instruments rules and policies. Several areas in which the EU exercise competence which have effect on energy sector include: the functioning of the internal energy market (Article 114 TFEU), competition and state aid (Articles 107-108 TFEU), environmental protection (Article 192 TFEU), the promotion of renewable energy sources (Article 194 TFEU), energy efficiency and savings (Article 194 TFEU), security of supply (Article 122 TFEU), energy networks (Articles 170-172 TFEU) and energy external policy (Articles 216-218 TFEU).

⁹⁵ Renner, Stephan, “The Energy Community of Southeast Europe: A neo-functionalist project of regional integration” (2009) Vol. 13, *European Integration online Papers (EIoP)*, p. 4, available at: <http://eiop.or.at/eiop/pdf/2009-001.pdf>. Visited on 26 May 2021. See also Buschle, Dirk, “Exporting the Internal Market – Panacea or Nemesis for the European Neighbourhood Policy? Lessons from the Energy Community” (2014) Paper 2, *EU Diplomacy*, p. 8. Available at: <http://aei.pitt.edu/58677/>. Accessed on 26 May 2021.

⁹⁶ Damro, Chad, “Market Power Europe”, (2012) 19 *Journal of European Public Policy* 682. Online copy available at: <https://eustudies.org/assets/files/papers/EUSA-11%20Damro%20MPE%20Paper-Submitted.pdf>. Last visited on 26 May 2021.

⁹⁷ Ibid, p. 3 of the online copy.

⁹⁸ Ibid, p. 4 of the online copy.

⁹⁹ Ibid, p. 12. Chad argued, inter alia, that: “The first stage of externalisation occurs when the institutions and actors of the EU attempt to get other actors to adhere to a level of regulation similar to that in effect in the European single market or to behave in a way that generally satisfies or conforms to the EU’s market-related policies and regulations. ... The second stage of externalisation requires these non-EU targets actually to adhere to said level of regulation or to behave in said way.”

¹⁰⁰ Petrić, Davor, “The Global Effects of EU Energy Regulation”, supra, at 166.

¹⁰¹ Ibid. see also Leal-Arcas, Rafael and Filis, Andrew, “Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective”, supra, at p. 1298.

regulations in external relations with third parties.¹⁰² It is however important to note that the ‘externalization’ of energy policy or and regulations happens either intentionally or unintentionally.¹⁰³ For instance, the EU market power is an intentional behavior, displayed either through market diplomacy (persuasive) or by extra-jurisdictional (coercive) legal instruments, as was the case with adoption of various regulations which have impact on third countries and beyond the borders of Europe. In this regard, the EU has adopted a long and growing list of legal instruments covering different areas of energy uses, with policy objectives in a wider context.¹⁰⁴

The intentional externalization may come in form of ‘exercise of conditionality’, through the threat of sanctions or inducement through incentives; and leveraging on the “attraction of single market”.¹⁰⁵ In this instance, the coercive mechanism is triggered against national administrations of third countries to implement the EU rules in order to avoid sanctions or denial of access to the single market.¹⁰⁶ In fact, the EU has sometimes been accused of engaging in “unilateral regulatory globalization”, otherwise known as “The Brussels Effect.”¹⁰⁷ Intentional externalization is very tricky and open to many legal challenges. Scott argues that even though the EU rarely enacts “extraterritorial legislation”, it sometimes adopts the practice of enacting legislations with intent for “territorial extension.”¹⁰⁸ This practice “enables the EU to govern activities that are not centered upon the territory of the EU and to shape the focus and content of the rules of third countries and international law.”¹⁰⁹

However, whatever the noble objective of the EU regarding externalizing its internal policies, it must respect the principle of customary international law, treaty obligations and regard for internal sovereignty of the third countries.¹¹⁰ A classic example of the tricky nature of intentional externalization was brought to fore in the case of *Air Transport Association of*

¹⁰² Petrić, Davor, “The Global Effects of EU Energy Regulation”, supra, p. 166. See also Damro, Chad, “Market Power Europe”, supra, at 683.

¹⁰³ Damro, Chad, “Market Power Europe”, supra, p. 4 of the online copy.

¹⁰⁴ Solorio, Israel, “Bridging the Gap between Environmental Policy Integration and the EU's Energy Policy: Mapping out the ‘Green Europeanisation’ of Energy Governance” (2011) Vol. 7 Issue 3, *Journal of Contemporary European Research*, pp. 369-416, at pp. 405-408.

¹⁰⁵ Lavenex, Sandra (2014) “The Power of Functionalist Extension: How EU Rules Travel” (2014) Vol. 21 No. 6, *Journal of European Public Policy*, 885-903, at p. 889.

¹⁰⁶ Schimmelfennig, Frank, “Europeanization beyond Europe” Vol. 7, (2012) No. 1, *Living Reviews in European Governance*, p. 7.

¹⁰⁷ Scott, J., “Extraterritoriality and Territorial Extension in EU Law” (2014) 62(1) *American Journal of Comparative Law*, 87–125, at p. 88.

¹⁰⁸ Ibid, Scott, J., “Extraterritoriality and Territorial Extension in EU Law”, supra, at pp. 89-90.

¹⁰⁹ Ibid.

¹¹⁰ Case C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*.

America and Others v. Secretary of State for Energy and Climate Change.¹¹¹ The disputed EU act in this case is Directive 2008/101/EC, which amended Directive 2003/87/EC, with regard to the inclusion of the emissions from aviation activities in the Community scheme, pursuant to the Kyoto Protocol.¹¹² The case was commenced by transatlantic private American and Canadian airlines, before the English High Court, Queen’s Bench Division.¹¹³ One of the objections of the airlines against the inclusion of aviation activities in the EU scheme is that the EU was unlawfully applying its law extra-territorially, thereby exceeding its powers under international law by not confining the scheme to internal flights within the EU.¹¹⁴ It was further argued that the scheme under Directive 2008/101/EC should have been negotiated and adopted under the International Civil Aviation Organisation (ICAO), and not unilaterally by the EU.¹¹⁵ Significantly, the CJEU was asked to determine compatibility of the EU act with the rules of international law. The CJEU, decided, inter alia, that the ‘validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law.’¹¹⁶ Meanwhile, the CJEU had recognized that: “by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union.”¹¹⁷

In its final determination, the Court the rejected the arguments challenging the validity of the disputed act, and “concluded that examination of Directive 2008/101 has disclosed no factor of such a kind as to affect its validity.”¹¹⁸ The decision has however generated both positive and negatives reactions from scholars and decisions makers. To some, the decision is a “definitive view on the legality of the EU’s ambitions to uphold high environmental standards and to compel others to uphold these standards also.”¹¹⁹ On the other hand, while the preliminary

¹¹¹ Ibid.

¹¹² Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ L 8, p. 3–21).

¹¹³ The case came before the CJEU via the procedure of reference for a preliminary ruling from English Court.

¹¹⁴ Case C-366/10 *Air Transport Association of America and Others*, supra, paras 43 and 45.

¹¹⁵ Ibid.

¹¹⁶ Ibid, para 51. See also Case C-61/94 *Commission v Germany*, para 52; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht*, para 25; Case C-308/06 *Intertanko and Others*, para 42; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, para 307.

¹¹⁷ Ibid, para 50. See also Case C-61/94 *Commission v Germany*, para 52; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht*, para 25; Case C-308/06 *Intertanko and Others*, para 42; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, para 307.

¹¹⁸ Case C-366/10 *Air Transport Association of America and Others*, supra, 157.

¹¹⁹ Fahey, Elaine, “The EU Emissions Trading Scheme and the Court of Justice: The ‘High Politics’ of Indirectly Promoting Global Standards” (2012) Vol. 13 No. 11, *German Law Journal*, p. 1248. See also Scott, Joanne and Rajamani, Lavanya, “EU Climate Change Unilateralism: International Aviation in the European Emissions Trading Scheme” (2012) 23, *European Journal of International Law*, 469.

reference was still pending before the CJEU, the US adopted a retaliatory legislation on 24 October 2011, known as the European Union Emissions Trading Scheme Prohibition Act of 2011.¹²⁰ The US legislation directed the Secretary of Transportation to prohibit US aircraft operators from participating in the EU ETS. In the forceful submission before the US House of Representatives before the adoption of US legislation, Nancy Young, the Vice President of Environmental Affairs, Air Transport Association of America, Inc., stated, inter alia that the EU scheme under Directive 2008/101 “violates international law, including the sovereignty of the United States.”¹²¹ It was further argued that the EU ETS also constitutes “the most egregious is its regulatory overreach into other nations”,¹²² and considered an “extraterritorial assertion of jurisdiction”.¹²³

Third, the EU has expanded of Europeanization of climate energy policy through the quasi-member states, arrangement, specifically involving members of the European Economic Area (EEA).¹²⁴ Even though the EU legal acts does not automatically apply to non-EU members of EEA, such EU act can be incorporated into the EEA Agreement, once they are considered EEA relevant.¹²⁵ While of Iceland, Liechtenstein and Norway are signatories to the international climate change regime, they are not subject to the collective targets of the EU, because combating climate change is not included in the EEA Agreement.¹²⁶ In particular, Article 73 EEA in which the objectives of the EEA environmental policy are stipulated does not mention climate change.¹²⁷ There are however several reasons why non-EU members of EEA, especially Norway will be impacted by the EU climate and energy policy framework. First, Norway is an

¹²⁰ European Union Emissions Trading Scheme Prohibition Act of 2011, H.R. 2594, 112th Cong. (2011). See also “The European Union’s Emissions Trading Scheme: A Violation of International Law”, 112th Cong. (2011) (Testimony of Nancy N. Young, Vice President of Environmental Affairs, Air Transport Association of America, Inc.), p. 34-35. Available at: <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg67582/pdf/CHRG-112hhrg67582.pdf>.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Schimmelfennig, Frank, “Europeanization beyond Europe”, supra, p. 5. The EEA Agreement, which entered into force on 1 January 1994 is cited as: Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States - Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area (OJ L 1, p. 3–522).

¹²⁵ ‘The Basic Features of the EEA Agreement’. Available at: <https://www.efta.int/eea/eea-agreement/eea-basic-features>.

¹²⁶ Cyndecka, Malgorzata, “EEA Law and the Climate Change: The Case of Norway” (2020) Vol. 9 No. 2, *Polish Review of International and European Law*, 107-126, at 109-110. Climate change issues were not part of negotiations of the parties, being relatively new issues at the material time.

¹²⁷ Article 73(1) refers to the objectives of: “(a) to preserve, protect and improve the quality of the environment; (b) to contribute towards protecting human health; (c) to ensure a prudent and rational utilization of natural resources.” See also Article 73(2) which talks about environmental principles. It will therefore amount to unjustifiable restrictive interpretation to exclude climate change issues from environmental protection requirements.

energy resource-dependent country, who would want to “safeguards a stable legal framework for the development of the oil and gas sector”.¹²⁸ Secondly, EU Emission Trade System (EU ETS) applies at the EEA level, which enables EU and EEA to adopt cost-effective market mechanism for cross-sectoral GHG emissions reduction measures.¹²⁹ Thirdly, the objectives and principles of creating “homogeneous European Economic Area”, founded on four freedom: movement of goods; movement of persons; movement of services; and movement of capital,¹³⁰ makes EU’s policy framework on energy and environment, including climate relevant to EEA Agreement.

On the other hand, the ‘unintentional externalization’ energy policies and regulations is still connected with the sheer size of EU internal market, and the influence it wields on the economic partners.¹³¹ This EU governance by externalization compel third countries interested in the EU’s internal market to follow the EU’s rules relevant to the areas of common market interest.¹³² According to Frank Schimmelfennig, the ‘larger the EU’s share is in the foreign trade of a country, and the more binding and centralized the EU’s rules are, the more this country will be subject to Europeanization pressures.’¹³³ Generally, the size of the market has influence over global public policy.¹³⁴ However, a market size alone does not provide a complete assessment EU’s growing global regulatory influence.¹³⁵ It has been argued that the EU’s regulatory authority has a long history, but with variations ‘across industries and policy areas’.¹³⁶ What is certain is that the EU’s growing regulatory influence is not just a consequence of the character or size of its single market, but also of domestic institutional reforms, regulatory capacity and strong co-ordination on the EU level.¹³⁷ This research recognizes there are many studies and theories about the concept of EU regulatory measures, and the whole gamut thereof cannot fully analyzed or explained herein.

¹²⁸ Cyndecka, Malgorzata, “EEA Law and the Climate Change: The Case of Norway”, supra, p. 111.

¹²⁹ Ibid, p. 113.

¹³⁰ Article 1, EEA Agreement.

¹³¹ Damro, Chad, “Market Power Europe”, supra, p.12.

¹³² Schimmelfennig, Frank, “Europeanization beyond Europe”, supra, p. 9.

¹³³ Ibid. See also Bach, D. and Newman, A.L., “The European Regulatory State and Global Public Policy: Micro-Institutions, Macro-influence” (2007) 14(6) *Journal of European Public Policy*, 827 – 46.

¹³⁴ Bach, David and Newman, A.L., “The European Regulatory State and Global Public Policy: Micro-institutions, Macro-influence”, supra, p. 829.

¹³⁵ Ibid, at 830.

¹³⁶ Ibid.

¹³⁷ Ibid.

Chapter 3

3 Energy Framework of the EU

3.1 Historical Background to EU Energy Policy and Article 194 TFEU

Even though energy has been pivotal to EU integration policy, beginning with the European Coal and Steel Community Treaty (ECSC) of 1951¹³⁸ and followed by the European Atomic Energy Community (Euratom) Treaty 1957,¹³⁹ it has had a checkered history.¹⁴⁰ While the Euratom Treaty has a narrow focus on nuclear energy, the Treaty of Rome (EEC Treaty) and the successive amending Treaties, did not provide the EU with legal basis to deal with energy issues, until the adoption of the Lisbon Treaty.¹⁴¹ In pre-Lisbon era, the European Community (EC) treaties have no specific enabling provisions to underly EC's objectives, commitments, procedures and actions in the sphere of energy.¹⁴² The Treaty of Lisbon is, therefore, a watershed in the legal framework for the energy sector: first, the recognition of shared competences between the EU and the Member States under Article 4(2) TFEU; and second, the introduction of Article 194 TFEU, being a specific provision that establishes legal basis for future energy legislations.¹⁴³

¹³⁸ The European Coal and Steel Community Treaty (ECSC) of 1951, which has now become spent, brought 6 European countries together (i.e. Belgium, West Germany, France, Italy, Luxembourg and the Netherlands) to organise the free movement of coal and steel and to free up access to sources of production. ECSC treaty applied from 1952, and expired in 2002.

¹³⁹ Euratom Treaty has the objective of regulating the usage of nuclear energy for civilian purposes and to address the general shortage of “conventional energy” with a view to “achieving energy independence”. Euratom Treaty was adopted contemporaneously with Treaty establishing the European Economic Community (EEC Treaty or otherwise referred to as the “Treaty of Rome”) in March 1957.

¹⁴⁰ The preceding treaties before the Treaty of Lisbon (signed in 2007) are: Single European Act (signed in 1986); Maastricht Treaty (signed in 1992); Treaty of Amsterdam (signed in 1997); and Treaty of Nice (signed in 2001). The complete texts of the treaties and EU legislations are available at: the [EUR-Lex database of EU law](#). See also Andoura, Sami, *et al*, “Towards a European Energy Community: A Policy Proposal”, p. 7. Available at: <https://institutdelors.eu/wp-content/uploads/2018/01/europeanenergycommunity-andoura-hancher-vanderwoude-ne-march10.pdf>.

¹⁴¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (Treaty of Lisbon) OJ C 115, p. 1–388.

¹⁴² Andoura Sami, *et al*, “Towards a European Energy Community: A Policy Proposal”, *supra*, p. 11. Before the introduction Article 194 TFEU (Title XXI), the previous EU energy legislations were predicated on the legal basis of environmental protection under Article 192 TFEU (ex Article 175 TEC), or on the internal market basis under Article 114 (ex Article 95 TEC).

¹⁴³ Treaty of Lisbon introduced a separate energy Title (XXI), consisting of a single Article 194 TFEU. The purport of this provision has given rise to different perspectives from legal scholars. See also Hancher, L. and Salerno F., “Energy Policy After Lisbon” in A. Biondi *et al* (eds.), *EU Law After Lisbon* (Oxford: Oxford University Press, 2012), Ch. 18, pp. 367-402; Johnston, Angus and van der Marel, Eva, “Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU” (2013) 22(5) *EEELRev* 181-199.

