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The Interface between EU Energy, Environmental and Competition Law in Spain

by C. Plaza Martín

The Interface between EU Energy, Environmental and Competition Law in Spain

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Responses: Professor Carmen Plaza Martín (Universidad de Castilla-La Mancha)

Summary

This article is a part of an OGEL Special issues examining the Interface between EU Energy, Environmental and Competition Law. This article approaches the topic from the Spanish perspective. It responds to questions relating to the role of sector-specific energy regulation and general competition law, and it examines the sometimes uneasy relationship between competition, security and promotion of green energy production. It also covers Treaty amendments and developments in both the sector regulation and the case law, and includes issues on climate change, energy trading, and security of supply.

Introduction and the questions

By Professor Peter Cameron, CEPMLP, University of Dundee (UK)

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

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

A. Regulation and Competition Policy

1. Will the limited powers of ACER and the responsibilities placed upon ENTSO-E and ENTSO-G require greater cooperation between national regulatory authorities (NRAs) inter se and with the EU to open up the European power and gas sectors to greater cross-border competition, at least at the wholesale supply level?

2. Or will increased competition turn out to be mainly a task for the competition authorities to ensure progress in dismantling predominantly national markets, for example by stopping discriminatory congestion management practices of transmission system operators, as in the Svenska Kraftnät case?

3. In this context, what is the position of your Member State with respect to enforcement of Competition Law (EU and national) in the energy sector, whether by sector-specific NRAs, by NCAs or a combination of the two?

4. With respect to NRA roles, powers and duties, are there any peculiarities or difficulties in the position of your Member State (for example, limiting or promoting cooperation with other Member States' NRAs or with respect to the EU Network of Competition Authorities)?

5. Considering that exemptions from the regulatory regimes for gas and electricity are permitted, what safeguards are in place at the Member State level for protecting 'process' rights such as the right to be heard and access to justice, and which national bodies are responsible in ensuring that these rights are respected?

6. Are the latest proposals (COM(2010) 726) on market abuse in the energy sector likely to present challenges for the NRAs whether in their sole capacity or as a hybrid with national financial regulatory bodies at Member State and/or EU level?

B. Promotion and Subsidy of Renewable Energy

7. Are Directive 2009/28/EC and the purely national subsidy schemes and national RES consumption targets it perpetuates fully compatible with principles and rights established in the Treaty, as interpreted by the Court? For example, does the preclusion of the exchange of instruments evidencing renewable power output between suppliers and generators in different Member States, as a means of proving compliance with minimum renewable electricity consumption quotas or earning feed-in tariffs, interfere with internal trade and distort competition in the electricity market?

8. More specifically, would the Court's decision in the case of Preussenelektra still be valid in 2012, given both the substantial expansion of wind and solar power generation output, an the maturing of the EU liberalised markets in power and gas, in the meantime?

9. Are there notable features of your Member State's implementation of the RES 2009 Directive that present challenges and difficulties with respect to cross-border cooperation, if they are provided for at all (joint projects, for example, whether between governments and their authorities or between private parties, and statistical transfers under the Directive)?

C. Climate Change

10. To what extent has the choice of the emissions trading scheme (the EU ETS) to deliver climate change targets had the final word vis-à-vis alternative methods such as carbon and energy taxation?

11. Have differences in viewpoints on the above been reflected in legal measures in your Member State and how have they been resolved?

Security

12. To what extent has your Member State implemented EU legislative measures on energy security in ways that seek to ensure the functioning of the internal market but which also promote measures of solidarity with other Member States?

13. Has this had any significant impact upon the distribution of domestic institutional responsibilities for such matters (both within the government and public sector and as between public and private)?

The Treaty

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

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

Carmen Plaza*

Spain's Ley 57/1997 del Sector Eléctrico (*Electricity Act*)[1], which transposed the first European Community directive that aimed to liberalise the energy market in the mid 1990s[2], established a new legal framework designed to introduce effective competition in the electricity sector. The regulation of this crucial sector was adopted 'with the traditional three-fold goal of guaranteeing the supply of electric power, its quality and the provision of such supply at the lowest possible cost'.[3] Furthermore, environmental protection was another element 'taken into account in the equation and one of considerable importance given the characteristics of this particular sector of the economy'.[4] A year later, Ley 4/1998 del Sector de Hidrocarburos (*Hydrocarbons Act*)[5] triggered the same process in the gas market[6], and created the Comisión Nacional de la Energía' (*National Energy Commission*, hereinafter CNE) as 'the public body responsible for regulating the operation of the energy system, with the aim of ensuring effective competition in the energy systems'.[7]

The liberalization process received a new input with the approval of Ley 12/2007 (*Act 12/2007*)[8], which amended the Hydrocarbons Act in order to adapt it to the second Gas Directive[9], and Ley 17/2007 (*Act 17/2007*)[10], which amended the Electricity Act to adapt it to the second Electricity Directive,[11] respectively. However, opening up this sector to competition and building a single energy market has proved particularly burdensome. Following the 2012 FIDE Questionnaire, this report aims to give an

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1 BOE nº 285, 28 November 1997.

2 Directive 96/92/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity [1996] O.J. L27/ 20.

3 See Preamble, paragraph 2.

4 *Ibid.*

5 BOE nº 241, 8 October 1998.

6 It transposed into Spanish Law Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas [1998] OJ L 204/1.

7 See Eleventh Additional Provision of Act 34/1998, One, point 2.

8 BOE nº 158, 3 July 2007.

9 Directive 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, [2003] OJ L 176/57.

10 BOE nº 160, 5 July 2007.

11 Directive 2003/54/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L 176/37.

overview on some of the main challenges that Spain currently faces within the context of completing the single electricity and gas market following the Third Energy Package, not only due to the inherent difficulties of promoting and protecting effective competition in this strategic sector, but also due to the requirements of integrating environmental and security concerns into this regulation in order to tackle climate change and the growing external energy dependence. It should be taken into account, nevertheless, that at the time of writing this report the Third Energy Package has not been fully implemented in Spain yet, and the dissolution of Parliament due to the General Elections called for November 2011 will involve further delays in the process of transposing the new Directives.

A. Regulation and Competition Policy

1. Will the limited powers of ACER and the responsibilities placed upon ENTSO-E and ENTSO-G require greater cooperation between national regulatory authorities (NRAs) *inter se* and with the EU to open up the European power and gas sectors to greater cross-border competition, at least at the wholesale supply level?

Since the creation of the European Electricity Regulatory (Florence) Forum in 1998 and the European Gas Regulatory (Madrid) Forum in 1999, voluntary cooperation between national regulatory authorities has been envisaged, in a context of significant regulatory gaps at EC level, as an alternative means to promote market integration in the electricity and gas sector. Under the second Electricity and Gas Directives, the NRAs were already required to co-operate to this end, and such cooperation was further promoted by the Commission within the European Regulators Group for Electricity and Gas (ERGED)[12], which in 2006 launched regional initiatives seeking to foster market integration through bottom-up, largely voluntary, initiatives[13].

In Spain and Portugal, the creation of the Iberian Electricity Market (MIBEL)[14] has significantly strengthened cooperation between NRAs of both countries[15] and is

12 See Decision 2003/796 establishing the European Regulators Group for Electricity and Gas, [2003] OJ L 296/34.

13 See, ERGEG, *Status Review on the ERGEG Regional Initiatives 2010*, Ref: E10-RIG-11-03, p. 10, <www.energy-regulators.eu>, visited 30 May 2011. See also P.D. Cameron, *Competition in Energy Markets –Law Regulation in the European Union* (Oxford University Press, 2007), pp. 101-111.

14 MIBEL is regulated by the 'Agreement between the Portuguese Republic and the Kingdom of Spain relative to the constitution of an Iberian Electrical Energy Market' (MIBEL Agreement) signed in Santiago de Compostela, 1 October 2004. This Agreement established the principles for the organisation and management of MIBEL and, in particular, the framework for the organisation of the Spot Market (OMEL) and the Derivatives Market (OMIP).

15 The Santiago Agreement establishes the powers of MIBEL's Regulatory Board (that integrates the sector regulators of the two countries), the Market Agents Committee (that integrates representatives from

fostering price convergence in the Iberian wholesale market and promoting increasing interconnection capacity[16]. Cross-border cooperation with France, where an increase in interconnection capacity is crucial for real market integration, since it is still very scarce, has, so far, been more limited, but the NRAs are currently collaborating to improve it in the ERGEG South-West Electricity Region (France, Portugal and Spain). This is essential for MIBEL to join the EU market effectively.[17]

Following this path, the Third Energy Package now requires NRAs to cooperate with the purpose of integrating their national markets at one or more regional levels as a first step towards a fully liberalised internal market[18], and provides for regional cooperation between Transmission System Operators.[19] But it also acknowledges that NRAs/TSOs cooperation should better develop within an EU structure with competences to coordinate them and with the power to adopt individual regulatory decisions regarding cross-bother issues and to participate in the creation of network codes. Thus, ACER and ENTSO-E/ENTSO-G create the institutional framework to foster a more intensive cooperation among national NRAs and TSOs in order to solve the regulatory gap affecting cross-border integration and, therefore, the viability of the energy single market. On the other hand, although NRAs-TSOs cooperation and regional initiatives are due to play an important role in the process of building the internal market, they are now complemented with top-down guidance and decisions by ACER and the Commission where NRAs and TSOs cooperation prove insufficient.[20] Furthermore, the

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all the intervening entities on the market) and the MIBEL Economic and Technical Management Committee (that integrates the Market and System Operators of the two countries). It also defines the means for regulation, consultation, supervision and management of MIBEL, as well as the legal regime relative to infringements, sanctions and competent jurisdiction.

16 See CNE, 'Spanish Energy Regulator's Annual Report to the European Commission – 2009', 15 July 2010, p. 8, <www.cne.es/cne/doc/publicaciones/PA011_10.pdf>, visited 30 May 2010; and Consejo Regulador de MIBEL, 'Descripción del funcionamiento del MIBEL', November 2009, p. 13 www.cne.es/cne/doc/mibel/Descrip_funcionamiento_MIBEL.pdf, visited 30 May 2011.

17 See CNE, 'Spanish Energy Regulator's Annual Report to the European Commission – 22 July 2011', p. 6, 22, 67, <http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NATIONAL_REPORTS/National%20Reporting%202011/NR_En/C11_NR_Spain-EN.pdf>, visited 30 July 2011. See further ERGEG, *supra* n. 13, pp. 25 and 35, as regards the new investments launched in May 2010 between France and Spain in order to allocate new interconnection capacities which should be available from 2015.

18 Art. 6(1) of Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L 211/55 and Art. 7(1) of Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, [2009] OJ L 211/94.