Article 194(1) TFEU sets out the four main aims of Union policy on energy, which shall be performed in the ‘spirit of solidarity between the Member States’¹⁴⁴ to: guarantee the functioning of the energy market; to ensure security of energy supply in the Union; promote energy efficiency and the development of new and renewable forms of energy; and promote the interconnection of energy networks.¹⁴⁵ With respect to the area of shared competences, the Member States may legislate when the EU has not exercised its legislative power in those areas; provided that the EU cannot obliterate the sovereign right of the Member States to ‘determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply’ under Article 194(2) TFEU.¹⁴⁶ This is indicative of the recognition of what has been referred to as the energy rights of the Member States, with three components: energy resources, energy sources and energy supply.¹⁴⁷ Article 194(2) is full of problematic phrases; which seem to conflict and make the understanding of energy rights of Member States uncertain.¹⁴⁸ The drafting of Article 194(2) is far from being elegant and this makes the interpretation of Member States’ energy rights, within the context other provisions of the TFEU, quite challenging.¹⁴⁹

The operative phrase to each of the component energy rights under Article 194(2) TFEU is “shall not affect”. The phrase is however inserted between two caveats of “without prejudice”: one at the beginning of the paragraph and the second after the declaration of Member States’ energy rights. This makes the full extent of the Member States’ energy rights unclear. For this, Angus and Eva¹⁵⁰ formulated five hypotheses: one, that Article 114 remains applicable in the context of a harmonising of national rules regarding the establishment and functioning of the

¹⁴⁴ See the recent Opinion of Advocate General Campos Sánchez-Bordona delivered on 18 March 2021 in Case C-848/19 P *Germany v Poland*, with respect to the interpretation and application of the ‘spirit of solidarity’ under Article 194(1) TFEU.

¹⁴⁵ *Ibid.*, paras 76-78.

¹⁴⁶ The next sub-chapter discusses the dynamic nature of EU legal jurisprudence with respect to the shared competences on ‘environment’ and ‘energy’ under applications of Articles 192 and 194 TFEU. The issue of whether EU has any competence to take legally binding measures to ensure the protection of the environment in the energy development, in the light of Article 194(2) has generated different scholastic perspectives. See Andoura, Sami, *et al.*, “Towards a European Energy Community: A Policy Proposal”, *supra*, p. 12; Malafry, Melina, *supra*, pp. 59-66.

¹⁴⁷ Johnston, Angus, “The impact of the new EU Commission guidelines on State aid for environmental protection and energy on the promotion of renewable energies” in Trond Solvang (ed) *EU Renewable Energy Law: Legal Challenges and New Perspectives*, Scandinavian Institute of Maritime Law Yearbook 2014, 13-56, at pp. 52-54. See also Article 4(2) TFEU. For lack space, the author will not be able to delve into characteristics of each of the component or the analysis of whether each is mutually exclusive of the other. or not.

¹⁴⁸ Johnston, Angus and van der Marel, Eva, “Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU”, *supra*, at 181.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

internal market;¹⁵¹ two, that the substantive and procedural requirements of the derogation provisions under Article 114(4) and (5) TFEU may serve as guide in the interpretation of Article 194(2) TFEU;¹⁵² three, that the energy rights of Member States in Article 194(2) TFEU either presuppose that the Member States have the right to ‘opt-out’ of EU measure if such measure seek to curtail or affect the rights, or that the energy rights are ‘free-standing’, subject only to derogation provided expressly by the TFEU, through the adoption of ordinary legislative procedure, after consultation of the Committee of the Regions and the Economic and Social Committee;¹⁵³ four, that the “EU harmonisation measures in the energy field will require unanimity voting in Council when the measure risks affecting Member States' energy rights”;¹⁵⁴ and that any EU measure based on Article 194 TFEU may not even have effect on the Member States’ “energy rights”.¹⁵⁵ The question is, which of these hypotheses on the possible interpretations of Article 194 have been validated by the CJEU? Interpreting Article 194 TFEU will certainly portend challenges to the CJEU, as to what canons of interpretation of EU law are to be adopted.¹⁵⁶

3.2 CJEU Case Law

The debates on the scope of Article 194 TFEU with respect to the decisions of the Member States or in providing legal basis for the EU action will be unending if there is there no intervention by the CJEU.¹⁵⁷ On what should constitute the proper interpretation of Article 194(1) TFEU, the recent Opinion of Advocate General Campos Sánchez-Bordona delivered on 18 March 2021 in *Germany v. Poland*¹⁵⁸ is both instructive and enlightening. The appeal arose from the judgment of the General Court delivered on 10 September 2019 in *Poland v. Commission*,¹⁵⁹ in which Poland filed the action for the annulment of the Commission’s Decision C(2016) 6950 final, adopted on 28 October 2016.¹⁶⁰ Poland contends before the

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ A full discussion on the rules of interpretation of the EU law is, unfortunately, not within the scope of this thesis. See Fennelly, Nial, “Legal Interpretation at the European Court of Justice” (1996) Vol. 20 Issue 3, *Fordham International Law Journal*, pp. 656-679; Johnston, Angus and van der Marel, Eva, “Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU”, *supra*, at pp. 185-188.

¹⁵⁷ The CJEU exercises its clearly defined in various categories of proceedings: references for preliminary rulings; actions to fulfill obligations; actions for annulment; actions for failure to act. See Articles 258-267 TFEU.

¹⁵⁸ Case C-848/19 P *Germany v Poland*.

¹⁵⁹ Case T-883/16 *Poland v. Commission*.

¹⁶⁰ Commission Decision of 28 October 2016 (C(2016) 6950 final) on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC. This is the disputed Decision in Case T-883/16 *Poland v. Commission* and Case C-848/19 P *Germany v Poland*.

General Court, inter alia, that the disputed decision of the Commission constitutes an infringement of Article 36(1)(a) of Directive 2009/73,¹⁶¹ read in conjunction with Article 194(1)(b) TFEU and the ‘principle of solidarity’ among Member States. The General Court annulled the disputed decision on the ground that it infringed the principle of energy solidarity under Article 194 TFEU. Before annulling the disputed decision, the Court compared the ‘spirit of solidarity’ referred to in Article 194(1) TFEU with general principle of solidarity between the Member States, mentioned in Article 2 TEU, in Article 3(3) TEU, Article 24(2) and (3) TEU, Article 122(1) TFEU and Article 222 TFEU, and noted that the “principle is at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU”.¹⁶² The Court interpreted the principle of solidarity as entailing the “rights and obligations both for the European Union and for the Member States”,¹⁶³ in which the EU is bound towards the Member States, on the other hand; and the Member States are bound between themselves with regard to the common interest of the EU, on the other hand.¹⁶⁴

In the context of energy policy, the principle implies, inter alia, the “obligations of mutual assistance” either in the event of extra ordinary situations natural disasters or acts of terrorism, or where a Member State is in a critical or emergency situation as regards its gas supply; and “cannot be restricted to such extraordinary situations which would exclusively involve the competence of the EU legislature”.¹⁶⁵ It also means that both the European Union and the Member States, in the exercise of their shared competences in the field of energy policy, must “avoid adopting measures liable to affect the interests of the European Union and the other Member States, as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply”.¹⁶⁶

In the appeal filed by Germany, it was contended, inter alia, that the principle of energy solidarity in Article 194 TFEU is “a purely political notion and not a legal criterion”,¹⁶⁷ which

¹⁶¹ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, p. 94–136). Article 36(1)(a) of the Directive speaks about the enhancement of the investment competition in gas supply and security of supply.

¹⁶² Case T-883/16 *Poland v. Commission*, para 69.

¹⁶³ *Ibid*, para 70.

¹⁶⁴ *Ibid*, para 70.

¹⁶⁵ *Ibid*, para 71.

¹⁶⁶ *Ibid*, para 73. See also the decision in case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para 156, delivered on 29 July 2019, where the Court observed that security of energy supply in the EU is one of the fundamental objectives of EU policy in the field of energy under Article 194(1)(b) TFEU.

¹⁶⁷ Germany filed an appeal (Case C-848/19 P *Germany v Poland*) on 20 November 2019 against the judgment of the General Court delivered on 10 September 2019 in Case T-883/16 *Poland v Commission*. The appeal has five grounds, three of which relate to principle of energy solidarity in Article 194(1) TFEU. The appeal is available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=222692&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4626896>.

“cannot give rise to specific rights and obligations for the European Union and/or for the Member States.”¹⁶⁸ While the Advocate General Campos Sánchez-Bordona acknowledged the divergent opinions of legal scholars on the nature of character of the principle of solidarity in the EU jurisprudence,¹⁶⁹ he agreed with the view of the General Court that:

the principle of energy solidarity under Article 194(1) TFEU produces effects which are not merely political but legal: a) as a criterion for interpreting provisions of secondary law adopted in implementation of the European Union’s powers in energy matters; b) as a means of filling any gaps identified in those provisions; and c) as a parameter for judicial review, either of the legality of the aforementioned provisions of secondary law, or of decisions adopted by the bodies of the European Union in that field.¹⁷⁰

In the case of *Eni and Others*¹⁷¹, Advocate General Mengozzi described the principle of solidarity as a “constitutional principle”. In his Opinion, delivered on 26 July 2017, he stated that the ‘reference to solidarity between Member States [in Article 194(1) TFEU], which was added into the wording of the text of the Treaty of Lisbon, is made in a context in which the principle of solidarity between Member States has taken on a character that could be defined as a “constitutional principle”’.¹⁷² However, the full extent of ‘solidarity’ cannot be interpreted to derogate from the energy rights with respect to the energy security of the Member States, which is within the scope of national security, and considered as within “an exclusive competence of the Member States under Article 4(2) TEU).”¹⁷³

Article 194(2) appears to have provoked more debate than the previous paragraph, particularly because of the manner in which it was drafted.¹⁷⁴ In the case of *Austria v. Commission*,¹⁷⁵ one of the issues for determination before the General Court of the EU relates to the right of Member

¹⁶⁸ Ibid.

¹⁶⁹ Case C-848/19 P *Germany v Poland*, para 64. For ease of reference, the divergent scholastic’ opinions cited by the Advocate General include: Van Cleynenbreugel, P., “Typologies of solidarity in EU law: a non-shifting landscape in the wake of economic crisis”, in Biondi, E., Dagilyté, E. and Küçük, E. (eds.): *Solidarity in EU Law. Legal principle in the making*, Edward Elgar, Cheltenham, 2018, pp. 25 and 36; Dagilyté, E., “Solidarity: a general principle of EU law? Two variations on the solidarity theme”, in Biondi, E., Dagilyté, E. and Küçük, E. (eds.), supra, p. 62; Ross, M., “Solidarity: A new constitutional paradigm for the EU?”, in Ross, M., and Borgmann-Prebil, Y. (eds.): *Promoting Solidarity in the European Union*, Oxford University Press, Oxford, 2010, pp. 23-45.

¹⁷⁰ Case C-848/19 P *Germany v Poland*, para 96.

¹⁷¹ C-226/16 *Eni and Others (Eni SpA and Others v Premier ministre and Ministre de l’Environnement, de l’Énergie et de la Mer)*.

¹⁷² Ibid, para 33 of the Opinion.

¹⁷³ Case C-848/19 P *Germany v Poland*, para 80. See also *Campus Oil Limited and Others v. Minister for Industry and Energy and Others*, paras 34-35; Case C-503/99 *Commission v Belgium*, para 46.

¹⁷⁴ See for example the five hypotheses raised by Johnston, Angus and van der Marel, Eva, “Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU”, supra.

¹⁷⁵ Case T-356/15 *Austria v. Commission*.

States to invoke the provision of Article 107(3)(c) TFEU on “State aid”, in order to facilitate the enjoyment of the energy rights to choose between different energy sources, pursuant to Article 194(2) TFEU.¹⁷⁶ The decision of the Court in this case is rather complex because it has to navigate, inter alia, between difficult and contentious areas of ‘State aid’ under Article 107(3), which deals with common rules of trading and competition conditions; and the ‘energy rights’ under Article 194(2). In fact, the Court was prepared to accept that a Member State is “entitled to choose nuclear technology as an energy source forming part of its energy mix, but,...also entitled to decide on the construction of new nuclear energy generating capacity...for the purposes of Article 107(3)(c) TFEU.”¹⁷⁷ Accordingly, it was decided that the United Kingdom’s right to determine its own energy mix and to maintain nuclear energy as a source in that mix, is consistent with Article 194(2) TFEU and cannot be disapproved.¹⁷⁸ The Court further noted that the measures adopted by the United Kingdom was compatible with the internal market under Article 107(3)(c) TFEU, and consequently dismissed the action. In the appeal against the judgment of the General Court, brought before the Grand Chamber and decided on 22 September 2020,¹⁷⁹ the Court, in rejecting the appeal stated, inter alia, that the choice of nuclear energy is a matter for the Member States to decide under Article 194(2) TFEU; and that the objectives and principles of EU environmental law, and the objectives pursued by the Euratom Treaty do not conflict.¹⁸⁰

It therefore seems that the use of phrase: “without prejudice”, in Article 194(2) TFEU, does nothing to derogate from the energy rights of the Member States “to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply”.¹⁸¹

3.3 Interactions between Articles 192 and 194 TFEU

The point of interaction(s) between Articles 192 and 194 TFEU is located in the text of Article 194(2) TFEU, which states that:

¹⁷⁶The action by Austria in Case T-356/15 *Austria v. Commission* is for the annulment of the Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (OJ 2015 L 109, p. 44).

¹⁷⁷ Ibid, at para 371.

¹⁷⁸ Ibid, at paras 507-508, 526.

¹⁷⁹ C-594/18 P, *Austria v Commission*.

¹⁸⁰ Ibid, paras 48-49.

¹⁸¹ Ibid. This seems to align with the fifth hypothesis raised Johnston, Angus and van der Marel, Eva, “Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU”, supra, A fuller analysis of Article 194(2) will be discussed in the next sub-paragraph.

Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

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

On the other hand, Article 192(c) TFEU states that:

By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

By way of literal interpretation, Article 192(2)(c) refers to the power of the EU Council to seek to legislate or take measures that may “significantly affect” a Member State's choice between different energy sources and the general structure of its energy supply only after a unanimous decision of the Council. Unanimous decision of the Council with respect to Article 192(2) (c) is a special legislative procedure that permits no dissent voting, unlike the decision-making based on the qualified majority voting procedure under Article 238 TFEU or the ordinary legislative procedure under Articles 289 and 294 TFEU.¹⁸² The basis for unanimity is to safeguard the energy rights of the Member States from the tyranny of the majority votes, and “preserves certain sovereign prerogatives of member states.”¹⁸³ However, with respect to EU measures necessary to achieve the objectives set out in Article 194(1) TFEU, the Council is only expected to apply the ordinary legislative procedure described in Article 294 TFEU.¹⁸⁴

¹⁸² Under Article 238 TFEU, as from 1 November 2014, qualified majority is defined to mean at least 55% of Council members representing at least 65% of the EU population or 72% of Council members representing at least 65% depending on circumstances. The ordinary legislative procedure referred to under Article 289 TFEU has been set out in Article 294 TFEU.

¹⁸³ Leal-Arcas, Rafael and Filis, Andrew, “Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective”, supra, at pp. 1245-1246; Johnston, Angus and van der Marel, Eva, “Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU”, supra; Szabo, Viktor, “The EU Member States' Right to Electricity Mix” (2016) Vol. 10 No. 1 *Masaryk University Journal of Law and Technology*, pp. 23-45, at 31.

¹⁸⁴ Case C-490/10 *Parliament v Council*, para 65.

This has, therefore, posed major challenge to the EU with respect to the adoption of environmental policies under Article 192 TFEU, which may affect the energy rights of the Member States.¹⁸⁵

As noted earlier, Article 194 of TFEU provides the legal basis for the field of energy based on shared competences between the EU and its Member States.¹⁸⁶ On the other hand, by virtue of Article 192(1) TFEU, the EU can decide what measure is to be taken in order to achieve its objectives and policies on the environment, as specified in Article 191 TFEU.¹⁸⁷ However, Article 194(2) usually presents problematic situations between the EU and the Member States when adopting measures which may have concurrent impact on the environment (climate change) and energy structure.¹⁸⁸ The choice of legal basis for EU legislative measure is required to be “based on objective factors amenable to judicial review.”¹⁸⁹ Accordingly, an inappropriate or the wrong choice of legal basis may may sustain an action for annulment of the disputed legislative measure.¹⁹⁰

Furthermore, another question is energy legislative instrument adopted under Article 194 TFEU can be considered *lex specialis*,¹⁹¹ within the context of other energy provisions of the TFEU. In the opinion of the International Law Commission (ILC) Study Group on Fragmentation of International Law: “Legal rules always appear in clusters, referring to each other in a number of ways.”¹⁹² Articles 192 and 194 create two separates, but interconnected, legal bases for

¹⁸⁵ Malafry, Melina, *supra*, p. 68.

¹⁸⁶ For instance, both Renewable Energy Directive-RED II and Directive (EU) 2018/2002 (Energy Efficiency Directive-EED) have Article 194(2) TFEU as their legal basis. However, before the entry into force of Treaty of Lisbon, Directive 2009/28/EC (RED I) on the promotion of the use of energy from renewable sources, imposed individual or national binding target on Member States “to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.” See Article 3(2), RED I. This directive (RED I) was adopted under the legal basis of environmental protection pursuant to Article 192 TFEU (ex Article 175 TEC).