19 Art. 12 Regulation 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity, [2009] DO L 211/15.

20 Thus, ACER has the power not only to issue guidelines, recommendations and opinions to NRAs and to the EU Commission, but also to monitor compliance of system operators and NRAs with those guidelines and other duties imposed on them according to the Third Energy Package, and to adopt individual binding decisions of technical issues upon regulatory issues –even if they fall within the competence of national regulatory authorities- where the competent national regulatory authorities have

Third Energy Package also requires the harmonization of NRAs' powers, including strengthening those relating to interconnection issues, which will make coordination more effective.[21]

On the whole, this new approach is designed to trigger more effective NRAs and TSOs voluntary cooperation –as a first option before turning to top-down measures- in order to further open up the markets and promote competition in the energy sector.

2.Alternatively, will increased competition turn out to be mainly a task for the competition authorities to ensure progress in dismantling predominantly national markets, for example by stopping discriminatory congestion management practices of transmission system operators, as in the *Svenska Kraftnät* case?

In sectors with persistent market failures, such as energy, the EU has followed a dual strategy: it has adopted and improved legislation to introduce competition and open up the markets, and it is also using the full range of competition tools at its disposal to pursue cases contrary to EU competition policy and 'set precedents' for companies in this sector.[22] In fact, the EU Commission's enforcement policy of Competition Law has so far played an important role in achieving the EU liberalisation objectives set for the energy markets and to opening up this economic sector to effective competition.[23] Thus, based on Article 102 TFUE, the Commission's enforcement actions have dealt successfully, for example, with network operators' practices to manage congestion inside their networks by curtailing exports to other Member States and therefore preventing EU market integration and efficiency[24], or with practices such as long term contracts, blocking access to essential facilities, refusal to supply or strategic

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not been able to reach an agreement in due time or upon a joint request from the competent national regulatory authorities (see e.g. Arts. 6, 7 and 8 of Regulation 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators [2009] DO L 211/1). ACER has powers as well, under certain conditions, to decide on exemptions such as those applicable to new interconnectors from the third party access regime (see Art. 9 of Regulation (EC) No 713/2009). Finally, the Commission may take certain decisions where the ENTSOs or ACER do not reach the required results as might happen, for example, with the adoption or the amendment of network codes (see Art. 6 of Regulation 714/2009 and Art. 6 of Regulation 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks [2009] DO L 211/36). For an in-depth assessment see J.E. Soriano, 'The Internal Gas Market according to the Law of Competition. Provisions of the Community's Third Package', EEELRev. August 2010, p. 175, pp. 184-193.

[21] See Art. 35 of Directive 2009/72/CE (electricity) and Art. 39 of Directive 2009/73/CE (gas).

22 See P. Lowe, 'Making Energy Markets in Europe work better', Brussels, 26 November 2009, <ec.europa.eu/competition/speeches/text/sp2009_18_en.pdf> visited 27 July 2011.

23 See Communication from the Commission - A pro-active Competition Policy for a Competitive Europe, COM/2004/0293 final, p. 18; Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors, COM(2006)851 final. See also P.D. Cameron, *supra* n. 13, pp. 279 ff.

24 Case COMP/39.351 – Swedish Interconnectors, [2010] OJ C 142/28. For a detailed analysis see A. De Hauteclocque and L. Hancher, 'The Svenska Kraftnät case: introduction of bidding zones in Sweden', Network Industries Quarterly, vol. 13, n1 1, 2011, pp. 20-22.

underinvestment that leads to foreclosure of energy markets and harms competition.[25] It has also applied Article 101 TFUE (previously Article 81) to deal with collusive conduct between incumbents such as, for example, market sharing.[26] Further, the Commission uses its powers to control mergers with an EU dimension to help preserve incipient competitive market structures in the energy sector.[27] Finally, it also ensures that illegal State subsidies do not distort competition of these markets.[28] In short, the enforcement of EU Competition Law is an essential part of the Commission's agenda to build a competitive internal market in the energy sector.[29]

Likewise, the Spanish Competition Authorities, in particular the Comisión Nacional de la Competencia (*National Competition Commission*, hereinafter CNC) and formerly the Tribunal de Defensa de la Competencia (*Defense Competition Tribunal*, hereinafter TDC), have pursued an active application of EU and national competition law to the energy markets as explained below.

As 'the liberalisation of the EU energy markets – through legislation and competition enforcement action- is an ongoing process', in the current state of the energy markets in Europe –where important barriers to competition still remain- strong and pro-active enforcement of EU and National Competition will continue to play an essential role.[30] Nonetheless 'Competition rules apply *ad hoc*, and *ad hoc* solutions cannot offer an all-encompassing solution to structural market failures'.[31] Hence both, diligent implementation of the Third Energy Package and robust and coordinated enforcement of EU and National Competition Law by the EU Commission, NCAs and NRAs, are essential to create the necessary synergies for the promotion of internal energy markets.

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25 See, e.g., Case COMP/39.386 — Long Term Electricity Contracts France, [2010] OJ C 133/5; Case COMP/B-1/37.966 — Distrigaz, [2008] OJ C 9/8; and Case COMP/39.315 — ENI, [2010] OJ C 352/8.

26 See e.g. Case COMP/39.401 — E.ON/GDF, [2009] OJ C 248/5–6.

27 See, e.g. Case COMP/M.4180 GDF and Suez [2007] OJ L 88/47 and Case COMP/M.3696, E.ON and MOL [2006] OJ L 253/20. For an in-depth analysis see P.C. Cameron, *supra* n. 13, pp. 368 ff; G. Federico, 'The Competition Effects of Energy Mergers: Economic Analysis in Europe and Spain', IESE Business School, Occasional Paper, OP-185, February 2011, pp. 3-10, <www.iese.edu/research/pdfs/OP-0185-E.pdf> visited 30 May 2011; for a critical assessment see G. Ariño, 'Problemas de competencia en los sectores energéticos', in M. Serrano and M. Bacigalupo, *Cuestiones actuales del Derecho de la Energía* (CNE-Iustel 2010) p. 146-160.

28 Particularly noteworthy is the investigation procedure on the regulated electricity tariffs in Spain and in France that the Commission carried out in 2007. See State aid Nº C 3/07 – Regulated electricity tariffs in Spain – Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, [2007] OJ C 43/9.

29 See P. Lowe, *supra* n. 22 pp. 6 ff.; G. Federico, 'The Spanish Gas and Electricity Sector: Regulation, Markets and Environmental Policy', IESE Business School, Reports of the Public-Private Sector Research Center 5, November 2010, pp. 11-13.

30 See P. Lowe, *supra* n. 22 p. 12.

31 S. Andoura, L. Hancher and M. Van der Woude, 'Towards a European Energy Community: a policy proposal', Notre Europe, Studies & Research, 76, 2010, p. 35.

3. In this context, what is the position of your Member State with respect to enforcement of Competition Law (EU and national) in the energy sector, whether by sector-specific NRAs, by NCAs or a combination of the two?

Spanish law has given the national competition authority, the CNC, a predominant role in the enforcement of Competition Law (EU and national) in specific regulated sectors such as energy, but it has established coordination mechanisms with national regulatory authorities in order to supervise these markets. The Spanish legislator opted for this approach with the object of safeguarding the consistency of competition policy, efficiency in the allocation of public resources, and the legal certainty of the incumbents.[32] According to Ley 15/2007 de Defensa de la Competencia (*Competition Act 15/2007*)[33], the body responsible for applying Competition Law in Spain to promote and protect effective competition in all production sectors and throughout the national territory is the National Competition Authority (CNC).[34] Recent Ley 2/2011 de Economía Sostenible (*Sustainable Economy Act 2/2011*)[35], which partially transposed the Third Energy Package legal requirements concerning NRAs, has clarified that the national energy sector regulator's aim is 'to preserve and promote a higher degree of effective competition and transparency' in this sector but 'without prejudice to the National Competition Commission competence'. [36]

Thus, the national regulatory authority, the CNE, has investigative powers in order to ensure that energy undertakings act in total accordance with the principles of free competition, although when it detects practices which might be in breach of the Competition Act 15/2007 (either collusive conduct or, mainly, abuses of dominant positions)[37] its task is limited to informing the CNC, and to issuing a non-binding but 'determinative' opinion on the impact of such practices in the energy market –which means that any subsequent final decision taken by the CNC on the issue may only

32 See Explanatory Statement of Competition Act 15/2007.
33 BOE nº 159 of 4 July, 2007.
34 Art. 12 of the Competition Act 15/2007. The CNC substituted both the former *Tribunal de Defensa de la Competencia* (TDC) and *Comisión de Defensa de la Competencia* (CDC), which were regulated by Competition Act 16/1989 (repealed by the Competition Act 15/2007)
35 BOE nº 55, 5 March 2011.
36 Eleventh Additional Provision, One, point 2, Hydrocarbons Act, as amended by Art. 10 of the Sustainable Economy Act 2/2011, 4 May 2011, BOE nº 55, 5 March 2011.
37 In the exercise of its functions, the CNE receives complaints regarding market behaviour which can infringe Competition law, such as obstacles to third parties' access to the distribution networks, unfair practices in the capture of customers for the deregulated market, discriminatory treatment in the access to the distribution network, application of discriminatory prices, incidents in the change of supplier procedure. See CNE, 'Spanish Regulator's Annual Report to the European Commission – 2008', 18 July, p. 97 2008, <www.cne.es/cne/doc/publicaciones/PA011_08.pdf> visited 30 May 2011.

dissent from the opinion of the CNE if it is duly reasoned-.[38] As to the economic concentration of undertakings in the energy market the CNE participates in the authorization procedure also delivering 'determinative opinion' to the CNC[39]. However, the final decisions on mergers are taken either by the CNC or by the Government according to the procedure establishes in the Competition Act.[40]

The CNC –and, before the Competition Act 15/2007, the former *Tribunal de Defensa de la Competencia*- has been active against different forms of abuse of dominant position and collusive conduct[41], and it has also played a central role in controlling mergers and takeovers in the electricity and gas market that do not have a community dimension.[42] On the other hand, the exceptional powers granted to the CNE to authorise stakes acquisitions and takeover bids in the energy sector –the so-called 'function fourteen'- has turned out to be particularly problematic as the *Endesa* saga showed.[43]

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38 Hydrocarbons Acts, Eleventh Additional Provision, Three, function twelve.

39 Art. 17 of the Competition Act 15/2007 and Eleventh Additional Provision, function fifteen, of the Hydrocarbons Acts (as amended by the Sustainable Economy Act 2/2011).

40 Articles 55 to 60 of the Competition Act 15/2007. See further M. Bacigalupo Saggese and J.A. Fuentetaja Pastor, 'Reguladores nacionales y europeos en el Mercado interior de la electricidad. La futura Agencia de Cooperación de Reguladores de la Energía', in J. Guillen et all., *Derecho de la Competencia y Energía Eléctrica* (Cívitas-Thomson, 2009), pp. 197 ff.

41 For example, it has imposed sanctions on electricity distributors for exclusionary conduct in the retail electricity market consisting in withholding commercial information from a downstream competitor (e.g. CNC, *Resolución del Expediente 641/08 Centrica/Endesa*, 2 April 2009); it has also adopted several decisions against incumbents which were fined for allegedly having distorted the price of electricity in the wholesale electricity market when they were called to produce in areas with transmission congestion –the so called '*restricciones técnicas*'- (e.g. *Resolución TDC 552/02 Empresas eléctricas*, 7 July 2004; *Resolución TDC 602/05 Viesgo Generación*, 28 December 2006; and *Resolución 601/05 Iberdrola*, 8 March 2007; although the Spanish Supreme Court, in its Judgment of January 2010, annulled the sanctions imposed on these undertakings by the former Tribunal de Defensa de la Competencia, as it found that the prices set by these undertakings were justified on the grounds of the costs that they incurred when providing congestion relief services). More recently, it has imposed important sanctions to energy incumbents for alleged collusive conduct to hinder the change of retailer to small consumers and for fixing prices and service conditions (*Resolution CNC S/0159/09 UNESA*, 13 May 2011).

42 Since 2006 two major transactions have been reviewed by the Spanish competition authorities: the *Gas Natural/Endesa* deal (which was abandoned due to the very strict approach and ambitious remedies demanded by the national merger authorities) and the *Gas Natural/Unión Fenosa* deal (which was approved in 2009 by the CNC). See, CNE, 'Informe sobre la evolución de la competencia en los mercados de gas y electricidad, Periodo 2007-2009', pp. 10 ff., http://www.cne.es/cne/doc/publicaciones/PA-competencia-011.pdf, visited 15 September 2011. For a general overview see M. Cuerdo Mir, 'Defensa de la competencia y control de concentraciones en mercados eléctricos en España', in J. Guillen et all., *supra* n. 40, pp. 23-45. For an in-depth analysis of the more recent decisions on mergers taken by the CNC see G. Federico, *supra* n. 27, pp. 11-24. For an account of former cases see E. Garayar, 'Spain', in PD Cameron (Ed.), *Legal Aspects of EU Energy Regulation: Implementing the New Directives on Electricity and Gas across Europe* (Oxford University Press, 2005) p. 342.

43 Hydrocarbons Acts, Eleventh Additional Provision, function 14th, amended by Royal-Decree Law 4/2006. CNE's function fourteen was originally designed to enable this regulatory agency to control investments made by energy companies operating in regulated sectors with the main goal of guaranteeing security of energy supply and other national 'general interests within the energy sector'. When E.ON launched a takeover bid for Spanish utility Endesa, the Spanish Government enacted Royal-Decree 4/2006 which modified this function to require authorizations also for stakes acquisition over 10% of capital stock, or any other that resulted in a significant influence, made by ordinary (non-regulated) energy companies. This system of prior authorisation allowed the CNE to impose conditions on mergers

Although the regulatory and competition authorities have different legislative mandates and employ different approaches, their perspectives on competition policy and sector regulation can be a source of friction.[44] In Spain, however, as the CNE itself has declared, 'The CNE's jurisdiction does not overlap with that of any other government agencies. What do exist are complementariness and a spirit of co-operation'.[45] There have not been, certainly, any significant overlapping problems between the CNE and the CNC as there have been in other sectors, such as telecommunications.[46] This is mainly due to the combined effect of the more modest powers granted to the CNE (as up to now the CNE has had very limited executive and enforcement powers to fulfil its aim of promoting competition in the sector)[47] and of the clear pre-eminence granted to the CNC in the implementation and enforcement of Competition Law. However, the implementation of some provisions of the Third Energy Package might have as side effects a new balance of powers among the national competition and regulatory authorities. The new powers that should be granted to the CNE to comply with the Third Energy Package may make it necessary in the future to clarify further certain intersection areas of their jurisdiction.

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having a Community dimension (as in fact it did in the case of E.On's takeover of Endesa, in spite that it had been previously authorised by the EC Commission). The EC Commission started two infringement proceedings against Spain that gave place to two ECJ judgments: in Case C-196/07 (ECJ 6 March 2008, *EC Commission* v *Spain*) the ECJ declared that Spain had failed to comply with the Commission's decisions in which this institution found that the majority of the conditions imposed on E.ON's takeover of Endesa were incompatible with Community law and should be withdrawn; in Case C-207/07 (ECJ 17 July 2008, *EC Commission* v *Spain*) the ECJ ruled that the amendment introduced by the Royal Decree-Law 4/2006 in function fourteen of the CNE infringed Art. 43 EC (freedom of establishment and freedom to provide services) and Art. 56 EC (free movement of capital). The wording of the CNE's function fourteen was finally amended by the *Sustainable Economy Act* to comply with the ECJ rulings: currently the stakes acquisition of over 10% of capital stock –or any other that resulted in a significant influence- by EU companies of energy companies involved in regulated activities will not require the CNE's previous authorization, but only a mere communication to this agency. For an in-depth analysis of the CNE's function and the ECJ Case law see G. Ariño Ortiz, 'Intervención del Estado en las operaciones corporativas: la Función 14ª de la CNE', in S. Muñoz Machado et. al, *Derecho de la regulación económica. III. Sector Energético*, Tomo I (Iustel 2010) pp. 160-200. See also, for a critical assessment of the ECJ Judgment, C. Padrós and E. Cocciolo, 'Security of Energy Supply: When could national policy take precedence over European Law, 31 Energy L.J. (2010), p. 31-54.

44 As the Commission's Green Paper on services of general interests noticed, the responsibilities of competition and regulatory authorities usually overlap to an extent. See EC, Green paper on services of general interest, COM/2003/0270 final, p. 48.

45 CNE, 'Spanish Regulator's Annual Report to the European Commission', 26 July 2006, p. 7; CNE, *supra* n. 37 p. 13;

46 In this sector, due to certain unclear provisions of former Ley 11/1998 General de Telecomunicaciones (1998 Telecommunications Act) that granted powers to the National Telecommunications Commission (CNT) to protect competition in this sector, there were important overlapping problems and conflicts of jurisdiction with the national competition authorities which ended up with several cases being adjudicated in the Spanish Supreme Court. See M. Bacigalupo Sagesse, 'La coordinación y delimitación de funciones entre las autoridades de defensa de la competencia y el regulador sectorial energético', in S. Muñoz Machado et. al, *supra* n. 43, pp. 130 ff.

47 E.g., the CNE does not have the power to address binding decisions to the incumbents, nor sanction powers. On the contrary, the National Telecommunication Commission has always have those powers.

4. With respect to NRA roles, powers and duties, are there any peculiarities or difficulties in the position of your Member State (for example, limiting or promoting cooperation with other Member States' NRAs or with respect to the EU Network of Competition Authorities)?

Hitherto, the CNE has exercised a wide range of powers (among which the powers to issue regulatory circulars and authorisations regarding stakes acquisitions and takeover bids in energy sector companies are particularly relevant).[48] Although in some respects Spanish regulation on the legal status, organization and powers of the CNE could be considered to be already in line with the Third Package[49], it needs to be updated to fully comply with the provisions of the new directives with regard to the duties and competences that have to be assigned to the national regulatory authorities. As the CNE itself has requested, this is necessary due not only to the new international dimension of its tasks (and, in particular, to the duty of cooperating with other NRAs at both regional and EU level, which requires it to grant competences on cross-border regulatory issues[50]), but also to the general tasks entrusted by the EU Directives to the NRAs.[51] These entail the conferral of certain powers which the CNE still lacks, such as the power to issue binding decisions on electricity undertakings, the power to implement any relevant legally binding decisions of ACER and of the Commission, and the power to impose effective, proportionate and dissuasive penalties on natural gas/electricity undertakings (as so far the power to impose penalties is vested in the Ministry of Industry, Trade and Tourism).[52]

The process of adapting Spanish regulation to the Third Energy Package started with Ley 2/2011 on Sustainable Economy[53]. This Act has improved the independent status of all NRAs in Spain and has also added new competences to the CNE in line with the

48 Eleventh Additional Provision of the Hydrocarbons Act, Tree, functions number 6, number 7 and number 14, respectively. See, for a brief account of its powers E. Garayar, *supra* n. 42, p. 340-341.

49 For example, as regard its legal status, assets and full capacity to act (Eleventh Additional Provision of the Hydrocarbons Act, Two). See in this regard CNE, Informe sobre las implicaciones derivadas de la aprobación de la nueva normativa comunitaria en materia de energía y medio ambiente, 22 June 2010, pp. 23, 111 < http://www.cne.es/cne/doc/publicaciones/cne94_10.pdf>, accessed 30 May 2011

50 The CNE has repeatedly requested such competence in its reports as otherwise it is not able to agree and adopt common decisions on interconnections' regulation with its neighbouring regulators. See, for example, CNE, 'Informe sobre las implicaciones derivadas de la aprobación de la nueva normativa comunitaria en materia de energía y medio ambiente', 22 June 2010, p. 50, < http://www.cne.es/cne/doc/publicaciones/cne94_10.pdf>, visited 30 may 2011; CNE, 'Informe 18/2011 sobre el anteproyecto de Ley por el que se modifica la Ley 54/1997 del sector eléctrico', 3 June 2011, < http://www.cne.es/cne/doc/publicaciones/cne58_11.pdf>; CNE, *supra* n. 17, p. 16.

51 Arts. 35-37 of Directive 2009/72/EC (electricity) and Arts. 30-41 of Directive 2009/73/CE (gas).

52 See in this regard CNE 2010, *supra* n.49, p. 25.

53 Articles 8 to 26 of Ley 2/2011 de Economía Sostenible, BOE Nº 55, 5 March 2011.

Third Energy Package.[54] First, regarding the strengthening of the CNE's independence, it should be notice that until the enactment of Act 2/2011 those affected by the decisions adopted by the CNE had to appeal them to the Minister of Industry, Tourism and Trade before having access to justice. In order to reinforce the independence of NRAs, this right to appeal has been suppressed by Act 2/2011 on Sustainable Economy and, therefore, undertakings may appeal the CNE' decisions directly before the judiciary (Contentious Administrative Courts).

As to its tasks, Article 23 of Act 2/2011 provides that, in order to contribute actively to the achievement of the single market and to the international economic system, 'NRAs, shall regularly and periodically promote contacts, collaboration and coordination with the NRAs of the other Member States, the European Commission, and another States'. However, this general provision does not grant the CNE any new specific powers to that effect. As a matter of fact, at the time of writing these words, Spain has not yet adopted the main legislative measures that are still necessary to fully transpose the Third Package Directives -failing, therefore, to meet the transposition deadline-. It was not until 15 July 2011 when the Government presented in Parliament two Bills to adapt the Electricity Act and the Hydrocarbon Act to the new EU Directives, but the dissolution of the Spanish Parliament due to the November 2011 general elections brought a halt to the transposition process, and both Bills expired without having been approved.[55]

5. Considering that exemptions from the regulatory regimes for gas and electricity are permitted, what safeguards are in place at the Member State level for protecting 'process' rights such as the right to be heard and access to justice, and which national bodies are responsible in ensuring that these rights are respected?

54 Thirty Third Final Provision (Disposición Final Trigesimotercera) of Act 2/2011 amending Eleventh Additional Provision (Disposición Adicional Undécima) of the Hydrocarbon Sector.