¹⁸⁷ Article 191(1) provides, *inter alia*, that the Union policy on the environment shall contribute to pursuit of the following objectives: of “preserving, protecting and improving the quality of the environment”, and “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.”

¹⁸⁸ This is what is referred to as “twofold purpose” measure by the Court of Justice in *Opinion 2/00*, para 23.

¹⁸⁹ Case C-45/86, *Commission v. Council (Generalised Tariff Preferences)*, para 5. See also Case C-440/05 *Commission v. Council*; Case C-411/06 *Commission v. Parliament and Council*.

¹⁹⁰ In the *Opinion 2/00*, para 5, the Court of Justice noted, *inter alia*, that “[T]he choice of the appropriate legal basis has constitutional significance.... To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed.”

¹⁹¹ The term *lex specialis* is a Latin maxim in the interpretation of law: *lex specialis derogate legi generali*, which literally means that ‘more specific rules will prevail over more general rules.’ According to the International Law Commission (ILC), the term “is usually dealt with as a conflict rule”, and will therefore not apply where there is no conflicting of rules. See “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’: An outline”, *supra*. See the discussions on the application of the rule of *lex specialis* to 194 TFEU by Malafry Melina, *supra*, at pp. 56, 63, 69-70 and 87.

¹⁹² *Ibid*, p. 8. The clusters of rules are sometimes referred to as the regime. See the definition of international climate change regime adopted by the author under Chapter 1 of this thesis.

environment and energy policies and regimes, respectively. While the former seeks to, subtly, assert precedence over the latter; the latter was drafted in a manner which appears self-conflicting in character, such that a recourse to the former for its interpretation and full implementation is inevitable. Such is the situation with Article 194 TFEU, which now forms the legal basis for the EU energy legal acts; and the other provisions, such as Articles 192 and 114 TFEU, providing legal basis for environmental policies the internal market respectively.¹⁹³

The complexities of interpreting the Article 194(2), effectively is premised on the principle that any rule which is considered as *lex specialis* should not be applied to set aside the rules that are *lex generalis*. Instead, the former should take into account when applying the latter.¹⁹⁴ In fact, the complexity of the relationships between Articles 192 and 194, as exemplified in text of Article 194(2). For instance, a legislative measure, such as Renewable Energy Directive-RED II, may be intended to pursue dual purposes of energy and environment policies. The question is how to identify the main or predominant purpose from what is merely incidental; because, there must be a selection of legal basis for the predominant purpose, as against the incidental purpose. Again, what if a measure involves several contemporaneous objectives or components, which are interconnected and inseparable? How will the choice of legal basis be determined? The Court of Justice in *Opinion 2/00* attempts to resolve the logjam when it states:

If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component.... By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases.¹⁹⁵

The above exposes the dilemma on how the adoption of energy related environmental policies by the EU under Article 192, will not ‘significantly affect’ the energy rights of the Member

¹⁹³ Szabo, Viktor, “The EU Member States’ Right to Electricity Mix”, supra, at p. 30.

¹⁹⁴ International Law Commission’s “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’: An outline”, supra. See also *Case of Neumeister v. Austria (Article 50)* ECHR 1974 A No. 17 (1974) para 28-31.

¹⁹⁵ *Opinion 2/00*, supra, para 23. See also the other cases referred to in the Opinion: Case C-155/91 *Commission v Council (Waste Directive judgment)*, paras 19 and 21; Case C-42/97 *Parliament v Council*, paras 39 and 40; Case C-36/98 *Spain v Council*, para 59; Case C-300/89 *Commission v Council (Titanium Dioxide judgment)*, paras 13 and 17.

States under Article 194(2), and vice versa. According to the Court of Justice of European Union (CJEU), the second subparagraph of Article 194(2) TFEU cannot be treated as establishing a general prohibition to assign the right of the Member States to the EU to make policy in the area of the environment.¹⁹⁶ As a matter of clarity, the CJEU treated Article 194 TFEU as “a general provision which relates solely to the energy sector and, consequently, delineates a sectoral competence.”¹⁹⁷ In other words, Article 194 TFEU constitutes the general reference provision for policy in the energy sector.¹⁹⁸ The indicative clarification is provided in Article 194(2) TFEU, which says: ‘without prejudice to the application of other provisions of the Treaties’; and establish ordinary legislative procedure, allowing a concurrent decision of the Council and the European Parliament.¹⁹⁹

The difficulty in determining the measure of energy policies that could ‘significantly affect’ Member States’ rights arises from the fact that the distinction between what constitutes *lex specialis* (special) and *lex generalis* (general) is relatively unclear.²⁰⁰ As noted by the International Law Commission, “all special law is general as it is a characteristic of rules that they apply to a class *generally*”.²⁰¹ It noted further that: “A rule may be general or special in regard to its subject-matter or in regard to the number of actors whose behaviour is regulated by it.”²⁰² The question of whether special or general is, therefore, relational to its subject-matter or in regard to the conditions of its application.²⁰³ Consequently, the dynamic nature of relationship between Articles 192 and 194 TFEU is underscored by the different types of legislative procedures required with respect to the objectives set out in Article 194(1) and the energy rights guaranteed in Article 194(2) TFEU respectively. Thus, while the EU is entitled to adopt the ordinary legislative procedure described in Article 294 TFEU in order to achieve the objectives set out in Article 194(1) TFEU; the Council is required, by Article 192(2)(c) to act with unanimity on measures which may ‘significantly affect’ a Member State’s energy rights, guaranteed by Article 194(2) TFEU. In addition, Article 192(2)(c) also imposes obligation on the Council to consult the EU Parliament, the European Economic and Social

¹⁹⁶ Case T-370/11 *Poland v. Commission*, supra, para 17; Case C-490/10 *Parliament v. Council*, para 77.

¹⁹⁷ *Ibid* (*Poland v. Commission*).

¹⁹⁸ Case C-490/10 *Parliament v. Council* (Opinion of Advocate General Mengozzi delivered on 18 April 2012, para 23)

¹⁹⁹ Article 289 TFEU states that: “The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.”

²⁰⁰ International Law Commission’s “The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’: An outline”, supra.

²⁰¹ *Ibid*.

²⁰² *Ibid*.

²⁰³ *Ibid*.

Committee (EESC), and the Committee of the Region. The above therefore constitutes a strong safeguard for the energy rights of the Member States, from the EU encroachment. Regardless of the procedures stated above, the contestation over the degree of Member States' 'energy sovereignty',²⁰⁴ within the context of Article 194(2) of TFEU,²⁰⁵ will continue to raise "a gap in institutional dynamics...between the development of supranational competences over internal energy and climate issues."²⁰⁶

²⁰⁴ Youngs, Richard (2020) "EU Foreign Policy and Energy Strategy: Bounded Contestation" (2020) 42(1), *Journal of European Integration*, 147-162, at p. 148; Ammannati, Laura, "The Governance of the Energy Union: An 'Intricate System' Unable to Achieve Union Common Goals", *supra*, pp. 5 and 10

²⁰⁵ Article 194(2) of TFEU has been discussed in the chapter.

²⁰⁶ *Ibid.* See also Szulecki, K., *et al.*, "Shaping the 'Energy Union': between national positions and governance innovation in EU energy and climate policy" (2016) 16(5) *Climate Policy*, 548-567, at pp. 548-549.

Chapter 4

4 Paris Agreement and EU's 2030 Climate and Energy Framework

4.1 Paris Agreement and EU's Nationally Determined Contributions (NDCs)

Preparatory to the adoption of the Paris Agreement at 21st session of the Conference of the Parties (COP21) in December 2015, the European Union and its Member States submitted their collective/joint intended nationally determined contributions (INDCs) on 6 March 2015, together with an Annex containing quantifiable and qualitative information on the INDC, in line with decisions taken at the 20th session of the Conference of the Parties (COP) in Lima.²⁰⁷ The Paris Agreement has come in a unique format, regarding its substantive obligations. On the surface, it looks more encompassing than Kyoto Protocol, and more ambitious going by the objectives in Article 2.²⁰⁸ But, setting the climate objectives is different from how the objectives will be achieved. This appears to be the snag with the climate objectives set out in the climate regimes. Whether the Paris Agreement is “essentially a statement of good intentions”,²⁰⁹ or a statement of positive law, regarding the characteristics of its provisions, as an international treaty within the meaning of the Vienna Convention on Laws of Treaties,²¹⁰ seems to be an unending controversy.²¹¹ Regardless of the legal character of the Paris Agreement, as presently constituted, its obfuscation in addressing the issue of emissions from fossil fuels has been major gap in the in its provisions.²¹²

²⁰⁷ At the Lima Conference of December 2014, which was the 20th Conference of the Parties (COP20) to the UNFCCC, the parties, while agreeing that a new climate agreement should be concluded in Paris in late 2015, proposed, inter alia, that Intended Nationally Determined Contributions (INDCs) will form the basis for climate action post 2020.

²⁰⁸ Article 2, Paris Agreement.

²⁰⁹ Slaughter, Anne-Marie, “The Paris Approach to Global Governance, Project-Syndicate” (28 December 2015), available at: <http://scholar.princeton.edu/sites/default/files/slaughter/files/projectsyndicate12.28.2015.pdf>.

²¹⁰ Vienna Convention on the Law of Treaties, 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

²¹¹ As a matter of fact, several scholars have indeed questioned the characterization of the Paris Agreement as an international treaty. Bodansky, Daniel, “The Legal Character of the Paris Agreement” (2016) 25(2) *Review of European, Comparative & International Environmental Law (RECIEL)*, at 143; Slaughter, Anne-Marie, supra. Prof. Anne-Slaughter stated, inter alia, in her short article that: “I should bemoan the recent Paris agreement on climate change as a failure. By the standards of a traditional treaty, it falls woefully short. Yet its deficits in this regard are its greatest strengths as a model for effective global governance in the twenty-first century. The international legal gold standard is a treaty, a binding document that can be enforced by courts and arbitration tribunals. Such agreements comprise more than expressions of intent; they contain codified, enforceable rules, along with sanctions for non-compliance. Indeed, they must be ratified by national parliaments, so that they become a part of domestic law. The Paris agreement is none of these things.”

²¹² Peel, Jacqueline and Osofsky, M. Hari, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge University Press, 2015, p. 13; IPCC Group II, *Summary for Policymakers- Final Draft, Climate Change 2014- Impacts, Adaptation, and Vulnerability* (2014, IPCC, Geneva).

As earlier noted in the introductory chapter, the regional approach by the EU provides a model for consideration. Firstly, the EU and its Member States, submitted their collective intended nationally determined contributions (INDCs) on 6 March 2015,²¹³ as the first major economy to communicate their commitments to the negotiations leading to the Paris Agreement,²¹⁴ and before any other Party did so. Secondly, the EU, by its NDCs,²¹⁵ committed to a binding target of at least a 40% domestic reduction in economy-wide GHG emissions by 2030 compared to 1990. This replaces the approach taken under the Kyoto Protocol, which was approved by the EU, pursuant to the that Council Decision 2002/358/EC,²¹⁶ but ended in 2020. Thirdly, the adoption of the 2030 Climate and Energy Policy Framework (2030 Framework),²¹⁷ leading to the submission of EU's NDC, has undergone series of reviews, particularly as it relates to the targets on share of renewable energy in the EU's final energy from consumption, which has been increased from 27% to at least 32%,²¹⁸ and improving energy efficiency from at least 27% to at least 32.5%.²¹⁹ In fact, the EU's regulatory proposals (of November 30, 2016),²²⁰ presented for adoption, immediately after the Paris Agreement became effective (on November 4, 2016), aimed at accelerating the implementation of the Paris Agreement, and to transform the EU economy to clean energy system.²²¹

²¹³ See the “Intended Nationally Determined Contribution of the EU and its Member States”, Submission by Latvia and the European Commission on behalf of the European Union and its Member States, Riga, 6 March 2015. Available at: [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/LV-03-06-EU%20INDC\(Archived\).pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/LV-03-06-EU%20INDC(Archived).pdf). The Intended Nationally Determined Contributions (INDCs) were converted to Nationally Determined Contributions (NDCs) after the ratification of the Paris Agreement, by COP21 in Paris.

²¹⁴ The Paris Agreement was ratified by the EU on 5 October 2016, pursuant to the Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016, p. 1). Paris Agreement, thereafter, entered into force on 4 November 2016, having satisfied the provisions of Article 22(1) thereof, which states: ‘This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.’

²¹⁵ Ibid.

²¹⁶ Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ L 130, 15.5.2002, p. 1).

²¹⁷ European Council conclusions, 23-24 October 2014 (EUCO 169/14).

²¹⁸ The original Renewable Energy Directive, Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, (OJ L 140, p. 16–62), established a mandatory 20% share of EU energy consumption by 2020 (otherwise known as ‘RED I’). This was subsequently increased to 27%, virtue of EUCO 169/14 (ibid). In 2018, the EU further increased the share of renewable energy sources in the gross final consumption in 2030 to at least 32%. See Article 3(1), RED II.

²¹⁹ The Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency (OJ L 328, p. 210–230).

²²⁰ COM(2016) 860 final, titled: ‘Clean Energy For All Europeans’, otherwise referred to as “Winter Package”, of November 30, 2016. The proposals also focused on ‘energy efficiency, renewable energy, the design of the electricity market, security of supply and governance rules for the Energy Union.’

²²¹ Ibid.

4.2 EU Legislative Package pursuant to the Paris Agreement

In order to achieve the targets contained in the NDCs submitted by the EU, some specific EU legal acts were adopted, with climate (environmental) and energy components.²²² While Articles 192(1) TFEU provide legal basis for legal instruments on environment component,²²³ EU legislations on energy component, were adopted under Article 194(2) TFEU.²²⁴ Those legal acts, within the legislative package, adopted under Article 192(1) are: Directive (EU) 2018/410 (Emissions Trading Directive);²²⁵ Regulation (EU) 2018/841 (LULUCF Regulation)²²⁶; and Regulation (EU) 2018/842 (Effort Sharing Regulation).²²⁷ Whereas, the regulatory instruments adopted under Article 194(2) include: Directive (EU) 2018/2001 (Renewable Energy Directive-RED II);²²⁸ Directive (EU) 2018/2002 (Energy Efficiency Directive-EED);²²⁹ Directive (EU) 2018/844 (Energy Performance of Buildings Directive);²³⁰ Regulation (EU) 2019/943 (Electricity Market Regulation);²³¹ and Directive (EU) 2019/944 (Electricity Market Directive).²³²

The above cluster of regulatory instruments will, however, constitute legal proliferations and fragmentation of policies unless there is a proper coordination; hence, the need for the governance mechanism at the EU level. This is the backdrop to the Governance Mechanism,

²²² Kulovesi, Kati and Oberthür, Sebastian, “Assessing the EU’s Climate and Energy Policy Framework: Incremental change toward radical transformation?” (2020) 29 *RECIEL*, 151-166, at p. 152.

²²³ Note that Article 192(1) TFEU speaks about the legislative procedure to be adopted by the EU in order to achieve the objectives referred to in Article 191, regarding EU policy on the environment.

²²⁴ Article 194(2) TFEU is much more complicated, even though it recognizes the right of Member States to ‘determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.’ See the discussions in the previous Chapter.

²²⁵ Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3).

²²⁶ Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (OJ 2018 L 156, p. 1).

²²⁷ Regulation (EU) 2018/842 (Effort Sharing Regulation) of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ 2018 L 156, p. 26).

²²⁸ RED II, *supra*.

²²⁹ Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency (OJ L 328, p. 210–230).

²³⁰ Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency (OJ L 156, p. 75–91).

²³¹ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ L 158, p. 54–124).

²³² 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, 14.6.2019, p. 125–199).

which provides the template that will ensure the achievement of the Energy Union²³³ in line with the Paris Agreement. Governance Mechanism focuses on five dimensions of Energy Union, which have their respective substantive regulatory instruments. The five dimensions are: (i) decarbonisation, including efforts to reduce greenhouse gas emissions, the sinks and efforts to increase renewable energy; (ii) energy efficiency; (iii) energy security; (iv) the internal energy market; and (v) research, innovation and competitiveness.²³⁴ The overarching objective of the Governance Mechanism is to establish the procedure for managing the relationship between different legislative acts that govern the five dimensions, with respect to possible overlaps or gaps, and ensure coordination in order to bring about ‘synergies and interactions between policy areas’.²³⁵ rationale

The definition portion of the Governance Mechanism, under Article 2 thereof, has already reflected the targets sought to be achieved by 2030 as follows:

‘the Union’s 2030 targets for energy and climate’ means the Union-wide binding target of at least 40% domestic reduction in economy-wide greenhouse gas emissions as compared to 1990 to be achieved by 2030, the Union level binding target of at least 32% for the share of renewable energy consumed in the Union in 2030, the Union level headline target of at least 32.5% for improving energy efficiency in 2030, and the 15% electricity interconnection target for 2030 or any subsequent targets in this regard agreed by the European Council or by the European Parliament and by the Council for 2030.²³⁶

Given the numbers of issues facing the EU, in the areas of import dependence of energy sources from third countries, the internal political problems over how to regulate the diversification of energy sources of Member States, and global climate change challenges, among others, are multi-dimensional. It is therefore not sufficient to enact or adopt different legal instruments to address these challenges, without more. A reliable and transparent Governance Mechanism would be required that will, among others: coordinate the different dimensions of the Energy Union into a cohesive and coherent implementation; allow sufficient flexibility for Member States to meet the EU energy policy goals, while fully respecting the freedom of the Member States to determine their energy mix’; allow national climate programmes, and national plans

²³³ COM/2015/080 final, “A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy”.