[55] The Bill proposed to amend Act 54/1997 of the Electricity Power Act in order to adapt it to Directive 2009/72/CE (electricity) added as 'general aims' of the CNE, among other the tasks, 'Promoting, in cooperation with ACER, the NRAs of other States, and the European Commission, a competitive, safe and environmentally sustainable internal electricity market, the effective opening of the market to all consumers and EU retailers, and to ensure adequate conditions for the effective and reliable functioning of electricity Networks in the long term". It also establishes the institutional arrangements for the CNE to participate in the organization of ACER and to collaborate on cross-border issues with ACER and other NRAs. To that effect, the Bill gave the CNE powers to sign cooperation agreements with other NRAs. Further, it assigned to the CNE the task of implementing and complying with ACER decisionsFinally, the Bill also intended to confer on the CNE powers to impose penalties on natural gas/electricity undertakings (see Articles 6 and 7 of the Bill).

The Third Energy Package allows Member States to authorise exemptions from the regulatory regimes for gas and electricity.[56] So far, Directive 2009/73 (Gas) has not been transposed into Spanish Law, and current Article 70 of the Hydrocarbon Act only establishes that, by way of exemption, certain new facilities, or facilities entailing significant increases in capacity for existing infrastructures, may be excluded from the third-party access obligations. Although it also envisages that a regulation will be enacted to govern the authorisation procedure for these exemptions, this provision has still not been implemented by any subsequent regulation. On the contrary, the expired Bill of 15 July 2011 to adapt the Hydrocarbon Act to the Third Energy Package, did include a new Article 71 in the Hydrocarbon Act devoted to regulating in detail the conditions and procedure to be followed by the Ministry of Industry and the CNE to grant exemptions from the third-party access obligation following Article 36.9 of Directive 2009/73.[57] The exemption would eventually have been given by the Minister of Industry after informing the EU Commission. As there are no specific provisions regulating the exemption procedure in force yet, the general provisions of the Ley 30/1990 de Régimen Jurídico de las Administraciones Públicas y de Procedimiento Administrativo Común (*Act on the Common Administrative Procedure*) will apply[58]. This Act stipulates the minimum guarantees that citizens shall enjoy when affected by administrative action. Thus, it sets out rights addressed to improving citizens' participation in Administrative procedures, such as the right to bring pleas and submit documents at any stage of the proceeding prior to the hearing, and regulates procedural rights that aim to bring transparency into administrative action, such as the right to identify the authorities and officials responsible for conducting the proceedings, the right to know at any time about the state of the proceeding in which a citizen intervenes as an interested party, and the right of access to information in administrative files and registers and the right to receive information and guidance.[59] Energy incumbents that apply for exemption from the regulatory regimes for gas and electricity according to the Third Energy Package will also have access to justice for the protection of those

[56] Art. 36 of Directive 2009/73 (Gas) and Article 17 of Regulation 714/2009 Regulation (EC) No. 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity [2009] OJ L 211/35.
[57] See the Bill to amend Ley 34/1998 of the Hydrocarbons Sector to adapt it to Directive 2009/73/CE, Single Article, Point Forty Three.
[58] BOE nº 285, 27 November 1992.
[59] Art. 35.

procedural rights according the *Ley 29/1998 de la Jurisdicción Contencioso-administrativa* (Administrative Jurisdiction Act).[60]

6. Are the latest proposals (COM (2010) 726) on market abuse in the energy sector likely to present challenges for the NRAs whether in their sole capacity or as a hybrid with national financial regulatory bodies at Member State and/or EU level?

In Spain the supervisory agencies of the Iberian Electricity Market (MIBEL) are the National Energy Commission (CNE) and the National Stock Market Commission (CNMV).[61] Both have to cooperate in the exercise of their functions to supervise the auctions of primary energy emissions in the OTC market (Over The Counter), in line with the draft Regulation of the European Commission on Integrity and Transparency of Energy Markets (the so-called 'REMIT' Regulation), in order to enable both to have an overview of the markets concerned.

Until recently, the CNE has had limited access to information over OTC power transactions (volumes and transaction prices, through the information voluntarily submitted by the main brokers).[62] Recently, the 2011 Sustainable Economy Act amended the Securities Market Act[63] to enable the exchange of information between CNMV and the entities composing the MIBEL Regulatory Council.[64] Furthermore, in order to enhance cooperation and coordination among the Spanish and Portuguese national regulatory authorities and financial market regulators, the four members of the MIBEL Regulatory Council have signed, on 17 May 2011, a Multilateral Memorandum of Understanding (MoU) for cooperation and efficient coordination in MIBEL supervision, permitting coordinated OTC supervision and facilitating data collection among others.[65] On the other hand, the fact that the supervision of the financial contracts traded in the OTC market is also under the scope of Directive 2004/39/EC[66] and, in Spain, under the scope of Ley 24/1988 del Mercado de Valores (*Market*

[60] BOE nº 167, 14 July 1998. See in particular Art. 19 (*locus standi*) and Art. 71 (the content of the judicial decisions).
[61] Art. 10 of Santiago Agreement.
[62] See CNE, *supra* n. 17, p. 44.
[63] See 5th final provision of Act 2/2011 on Sustainable Economy.
[64]The MIBEL Regulatory Council is composed of CNE, CNMV, Entidad Reguladora de los Servicios Energéticos (ERSE, Portuguese National Regulatory Authority) and CMVM (Portuguese Financial Services Authority). See www.mibelcr.com.
[65] Memorando de Entendimiento entre la CMVM, CNE, CNMV y ERSE para la cooperación y coordinación eficaz de la supervisión del mercado eléctrico, <www.mibel.com/uploads/documentos/documentos_MOU-espanol_8a48671d.pdf.>, visited See also CNE, *supra* n.17, p. 44.
[66] Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments, [2004] OJ L 145/1.

Securities Act)[67] –due to the fact that they qualify as financial instruments- gives the CNMV a particularly important role to this end. This could trigger potential inconsistency or overlapping in the application of REMIT if close and efficient cooperation among both agencies is not established.[68]

B. Promotion and Subsidy of Renewable Energy

7. Are Directive 2009/28/EC and the purely national subsidy schemes and national Renewable Sources (RS) consumption targets it perpetuates fully compatible with principles and rights established in the Treaty, as interpreted by the Court? For example, does the preclusion of the exchange of instruments evidencing renewable power output between suppliers and generators in different Member States, as a means of proving compliance with minimum renewable electricity consumption quotas or earning feed-in tariffs, interfere with internal trade and distort competition in the electricity market?

Support schemes to promote renewable energy remain mainly national under the revised Directive 2009/28/EC[69] (hereinafter RES Directive) in spite of the fact that 'a greater convergence of national support schemes to facilitate trade and a move towards a more pan-European approach to development of renewable energy sources must be pursued', as the EU Energy Strategy notes.[70] It has been argued that national renewable energy consumption targets coupled with purely national support schemes are at odds with the free movement of goods and undistorted competition in a liberalised energy market.[71] In particular, as long as national support schemes remain separate the view that they could be undermined by a system of Guarantees of Origins trade between private markets actors impedes cross-border trade and competition between power generators.[72] However, as this Directive is framed within the EU policies 'of combating climate change, reducing greenhouse gas emissions, achieving sustainable development,

[67] BOE Nº 181, 20 January 1988 (as amended by Law 47/2007, 19 December, 2007, and Law 5/2009, 29 June 2009, of the Securities Market).
[68] See CNE Press Release, 26 January 2011, p. 5 <www.cne.es/cne/doc/prensa/np_26012011.pdf> visited 17 July 2011.
69 Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources [2009] OJ L 140/16.
70 Communication from the Commission, 'Energy 2020: A strategy for competitive sustainable and secure energy', COM(2010)639/3 p. 10.
71 See, among others, D. Wilsher, 'Reducing Carbon Emissions in the Electricity Sector: a Challenge for Competition Policy Too? An Analysis of Experience to Date and Some Suggestions for the Future', 6 The Competition Law Review (2009) p. 31 at p. 32. See also EFET, 'Effective integration of renewable energy in the European power market', EFET Position Paper, December 2010, p.5 <www.recs.org/uploads/RES-E_position_final.pdf>, visited 30 July 2011.
72 See D. Wilsher, *supra* n. 71. See also C. Klessmann, 'The evolution of flexibility mechanisms for achieving European renewable energy targets 2020 –ex-ante evaluation of the principle mechanisms?', 37 Energy Policy (2009) p. 4966, at p. 4967.

ensuring energy security and realising the Lisbon Strategy'[73], especial attention should be paid to the EU environmental principles and –in particular to the polluter pays principle[74] and to the principle of the integration of environmental protection requirements into the definition and implementation of other Community policies[75]- for an overall appraisal. Furthermore, the principle of proportionality is crucial to assess the compatibility of any support system with the provisions of the internal market as explained below.

8. More specifically, would the Court's decision in the case of *Preussenelektra* still be valid in 2012, given both the substantial expansion of wind and solar power generation output, and the maturing of the EU liberalised markets in power and gas, in the meantime?

The polluter pays principle (PPP), one of the fundamentals of EU environmental law, plays a pivotal role in the conflict between subsidy schemes and competition and, in particular, with regard to the principle of the incompatibility of State aid. According to ECJ case law, the PPP precludes persons and undertakings from taking on the burden of remedying pollution to which they have not contributed.[76] In addition to the function of allocating costs fairly, the PPP also fulfils an incentive function and creates synergies with another important principle of environmental law, the principle of prevention.[77] As long as producing energy with fossil fuels does not internalize the environmental and social costs that it entails, there will be a market failure that contributes to the competitive disadvantage of renewable sources of energies. As the Commission states in its 2008 Guidelines on State aid for environmental protection, 'Full implementation of the PPP would thus lead to correction of the market failure'.[78] But its application to non-clean energies would entail a price increase of this essential commodity that (some) national governments (and societies) might not be ready to assume.[79] In this scenario, although the renewable energy sector has experienced continued growth in recent years, as long the PPP is not fully implemented 'State aids is in fact a second-best option'[80] to

73 EU Commission, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM(2008) 30 final.
74 Art. 191(2) TFEU.
75 Art. 11 TFEU.
76 Case C-293/97 *Standley* [1999] ECRR I-2603; Case C-402/09, *Ioan Tatu*, 7 April 2011 n.y.r.
77 See Opinion of Advocate General Kokot delivered on 22 October 2009, Case C-378/08 *Raffinerie Mediterranee SpA* (ERG).
78 Para. 8.
79 On the failure of the EU Emission Trade System to price emissions adequately see D. Wilsher, *supra* n. 71, p. 43.
80 See, Community Guidelines on State Aid for Environmental Protection, (2008) OJ C 82/1, para. 24.

giving support to clean producers in order to compensate both the competition desadvantages they suffer and their contribution to sustainable development (the positive externalities that renewable energies have for society).[81]