²³⁴ Recital 2, Governance Mechanism.

²³⁵ Ibid. The combined reading of Recitals 12, 18 and 24 of Governance Mechanism provide a clear picture of the justification for its enactment.

²³⁶ Ibid, Article 2(11).

for renewable energy and energy efficiency towards emission reduction obligations contained in the NDC; and provide clear standards for planning, reporting, ‘systematic monitoring’ of national climate and energy policies, in order to “foster regional cooperation between Member States”.²³⁷

Finally, another key challenge that the 2030 Climate and Energy Framework has, in relation to governance and implementation, is the fact that under the Renewable Energy Directive (RED II), the shares of renewables target is only binding at the EU level and not on Member States. The first contradiction is that if, as stated in Recital 2 of Renewable Energy Directive (RED II), that the “increased use of energy from renewable sources or ‘renewable energy’ constitutes an important part of the package of measures needed to reduce greenhouse gas emissions and comply with the Union's commitment under the 2015 Paris Agreement on Climate Change”, what then is the basis for EU’s 2030 renewables and energy efficiency targets at EU level without the underpinning binding targets at Member State levels?²³⁸ Secondly, if the increased use of energy from renewable sources is fundamental to “promoting the security of energy supply”,²³⁹ among others, the absence of binding target on Member States, may, indeed, constitute a tradeoff to having a certainty of reducing greenhouse gas emissions in the EU to at least 40% by 2030 and the EU’s objective of addressing energy dependence.²⁴⁰

Thus, in order to generate the EU target of at least 32% of the gross final consumption of energy from renewable sources in 2030, among other ‘Union’s 2030 targets for energy and climate’, as defined in Article 2(11) of the Regulation on Governance Mechanism, the ‘need for a governance system to safeguard ambition and delivery’²⁴¹ becomes imperative.²⁴² However, whether governance regulation is sufficient to engender effectiveness of the different legal acts, relating to the five dimensions of the Energy Union or the implementation of the Paris Agreement is yet to be seen.

4.3 EU Renewable Energy Directive (RED II)

Since addressing the problems of climate change will, inevitably, require a shift to low carbon economies,²⁴³ renewable energy is fundamental to reducing GHG emissions and attaining the

²³⁷ Ibid, Recital 12

²³⁸ Communication (EU) ‘United in delivering the Energy Union and Climate Action - Setting the foundations for a successful clean energy transition’ COM/2019/285 final, para 1, of 18 June 2019.

²³⁹ Ibid, Recital 3.

²⁴⁰ Ibid, Recital 4.

²⁴¹ Vandendriessche, Marie, *et al*, “The Governance of the EU’s Energy Union: Bridging the Gap?”, *supra*, at p.1.

²⁴² Ibid.

²⁴³ Fisher, Liz, “Challenges for the EU Climate Change Regime” (2020) 21(1), *German Law Journal*, 5-9, at p. 6.

objective of Article 2 of the Paris Agreement.²⁴⁴ Interestingly, the energy system and climate change concerns have evolved under different motivations and circumstances, save that the growing knowledge of intersections between the two have necessitated the need for synergies through adoption of appropriate legal instruments, but without the risk of one stultifying the other.²⁴⁵ The nature of interactions between energy and environment is aptly put by Thea Sveen²⁴⁶ thus:

Energy security and environmental protection have traditionally been perceived as two different aims at the European and national level. With the increased knowledge and emphasis on climate change mitigation, conventional energy based on fossil fuels is no longer seen as a separate concept but inherently as the main reason for the increase in greenhouse gas emissions.²⁴⁷

However, the EU energy policy remains largely inter-governmental in nature, as national governments are the primary actors.²⁴⁸ By Article 4(a)(2) of the Regulation, at least 32% of renewable energy in 2030 as referred to in Article 3 of Renewable Energy Directive (RED II), for EU's gross final energy consumption. The national overall targets of each Member State for the share of energy from renewable sources in gross final consumption of energy in 2020 is, however, stated in Annex I of RED II. It is instructive also to note that Article 2(1) of RED II defines 'energy from renewable sources' to mean: "energy from renewable non-fossil sources". RED II provides for collective target of Union's gross final consumption of energy of at least 32% by 2030; and the obligation of EU Commission to assess that target with a view to submitting a legislative proposal by 2023 to increase it in order to meet the EU's international commitments for decarbonisation."²⁴⁹ The obligation of the Member States to set national contributions to meet, collectively, the binding overall EU target, aforesaid, is open to the

²⁴⁴ Wilder, Martijn and Drake, Lauren, "International Law and Renewable Energy Sector" in Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlarne (eds) *The Oxford Handbook of International Climate Law*, Oxford University Press, 2016, p. 359; IPCC, 2011. The EU legislative package to operationalize the Paris Agreement is discussed in the next Chapter.

²⁴⁵ Owens, S. and Hope, C.W., "Energy and environment: The challenge of integrating European policies" (1989) Vol. 17, Issue 2, *Energy Policy*, pp. 97– 102. At page 102, it was stated, inter alia, that energy and environment belong to different constituencies and a different 'world view'; thereby making 'genuine policy integration' a difficult task. See also Malafry, Melina, *supra*, p. 26.

²⁴⁶ Sveen, Thea, "The interaction between Article 192 and 194 TFEU: Renewable energy promotion with a predominant environmental purpose", in Trond Solvang (ed) *EU Renewable Energy Law: Legal Challenges and New Perspectives*, Scandinavian Institute of Maritime Law Yearbook 2014.

²⁴⁷ *Ibid*, p. 159.

²⁴⁸ See the discussions on Articles 192 and 194 TFEU.

²⁴⁹ Article 3(1), RED II.

discretion of considering the formula referred to in Annex II of the Governance Mechanism.²⁵⁰ Although, if the Commission determines that ‘national contributions of the Member States are insufficient for the collective achievement of the binding overall Union target’, the Commission has the power to make recommendations to the affected Member States, in accordance with the procedures set out in Articles 9 and 31 of the Governance Mechanism.²⁵¹

RED II, however, obligates Member States to, from 1 January 2021, ensure that their share of energy from renewable sources in gross final consumption of energy ‘shall not be lower than the baseline’ contained in Part A of Annex I to the Directive. Member States shall take the necessary measures to ensure compliance with that baseline share. But, where a Member State does not maintain its baseline share, aforesaid, over any one year period, the first and second sub paragraphs of Article 32(4) of Governance Mechanism shall apply.²⁵² Article 4(1) provides for the right of the Member States to adopt support schemes in order to attain the national contribution towards the EU target set in Article 3(1), that is the EU’s gross final consumption of energy in 2030 is at least 32%. The design of such support schemes for electricity from renewable sources shall be to: maximise the integration of electricity from renewable sources in the electricity market; ensure that renewable energy producers respond to market price signals; and maximise the producers’ market revenues.²⁵³ The Member States must, however, ensure that the support schemes adopted shall be for the integration of electricity from renewable sources in the electricity market and avoiding market distortions.²⁵⁴ Article 4(9) states that the support schemes permitted by the Directive shall apply ‘without prejudice to Articles 107 and 108 TFEU’ on ‘State aid’. As general rule, but subject to specific exceptions, ‘State aid’ is prohibited by the EU law.²⁵⁵

Other instances when State aid “may be considered compatible with internal market” are stated in Article 107(3)(a)-(d) TFEU. The rationale for this is to prevent that companies doing business

²⁵⁰ Article 3(2). The national contributions of Member States are required to be set out as part of their integrated national energy and climate plans (NECPs). The concept of NECPs is fully discussed under Chapters 4 and 5.

²⁵¹ Ibid.

²⁵² Article 3(4), RED II. Article 32(4) of Regulation on Governance Mechanism talks about “additional measures” such as those as set out in points (a) to (e) of Article 32(3) of the Regulation, sufficient to cover the gap within one year.

²⁵³ Article 4(3), RED II.

²⁵⁴ Article 4(2), RED II.

²⁵⁵ Article 107(1) TFEU. See the Communication from the EU Commission titled: “Guidelines on State aid for environmental protection and energy 2014-2020” dated 28 June 2014 (OJ C 200), para 23. It says: “State aid for environmental protection and energy objectives will be considered compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty if, on the basis of the common assessment principles . . . , it leads to an increased contribution to the Union environmental or energy objectives without adversely affecting trading conditions to an extent contrary to the common interest.” See also Article 107(2)(a-b) TFEU.

in the internal market from receiving selective advantages over others, which might distort competition, and jeopardize the objectives of free movement of goods.²⁵⁶ However, whether a certain measure will be regarded as constituting ‘State aid’ within the meaning of Article 107(1) TFEU, will, ultimately depend on the presence of the certain elements or criteria mentioned in the Article, and which must be cumulative. Accordingly, any alleged measure must meet all the requirements stated in Article 107(1) before it can be described as State aid. The requirements, which can be gleaned from the provision, are that: the aid has been granted by the Member State or through State resources; it confers competitive advantage on the beneficiaries; it is selective; it distorts or threatens to distort competition; and has actual or potential effect on trade between Member States, and incompatible with the internal market within the EU.²⁵⁷ Article 20 RED II, on rules on access and operation of the grids departs from the previous Directive 2009/28/EC which, in Article 16, guaranteed transmission and distribution, priority access or guaranteed to grid system; and priority in electricity dispatching to electricity produced from renewable sources. While Article 21 allows renewables self-consumers, otherwise referred to as ‘prosumers’.

Since decarbonization is the ultimate goal of the EU energy policy,²⁵⁸ as shown in the incremental goals set out in the 2020 Package, the 2030 Framework and the 2050 Roadmap;²⁵⁹ the fact that there is no binding target of shares of renewable energy for the EU’s Member State under RED II is a regression from the 2020 package and unclear path to climate neutrality by 2050.²⁶⁰ This will be inconsistent view of the CJEU that the development of renewable energy is one of the objectives that must guide EU energy policy.²⁶¹

4.4. Europeanization of the Paris Agreement

Domestic implementation of international treaties and agreements by the EU has generated conceptual perspectives, one of which is the concept of ‘Europeanization’. The concept of “Europeanization” is a convoluted topic in EU studies, with wide range of different scholastic

²⁵⁶ European Commission, *State Aid Control*, available at: https://ec.europa.eu/competition/state_aid/overview/index_en.html, visited on 26 November 2020.

²⁵⁷ Case 173/73 *Italian Republic v Commission of the European Communities*; Case 78/76 *Steinike & Weinlig v Federal Republic of Germany*; C-248/84 *Germany v Commission*; Case C-379/98 *PreussenElektra v Schleswig AG*. Ex Articles 92 and 93 TEC are *in pari materia* with Articles 107 and 108 of TFEU. The cases decided under the Articles 107 and 108 TFEU include: Case T-356/15 *Austria v. Commission*, paras 110-114; Case T-177/07 *Mediaset v Commission*.

²⁵⁸ Leal-Arcas, Rafael and Rios, Juan Alemany, “The creation of a European Energy Union”, *supra*, p. 48.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdey Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha*, para.38.

perspectives.²⁶² One of its cores is “the domestic implementation of EU policies”.²⁶³ The origin of the concept may be traced to the cornerstone of the EU legal order, which rests on the primacy of EU law.²⁶⁴ In the case of *Costa v ENEL*,²⁶⁵ the Court of Justice had declared the principle of the priority of EU law over national law, by stating that:

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.²⁶⁶

As noted earlier, the competences of the EU in relation to ‘energy’ and ‘environment’ are shared with the Member States,²⁶⁷ and represent the most dynamic and intractably connected fields of EU legal jurisprudence. This is so because certain aspects of the subject of energy ‘in its broad sense’, may also involve trade tariff policy²⁶⁸ and competition rules necessary for the functioning of the internal market.²⁶⁹ Prof. Jan once raised the issue of whether EU has “any competence to take legally binding measures to ensure that protection of the environment”²⁷⁰ in the energy development, being a very volatile issue between the EU and the Member States. In answering the question in the affirmative, he argued that the principle of environmental integration “broadens the objectives of the other powers laid down in the TFEU and thus limits the role of the specific powers doctrine in environmental policy.”²⁷¹ While it is difficult to ascertain the limit or elasticity of the competence of the EU, when the issue involved relates to environmental protection, the EU sometimes assumes a *de facto* exclusive competence in that area.²⁷² In such situation, even though the shared competence of the Member States does not

²⁶² Caporaso, J., “The Three Worlds of Regional Integration Theory” in Graziano, P. and Vink, M.P. (eds), *Europeanization*. Palgrave Macmillan, London, 2008, 23-34; Bulmer S. (2008) “Theorizing Europeanization” in Graziano, P. and Vink, M.P. (eds), *Europeanization*. Palgrave Macmillan, London, 2008, 46-58.

²⁶³ Graziano, R. Paolo and Vink M.P., “Europeanization: Concept, Theory, and Methods”, p. 34. Available at: https://www.researchgate.net/publication/303484310_Europeanization_Concept_Theory_and_Methods.

²⁶⁴ Case 6/64 *Costa v. ENEL*. In the earlier Case 26/62 *van Gend en Loos*, the Court of Justice had stated that: “the Community constitutes a new legal order of international law for the benefit of which States have limited their sovereign rights albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.” See para 3 of the summary of Case 26/62 *van Gend en Loos*.

²⁶⁵ Case 6/64 *Costa v. ENEL*, *supra*.

²⁶⁶ *Ibid*, para 3 of the summary of the judgment.

²⁶⁷ Article 4(2) TFEU.

²⁶⁸ Article 3(1)(a) TFEU

²⁶⁹ Article 3(1)(b) TFEU

²⁷⁰ Jans, H. Jan, “Stop the Integration Principle?”, *supra*, at p. 1540-1541.

²⁷¹ *Ibid*.

²⁷² Malafry, Melina, *supra*, p. 54.

cease completely, it only means that the Member States cannot exercise their competence in manner that is inconsistent with the EU legislation.²⁷³

As noted in the previous sub-paragraph, the adoption of the cluster of legal instruments by the EU²⁷⁴ towards the realization of the objectives of the Paris Agreement, including the Governance Mechanism, has created a European version of the international climate governance. This makes the concept of “Europeanization” of the international climate change regime an interesting and intricate debate. While Europeanization is regarded “as a new phase in European integration”,²⁷⁵ its main concerns is the creation of a collective identity in order to maximize the EU influence both within and outside Europe.²⁷⁶ The “Europeanization” of the global climate change regime includes ‘green Europeanisation’ of energy policy through energy tripod, which focuses on the environment, the internal market and external relations.²⁷⁷

²⁷³ Ibid.

²⁷⁴ 2030 Climate and Energy Framework (also known as legislative package).

²⁷⁵ Graziano, R. Paolo and Vink M.P., “Europeanization: Concept, Theory, and Methods”, supra, p. 3.

²⁷⁶ Michalski, Anna, “Europeanization of National Foreign Policy: The Case of Denmark's and Sweden's Relations with China” (2013) 51(5) *Journal of Common Market Studies*, 884-900, p. 885; Katsaris, Angelos, “Europeanization through Policy Networks in the Southern Neighbourhood: Advancing Renewable Energy Rules in Morocco and Algeria” (2016) 54 (3) *Journal of Common Market Studies*, 656-673, p. 657.

²⁷⁷ Petric, Davor, “The Global Effects of EU Energy Regulation” (2018) Vol. No. 2 *European Journal of Legal Studies*, 165-208, at pp. 173-174. See also Solorio, Israel, “Bridging the Gap between Environmental Policy Integration and the EU's Energy Policy: Mapping out the ‘Green Europeanisation’ of Energy Governance” (2011) 7 *Journal of Contemporary European Research*, 396, at p. 397.