As to the principle of incompatibility of State aid with the internal market and exemption from it**,** one of the most successful support systems to compensate the competitive disadvantage of renewable energies so far, the 'feed-in tariffs' –used by many EU sates, such as Spain, since Germany pioneered it the early 90s-, has escaped from the scope of Article 107 TFEU[82]. In a landmark decision in *PreussenElektra* the European Court did not follow the Commission's opinion that such price guarantees as were offered by the German system amounted to State aids[83]. More recently, in the *Dutch NOX* case[84], the Court has reiterated that only advantages granted directly or indirectly through State resources can constitute aid under that provision. In this latter case, dealing with the grant by the Dutch State of NOX tradable emission permits free of charge to a specific group of undertakings, the ECJ considered that there was 'a sufficiently direct connection between the measure in question [the free emission tradable permits] and the loss of revenue [by the State], a link which did not exist between the imposition of the obligation to purchase and the possible diminution in tax receipts at issue in the case which led to the judgment in *PreussenElektra*'.[85]

On the other hand feed-in tariffs such as those laid down in German Law -which imposed the obligation to purchase renewable energy sources at minimum prices within the respective supply area of each undertaking concerned- are capable, at least potentially, of hindering intra-Community trade. As a matter of fact, such purchase obligations should be regarded as a measure having an effect equivalent to a quantitative restriction on imports within the meaning of former Article 30 of the Treaty (currently Article 34 TFEU) and would therefore be prohibited unless they can be duly justified on the facts on grounds of environmental protection.[86] However, in *PreussenElektra* the Court took into account, on the one hand, the aim of the feed-in tariff scheme (the protection of the environment) and the principle of integration of environmental protection requirements into the definition and implementation of other

81 See recital 26 RES Directive.

82 As to the application of this principle in the field of EU Environmental Law see J. Jans and H.H.B. Vedder, *European Environmental Law* (Europa Law Publishing 2008) pp. 287-298.

83 See further J. A. Winter, 'Re(de)fining the notion of state aid in Article 87(1) of the EC Treaty', 41 CMLR (2004), p. 475, p. 30.

84 Case C-279/08, *Commission v. The Netherlands*, 8.9.2011, n.y.r.

85 Para. 111.

86 See Opinion of Advocate General Jacob in Case C-379/98, PreussenElektra, deliver on 26 November 2006, para. 199.

Community policies as enshrined in former Article 6 EC in order to interpret former Article 30. Besides, it considered that in that phase of the electricity market liberalization process EC directives had left 'some obstacles to trade in electricity between Member States in place'. This led the Court to declare that legislation such as the German *Stromeinspeisungsgesetz* was not incompatible with former Article 30 EC.[87] In this context, the principle of proportionality is crucial to assess the compatibility with the Treaty, on grounds of environmental protection goals, of both State aid measures[88] and quantitative restrictions (or measures having the equivalent effect) on imports or exports of renewable energy (as the protection of the environment is one of the imperative requirements which may impose limits to the free movements of goods).[89] As the electricity market evolves towards a bigger share of renewable energies, it will have to be assessed, case by case, to what extent the existing restrictions to free movement and competition are proportionate with regard to the environmental aim that they pursue, in the sense that no alternative measures with a minor impact on the market shall be available to achieve the end of increasing renewable energy production.

9. Are there notable features of your Member State's implementation of the RES 2009 Directive that present challenges and difficulties with respect to cross-border cooperation, if they are provided for at all (joint projects, for example, whether between governments and their authorities or between private parties, and statistical transfers under the Directive)?

In Spain, which can be considered as one of Europe's leading countries for renewable energies[90], the 1997 Electricity Act integrated electricity generation under 50 MW incorporating renewable energies into the so-called Special Regime (formerly regulated by Royal Decree 2366/94). In order to promote the production of renewable energy, it has guaranteed grid access to special regime installations and provides the basis for the

87 Para. 81.

88 See 2008 Community Guidelines on State Aid for Environmental Protection, pp. 7 ff.

89 In *PreussenElektra* the Advocate General eventually concluded that the limitation of the purchase obligation of electricity produced in Germany did not seem proportionate, and therefore it was in breach of the provisions on free movement of goods as, in his opinion, electricity from renewable sources produced in another Member State could also contribute to the reduction of gas emissions in Germany to the same extent as electricity from renewable sources produced in Germany.

90 See Commission Staff Working Document, 'Review of European and national financing of renewable energy in accordance with Article 23(7) of Directive 2009/28/EC Accompanying document to the Communication from the Commission to the European Parliament and the Council 'Renewable Energy: Progressing towards the 2020 target', p. 3, < eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011SC0131:EN:HTML:NOT>, visited 15 June 2011. See further F. Julien and M. Lamla, 'Competitiveness of Renewable Energies: Comparison of Major European Countries', European University, Viadrina Frankfurt (Oder) Department of Business Administration and Economics, Discussion Paper No. 302, June 2011, p. 12.

economic regime and generation guidelines. This is based on a feed-in-tariff support system currently implemented by Royal Decree 661/2007 which regulates the activity of production of electricity in the special regime (*Royal Decree 661/2007*)[91] according to which owners of renewable installations may choose, for periods of at least one year, between two remuneration options: a guaranteed feed-in tariff and a guaranteed bonus (premium) paid on top of the electricity price achieved on the wholesale market.[92] Furthermore, this scheme, which has proven effective in the development of renewable electricity sources in Spain, provides for adjustment mechanisms, set for each technology, to reduce support over time as the market develops.[93]

At the time of writing this report, Spain has not yet fully transposed Directive 2009/28/EC into Spanish law, which might affect cross-border cooperation. The second renewable energy directive is meant to be implemented through three different

91, BOE nº 126, 26 may 2007.

92 It acknowledges the right of producers under the special regime to transfer to the system, through the electricity distribution or transmission company as appropriate, their net energy production or sales, provided that it is technically possible for the grid to absorb it. Moreover, they also benefit from some tax advantages: investments in systems and equipment required for the generation of electricity from renewable sources may be deducted from tax.

93 Recently the Spanish Government has introduced highly controversial measures limiting the time that photovoltaic installations could benefit from regulated tariffs: (i) Royal Decree 1565/2010, of 19 November, which set a 25 year limitation in the period for which this type of installations may benefit from the feed-in tariffs under RD 661/2007; (ii) and, a few days later, Royal Decree-Law 14/2010, of 23 December, adopting urgent measures to correct the tariff deficit in the electricity sector, which established a new limitation on the remuneration regime of photovoltaic installations (a production cap that limits the maximum annual number of hours of operation on a regional scale for plant registered according to RD 661/2007). Afterwards, the 2011 Sustainable Economy Act introduced some amendments trying to mitigate partially the legal uncertainty already provoked by these measures (see Forty Fourth Final Provision). These regulations have been contested by many photovoltaic producers on the grounds that they infringe the principle of legal certainty and undermine legitimate expectations based on former legislation whereby a certain price was guaranteed for a certain period of time (investors have challenged RD 1565/2010 as illegal before the Supreme Court and before International Arbitration Courts as well; on this issue see M. Bacigalupo, 'El respeto al principio de seguridad juridical en la regulación del régimen retributivo de las energías renovables', *Otrosi*, nº 6, 2001, p. 11 ff). Furthermore, the EU Commission has expressed its concern to the Spanish authorities as this institution considers that they could have an adverse effect on renewable energy production as they undermine investors' trust (letter sent to by the Commission to the former Spanish Ministry of Industry in <ec.europa.eu/commission_2010-2014/oettinger/headlines/news/2011/03/doc/letter_sebastian_es.pdf>, visited 15 June 2011). Overall, these measures are considered to 'counteract the development of the PV sector' as these retroactive steps are 'severely jeopardising the long term security of support' (see M. Ragwn, G. Resch, S. Busch, F. Rudolf, D. Rosende, A. Held, G. Schubert, Assessment of National Renewable Energy Action Plans - REPAP 2020, Fraunhofer ISI and Technical University of Vienna / EEG, 14 March 2011, p. 75; F. Delgado Piqueras, 'Toward a European regulatory scheme for the promotion of green power: Ensuring energy supply, environmental protection and sustainable development', Paper in process of publication in *European PublicLaw*). Furthermore, this problem is also related to another important source of insecurity, the so called Spanish 'electricity tariff deficit' which is due to the fact that electricity prices fixed by the government during the last decade did not cover the real cost of electricity production and system costs. This created a huge mismatch between real costs and income of the overall electricity system that at the end of 2009 amounted approximately to 15 billion € (see CNE, *supra* n. 17, p. 14; see also M. Marañón y A. Morata, 'Tariff deficit in retail electricity markets in Spain', 13 *Network Industries Quarterly* (2011), pp. 23 ff.). Royal Decree-Law 14/2010 was adopted precisely as 'urgent measures to correct the tariff deficit in the electricity sector'. However, this problem should be sorted out without putting at risk the investment security for renewable energies.

instruments: the enactment of the 2011 Sustainable Economy Act, the enactment of a new Energy Efficiency and Renewable Energies Act, and the approval of a new Renewable Energy Plan from 2011 to 2020. The Sustainable Economy Act has already established the minimum mandatory targets for the use of energy from renewable sources as required by the new Directive and also enshrines the principles that should rule the national support mechanisms in order to achieve such targets and ensure its sustainability.[94] Further, it also foresees the enactment of a new Energy Efficiency and Renewable Energies Act[95] and the adoption of a Plan of Renewable Energies[96] in order to implement all the measures that are still needed to ensure that Spain achieves the objectives enshrined by the RES 2009 Directive. However such a new Act has not been passed yet; in fact, no Bill on this matter has been presented to Parliament so far. As to the *Plan de Energías Renovables* 2011-2020, the Spanish Government notified the Commission of 'Spain's National Renewable Energy Action' in June 2010 following Article 4.2 of Directive[97], and the final approval of the Renewable Energy Plan 2011-2020 (Plan de Energías Renovables 2011-2020) was envisaged, at the time of writing this report, for the autumn of 2011[98]. In the meantime, in January 2011, the Commission started an infringement procedure against Spain.[99] However, due to the political climate (the November 2011 general elections) it is unlikely that Spain will adopt any new legal measures to implement the Directive until year 2012. This situation might entail difficulties for the implementation of the above mentioned cross-border cooperation mechanisms in so far as no new legislation to that effect has been enacted.

According to the National Renewable Energy Action Plan, Spain is particularly interested in using statistical transfers given that it anticipates a surplus of generation in terms of its compliance with the compulsory energy targets laid down in Directive 2009/28/EC. In the case of joint projects, Spain intends to favour projects with other Member States and third countries according to Articles 9 and 10 of the Directive (it gives priority, in particular, to actions that help meet the energy targets of the

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[94] Art. 78.

95 According to Final Disposition Twenty One, the Government, in a three month period, was due to submit to Parliament a new bill for on Energy Efficiency and Renewable Energies, with the measures that are still needed to ensure that Spain achieves the objectives enshrined by the Sustainable Act, i.e. the mandatory target established by the RES 2009 Directive.