Chapter 5

5. EU's Governance Mechanism: Procedural Bridge for Substantive Objectives

5.1 Bases for Governance Mechanism

As stated in the previous chapter, prior to and immediately after the ratification of the Paris Agreement by the EU, several legislative proposals were considered by the EU Commission, including: 2030 Climate and Energy Policy Framework (2030 Framework);²⁷⁸ EU's regulatory proposals on "Clean Energy for All Europeans";²⁷⁹ and a "Proposal for a Regulation on the Governance of the Energy Union."²⁸⁰ These proposals produced a wide range of separate pieces of legislation in the energy and climate fields, and on specific policy areas, which were highlighted in the last chapter. It, therefore, became imperative to establish a legislative governance mechanism that will, among others: 'help to ensure that the EU and its Member States collectively achieve the agreed objectives of the Energy Union, including the 2030 targets for energy and climate';²⁸¹ ensure coherent implementation and integration of sectoral regulatory instruments on energy and climate areas;²⁸² achieve simplification of planning and reporting obligations arising from several 'pieces of EU legislation across energy, climate and other Energy Union related policy areas';²⁸³ and, synchronise with the planning and reporting obligations under the Paris Agreement.²⁸⁴ All these are to be achieved through 'coordinated and common solutions to common challenges in an effective and affordable manner';²⁸⁵ and by establishing a framework for the interactions among all stakeholders, particularly the EU institutions and national governments, on the bases of common rules and standards.²⁸⁶

As noted in previous studies, one of the major problems facing the implementation of the Energy Union objectives is the governance system: firstly, the choice of the right policy

²⁷⁸ Supra, European Council conclusions, 23-24 October 2014 (EUCO 169/14).

²⁷⁹ Supra, COM(2016) 860 final, titled: 'Clean Energy for All Europeans' of November 30, 2016.

²⁸⁰ Commission (EU) 'Regulation on the Governance of the Energy Union' COM(2016) 759 final 2, of 23 February 2017.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid. See also Vandendriessche, Marie *et al*, "The Governance of the EU's Energy Union: Bridging the Gap?" at p.5. Supra.

²⁸⁶ Ammannati, Laura, "The Governance of the Energy Union: An 'Intricate System' Unable to Achieve the European Common Goal" (2019) *Oil, Gas & Energy Law Intelligence*, p. 5. See also Szulecki, K. *et al.*, "Shaping the 'Energy Union': between national positions and governance innovation in EU energy and climate policy", (2016) 16(5) *Climate Policy*, 548-567, at pp. 548-549.

instruments; and secondly, finding the common procedure with respect to the design national climate and energy plans.²⁸⁷ The choice of policy instrument has multiple strands to it: the legal bases in adopting the appropriate instrument, which comes under Articles 191, 192 and 194 TFEU; the need for action at EU level, in order to ensure the coherence of energy and climate policies and the attainment of the objectives of several legal acts adopted on sectoral basis, within the EU, while preserving flexibility for Member States; and the ‘EU added-value’, which gives streamlined and simplified application, without the potential attendant complex challenges of transposition by the Member States.²⁸⁸ By adopting a Regulation, instead of a Directive, it allows the EU to ensure have common basis for the comparison of the national energy and climate plans of the Member States, which are the necessary metrics for measuring the implementations of various obligations from the sectoral legislations on energy and climate policies. With respect to the second aspect of the challenges identified above, the task of finding common ground between national (Member States) energy policies and supranational (EU) energy policy triangle objectives,²⁸⁹ coming from the backdrop of energy sector liberalisation in the EU, and the new wave of protecting the environment. The EU 2030 framework elaborates on regulatory programme of energy packages, with priority on decarbonisation, essentially through: increase in share of energy from renewable sources by Member States to meet EU level target at least 32%;²⁹⁰ and improving energy efficiency by at least 32.5%.²⁹¹

5.2 Overarching Objectives of the Governance Mechanism

Recital 18, in addition to the first recital, of the Governance Mechanism introduced the main objective of the governance mechanism, as a necessary instrument, which is adopted parallel to sequence of policy initiatives in the energy sector,²⁹² in order to achieve “the objectives of the Energy Union and in particular the targets of the 2030 Framework for Climate and Energy, in

²⁸⁷ Ibid, Ammannati, Laura, p. 5. See also Keay, M. and Buchan, D., “Europe’s Energy Union: a problem of governance (2015) *The Oxford Institute for Energy Studies*, pp. 3-4.

²⁸⁸ Commission (EU) ‘Regulation on the Governance of the Energy Union’ COM(2016) 759 final 2, of 23 February 2017.

²⁸⁹ ‘Energy policy triangle’ objectives of the EU means: security of supply; sustainability (i.e. climate security); and competitiveness. It also referred to as the three pillars as energy cooperation in the EU. See COM(2007)1, Council of Council of the European Union, Conclusions of the Presidency, March 2007, para. 28.

²⁹⁰ Article 3(2), RED II.

²⁹¹ Article 1(1) Directive (EU) 2018/2002 (Energy Efficiency Directive) amends Article 1, paragraph 1 of Directive 2012/27/EU, by replacing the latter with: ‘1. This Directive establishes a common framework of measures to promote energy efficiency within the Union in order to ensure that the Union’s 2020 headline targets on energy efficiency of 20% and its 2030 headline targets on energy efficiency of at least 32,5% are met and paves the way for further energy efficiency improvements beyond those dates.’

²⁹² Recital 5, Regulation on Governance Mechanism.

the field of GHG emission reduction, energy from renewable sources and energy efficiency.”²⁹³ While the ultimate goal of the EU climate and energy framework is the gradual shift to a sustainable low-carbon economy,²⁹⁴ the substantive objectives of the Governance Mechanism are set out Article 1(1).²⁹⁵ The management and governance of divergence of sectoral policies has long been considered a central mainstay of EU energy and climate objectives, pre and post Paris Agreement.²⁹⁶ Since the EU energy policy remains largely inter-governmental in nature, the contestation over the degree of Member States’ energy rights, within the context of Article 194(2) of TFEU, will continue to generate hiatus in the institutional system in the exercise of competences between the EU and the Member States.²⁹⁷ As noted in previous studies, one of the major problems facing the implementation of the Energy Union is the nature of the appropriate governance system adopt: firstly, the choice of policy instruments; and secondly, finding the acceptable collective procedure in the design of the national climate and energy plans.²⁹⁸ The choice of ‘policy instrument’ has multiple strands to it: the legal bases in adopting the appropriate instrument, which comes under either Article 192 or the problematic Article 194 TFEU or both. Again, the need for action at ‘EU level’, in order to ensure the coherence of energy and climate policies and the attainment of the objectives of several legal acts adopted on sectoral basis; which gives streamlined and simplified application, without the potential attendant complex challenges of transposition by the Member States.²⁹⁹ By adopting a Regulation, instead of a Directive, it allows the direct and uniform applicability necessary for measuring the implementations of various obligations from the sectoral legislations on energy and climate policies. With respect to the second aspect of the challenges identified above, the task of finding common ground on the objectives of ‘energy policy triangle’ between the EU and its Member States, and to incentivize participation, appears to be the bases for adopting regulatory framework of procedural in nature. The Regulation, therefore, provides template for long term energy and climate policy planning, reporting, review and monitoring of progress

²⁹³ Recital 18, Governance Mechanism. The relationship Governance Regulation and Energy Union has been described as built on a model of ‘hub and spoke’. See Ammannati, Laura, *supra*. p. 5.

²⁹⁴ *Ibid*.

²⁹⁵ The EU objectives, stated in Article 1(1) of Governance Mechanism, include meeting the long-term GHGs commitments consistent with the Paris Agreement, through the five dimensions of the Energy Union, which are treated as ‘closely related and mutually reinforcing’.

²⁹⁶ EU Communication ‘Stepping up Europe’s 2030 climate ambition: Investing in a climate-neutral future for the benefit of our people’, of 17 September 2020 COM(2020) 562 final.

²⁹⁷ Youngs, Richard, “EU Foreign Policy and Energy Strategy: Bounded Contestation” (2020) 42(1) *Journal of European Integration*, 147-162, at p. 148; Ammannati, Laura, *supra*. Pp. 5 and 10; Szulecki, K. *et al.* *supra*, at pp. 548-549.

²⁹⁸ Ammannati, Laura, *supra*, p. 5. See also Keay, M. and Buchan, D., *supra*, pp. 3-4.

²⁹⁹ Commission (EU) ‘Regulation on the Governance of the Energy Union’ COM(2016) 759 final 2, of 23 February 2017, p. 5.

between the EU and Member States, thereby creating synergies between Member States' objectives and contributions, as encapsulated in the NECPs, and the Union goals, in line with the Paris Agreement.³⁰⁰

5.3 Structure of Governance Mechanism

Even though the objective of the Governance Mechanism is to ensure the integration of the of different sectoral legislations on energy and climate goals, and stabilize the impulses of the EU Member States with respect to their right and need for “flexibility to choose policies that are best-matched to their national energy mix and preferences”,³⁰¹ the question still remains whether the regulatory framework is sufficiently clear, comprehensive and capable of creating certainty of result. In assessing this important issue, a close consideration of the structure and contents of the Governance Mechanism is imperative.

5.3.1 Recitals and Preambles

The Governance Mechanism has an elaborate preamble of 73 recitals:³⁰² starting with the objective of setting the “legislative foundation for reliable, inclusive, cost-efficient, transparent and predictable governance of the Energy Union and Climate Action”.³⁰³ The ultimate objective of the Governance Mechanism is to ensure that the achievement of the 2030 and long-term objectives and targets of the Energy Union in line with the 2015 Paris Agreement can be made predictable, within the institutional framework of the EU and its Member States. There is, however, the recognition that whatever measures that the EU may adopt under the governance mechanism, it should be in accordance with the principles of ‘subsidiarity’ and ‘proportionality’ as set out in Article 5 TEU.³⁰⁴

In a bit of a digression, but necessary in order to understand the context in which Article 5 TEU is relevant to climate and energy policy of the EU, while the ‘principle of conferral’³⁰⁵ governs

³⁰⁰ COM(2018) 773 (In-depth Analysis in support of the Communication), 28 November 2018, p. 30.

³⁰¹ Recital 18, Regulation on Governance Mechanism, based on Article 194(2) TFEU.

³⁰² Under the EU law, the recitals or preambles of EU laws “have no binding legal force and cannot be relied on as a ground either for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner that is clearly contrary to their wording”. See the Joined Cases C-422/19 and C-423/19 *Johannes Dietrich and Others*, para 64. They may, however, be relevant to explain the intentions of the draftsmen. See Case C-418/18 P *Puppinck and Others v Commission*, paras 75 and 76 and the case-law cited).

³⁰³ Recital 1, Regulation on Governance Mechanism.

³⁰⁴ Recital 73, Regulation on Governance Mechanism.

³⁰⁵ Article 5(1) TEU. Under this fundamental principle of EU law (i.e., ‘principle of conferral’), the EU is only permitted to act within the limits of the competences that the EU Member States have conferred upon it in the Treaties. The principle of conferral not only provides the basis of the division of competences between the EU and the Member States, but also fundamental to the validity of any legal or legislative act of the EU or the Member States on any subject matter.

the limits of competences of the EU, the exercise or use of those competences is governed by the principle of ‘subsidiarity’ and ‘proportionality.’³⁰⁶ The competences of the EU in relation to energy and environment are shared with the Member States;³⁰⁷ and represent the most dynamic and complicated fields of EU legal jurisprudence. This is so because certain aspects of the subject of energy, in its broad sense, may also involve trade tariff policy³⁰⁸ and competition rules necessary for the functioning of the internal market.³⁰⁹ It is therefore difficult to ascertain the limit or elasticity of the principle of the competence of the EU, when the issue involved relates to environmental consideration. Since Governance Mechanism is a legislative intervention at the EU level in the areas of shared competence between the EU and the Member States, it recognizes the freedom of the Member States to adopt legislation and measures on those issues; provided that the Member States shall refrain from any measure which could jeopardise the attainment of the EU’s objectives.³¹⁰

One of the key elements to the functionality of the Governance Mechanism is the proposal to amend the planning, reporting and monitoring obligations contained in sectoral energy and climate legislative acts of the EU, in order to ensure integrated approach in that regard.³¹¹ It, therefore, introduced new requirements with respect to planning, reporting and monitoring; through which Member States collectively have the potentials to meet the objectives of 2030 climate and energy framework.

5.3.2 Substantive Provisions

The Regulation is divided into eight (8) broad chapters of fifty-nine (59) Articles and thirteen (13) Annexes.

Chapter One deals with the subject matter and scope,³¹² and sets out the definitions of terms adopted in the Governance Mechanism; some of which are direct adaptation of terms used in other EU legal acts.³¹³ Since the its main objective, as earlier discussed above, is to, among

³⁰⁶ By Article 5(3) TEU provides that: ‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’ On the other hand, by the principle of proportionality, ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’ See Article 5(4) TEU.

³⁰⁷ Article 4(2) TFEU.

³⁰⁸ Article 3(1)(a) TFEU

³⁰⁹ Article 3(1)(b) TFEU

³¹⁰ Article 4(3) TEU. See also Malafry, Melina, *supra*, p. 54.

³¹¹ Recital 70, Governance Mechanism.

³¹² Article 1, Governance Mechanism.

³¹³ Article 2, Governance Mechanism.

others, ensure coherent implementation of various sectoral legislative acts, in order to achieve the energy and climate objectives of the EU, the adoption of various terms in these other EU legal acts suggests that the whole legislative package operate within the same context.³¹⁴

The focal point of its Chapter Two is the obligation for Member States to prepare and notify the EU Commission of their integrated national energy and climate plans (NECPs) for the period 2021 to 2030 by 31 January 2019, and subsequently by 1 January 2029 and every ten years thereafter.³¹⁵ It also stipulates what the Member States should include in the main sections of the NECPs,³¹⁶ how it should be structured,³¹⁷ and that same should be made publicly available.³¹⁸ By its Article 4, each Member State is ‘shall’ set out in its respective NECP, the main objectives, targets and contributions, with respect to the five dimensions of the Energy Union, as specified in point 2 of section A of Annex I.³¹⁹

Chapter Three obligates the Member States to, “[b]y 1 January 2020, and subsequently by 1 January 2029 and every 10 years thereafter,”³²⁰ prepare and report to the Commission its long-term strategy GHG emissions reduction with a perspective of at least 30 years.³²¹ Member States are allowed, where necessary, to update those strategies every five years.³²² This requirement, that the long-term strategy be updated every five years, finds alignment with the Paris Agreement that the process of NDCs be revised at every five years³²³ for the purpose of the global stocktake.³²⁴ The aim of this obligation is to ensure the fulfilment of the objective of the global average temperature to between 1,5 °C to 2 °C above pre-industrial levels;³²⁵ so that EU can achieve ‘net zero’ GHG emissions by 2050 and negative emissions thereafter.³²⁶

³¹⁴ Article 1(2), Governance Mechanism states that the ‘Regulation applies to the five dimensions of the Energy Union, which are closely related and mutually reinforcing.’

³¹⁵ Article 3(1), Governance Mechanism.

³¹⁶ Article 3(2), Governance Mechanism.

³¹⁷ Article 3(3), Governance Mechanism.

³¹⁸ Article 3(4), Governance Mechanism. The concept of integrated national energy and climate plans (NECPs) is extensively discussed under Chapter 4.

³¹⁹ Article 4, Governance Mechanism. The dimension of ‘decarbonization’ is supported by the following EU’s leg acts: Regulation (EU) 2018/842; Regulation (EU) 2018/841; and the Renewable Energy Directive (RED II). Hence, RED II comes under the dimension of ‘decarbonization’.

³²⁰ Article 15(1), Governance Mechanism.

³²¹ Ibid.

³²² Ibid.

³²³ Article 4(9), Paris Agreement.

³²⁴ Article 14, Paris Agreement. Under the Paris Agreement, the first global stocktake takes place in 2023 and every five years thereafter, for the purpose of updating and enhancing of NDCs “as well as in enhancing international cooperation for climate action.” See Article 14(2and4), Paris Agreement. The ‘update’ of long-term strategies of the Member States of the EU under Article 15(1) of the Governance Mechanism comes immediately after the global stocktake, presumably to reflect the necessary update or the enhancement in the long-term strategies in line Paris Agreement.

³²⁵ Article 15(3), Governance Mechanism.

³²⁶ Article 15(2), Governance Mechanism.

Governance Mechanism also obligates the EU to adopt a proposal for longer-term strategy for GHG emissions reduction, by 1 April 2019; and taking into account the Member States' draft NECPs.³²⁷ The content of the long-term strategies should reflect the elements set out in Annex IV of the Governance Mechanism, including: the total GHG emission reductions and enhancements of removals by sinks;³²⁸ emission reductions and enhancements of removals on sectoral basis;³²⁹ expected progress on transition to a low GHG emission economy;³³⁰ expected socio-economic effect of the decarbonisation measures;³³¹ and links to other national long-term objectives, planning and other policies and measures, and investment.³³² Instructively, it provides that the long-term strategies should be consistent with the NECPs.³³³ For instance, Sweden's long-term strategy for the reduction of GHG emissions, published on 20 December 2019 has a target of no net emissions of GHGs by 2045.³³⁴

Chapter Four of Governance Mechanism sets out various and elaborate reporting obligation for Member States, to produce biennial progress reports on the status of implementation of NECPs covering all five dimensions of the Energy Union.³³⁵ The required report is known as the "integrated national energy and climate progress report" (NECPR),³³⁶ and shall cover the following key information: the progress of reaching the objectives, targets and contributions set out in the NECP;³³⁷ the progress in establishing the multilevel climate and energy dialogue, under Article 11;³³⁸ regarding the five dimensions of Energy Union, particularly referred to Articles 20-25;³³⁹ adaptation, as regards the dimension of 'decarbonisation', in accordance with

³²⁷ Ibid. On 6 March 2020, the EU submitted its long-term low greenhouse gas emission development strategy (LT-LEDS) to the UNFCCC. Available at <https://unfccc.int/sites/default/files/resource/HR-03-06-2020%20EU%20Submission%20on%20Long%20term%20strategy.pdf>.

³²⁸ Article 15(4)(a), Governance Mechanism.

³²⁹ Article 15(4)(b), Governance Mechanism.

³³⁰ Article 15(4)(c), Governance Mechanism.

³³¹ Article 15(4)(d), Governance Mechanism.

³³² Article 15(4)(e), Governance Mechanism.

³³³ Article 15(6), Regulation on Governance Mechanism.

³³⁴ See the national long-term strategies submitted by Member States to EU Commission, pursuant to Article 15. Available at: https://ec.europa.eu/info/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-long-term-strategies_en?redir=1. Note that the submission made by Sweden is in Swedish language.

³³⁵ Article 17(1), Governance Mechanism.

³³⁶ Ibid.

³³⁷ Article 17(2)(a), Governance Mechanism.

³³⁸ Article 17(2) (b), Governance Mechanism.

³³⁹ Art Article 17(2)(c), Governance Mechanism. Articles 20-25 refer to the trajectory for the overall share of renewable energy in gross final energy consumption from 2021 to 2030; trajectory of energy efficiency (i.e., national energy savings contribution) from 2021 to 2030, energy security (diversification of energy sources and supply, with regard to reducing energy import dependency from third countries); the objectives on internal market; national indicative objective to reduce the number of households in energy poverty; and the strategic energy technology (SET) plan in research and innovation relating to clean energy technologies.

point (a)(1) of Article 4;³⁴⁰ and the “quantification of the impact of the policies and measures in the NECP on air quality and on emissions of air pollutants”.³⁴¹ The above biennial reports (NECPRs) are required to be submitted by the EU and its Member States in accordance with Decision 2/CP.17 of the Conference of the Parties (COP) to the UNFCCC Secretariat, and in accordance with Article 12 of the UNFCCC.³⁴² The biennial reporting obligation of Member States regarding the progress in the implementation of NECPs every two years, starting from 15 March 2023, seems to place more urgency on EU Member States with respect to the national projections in GHG measures, than the ‘global stocktake’ under the Paris Agreement.

Under Chapter Four, the Member States have additional ‘annual reporting’ obligations to the Commission, regarding the information referred to in Article 6(2) of Directive 2009/119/EC;³⁴³ and point 3 of Annex IX of Directive 2013/30/EU.³⁴⁴ There is also another layer of reporting obligation on the Member State, to report to the Commission by 30 April 2022, on the achievement of its 2020 energy efficiency national target established pursuant to Article 3(1) of Directive 2012/27/EU, and of the national overall targets for the share of energy from renewable sources in 2020 as set out in Annex I to Directive 2009/28/EC.³⁴⁵ In order to facilitate the discharge of the reporting obligation of the Member States to the Commission, the Governance Mechanism obligates the Commission to establish an online platform (e-platform), which shall become operational by 1 January 2020. The e-platform shall also allow public online access to the NECPs, NECPRs and the long-term strategies earlier referred to.³⁴⁶

Chapter Five establishes a monitoring and assessment of progress system to enable the Commission to monitor Member States progress in relation to the the progress made at EU level

³⁴⁰ Article 17(2)(d), Governance Mechanism. By Article 4(a)(1), Member State is required to (shall) set out in its INECP, with respect to GHG emissions and removals, with a view to contributing to the achievement of economy wide EU GHG emissions reduction target; taking into account the binding national target for GHG emissions and the annual binding national limits, pursuant to Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement; commitments pursuant to Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry (LULUCF) in the 2030 climate and energy framework; and, where applicable, the long-term objectives of the EU and consistent with the Paris Agreement.

³⁴¹ Article 17(2)(e), Governance Mechanism.

³⁴² Article 17(2), Governance Mechanism.

³⁴³ Article 26(1)(a), Governance Mechanism. Article 6(2) of Directive 2009/119/EC imposes an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products.

³⁴⁴ Article 26(1)(b), Governance Mechanism. Reporting obligation under point 3 of Annex IX of Directive 2013/30/EU on safety of offshore oil and gas operations, relates to the safety and environmental impact of oil and gas installations within their territory of Member States.

³⁴⁵ Article 27, Governance Mechanism. By referring Article 3(1) of Directive 2012/27/EU (on energy efficiency) and Annex I to Directive 2009/28/EC (on the promotion of the use of energy from renewable sources), the Governance Mechanism seems to create retrospectivity with respect to the 2020 EU Climate and Energy targets, by tracking the performance of the Member States under the outgoing 2020 framework.

³⁴⁶ Article 28, Governance Mechanism.

towards meeting the objectives of the Energy Union, and for the purpose of avoiding any gaps to the EU's 2030 targets.³⁴⁷ The assessment on the basis of NECPRs shall consider, among others: progress in the areas of renewable energy and energy efficiency;³⁴⁸ implementation of policies and measures set out in the NECPs;³⁴⁹ overall impact of aviation on the global climate;³⁵⁰ the overall impact of the policies and measures of the NECPs on the operation of the EU climate and energy policy measures;³⁵¹ and the overall impact of the policies and measures included in the NECPs on the operation of the EU's emission trading system (EU ETS).³⁵²

The Commission is empowered to issue recommendations to a Member State, pursuant to Article 34, if policy developments in the particular Member States are inconsistent with the objectives of the EU.³⁵³ In situation where the draft NECPs are, by assessments of the Commission, insufficient for the collective achievement of the EU's 2030 target for renewable energy and energy efficiency,³⁵⁴ it shall issue 'recommendations' to Member States, that have submitted insufficient contribution, to increase their ambition, in order to ensure a sufficient level of collective ambition.³⁵⁵ The procedure for interface between the Commission and the Member States on NECPs are well laid out in Articles 31, 32 and 34. However, in the EU jurisprudence, 'recommendations and opinions' of the Commission to the Member States do not have binding force, and of no legal effect.³⁵⁶ In the 'provisional text of the judgment' in the recent *Joined Cases of Johannes Dietrich and Others*³⁵⁷, the referring court sought clarity with

³⁴⁷ Article 29(1), Governance Mechanism.

³⁴⁸ Article 29(1)(a), Governance Mechanism.

³⁴⁹ Article 29(1)(b), Governance Mechanism.

³⁵⁰ Article 29(1)(c), Governance Mechanism.

³⁵¹ Article 29(1)(d), Governance Mechanism.

³⁵² Article 29(1)(e), Governance Mechanism.

³⁵³ Article 30(1), Governance Mechanism.

³⁵⁴ Article 31(1), Governance Mechanism. For instance, in the assessment of the first draft of the NECPs prepared by all Member States have prepared draft integrated National Energy and Climate Plans (NECPs), as required by Article 9 of the Regulation on Governance Mechanism, the Commission noted that there are still gaps, with respect to meeting the 2030 targets. See Communication (EU) 'United in delivering the Energy Union and Climate Action - Setting the foundations for a successful clean energy transition' COM/2019/285 final, para 1, of 18 June 2019. See also Kulovesi, Kati, Oberthür, Sebastian, "Assessing the EU's Climate and Energy Policy Framework: Incremental change toward radical transformation?" *Supra*, at p. 154.

³⁵⁵ *Ibid.* The EU issued country-specific recommendations, published in June 2019, pursuant to Article 34 of the Regulation. See Commission Recommendations of 18 June 2019 on the draft integrated National Energy and Climate Plan of each Member State covering the period 2021-2030, C/2019/4401 to C/2019/4428.

³⁵⁶ Article 288 TFEU. Notwithstanding that those recommendations and opinions are not legally binding, they usually carry political weight or sometimes referred to as type of soft law, which can form part of the EU *acquis*. See Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles*, judgment of 13 December 1989, paras 16 and 18.

³⁵⁷ *Joined Cases C-422/19 and C-423/19 Johannes Dietrich and Others (Case C-422/19 Johannes Dietrich v. Hessischer Rundfunk and Case C-423/19 Norbert Häring v. Hessischer Rundfunk)*.

respect to the importance to be attached to the ‘recommendations’ issued by EU institutions under Article 288 TFEU.³⁵⁸ The CJEU, while agreeing that recommendations of the EU have no legal force, appears to suggest that since recommendations are part of the EU legal acts, they qualify as matters to take “into consideration where they provide useful guidance for the interpretation of the relevant provisions of EU law.”³⁵⁹ This opinion does not clarify what will happen if the Member States fail to abide by the EU recommendations; or, in what way does recommendations become tool for interpretation.

Chapter Six obligates the Member States to establish and operate national inventory systems to estimate anthropogenic emissions by sources and removals by sinks of GHGs listed in Part 2 of Annex V.³⁶⁰ The Commission has the obligation to perform an initial check of the accuracy of the preliminary greenhouse gas inventory data to be submitted by Member States, who have discharged their reporting obligation under Article 26(3).³⁶¹ This Chapter also established the Union inventory system, in order ‘to ensure the timeliness, transparency, accuracy, consistency, comparability and completeness of national inventories with regard to the Union greenhouse gas inventory’.³⁶² The establishment of national inventory systems is also an obligation under the Paris Agreement,³⁶³ and provides the legal basis for the establishment of Union and national registries in order to account for the NDCs as required under Article 4(13) of Paris Agreement.³⁶⁴

Chapter Seven sets out the mechanisms and principles for regional cooperation and support between the EU and the Member States, on areas which include: the process for preparing, adopting, notifying and assessing the NECPs under Articles 9 to 13;³⁶⁵ the process for taking certain actions in respect of NECPRs under to Article 17 and annual reporting obligation

³⁵⁸ Ibid, para 26.

³⁵⁹ Ibid, para 48.

³⁶⁰ Article 37(1), Governance Mechanism. The national inventory is to be established by 1 January 2021.

³⁶¹ Article 37(4), Governance Mechanism.

³⁶² Article 37(3), Governance Mechanism.

³⁶³ Article 13(7)(a), Paris Agreement. It states that: ‘Each Party shall regularly provide the following information: (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement’.

³⁶⁴ Article 4(13), Paris Agreement states that: ‘Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.’ See also Commission (EU) ‘Regulation on the Governance of the Energy Union’ COM(2016) 759 final 2, p. 11, of 23 February 2017.)

³⁶⁵ Article 41(1)(a), Governance Mechanism. See also the discussion of Chapter Two of the Governance Mechanism, at page 46 above.

pursuant to Article 26;³⁶⁶ the review and compliance procedures under the Paris Agreement, as well as the EU's procedure to review the GHGs inventories of Member States under Article 38.³⁶⁷ The Chapter also sets out the role of the European Environment Agency (EEA) to support the Commission as regards the decarbonisation and energy efficiency dimensions, and compliance with obligations set out in Articles 15 to 21, 26, 28, 29, 35, 37, 38, 39 and 41.³⁶⁸ Chapter Eight is about the final provisions with regards to certain miscellaneous matters. Firstly, it confers on the Commission power with respect to 'delegated acts' under specified circumstances.³⁶⁹ It recognizes two committees, the Climate Change Committee and the Energy Union Committee,³⁷⁰ that will assist the Commission in the implementations of certain provisions of the Regulation.³⁷¹ This Chapter also obligates the Commission to report to the EU Parliament and the Council on the operation of the Governance Mechanism, its contribution to governance of the Energy Union, the long-term goals of the Paris Agreement, and progress towards the achievement of the 2030 climate and energy targets.³⁷² This reporting obligation is connected to the global stocktake agreed under Article 14 of the Paris Agreement. The Commission is also entitled to propose new legislative measures, pursuant to its 2030 climate and energy targets.³⁷³ The Chapter sets out various provisions of EU legislative instruments with their respective amendments,³⁷⁴ as well as the repeal and transitional measures as they relate to Regulation (EU) No 525/2013.³⁷⁵ The final provision under Chapter Eight deals with entry into force of the Regulation.³⁷⁶

³⁶⁶ Article 41(1)(b) Governance Mechanism. See discussion on 'annual reporting' obligation under Article 26 of Chapter Four, Governance Mechanism, at page 48 above.

³⁶⁷ Article 41(1)(f), Governance Mechanism.

³⁶⁸ Article 42, Governance Mechanism.

³⁶⁹ Article 43, Governance Mechanism.

³⁷⁰ These committees are deemed to be same committees referred to in Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, p. 13–18). The committees are composed of representatives of the Member States, chaired by a representative of the Commission.

³⁷¹ Article 44, Governance Mechanism.

³⁷² Article 45, Governance Mechanism.

³⁷³ *Ibid.*

³⁷⁴ Articles 46-51 and 52-56, Governance Mechanism.

³⁷⁵ Articles 57-58, Governance Mechanism. Regulation (EU) No 525/2013 of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC (OJ L 165, p. 13–40) is no longer relevant, and will only create proliferation of legislations, in view of the 'reporting' and 'monitoring' obligations under Chapter Four and Five of the Governance Regulation respectively.

³⁷⁶ Article 59, Governance Mechanism. Note that Governance Mechanism was published in the official journal of the EU on 21 December 2019, and by virtue of Article 59, it enters into force "on the third day following that of its publication."

5.4 European Climate Law (ECL)

One fascinating aspect of EU energy and climate framework is its progressive approach, both within the context of the international climate change regime and under the circumstances of EU legal framework, to meeting energy and climate targets, as well as the changing dynamics of global political configuration.³⁷⁷ In this regard, the EU made some technical adjustments to its 2030 targets, in the light of the withdrawal of the United Kingdom from the EU.³⁷⁸ The ‘amendment’ is to ensure that the contributions of Member States, as stated in their respective NECPs, correspond to the remaining 27 Member States of the EU.³⁷⁹ The adjustments require the remaining 27 Member States to take into account the projected energy consumption figures for 2030, and to ensure that they are reflected in their respective NECPs.

However, despite the remarkable progress by the EU in its efforts to respond effectively to the threat of climate change, through legislative framework on climate action,³⁸⁰ the prospect of achieving the objective of stabilizing global average temperature in accordance with Article 2 of the Paris Agreement would definitely require the “upscaling and acceleration of far-reaching, multilevel and cross-sectoral climate mitigation and by both incremental and transformational adaptation”.³⁸¹ The increased level of ambition to reduce the GHGs would require new legal framework or the amendment of the current, since the current targets were already locked-in into the 2030 legislative package. On this basis, the Commission had proposed European Climate Law (ECL),³⁸² as an essential implementing instrument to the climate neutrality target by 2050. This upfront approach underscores the transition necessary in all sectors to reset the Commission’s initial targets for 2021-2030, and upscaling the measures to achieve climate neutrality by 2050.³⁸³ Accordingly, the Commission intends to propose to amend the current

³⁷⁷ As previously discussed under Chapters Two and Three, the EU bold approach started with the 2020 targets under the Kyoto Protocol and followed by the 2030 targets under the Paris Agreement.

³⁷⁸ Decision (EU) 2019/504 of 19 March 2019 on amending Directive 2012/27/EU on energy efficiency and Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, by reason of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union (OJ L 85I, p. 66–68).

³⁷⁹ Ibid.

³⁸⁰ Mazur-Kumric, Nives and Zeko-Pivac, Ivan, “The EU as a Global Trendsetter in the Fight against Climate Change: Is a Climate-Neutral Europe by 2050 Feasible?”, *supra*, at p. 10.

³⁸¹ IPCC, 2018, Summary for Policymakers, “Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty” [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. P. 5.

³⁸² Communication (EU) “Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)” COM(2020) 80 final, 4 March 2020.

³⁸³ Ibid.