96 Art. 78.2.

97 Spain's National Renewable Energy Plan 2011-2020, of 30th June 2010, pp. 137-138 <ec.europa.eu/energy/renewables/transparency_platform/doc/national_renewable_energy_action_plan_spain_en.pdf>.

98 See further developments at www.mityc.es/energia/es-ES.

99 Commission Decision number 2011/0118 of 26th of January 2011, <ec.europa.eu/eu_law/eulaw/decisions/dec_20110126.htm>, visited 15 June 2011.

Mediterranean Solar Plan). [100] Electricity generated through potential joint projects with third countries will increase the surplus of generation and, according to the forecasts of Spain's National Renewable Energy Action Plan, this electricity could serve to make use of statistical transfers with another Member State or could be designated for consumption in another Member State when Spain is the country of transit. However, due to the incomplete transposition of Directive 2009/28/EC there is no specific legal procedure for the implementation of these cooperation mechanisms in Spain yet. In fact, there are only some general guidelines as provided for by Spain's National Renewable Energy Action Plan of May 2010 and in the future *Plan de Energías Renovables*.[101] As to the participation of private bodies, the *Spain's National Renewable Energy Action Plan* states that they 'may always apply to participate in joint projects'. The application 'must be addressed to the Secretariat of State for Energy, who ultimately decides whether or not to authorise such participation and in the event of authorisation is responsible for laying down the specific rules governing its implementation'.[102] This seems to give an unfettered discretion to the Spanish Administration that should be limited by establishing the legal procedures and conditions for private bodies to participate in joint projects. The current situation, which undermines legal certainty, should be sorted out with the enactment of new legal instruments, such as a future Energy Efficiency and Renewable Energies Act, which should include a chapter to regulate cooperation procedures and mechanism.

Finally, Spain has no plans to participate in joint projects with other Member States[103]. Due to the severe limitations that affect the electricity interconnection of Spain with the rest of the European Union through France, the Spanish Government considers that, 'unless these interconnections are reinforced, it would be senseless for Spain to take part in joint projects'.[104] Furthermore, these deficient interconnections will also affect other Member States that might wish to use this mechanism to import renewable energy through the interconnection between Spain and Morocco. Improving interconnections with France would put an end to the status of Spain as an 'energy island', and allow for the integration of a greater volume of renewables and increase electricity trading with the rest of Europe.[105] In short, Spain has no plans to cooperate in joint projects with other Member States as the Government considers that feeding more renewable energy

100 Spain's National Renewable Energy Plan 2011-2020, *supra* 97, pp. 137-138.
[101] *Ibid*.
[102] *Ibid*.
[103] *Ibid.*
104 *Ibid*.
105 *Ibid*. p.100.

into the Spanish network would create operational and congestion problems 'without counting toward the achievement of national mandatory targets'.[106]

C. Climate Change

10. To what extent has the choice of the emissions trading scheme (the EU ETS) to deliver climate change targets had the final word vis-à-vis alternative methods such as carbon and energy taxation?

An efficient climate change policy should make a balanced use of the different instruments available to reduce CO2: thus, emission trading should be complemented with other mechanisms, such as taxes or voluntary approaches, allowing for wide coverage of polluters with reasonable administrative and compliance costs.[107] Actually, taxes may play an important role when they are combined with tradable permits that have been auctioned for free[108] or in order to reduce emissions in the sectors not covered by the EU ETS[109], as they can increase overall welfare and cost-efficiency, and improve an equitable application of the polluter pays principle. However, in spite of this complementary role, it has also been strongly argued that a global carbon tax should substitute the emission trade system.[110]

106 Gobierno de España, *Borrador del Plan de Energías Renovables 2011-2020*, p. 724, <www.mityc.es/energia/es-ES/Participacion/Documents/PER/PER_2011-2020_Borrador_II.pdf>, visited 15 June 2011; and Spain's National Renewable Energy Plan 2011-2020, *supra* n. 97, p. 138.

107 X. Labandeira and M.Rodriguez, 'Wide and Narrow Approaches in Climate Change Policies: The Case of Spain', *Documento de Trabajo* 2007-39, Serie 10, Cátedra FEDEA-Iberdrola, p. 15-16 <www.fedea.es/pub/papers/2008/dt2007-39.pdf>, visited 15 July 2011; I. W.H.I. Parry and W.A. Pizer, 'Emission trading versus CO2 taxes versus standards', in R. J. Kopp and W. A. Pizer, *Assessing U.S. Climate Policy Options*, 2007, p. 85 www.rff.org/RFF/Documents/CPF_COMPLETE_REPORT.pdf, last visited 30 July, visited 15 August 2011.

108 As the taxes will lower the price of the permits but will also recover some of the windfall gains that firms received by not having to buy their permits at auction, which –according to the OECD- can be desirable from an equity point of view. See OECD, *Taxation, Innovation and the Environment* – 2010, Summary in English, p. 5.

109 N. Johnstone, 'The use of tradable permits in combination with other environmental policy instruments', OECD, ENV/EPOC/WPNEP(2002)28/FINAL, p. 33. See also Commission Staff Working Document – Annex to the Impact Assessment. Document accompanying the Package of Implementation measures for the EU's objectives on climate change and renewable energy for 2020, SEC(2008) 85 vol. II, pp.51 ff.; CE, Proposal for a Directive amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance Trading system of the Community, COM(2008)16 final, p. 5.

110 See for example W.D. Nordhaus, 'Life after Kyoto: alternative approaches to global warming policies', ER Working Paper Series, number 11889, 2005; Robert J. Shapiro, Is Cap and Trade a Dead Policy Walking?, 4.01.2009, available at http://ndn.org/blog/2009/04/cap-and-trade-dead-policy-walking; and from the same author 'Economic issues in designing a global agreement on global warming', Keynote plenary address for the 10-12 March 2009 Copenhagen Climate Change Conference on Climate Change: Global Risks, Challenges and Decisions, <climatecongress.ku.dk/speakers/professorwilliamnordhaus-plenaryspeaker-11march2009.pdf/>, visited 15 June 2011; for this and other plenary lectures see: http://climatecongress.ku.dk/presentations/congresspresentations/ .

Beyond the advantages that a 'cap-and-trade' system may have for the abatement of GHG emissions[111], the current and future pre-eminence of the emission trading system favoured by the EU can be explained in terms of the EU's difficulties in adopting environmental taxes –as the decision-making process applicable requires Council unanimity-, and the European industry's fear of losing competitiveness due to increasing costs related to environmental taxes –which might have favoured the 'much milder situation with the grandfathering of pollution permits'-[112]. On the other hand, although energy taxes have been harmonised in the EU to a certain degree by Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity (hereafter 'the ETD')[113], this Directive has raised certain problems due to inconsistency with the ETS. Hence, it is currently under revision to ensure, among other objectives, 'a consistent treatment of energy sources within the ETS' and 'a framework for the use of CO2 taxation to complement the carbon price signal established by the ETS while avoiding overlaps between the two instruments'.[114] Moreover, Directive 2009/29/EC amending Directive 2003/87/EC, which has extended the scope of the EU ETS, leaves it to Member States to adopt measures applicable to small installations which will achieve a contribution to emission reductions equivalent to those achieved by the Community scheme, and among these measures it includes, in particular, taxation.[115] In short, carbon and energy taxes are important tools, as efficient decentralised market mechanisms, to fight against global warming[116], and they can create notable synergies jointly with the ETS to evolve towards a low carbon economy.

11. Have differences in viewpoints on the above been reflected in legal measures in your Member State and how have they been resolved?

Following the path opened up by the European Community with Directive 2003/87/CE, the key instrument to abate CO2 emissions in Spain is Ley 1/2005, 9 March, which regulates the regime of trading the rights of greenhouse gas emissions (*Emission*

111 See in general N. Johnstone, *supra* n. 109.
112 See X. Labandeira and M.Rodriguez, *supra* n. 107, p. 2.
113 [2003] OJ L 283/51.
114 Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, COM(2011)169 final, 13.4.2001, p. 2.
115 See Recital Eleven of the Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the Community's greenhouse gas emission allowance trading scheme, [2009] OJ L 140/63.
116 These economic instruments not only encourage the adoption of known pollution abatement measures, but can provide 'significant incentives for innovation, as firms and consumers seek new, cleaner solutions in response to the price put on pollution'. See OCDE, *supra* n. 109, p. 3.

Trading System Act).[117] The Spanish Government has not shown, however, much signs of favouring the use of taxes as a policy instrument for the protection of the environment. In fact, its reluctant attitude towards environmental taxes for the abatement of CO2 emissions, also within the Council of the European Union, reflects its belief that they may hamper economic growth in Spain.[118] On the contrary, several Autonomous Communities have established, within their limited legislative powers, environmental taxes on emissions of certain gases such as CO2, sulphur dioxide, or nitrogen dioxide, as explained below[119].

At the State level the most significant taxes in this field are excise duties on energy, which date back in Spain to the 1960s. Currently adapted to EU standards, the excise duties on energy products (hydrocarbons, electricity, on retail sales of certain oils, and on coal), and the tax on certain means of transport, are regulated in Ley 38/1992 de Impuestos Especiales[120] (*Special Taxes Act*).[121] It should be noticed that these taxes were not originally created with the purpose of protecting the environment but to raise fiscal revenues; however, they can be considered indirectly environmental because they influence producer and consumer behaviour towards a more efficient use of energy or cleaner energy sources.[122] As a matter of fact, they have gone 'greener' in the last few years: first, Act 38/1992 was amended by Act 22/2005 in order to transpose into Spanish Law Directive 2003/96/CE on Energy Taxation[123], and two years later, Ley

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117 BOE Nº 59, 10 May 2005.

118 See A. Gago, S. Labandeira, F. Picos and M. Rodríguez,, 'Environmental Taxes in Spain, A Missed Opportunity', Andrew Young School of Policy Studies, International Studies Program, Working Paper 06-09, pp. 7 ff.; T. Jones, 'Spain slams plans for EU energy tax', 8 April 1999, <www.europeanvoice.com/article/imported/spain-slams-plans-for-eu-energy-tax/38375.aspx> visited 25 june 2011.

119 It should be taken into account that, according to the Spanish Constitution, the State and the Autonomous Communities share the power to tax (Art. 133.2 SC): the autonomous regions can establish new taxes as long as they do not fall within the competence of the State (see Judgment of the Constitutional Court 37/1987, 26 March 1987) and do not duplicate taxes already existing at other levels of the State (Art. 6.2 of Organic Ac 8/1980 on the Financing of the Autonomous Communities). Local authorities, on the other hand, have power to tax only within the scope established by the Local Taxes Act (see *Real Decreto Legislativo 2/2004 Ley de Haciendas Locales*, BOE Nº 59, 9 March 2004), which regulates the taxes that local entities can levy In the realm of environmental protection, the State and the Autonomous Communities also share legislative powers, as the State is competent to enact 'basic' legislation establishing the common level of environmental protection for the whole Spanish territory, whereas the Autonomous Communities can enact additional protective measures (Art. 149.23 SC).

120 BOE Nº 312, 29 December 1992.

121 See in general M. González Jaraba, *Los impuestos especiales de ámbito comunitario* (La Ley 2005); J. Sánchez Maldonado and J.S. Gómez Sala, 'Past, Present and Future of Indirect Taxation in Spain and other Developed Countries', Cuadernos de CC.EE y EE., nº 50-51, 2006, pp. 178 ff.; by the same authors, 'The Reform on Indirect Taxation in Spain: VAT and Excise', Andrew Young School of Policy Studies, International Studies Program, Working Paper 06-07, pp. 14, 22, 70 ff.

122 See OECD, *Environmentally Related Taxes in OECD Countries. Issues and Strategies*, (París, 2001), p. 15

123 BOE Nº 277, 10 November 2005.

34/2007 de Calidad del Aire y Protección de la Atmósfera[124] (*Air Quality Act*) introduced a new amendment to Act 38/1992[125] which modified the tax scheme for certain means of transport in order to levy the official registration of vehicles according to their CO2 emissions[126].

In contrast, environmental taxes have been notably more developed in the Autonomous Communities. The Autonomous Community of Galicia pioneered the introduction of the first tax for air pollution in Spain with the enactment of Ley 12/1995 del impuesto sobre la contaminación atmosférica[127] (*Atmospheric Pollution Tax Act*)**,** which regulates a levy for emissions of sulphur dioxide (SOX) and nitrogen dioxide (NOX) from facilities responsible for these emissions located within the territorial scope of this Autonomous Community. Other Autonomous communities followed Galicia by establishing fiscal schemes to tax emissions to the atmosphere –Andalucía[128], Murcia[129], Aragón[130] and Castilla-La Mancha[131]-, and some of them, such as Andalucía and Murcia, also include a levy on carbon dioxide (CO2)[132].

It has been argued that the Autonomous Communities enacted environmental taxes for air pollution mostly due to the fact that this was one of the few areas that was not already occupied by State taxes, and that sometimes they pursued the increase of regional fiscal revenues rather than environmental targets as the primary goal.[133] Moreover, due to the fact that the State has not enacted laws regulating the bases for the use of environmental taxes, these regional tax schemes lack coordination and in some cases has given rise to conflicts of power between the State and the Autonomous

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[124] BOE Nº 275, 16 November 2007.

125 See Eighth Additional Provision of Act 34/2007 on Air Quality and the Protection of the Atmosphere (Ley 34/2007 de calidad del aire y protección de la atmósfera).

126 See A. Cornejo Pérez, 'Fiscalidad de Derechos de emisión y fiscalidad verde: la resestructruación del impuesto de matriculación', in I. Bilbao; F.A. García, A. Cornejo (Coord.), *La fiscalidad de los Derechos de emisión: estado de situación y perspectivas de futuro*, (Instituto de Estudios Fiscales, 2010), pp. 507 ff.

[127] BOE Nº 113, 9 May 1995.

128 Ley 18/03 sobre emisiones de gases a la atmósfera (*Emissions of Gases to the Atmosphere Act*).

129 Ley 9/05 sobre emisión de gases contaminantes (Polluting Gases Emissions Act).

130 Ley 13/05 sobre emisiones de gases a la atmósfera (*Act 13/05 on Emissions of Gases to the Atmosphere*).

131 Ley 11/00 modificada por Ley 16/05 sobre instalaciones que inciden en el medio ambiente (*Act 11/00 amending Act 16/05 on facilities that have a impact on the environment*).

132 J.A. Rozas Valdés, 'Los impuestos autonómicos sobre emisiones atmosféricas', in I. Bilbao; F.A. García; A. Cornejo (Coord.), *supra* n. 126, pp. 613 ff.

133 See, among others, I. Bilbao Estrada and J. V. Pedraza Bochons, 'La fiscalidad de los derechos de emisión', *Noticias de la Unión Europea* nº 311, 2010, p. 110; D. Carbajo Vasco, 'Situación actual y problemas de la fiscalidad verde en España', in E. Barón (Coord.), *Fiscalidad Verde en Europa Objetivo 20/20/20* (Centro de Innovación del Sector Público de la Fundación de PwC e IE Business School, 2011), pp. 101 ff.; M. Magadán Diaz, 'Imposición verde y financiación autonómica, evolución y estructura territorial', 371 *Revista de Economía Industrial* (2009), pp. 155 ff. <www.mityc.es/Publicaciones/Publicacionesperiodicas/EconomiaIndustrial/RevistaEconomiaIndustrial/371/155.pdf>, visited 15 August 2011.

Communities.[134] Thus, the absence of a consistent environmental strategy guiding the regional initiatives to tax pollution has undermined the efficient use of these measures to the extent that the Spanish experience with environmental taxes has been described as a 'missed opportunity and the cause of numerous current problems'[135].

More importantly, some of these taxes were established before Directive 2003/87/EC and the EU ETS were implemented in Spain. Now these two instruments –taxes and ETS- need to be coordinated at the regional and State level. To this end, the Autonomous Community that have established taxes on CO2, such Andalucía and Aragón[136], have exempted some of the emissions subjected to the EU ETS from taxation to avoid imposing a double economic burden on the industries installed in their territories. However, these tax exemptions were not notified to the European Commission, which raises the issue of their compatibility with Articles 107.1 and 108.3 TFEU on State aids[137]. Currently, due to the amendment of Directive 2003/87/EC by Directive 2009/29/EC, which included in the EU ETS new greenhouse gases such as NOX, the other Autonomous Communities –Galicia, Castilla-La Mancha and Murcia- also face the challenge of coordinating their gas emissions taxes with the EU ETS in compliance with the Treaty provisions on State aids.

The green tax reform still pending in Spain will have to address necessarily, on the one hand, the coordination between the State and the Autonomous Communities of the powers to impose environmental taxes and, on the other, the coordination between the taxes on GHG and the EU ETS with full respect of the TFEU provisions on State Aids.

D. Security

12. To what extent has your Member State implemented EU legislative measures on energy security in ways that seek to ensure the functioning of the internal market but which also promote measures of solidarity with other Member States?

Due to its energy dependency linked to its high reliance on fossil fuels[138], Spanish legislation has paid special attention to security of supply. Although at the time of

134 See, for example, Sentencia del Tribunal Constitucional (*Spanish Constitutional Court Judgment*) 179/2006, 13 June 2006.

135 See A. Gago, S. Labandeira, F. Picos and M. Rodríguez, *supra* n. 118, p. 101.

136 See in Andalucía Art. 24 of Act 18/2003 as amended by Art. 11 of Act 2/2004, and in Aragón Art. 23.b) of Act 13/2005.

137 See I. Bilbao Estrada and J.V. Pedraza Bochons, *supra* n. 133, pp. 111-112. See also A. Antón Antón and I. Bilbao Estrada, 'La coordinación del régimen de comercio de derechos de emisión y los impuestos autonómicos sobre emisiones atmosféricas: ¿un supuesto de ayuda de estado ilegal no compatible?', *Crónica Tributaria*, 133/2009, pp. 7 ff.

138 Oil is the main form of energy in total consumption with 47%, followed by gas in strong progression (24%), coal (9%), renewable energies (9%) and nuclear (11%)138. All oil and gas is imported from a

writing these words, as mentioned above, none of the Third energy package directives have been fully transposed into Spanish Law, some of their objectives on energy security are already partially achieved through current legislation in force. Furthermore, the importance of energy security has been recently underlined in the recent 2011 Sustainable Economy Act.[139]

The main lines of action to enhance energy security in Spain include diversification of energy sources, limiting dependence on supply from a single country, developing strategic reserves, as well as international interconnections, boosting infrastructure, liberalizing markets, and energy savings and efficiency.[140] This section will focus, first, on those measures to strengthen energy security which are particularly relevant for the EU market and entail a particularly intense cooperation with other Member States (ii), but it will also describe some legislative measures which are intended to reinforce energy diversification and security of supply in Spain, but that could also entail obstacles for the achievement of common EU goals.

(i) First of all, the Hydrocarbons Act grants the State Government powers to impose upon all operators the requirement to hold emergency stocks of petroleum products up to a maximum of 120 days of sales or consumption.[141] As for natural gas and liquefied petroleum gases (hereinafter LPG), Spanish legislation already includes several provisions on security of gas supplies, as provided by European Directives 2004/67/EC.[142] Although hydrocarbon minimum security stocks are preferably located in Spain, there have been some initiatives to intensify cooperation in this field with other Member States. In accordance with Article 7 of Directive 2006/67/EC Spanish legislation allows the Government to authorise that minimum security stocks of oil-based products, including strategic reserves, be stored in other EU Member States,

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variety of different sources. In the electricity sector, coal is still the main fuel: domestic coal production, which depends on subsidies, is used for electricity generation. However, the contribution of gas and renewable energies has experienced a notable increase in the share of electricity generation during the last decade. See data available at International Energy Agency, 'Oil & Gas Security - Emergency Response of the IEA Countries, Spain Overview', 2011, p. 4 <www.iea.org/papers/security/spain_2011.pdf>.

139 Article 77.1.

140 See Government of Spain, 'Spanish Security Strategy Everyone's responsibility', Madrid 2011, p. 54 www.lamoncloa.gob.es/NR/rdonlyres/EF784340-AB29-4DFC-8A4B-206339A29BED/0/SpanishSecurityStrategy.pdf., visited 5 August 2011.

141 Art. 50. See Act 12/2007, of July 2, amending the 34/1998 Hydrocarbon Act to adapt it to the provisions of Directive 2003/55/EC on common regulations for the internal natural gas market. Hitherto, Spain meets the EU stockholding requirements according to Directive 2006/67/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products [2006] OJ L 217/8. Although Spain has not yet enacted any new law or regulation to transpose Directive 2009/199/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, it will not entail any substantial change as to the amount of minimum security stocks or as to the requirement to take into account biofuels and additives (see CNE 2010, *supra* n. 49, p. 207).

142 Council Directive 2004/67/EC concerning measures to safeguard security of natural gas supply, [2004] OJ L 127/92.

provided that there is an intergovernmental agreement with that Member State which guarantees its availability so that domestic supply is not harmed[143]. Currently such agreements have been signed with France, Italy and Portugal.[144] On the other hand, a major development to enhance security of supply and to promote market integration and competition has been the creation of the Iberian electricity market (MIBEL) launched in 2007.[145] The importance of MIBEL for energy security is enshrined in the Electricity Act, which was amended to establish that the Spanish System Operator shall perform its 'primary function'. This is to guarantee the continuity and security of the electricity supply and the proper coordination of the generation and transmission system, 'in coordination with the operators and agents in the Iberian Electricity Market according to the principles of transparency, objectivity and independence'.[146] Both Spain and Portugal have closely cooperated to implement certain EU energy security provisions to contribute to the construction of this regional market. Thus, in accordance with Article 7 of Directive 2006/67/EC, 8 March 2008 these two countries have signed an Agreement regarding the mutual allocation of minimum security stocks of crude oil, petroleum intermediate by-products and oil-based products that allows the operators to form the necessary oil product and natural gas reserves, within both countries.[147] Furthermore, they are pursuing several initiatives within MIBEL that aim to harmonise grid planning, transmission system operation procedures, data collection provisions, and calculation methodology of access tariffs, and to develop congestion management mechanisms.[148]

Moreover, strengthening international interconnections is also vital to reinforce energy security: Spain considers that 'The best guarantee of energy supply, security and quality for our country is a fully integrated European electricity and natural gas market'[149]. Therefore, it is 'fully committed to a European energy policy that encourages

143 See Ministerial Order of 18 December 2000 on the storage of minimum security stocks in countries outside Spain's territorial scope as amended by Ministerial Order of 26 July 2007 (Orden ITC/2389/2007 por la que se modifica la Orden de 18 de diciembre de 2000, sobre almacenamiento de existencias mínimas de seguridad fuera del ámbito territorial español), BOE 186, 4 August 2007.