Governance Mechanism by June 2021, and where necessary, to review all relevant related policy instruments.³⁸⁴

In the substantive provisions of the proposed ECL, one of its overarching objectives is to establish a framework for irreversible reduction of GHG emissions, including the enhancement of removals by natural or other sinks; set out a binding target of climate neutrality in the EU by 2050 in line with goal in Article 2 of the Paris Agreement. The objectives also include the establishment of a framework to pursue global ‘adaptation goal’, referred to in Article 7 of the Paris Agreement.³⁸⁵ Instructively, the inclusion of intention to provide a framework to pursue ‘adaptation goal’ is very novel to the EU implementing instruments of the Paris Agreement. Even though the Paris Agreement fails to set legally binding mitigation targets for the Parties,³⁸⁶ the EU has, on its own, established its own mitigation targets of at least 40% by 2030.³⁸⁷ Surprisingly, the EU has no framework for adaptation targets or objectives, unlike the case for mitigation objectives.³⁸⁸ It has been argued that the Paris Agreement places adaptation at par with mitigation, by its inclusion in Article 2.³⁸⁹ Nevertheless, it seems that the concept of adaptation under Article 7 of the Paris Agreement is much more complex and nebulous than mitigation obligation under Article 4, for several reasons. Significantly, whereas the mitigation obligation under the Paris Agreement is connected to the nationally determined contributions (NDCs),³⁹⁰ the situation is different for adaptation. In fact, the Paris Agreement appears bland on how adaptation should be addressed by the Parties, when it states that “Parties recognize that adaptation is a global challenge faced by all... and that it is a key component of and makes a contribution to the long-term global response to climate change”.³⁹¹ Additionally, majority of the provisions on adaptation are expressed in discretionary terms, and not as legal obligations,³⁹² unlike the mitigation obligations where most obligations are expressed

³⁸⁴ Ibid. See also the press release and statement of the European Council and Parliament dated 21 April 2021, titled: “European climate law: Council and Parliament reach provisional agreement”, supra.

³⁸⁵ Ibid. See in particular Article 1 of the Proposed ECL, COM(2020) 80 final, 4 April 2020.

³⁸⁶ See Article 4, Paris Agreement.

³⁸⁷ Article 2(11), Governance Mechanism.

³⁸⁸ Article 7, Paris Agreement

³⁸⁹ Wewerinke-Singh, Margaretha and Doebbler, Curtis, “The Paris Agreement: Some Critical Reflections on Process and Substance” (2016) Volume 39(4) *University of New South Wales Law Journal*, p. 1503. See also Article 2, Paris Agreement.

³⁹⁰ For instance, Article 4(2), Paris Agreement states that: “Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”

³⁹¹ Article 7(2), Paris Agreement.

³⁹² Bodansky, Daniel, “The Legal Character of the Paris Agreement” (2016) 25(2) *Review of European, Comparative and International Environmental Law*, 142-150, at p. 147.

mandatorily.³⁹³ Therefore, the novelty of including the framework to pursue adaptation goal should have gone beyond the introductory matters in the proposed ECL.³⁹⁴

Although the overall objective of the proposed ECL is to set a binding target of climate neutrality in the EU by 2050, it is too early to predict how the eventual adoption of new ECL will achieve the goal set out Article 2(1) ECL,³⁹⁵ without the contextual considerations of other sectoral legislative instruments within the same package. In fact, the *ex-post* assessment of the Governance Mechanism, as contained in the “EXPLANATORY MEMORANDUM”³⁹⁶ to the proposed to ECL, seems to suggest that the Governance Mechanism is an ‘experimentalist approach’,³⁹⁷ seeking to bring coherence to dispersed and distributed approaches to energy and climate objectives within the EU context, as well as to align with the global climate goal. The question which cannot be answered, for now is, what additional legal effect has the Governance Mechanism produced to the 2030 climate and energy targets, beyond what the sectoral legal instruments within the same package would have achieved?

³⁹³ Ibid.

³⁹⁴ The concept of adaptation of climate change is, however, further mentioned in Article 4 of the proposed ECL, which states that while both the EU institutions and the Member States shall ensure continuous progress in enhancing adaptive capacity, the Member States shall develop and implement adaptation strategies and plans in accordance with Article 7 of the Paris Agreement. Article 4, Proposed ECL, COM(2020) 80 final, 4 April 2020.

³⁹⁵ Article 2(1), proposed ECL states that the “Union-wide emissions and removals of greenhouse gases regulated in Union law shall be balanced at the latest by 2050, thus reducing emissions to net zero by that date.”

³⁹⁶ Supra, COM(2020) 80 final.

³⁹⁷ Ammannati, Laura, supra, p. 2.

Chapter 6

6 Concept of Integrated National Energy and Climate Plans (NECPs)

6.1 Purpose and Scope of Integrated National Energy and Climate Plans

The integrated national energy and climate plans (NECPs) are fundamental to EU 2030 climate and energy targets. Whereas, the EU Governance Mechanism consists of “structured, transparent, iterative process between the Commission and Member States”,³⁹⁸ all are connected to NECPs through which the implementation of the climate and energy objectives are designed at Member States’ level, and the regional cooperation ensured. The Governance Mechanism shows the ‘intricate system’ of planning, reporting and assessment structure of the Governance Mechanism, using the tool of NECPs through which the Member States implement the five dimensions of the Energy Union.³⁹⁹ The planning, reporting and assessment components of the Governance Mechanism project the NECPs as tools for national plans, measures and policies towards the energy and climate objectives.⁴⁰⁰ The NECPs allow the EU and Member States to perform analytical evaluation of longer term perspectives for the five dimensions of the Energy Union and interactions among the sectoral legislations, policies and measures.⁴⁰¹ It is also significant to mention that under the EU law, policies and measures that have the potentials of having effect on the environment always provoke public consultation.⁴⁰² By Article 10 of the Governance Mechanism each Member State is required to ensure public participate in the preparation of the draft and final NECPs for the 2021 to 2030 before its adoption.⁴⁰³ The obligation of public participation in the preparation of NECPs under Article 10 will, however, be deemed to have been satisfied if the Member State satisfies the conditions specified under Directive 2001/42/EC.⁴⁰⁴

Just like participation under Article 10, it further requires “multilevel climate and energy dialogue” of policies contained in the NECPs, including for the long term of Member States, with the involvement of local authorities, civil society organisations, business community,

³⁹⁸ Article 1(1), Governance Mechanism.

³⁹⁹ Ammannati, Laura, *supra*, p. 10.

⁴⁰⁰ Article 7, Governance Mechanism.

⁴⁰¹ Article 8, Governance Mechanism.

⁴⁰² Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, p. 30–37). The legal basis of Directive 2001/42/EC (otherwise known as SEA Directive) is Article 191 of TFEU (ex Article 174 TEC).

⁴⁰³ Article 10 Governance Mechanism.

⁴⁰⁴ *Ibid.* Articles 6 and 7 of SEA Directive (Directive 2001/42/EC) provides for consultations draft plan or programme and the environmental report, and where the implementation of a plan or programme being prepared by a Member State is likely to have significant effects on the environment in another Member State.

investors and other relevant stakeholders and the general public.⁴⁰⁵ This is to stimulate deeper regional cooperation.⁴⁰⁶ The aspect of regional cooperation is rather complex, because it requires the Member States to take into account of “all existing and potential forms of regional cooperation” in their NECPs.⁴⁰⁷ One key aspect of regional cooperation is through electricity interconnectivity among Member States.⁴⁰⁸ Since energy security of supply concerns every Member State, with varying degree of vulnerability peculiar to each Member State, one of the adopted approaches to tackling the challenge is diffusing supply sources and eliminating a situation of strong dependence from a single external supplier.⁴⁰⁹ In this regard, the EU proposed upscaling cross-border connectivity from the initial 10% interconnection target to 15% by 2030.⁴¹⁰ The EU internal energy market is currently predicated on what is referred to as ‘Fourth Energy Package’,⁴¹¹ which is on the principles which include:

the right of access for third parties to electricity grids, free choice of suppliers for consumers, robust unbundling rules, the removal of barriers to cross-border trade, market supervision by independent energy regulators, and the EU-wide cooperation of regulators and grid operators within the Agency for the Cooperation of Energy Regulators (ACER) and the European Network of Transmission System Operators (ENTSO).⁴¹²

The EU has already recognized that increase in fluidity of EU electricity markets, increase in the share of electricity generated from renewable energy sources, and the increased interdependence between Member States in relation to energy production and supply are crucial to the achievement of the EU obligations under the Paris Agreement.⁴¹³ The Member States are required to have national objectives and targets for these approaches, which must be set out in their respective NECPs, and in line with EU 2030 targets.⁴¹⁴

⁴⁰⁵ Article 11, Governance Mechanism.

⁴⁰⁶ Article 12, Governance Mechanism.

⁴⁰⁷ Article 12(1), Governance Mechanism.

⁴⁰⁸ The requirement of electricity interconnection of at least 15% among Member States is one of the EU 2030 targets. See Article 2(11) of the Regulation on Governance Mechanism.

⁴⁰⁹ Communication (EU) ‘European Energy Security Strategy’ COM(2014) 330 final, of 28 May 2014.

⁴¹⁰ Ibid.

⁴¹¹ The EU ‘Fourth Energy Package’ consists of the following legal instruments: Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU, otherwise known as ‘Electricity Directive’; and three Regulations, which are: Regulation (EU) 2019/943 on the internal market for, known as ‘Electricity Regulation’; Regulation (EU) 2019/941 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, also known ‘Risk-preparedness Regulation’; and Regulation (EU) 2019/942, establishing a European Union Agency for the Cooperation of Energy Regulators, known as ‘ACRE Regulation’.

⁴¹² COM(2016) 864 final, 30 November 2016.

⁴¹³ Ibid.

⁴¹⁴ Article 4, Governance Mechanism.

6.2 Sweden's Integrated National Energy and Climate Plans

The obligation of the Member States to prepare the integrated National Energy and Climate Plan (NECP) is the mechanism for direct bilateral dialogue between the Commission and each Member State on the Energy Union.⁴¹⁵ The Sweden's Integrated National Energy and Climate Plan (S-NECP) is a 199-page comprehensive document,⁴¹⁶ setting out the national objectives, targets and contributions for the five dimensions of the Energy Union, and according to the general framework set out in Annex I to the Regulation.⁴¹⁷ The S-NECP, inter alia, reiterates the Sweden's existing policies and measures for energy and climate goals; the long-term energy and climate targets and objectives, in line with five dimensions of the Energy Union; and emphasizing the significance of the EU 'energy policy triangle' in policy formulation and implementation.⁴¹⁸

Prior to the preparation of S-NECP, the Swedish Parliament (otherwise known as "Riksdag") had adopted a proposal on a climate policy framework for Sweden in June 2017, which sets out its targets for 2030, 2040 and 2045.⁴¹⁹ The Swedish' Climate Policy Framework (CPF) also seeks to implement the Paris Agreement, not only by pursuing climate policy based on the climate goals adopted by the Riksdag, but also, for the first time, by adopting a domestic legal instrument (Climate Act) for that purpose.⁴²⁰ The CPF proposal for 2030, 2040 and 2045 targets are assigned to the Environmental Objectives Committee,⁴²¹ who sits on regular basis to assess both the level of the ambition and the timeframe for the long-term goals, if they are in line with the IPCC reports.⁴²² The CPF consists of three elements: the Swedish Climate Act,⁴²³ new climate targets⁴²⁴ and a Climate Policy Council.⁴²⁵ While the provisions of the Swedish's

⁴¹⁵ Ammannati, Laura, *supra*, pp. 5-6. *Supra*.

⁴¹⁶ Sweden's Integrated National Energy and Climate Plan (hereinafter referred to as 'S-NECP') of 16 January 2020 available at: https://ec.europa.eu/energy/sites/ener/files/documents/se_final_necp_main_en.pdf.

⁴¹⁷ Articles 3-4, Regulation on Governance Mechanism.

⁴¹⁸ S-NECP, *supra*, p. 4. See also See COM(2007)1, *supra*, para. 28.

⁴¹⁹ The Swedish Climate Policy Framework, inter alia, seeks to implement the Paris Agreement in Sweden, and targets zero net emissions of GHGs by 2045. See The Swedish climate policy framework available at: <https://www.government.se/495f60/contentassets/883ae8e123bc4e42aa8d59296ebe0478/the-swedish-climate-policy-framework.pdf>. See also Sweden's fourth Biennial Report under the UNFCCC, p. 42, available at: https://unfccc.int/sites/default/files/resource/Fourth%20Biennial%20report_%20Sweden.pdf.

⁴²⁰ *Ibid*.

⁴²¹ *Ibid*.

⁴²² S-NECP, *supra*, p. 11.

⁴²³ The Climate Act entered into force on the 1 January 2018.

⁴²⁴ The Sweden's new climate targets cover the periods of 2030-2045: by 2030 emissions reduction at 63% lower than 1990; by 2040 emissions are to be 75% lower than 1990; zero net greenhouse gas emissions by 2045 at the latest. See the Swedish Climate Policy Framework, *supra*.

⁴²⁵ Climate Policy Council is the third pillar of the framework. The Council, which is an independent assessment body, is tasked with providing support, which compatible with the climate goals, for the Government. See the Swedish Climate Policy Framework, *supra*.

Climate Act appear scanty, the main legal instrument for the protection of the environment in Sweden is the Environmental Code,⁴²⁶ which has the overall purpose of promoting sustainable development, and supplemented by other sectoral legislations.⁴²⁷

Nonetheless, the Climate Act, which consists of five main sections, establishes that the Government's climate policy must be based on the climate targets. It also provides that the Government must draw up a climate policy action plan in every fourth year, which must be presented to the Riksdag the year following ordinary elections to the Riksdag. The action plan should contain, *inter alia*, a description of certain key elements. They include: Sweden's commitments in the EU and internationally; historical greenhouse gas emissions data, including the most recent emissions inventory; emissions reduction projections; the outcome of any emissions reduction measures taken; planned emissions reduction measures, including an approximate indication of when these measures may come into force; the extent to which adopted and planned emissions reduction measures can be expected to contribute to the achievement of the national and global climate change targets; the extent to which adopted and planned measures in different expenditure areas affect the ability to achieve the national and global climate change targets; and any further measures or decisions that may be needed to achieve the national and global climate change targets.⁴²⁸

Apart from the fact that the Climate Act requires the government to draw the climate policy action plan containing the above descriptions, it must also be based on the “long-term, time-bound emissions target”,⁴²⁹ and consistent particularly with “Sweden's commitments in the EU and internationally”.⁴³⁰ On its part, the Climate Policy Council is required to submit an annual report to the Government, with an assessment of the progress of climate work and emissions development, which must be compatible with the Swedish climate targets.⁴³¹ Hence, the crucial

⁴²⁶ Swedish Environmental Code (SFS 1998:808), which entered into force on 1 January 1999. The Code was based on the provisions of 15 environmental acts, which were consolidated into a single piece of legislation. The Code also encapsulates sixteen environmental quality objectives of Sweden, cover different areas, ‘from unpolluted air and lakes free from eutrophication and acidification, to functioning forest and farmland ecosystems.’ See “Swedish Environmental Law: An introduction to the Swedish legal system for environmental protection”, available at: <https://www.naturvardsverket.se/Documents/publikationer6400/978-91-620-6790-8.pdf?pid=21184>.

⁴²⁷ “Swedish Environmental Law: An introduction to the Swedish legal system for environmental protection”, *supra*, p. 16.

⁴²⁸ Section 5, Swedish Climate Act.

⁴²⁹ Section 3, Swedish Climate Act.

⁴³⁰ Section 5(1), Swedish Climate Act.

⁴³¹ “Sweden's fourth Biennial Report under the UNFCCC, (2019)”, prepared by the Ministry of the Environment p. 48, available at: https://unfccc.int/sites/default/files/resource/Fourth%20Biennial%20report_%20Sweden.pdf.

roles of the CFP and Environmental Code in the preparation and formulation of the S-NECP is clearly underscored.⁴³²

According to S-NECP, the goal is to cut Sweden's net GHG emissions to zero by 2045, and reduce the emissions from activities on its territory to 15% of their 1990 levels.⁴³³ The summary of the key objectives, policies and measures in S-NECP include: cut in net GHG emissions to zero by 2045, with a maximum of 15% of emission reductions from additional measures compared to 1990 levels,⁴³⁴ and achieve negative emissions thereafter;⁴³⁵ 75% reduction in emissions from sectors outside the EU's Emission Trading System (EU ETS) by 2040;⁴³⁶ 63% reduction in emissions from sectors outside the EU ETS by 2030;⁴³⁷ 70% reduction in emissions in the transport sector by 2030;⁴³⁸ 100% renewable electricity generation by 2040;⁴³⁹ 50% improvement in energy efficiency by 2030.⁴⁴⁰ Even though Sweden has not set a target for electricity interconnection for 2030, S-NECP indicates that, as at the beginning of 2019, Sweden's interconnectivity level was 27%, far above the EU's target of 15% for 2030.⁴⁴¹ In the pursuit of its energy efficiency target for 2030, S-NECP highlighted the role of Swedish Energy Agency, which has identified five sectors and strategic areas relevant to the objective, as fossil-free transport; world-class production; flexible and robust energy system; future trade and consumption; and resource-efficient building.⁴⁴²

⁴³² S-NECP, *supra*, pp. 6 & 44.

⁴³³ *Ibid*, p. 5.