144 See CORE webpage at http://www.cores.es/eng/stockpile/location.html.

145 See *supra* n. 14.

146 Article 34.Point 1, paragraph 2 as amended by Act 17/2007.

147 See footnote 144 above. See also the Protocol singed the 22nd of January 2009 ('Protocolo entre la Dirección General de Energía y Geología y la Corporación de Reservas Estratégicas de Productos Petrolíferos en el ámbito del Acuerdo celebrado entre la República Portuguesa y el Reino de España sobre el mantenimiento recíproco de reservas de crudo y productos petrolíferos', <www.cores.es/pdf/001-004.pdf>, visited 15 August 2011.

148 See International Energy Agency, Spain – 2009 Review, p. 109 <http://www.iea.org/textbase/nppdf/free/2009/spain2009.pdf>. See further MIBEL Regulatory Council, 'Long-Term Joint Management Mechanism for the Spain-Portugal Interconnection', May 2010 (available at http://mibel.com/index.php?mod=pags&mem=detalle&relmenu=88&relcategoria=1057&idpag=97).

149 Gobierno de España, *supra* n. 140, p. 54.

interconnections among Member States, particularly between the Iberian Peninsula and the rest of Europe'.[150]

(ii) As far as diversification of energy sources is concerned, Spain strongly relies on renewable energies to increase energy security and to reduce CO2 emissions.[151] However, it also supports national coal as a strategic reserve for economic, social and self-sufficiency reasons, which remains an important component of Spain's domestic energy supply (in spite of the fact that CO2 emissions from coal contributes substantially to the global warming problem).[152] Thus, the Spanish Government adopted Royal Decree 1221/2010 in order to promote consumption of indigenous coal[153]. This measure was criticized by both the Spanish competition authority (*Comisión Nacional de la Competencia*)[154] and by the national regulatory authority (*Comisión Nacional de la Energía*)[155] as it distorts competition and entails an increase of CO2 emissions. However, the Spanish Government justified the approval of this Decree as a transitory measure necessary to ensure security of supply for electricity in a country that still remains an energy island, and with a significant share of renewable energy whose production is highly intermittent as it depends on weather conditions. This aid scheme, partially amended by Royal Decree 1221/2010, was eventually authorised by the European Commission (in September 2010 it declared it compatible with the TFUE though it limited the amount of energy that could be generated under this scheme for the 2011-2014 period to 23.4 TWh per year)[156].

150 *Ibid*. See CNE, *supra* n.17, p. 68, and the information that this report provides on the cooperation initiatives between the Spain and France to manage congestion and to develop new interconnection capacities (p. 11), and between the Spain and Portugal as regard as a transit contract through Spain (from Morocco to Portugal) concluded pursuant to Article 3(1) of Directive 91/296/EEC (p. 110).

151 In 2010 renewable energies accounted for one third of electric power generation and more than 11% of primary energy consumption. See Government of Spain, 'Spanish Security Strategy Everyone's responsibility', Madrid 2011, p. 54 www.lamoncloa.gob.es/NR/rdonlyres/EF784340-AB29-4DFC-8A4B-206339A29BED/0/SpanishSecurityStrategy.pdf., visited 15 July 2011.

152 The Twentieth Additional Provision of the Electricity Act establishes that '[…] in accordance with the provisions of articles 3 and 11 of European Parliament and Council Directive 2003/54/EC concerning common rules for the internal market in electricity, and for supply security reasons, the Government may approve a system of premiums up to an upper limit of EUR 10 per MWh produced, to allow the preferred start-up of electricity generation installations which use domestic energy sources.

153 It obliges ten power stations to buy domestic coal, whose price is higher than that of other fuels, to produce a certain amount of electricity. The operators affected by this measure are granted priority dispatching and are compensated by the additional costs caused.

154 CNC, IPN 33/09 Royal Decree creating the procedure to solve restrictions to guarantee supply (available at www.cncompetencia.es/Inicio).

155 CNE, Informe 29/2009 sobre la Propuesta de Real Decreto por el que se crea el procedimiento de resolución de restricciones por garantía de suministro, 16 November 2009 (available at http://www.cne.es/cne/doc/publicaciones/cne136_09.pdf).

156 See Decision C (2010) 4499 of the Commission, of 29 September 2010, concerning State aid No N 178/2010 notified by the Kingdom of Spain in the form of a public service compensation linked to a preferential dispatch mechanism for indigenous coal power plants.

13. Has this had any significant impact upon the distribution of domestic institutional responsibilities for such matters (both within the government and public sector and as between public and private)?

EU Legislation has had a significant impact in the distribution of domestic institutional responsibilities in the realm of energy security as the liberalization process triggered by the EC Directives requires a new pattern of distribution responsibilities among competent authorities and all relevant market actors. Following the EC Directives[157], the Electricity Act and Hydrocarbons Act define the roles and responsibilities that competent authorities, national regulators and other relevant market actors are due to play to pursue energy security. In particular, the Spanish regulatory authority (the National Energy Commission) shall, in addition to its duties to eradicate discrimination and ensure the effective running of the market, oversee certain aspects within the electricity and hydrocarbons markets that are relevant for energy security, such as the extent to which the transmission and distribution network managers comply with their functions.[158]. Furthermore, the Electricity Act clarifies in Article 9 the role the different private agents involved in the supply of electric power (electricity generators, the market operator; the system operator; the transmission agent, distributors and retailers) would play. In this regard it is the responsibility primarily assigned to the system operator 'to guarantee the continuity and security of the electricity supply and the proper coordination of the generation and transmission system'.[159] Following the amendment introduced in the Electricity Act by Act 12/2007, the system operator shall perform its task in coordination with the operators and agents in the Iberian Electricity Market according to the principles of transparency, objectivity and independence. As regards natural gas supply through pipelines, the Hydrocarbons Act also clarifies the role to be played by different public and private actors (transporters, distributors, traders, and the System Technical Manager). The latter, currently ENAGAS, plays a particularly important role as regards energy security as it will be responsible for operating and managing the Basic Network, and the secondary transportation networks will likewise be responsible for maintaining the proper conditions to ensure the normal running of the system.

Finally, Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC will enhance national authorities'

157 See in particular Directive 2005/89 concerning measures to safeguard security of electricity supply and infrastructure investment, [2006] OJ L33/22, and Directive (EC) 2004/67 concerning measures to safeguard security of natural gas supply [2004] OJ L 127/92.
158 Article 3.5.g) Electricity Act, and
159 Article 34.

cooperation and solidarity to safeguard security of natural gas supply as well as granting the Commission substantial supervision and coordination powers to this end[160].

E. The Lisbon Treaty

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

The fact that the Lisbon Treaty reinforces the EU option in favour of renewable energy may well have an important impact for Spain**.** The EU institutions enjoy, however, a wide margin of discretion as to the measures to pursue this aim, and they also have to balance the objective of promoting renewable energy with other EU goals. However, Article 194 (as well as the provisions on security of energy supply both in Articles 194 and 122 TFUE) provides a stronger basis for EU measures to promote renewable energies that could eventually lead to a desirable harmonization of national support systems and to the adoption of a European scheme to promote renewable energy. On the other hand, any new EU measures adopted with the aim of promoting the interconnection of energy networks would have an extremely positive impact for Spain, as they are essential to connect the Iberian Peninsula to the electricity internal market.

As regard the choice of legal bases, Article 194 TFEU establishes that decisions on energy should follow, as a rule, the ordinary legislative procedure. However, paragraphs 2 and 3 of Article 194 TFUE establish important limits to the EU control over energy policy, very much in line with what Article 192.2 TFUE does in the field of EU environmental policy. First, EU 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) TFUE'. According to the latter, 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' will be taken 'by 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'. Therefore,

160 According to Article 4, the Commission will assess national preventive action and emergency plans in consultation with the Gas Coordination Group, an assessment that will be vital to ensure that these plans are not inconsistent with other plans at national, regional or Union levels, and that they define clear roles and responsibilities for all natural gas undertakings and Competent Authorities concerned. Moreover, the Commission may also recommend the establishment of joint Preventive Action Plans or Emergency Plans at regional level. Furthermore, Article 11 grants it powers to declare an EU or regional emergency and, in such event, it shall coordinate the action of the national competent authorities.

through the requirement of unanimity voting in the Council, Member States still maintain the control over these essential features of their national energy policies.

Finally, measures on energy that are primarily of a fiscal nature should also be taken following a special legislative procedure (the Council acting unanimously and after consulting with the European Parliament)[161] in line with Article 192(2)(a). Hitherto, Spain has not supported the adoption of environmental taxes at the EU level proposed by the Commission on the bases of former Article 175.2 TCE (currently Article 192.2 TFEU). As a matter of fact, Spain was one of the Member States that opposed the EU-wide tax on carbon dioxide and energy[162] and there are no signs of a change in the position of the Spanish Government on matters involving fiscal harmonization. Thus, it is predictable that Spain will continue to be reluctant to approve any fiscal harmonization measure based on either on Article 192(2)(a) or Article 194(3) TFEU. Further, the fact that both provisions establish that the adoption of measures that are 'primarily of a fiscal nature' should follow a special legislative procedure (where the Council voting rule is unanimity and that the EP is only consulted) eliminate the risk of conflicts between Member States and the EU institutions regarding the choice of the legal base to harmonize taxes on energy which also seek to achieve a high level of environmental protection.[163]

161 Art 194(3) TFEU.

162 Oriol Costa, 'Spanish EU and international climate change policies: download, catch up, and curb down', in R. K.W.Wurzel and J. Connelly (Ed.), *The European Union as a Leader in International Climate Change Politics*, (Routledge 2011), P. 185; A. Gago, S. Labandeira, F. Picos y M. Rodríguez, *supra* n. 118, p. 407.

163 It should be noticed, nevertheless, that Art. 192(2) TFEU imposes a special legislative procedure that also requires consultation to the Economic and Social Committee and the Committee of the Regions. Therefore, following Art. 263 TFEU the Committee of the Regions could bring and annulment action before the European Court of Justice against fiscal measures based upon Art. 194(3), if it considers that the legal base should be Art. 192(2)(a) instead for the purpose of protecting their prerogatives.