⁴³⁴ *Ibid*. The implication of this is that the emissions from activities on Swedish territory are to be at least 85 % lower by 2045 compared to 1990. See Sweden's fourth Biennial Report under the UNFCCC, *supra*, p. 42, While the EU 2030 binding target for reduction in economy-wide GHG emissions is at least 40 % as compared to 1990 levels, the EU's contribution to long-term objectives of achieving 'net zero GHG emissions' commitments to the Paris Agreement has 2050 target. Even though the 'European Green Deal' (EGD) did not alter the goal of transforming the EU into 'no net emissions of GHGs in 2050', the proposed European Climate Law (ECL) reset or adjusted 2030 target by increasing the emissions reduction target to 55% by 2030. See COM(2020) 562 final, *supra*. Accordingly, Sweden's national GHG emission reduction targets exceeding EU targets.

⁴³⁵ *Ibid*.

⁴³⁶ S-NECP, *supra*, p. 5. The EU target for reduction of GHG emissions non-ETS sectors is 30% by 2030 compared to 2005. There is no EU target for 2040. See European Council conclusions, 23-24 October 2014 (EUCO 169/14), *supra*.

⁴³⁷ *Ibid*. The Sweden's national contributions to the EU for GHG emissions reduction target from non-ETS sectors exceed the EU targets.

⁴³⁸ S-NECP, *supra*, p. 5.

⁴³⁹ S-NECP, *supra*, p. 5. Under RED II, Sweden has no binding target for the share of renewable energy in gross energy consumption for 2021-2030, unlike under Directive 2009/28/EC (RED I) where Sweden has a binding target of 49% as its 2020 target. In the S-NECP, the indicative trajectory projected as national contribution is 65% share of renewable energy in gross energy consumption by 2030, higher than 32% for EU-wide 2030 target. See S-NECP, *supra*, pp. 19-20.

⁴⁴⁰ S-NECP, *supra*, p. 5. Sweden sets an energy efficiency target of 50% by 2030 compared than it was in 2005. Under the Directive (EU) 2018/2002 (Energy Efficiency Directive-EED), the EU has an energy efficiency target of least 32,5% by 2030, which is an incremental target from 20% for 2020 energy and climate framework, under Directive 2012/27/EU.

⁴⁴¹ S-NECP, *supra*, p. 32.

⁴⁴² *Ibid*, p. 28.

With respect to the dimension of energy security set out in point (c) of Article 4 of the Governance Mechanism,⁴⁴³ the S-NECP does not have national targets for reducing dependence on importing energy from third countries.⁴⁴⁴ However, Sweden seeks to leverage on the functioning of the energy markets, both within Sweden and with other countries.⁴⁴⁵ Additionally, Sweden intends to pursue its national objectives, with regard to increasing the flexibility of the national energy system, through the deployment of domestic energy sources, with a larger proportion of renewable energy, and address demand response in consumer sectors with energy storage.⁴⁴⁶

Notwithstanding the level of the Sweden ambitions, regarding the five dimensions of the Energy Union, compared to that of the EU, as stated in the S-NECP, the outcome of national consultation of S-NECP, conducted pursuant to 10 Article of the Regulation on Governance Regulation reveal both positive review as well as suggestions for a complete revision.⁴⁴⁷ The public consultation also reveal that the S-NECP will not achieve its national climate targets for 2030 in transport sector and for 100% renewable electricity production by 2030. it suggests that the plan should reflect on how the targets on transport and renewable electricity production will be achieved.⁴⁴⁸ From another perspective, the attainment of 100% renewable electricity target by 2040 has been questioned, on the ground that, it is dependent on achievement of well over 80% renewable electricity by 2030. It has therefore been contended that S-NECP should indicate 80% renewable electricity production in 2030, in order to meet the Sweden national target of 100% renewable energy by 2040.⁴⁴⁹

Another important caveat that was raised in the course of the public consultation, relates to the effect that the long-term validity and stability of sectoral regulations and forecasts are necessary conditions prerequisites in implementing the plan. Several legal instruments are involved in drawing up of the S-NECP, some of which are constantly being reviewed. As earlier stated in the introductory paragraph and under Chapter 3 of this thesis, the provisional political agreement of the Council and the Parliament of the European Union, on 21 April 2021,⁴⁵⁰ to

⁴⁴³ Point c of Article 4, Governance Mechanism requires Member States to set national objectives with regards to: increasing the diversification of energy sources and supply from third countries; increasing the flexibility of the national energy system; and addressing constrained or interrupted supply of an energy source.

⁴⁴⁴ S-NECP, *supra*, p. 28.

⁴⁴⁵ *Ibid*, pp. 28-29.

⁴⁴⁶ *Ibid*, 31.

⁴⁴⁷ *Ibid*, p. 185.

⁴⁴⁸ *Ibid*.

⁴⁴⁹ *Ibid*, p. 186.

⁴⁵⁰ Press release and statement of the European Council and Parliament dated 21 April 2021, titled: “European climate law: Council and Parliament reach provisional agreement”, *supra*.

translate the objective of a ‘climate-neutral EU by 2050’ into a legal instrument, and increased GHG emissions reduction target to at least 55% by 2030 compared to 1990 levels, will definitely have impact on the goals and aspirations stated in the NECP of the Member States. Even though Sweden’s target for zero net GHG emissions is by 2045, which is more ambitious than the EU carbon neutrality target by 2050; it is premature to predict the effect of the proposed amended Governance Mechanism and the latitude of review that all the relevant related policy instruments will have on the character and content of the NECP. Again, the choice of Sweden’s implementation of climate and energy ambitions may look attractive and promising, its level of ambitions and national targets cannot be fairly assessed on the basis of mere compliance on Governance alone. The same applies to other Nordic countries (e.g., Norway and Finland), who have comparable high climate and energy ambitions like Sweden, and who could have pursued the five dimensions of Energy Union anyway.

From the foregoing, while the approach of the Governance Mechanism emphasizes the centrality of the achievement of the five dimensions of the Energy Union, the trajectory of ambitions in the S-NECP reflects more of national energy and climate objectives, which are generally above EU-wide targets. The S-NECP is essentially predicated on the Swedish CPF, which establishes long-term national climate targets and compliance framework conditions for the Paris Agreement.⁴⁵¹ The S-NECP actually provide an inflection of the requirements of both the Governance Mechanism and the Paris Agreement, without any tradeoff of Sweden’s national objectives on climate mitigation and energy security. In other words, it seems that with the domestic legal framework established by Sweden, the NECP mandated by the Governance Mechanism becomes unnecessary multiplicity and proliferation of procedural undertakings. At any rate, the Swedish climate and energy ambitions are higher than required by the EU. It is of the view of the of this thesis that the national domestic energy and climate plans and targets should ought to be made backed by legal instruments, and made as binding targets at the EU level. This also has its complicated challenges.

6.3 EU’s Integrated National Energy and Climate Plans

In assessing the role of NECPs in contributing to the five dimensions of Energy Union in 2030 targets, the Commission noted that the final NECPs submitted by Member States, identified key indicators of whether the full implementation of the NECPs by the Member States would lead Europe to achievement of the current 2030 GHGs reduction target. While the EU

⁴⁵¹ S-NECP, *supra*, p. 6.

Commission suggested that the *ex post* assessment of the NECPs shows that the the full implementation of the plans would lead Europe to ‘overachieve the current 2030 emissions reduction targets’,⁴⁵² the sectoral aspects of the five dimensions of the Energy Union do not provide a concurrent support for the assertion.

Firstly, whereas the performance of the share of renewable energy is projected to reach between the range of 33.1 to 33.7% in 2030, thereby surpassing the 2030 target of at least 32%;⁴⁵³ the energy efficiency aggregated ambition for the same period would only amount to a reduction of 29.7% for primary energy consumption and 29.4% for final energy consumption, instead of at least 32.5% target for 2030.⁴⁵⁴ Secondly, it was noted by the Commission that COVID-19 crisis created hiatus on energy consumption, and gives a false narrative about whether the EU would have reached the 2020 energy efficiency targets.⁴⁵⁵ However, it is yet to be seen how recovery from the COVID-19 will impact on energy consumption, and whether the indicative national energy efficiency contribution to achieving the Union's energy efficiency targets of at least 32,5 % in 2030 is still possible.

The Commission, having received and reviewed almost all the final NECPs and the aggregate figures of the Member State contributions, has assessed that several NECPs ‘fail to include sectoral trajectories that are in line with the Renewable Directive requirements. The reason is not farfetched: it is because the Renewable Energy Directive (RED II) does not impose any binding target on Member States. Consequently, regardless of the reporting obligation on the Member States, or the monitoring responsibility on the Commission; the absence of binding targets at the Member States level will always pose challenges to the achievement of EU goals. If the impact assessment has shown that the attaining of at least 55% GHG emissions reduction by 2030 would require increasing the shares of renewable energy in the EU to higher target for 2030;⁴⁵⁶ the trajectory towards ‘climate-neutral EU by 2050’⁴⁵⁷ will be in jeopardy if the Renewable Energy Directive (RED II) remains as it is and in its present character of non-binding target on Member States. Instructively, as at 2017, the EU reached a share of 17.52% of renewable energy in gross final energy consumption, against a target of 20% for 2020, and

⁴⁵² See Communication (EU) “An EU-wide assessment of National Energy and Climate Plans- Driving forward the green transition and promoting economic recovery through integrated energy and climate planning” COM(2020) 564 final, 17 September 2020.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ See COM(2020) 80 final

⁴⁵⁷ Ibid.

above the indicative trajectory of 16% for 2017/2018.⁴⁵⁸ This was when the extant legal instrument on the promotion of the use of energy from renewable sources, Directive 2009/28/EC (RED I),⁴⁵⁹ imposed individual or national binding target on Member States “to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.”⁴⁶⁰ Consequently, doubling the 2020 renewable energy target in 2030 without an equivalent national binding target on Member States appears speculative and more potentials for unpredictable outcome.⁴⁶¹ As noted under Chapter 3 of this thesis, the uncertainty on the latitude of the Member States’ energy rights, under Article 194 TFEU is a major void between the EU targets and competence to achieve them.

⁴⁵⁸ European Commission Renewable Energy Progress Report 2019 (COM(2019) 225 final).

⁴⁵⁹ Directive 2009/28/EC of on the promotion of the use of energy from renewable sources (RED I).

⁴⁶⁰ Article 3(2), RED I.

⁴⁶¹ This takes us back to the discussions on Articles 192 and 194 TFEU and *Opinion 2/00* of the Court of Justice that a legislative measure may “be founded on the corresponding legal bases”.

Chapter 7

7. Conclusion

The tentativeness of the international climate regime, particularly the Paris Agreement, in not imposing binding national quantitative target of emissions reduction on Parties, blurs the practicality of achieving the objectives both Article 2 of the Paris Agreement and Article 2 of UNFCCC. While the criticisms against these international instruments have well been documented in literature, the alternative of regulatory measures and actions at the national and sub-global level, particularly by the major carbon emitters, to fill in the gaps becomes an important supplement in this regard.⁴⁶² But it is not as easy as it seems. Limiting the global mean temperature rise to well below 2°C, being the goal of Paris Agreement, would, undoubtedly, “require an energy transition of exceptional scope, depth and speed... unprecedented levels, extensive market reforms and stringent low-carbon and energy-efficiency measures would be needed to achieve this transition.”⁴⁶³ This is the first step. The EU has approached the challenges with some innovative measures, with targets, milestones, and sectors specific. They are energy and climate targets and framework of the EU for 2030, which include: at least 40% cuts in greenhouse gas emissions (from 1990 levels); at least 32% share for renewable energy; and at least 32.5% improvement in energy efficiency.⁴⁶⁴ And, as part of the 2030 climate and energy framework, the EU introduced Regulation on the Governance of the Energy Union.⁴⁶⁵ Governance Mechanism has been described as a novel procedural tool to galvanize transformation towards sustainable energy system, through its five dimensions approach. Its objective is to ensure that the policies and measures adopted in the EU and in the Member States are coherent, complementary and sufficiently ambitious enough to meet the objectives of the Paris Agreement.

However, due to the differences in the energy resources and general structures of energy supply of the Member States of EU, different measures are required in each of the Member State to accomplish the goals of 2030 climate and energy framework, regardless of collective targets. Because of the legal architecture of the EU, energy policies are developed at different spatial

⁴⁶² Peel, Jacqueline and Osofsky M. Hari, *supra*, p. 13; IPCC Group II, “Summary for Policymakers- Final Draft, Climate Change 2014- Impacts, Adaptation, and Vulnerability” (2014, IPCC, Geneva).

⁴⁶³ Policy Brief on Interlinkages Between Energy and Climate Change, available at <https://sustainabledevelopment.un.org/content/documents/17498PB15.pdf>, p. 6, visited on 24 November 2020

⁴⁶⁴ EU 2030 Climate & Energy Framework, available at https://ec.europa.eu/clima/policies/strategies/2030_en. Visited on 26 November 2020. See also Preamble 6 of Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, *supra*.

⁴⁶⁵ Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, *supra*.

levels. For example, while the EU's Member States historically had their own national energy policies and energy markets, the EU increasingly emphasises on the importance of a single internal energy market through the dimensions of Energy Union is driving shift towards greater regional integration and hegemony. The EU must however carefully coordinate its intricate legal structure and its labyrinth of national energy diversities, policy priorities and national circumstances, among others. Accordingly, notwithstanding the obligation of the EU under Article 3(5) TEU to ensure "strict observance and the development of international law", the 'energy rights' of the Member States and the limits of procedural as well as the substantive competence of the EU to adopt binding targets will continue to militate against necessary climate measures.

The legislative competences between the EU and its Member States under Article 4(2) TFEU, as they relate to energy and environment, and the applications of Articles 192 and 194 as legal bases for environmental and energy respectively underscores different, though interconnected, priorities. The requirement of situating EU policy direction on specific legal basis makes the task of coordinating the exercise of competences in the field of energy and environment not just dynamic but also delicate. Compounding this dilemma is the fact that the objectives of the energy policy of the EU are usually related to other policies, such as environmental, internal market and competition policies, in which the competence of Member States is limited. The fact that RED II is adopted under Article 194 TFEU, post Treaty of Lisbon, show that the legal dynamics have from what were obtainable under 2009/28/EC (RED I). The choice of legal basis for environmentally induced energy legislations at EU level is therefore far from certain. Since the Renewable Energy Sources (RES) has been widely acknowledged to "contribute to climate change mitigation through the reduction of greenhouse gas emissions, achieve sustainable development, protect the environment and improve citizens' health",⁴⁶⁶ it seems that adopting Article 194 TFEU as the only legal basis for renewable energy legislation undermines other the achievement of the objectives.

The alternative proposal for the amendment of the provision of Article 194 TFEU, "by deleting the reference to paragraph 2 of Article 194 TFEU, thus referring to Article 194 TFEU in its entirety, and by adding a reference to Article 191 paragraph 1 TFEU under the environmental

⁴⁶⁶ See the opinion Committee on Legal Affairs of the European Parliament, titled: "Opinion on the legal basis of the promotion of the use of energy from renewable sources (recast) (COM(2016)0767 – C8-0500/2016 – 2016/0382(COD))" of 15 January 2018. Available at: https://www.europarl.europa.eu/doceo/document/JURI-AL-616586_EN.pdf.

title XX of the TFEU”,⁴⁶⁷ underlies the fundamental nature of the conflicts between the EU and its Member States on the subject. As it presently appears from the legal text of Article 194 TFEU and most of the decisions of the CJEU, energy rights of the Member States “to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply,”⁴⁶⁸ will continue to be the predominant factor in EU climate and energy policy. The consequence is that the EU regional approach may not actually achieve the coherence it seriously needs, considering that Article 194 and notwithstanding the its Governance Mechanism.

However, considering that the complications of adopting stringent policy measures at the regional level may not be as difficult at the national levels, the analysis of the Swedish’ Climate Policy Framework (CPF), also to implement the same Paris Agreement, gives some kind of respite. The level of Swedish climate and energy ambitions, with the implementing legal instruments and institutions, also indicate that multilevel approaches to climate change problems should be driven from the national levels, as much as the regional and global levels. However, while Sweden may present an attractive example of a well-structured national climate and energy framework, and perhaps reflective of the other Nordic countries, can it be said that the EU approach has advanced the cause of addressing the climate crisis at the regional level, if country like Poland has been considered as a case study? Unfortunately, this scope of this thesis does not permit this additional adventure.

Finally, the point here is not to take a stand in favour or against either the international climate change regime or the EU regional approach to climate change mitigation through energy transition. I, only, endeavor to illustrate how regional institutions, like the EU, faced with the same set of global climate change crisis can, within the limits competences, establish a legal system that will concretize what would have otherwise remained normative rules of little effective practical application. Nevertheless, addressing the challenges of climate goes beyond the incremental adjustments of ambitions or the slow process of policy inflections by the EU. So long as the disparities in the energy mix of EU Member States remains part of the national and natural circumstances, Article 194 TFEU will continue to inhibit the ‘common level’ of commitment to energy transition, necessary for climate change mitigation.

⁴⁶⁷ Ibid.

⁴⁶⁸ Article 194(2) TFEU.

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