

# REPORT OF THE INTERNATIONAL ENERGY LAW & TRANSACTIONS COMMITTEE

This Report summarizes three areas of significant development in European Union (EU) energy policy development in recent years. First, it describes the creation of the Agency for the Cooperation of Energy Regulators. As described below, this agency replaces an earlier institution created in 2003 and endows it with significantly greater oversight powers, with a view to greater harmonization of regulatory competences. Second, it describes developments in the EU related to renewable energy support mechanisms and the impact on Feed-In Tariffs (FITs) of the recent economic crisis in the Euro-zone. Third, it discusses energy efficiency measures that have been undertaken in the past few years, as well as a draft Energy Efficiency Directive, which is intended to replace several existing directives deemed to have been insufficient to meet the EU's goal of 20% reduced primary energy consumption by 2020. The Report covers developments in these areas from the prior Committee Report in 2009 through 2011.\*

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## I. CREATION OF “ACER” – THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

### A. *Genesis of the New Agency*

The EU has continued to develop and implement its energy market liberalization policies initially adopted during the 1990s. The major steps in this evolution were summarized in earlier Committee reports in 2003 (addressing the initial EU directives beginning the market liberalization process and the so-called “Second Energy Package”)<sup>1</sup> and in 2009 (summarizing legal and regulatory developments following adoption of the Second Package and leading

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\* The International Energy Law & Transactions Committee acknowledges the substantial drafting contributions made to this Report by O. Julia Weller, Philip M. Marston, and Steven M. Sherman.

1. *Report of the International Energy Transactions Committee*, 24 ENERGY L.J. 429 (2003).

up to the then-proposed Third Energy Package).<sup>2</sup> The reader is directed to those earlier reports for more a detailed discussion of and references to these prior developments.

One of the five components of the Third Energy Package was the Regulatory Authorities Regulation (Regulation), which provided for the creation of a new EU regulatory body named the Agency for the Cooperation of Energy Regulators (ACER or Agency).<sup>3</sup> The new agency was established in 2010 and formally opened its doors for business in March of 2011.<sup>4</sup> ACER replaces an earlier institution created in 2003 to coordinate among the various Member State energy regulators, known as the European Regulators Group for Electricity and Gas (ERGEG).<sup>5</sup> The Agency's headquarters are located in Ljubljana, capital of the Republic of Slovenia.<sup>6</sup>

Under the 2003 law, ERGEG did not have direct regulatory responsibilities with regard to cross-border trade (what an American energy practitioner might term interstate commerce),<sup>7</sup> but was rather charged to "facilitate consultation, coordination and cooperation" among the various recently established Member State regulators as well as between the Member State regulators and the EU Commission (*i.e.*, the EU executive).<sup>8</sup> The purpose was to assist in consolidating the evolving internal markets in electricity and natural gas.<sup>9</sup> As European energy markets continued to evolve after 2003, the decision was made to incorporate this voluntary cooperation among the various national regulatory authorities into

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2. *Report of the International Energy Transactions Committee*, 30 ENERGY L.J. 207 (2009) [hereinafter *2009 Committee Report*].

3. Regulation (EC) No 713/2009, of the European Parliament and of the Council of 13 July 2009 Establishing an Agency for the Cooperation of Energy Regulators, 2009 O.J. (L 211) 1 [hereinafter *Regulation*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0001:0014:EN:PDF>.

4. *Id.* at art. 35(2) (articles granting powers to ACER apply from Mar. 3, 2011).

5. ERGEG had been created by Commission Decision (EC) No. 2003/796 of 11 November 2003, recital 6, 2003 O.J. (L 296) 34, 34 [hereinafter *Nov. 11 Decision*], in order "to facilitate consultation, coordination and cooperation between the regulatory bodies in the Member States, and between these bodies and the Commission, with a view to consolidating the internal market and ensuring the consistent application in all Member States" of the 2003 directives addressing electricity and gas market liberalization. With the creation of ACER, ERGEG was dissolved effective July 1, 2011. Commission Decision (EU) No. 2011/280 of 16 May 2011, at recital 1 and art. 1, 2011 O.J. (L 129) 14.

6. *Contact Information*, ACER, [http://www.acer.europa.eu/portal/page/portal/ACER\\_HOME/The\\_Agency/Contact\\_us](http://www.acer.europa.eu/portal/page/portal/ACER_HOME/The_Agency/Contact_us) (last visited Feb. 24, 2012).

7. *Nov. 11 Decision*, *supra* note 5, at art. 1(2) (setting out subject matter and activity).

8. *Id.* at art. 1(2) (Group to "advise and assist the Commission in consolidating the internal energy market, in particular with respect to the preparation of draft implementing measures in the field of electricity and gas, and on any matters related to the internal market for gas and electricity" and "shall facilitate consultation, coordination and cooperation of national regulatory authorities, contributing to a consistent application" of previously adopted energy market liberalization directives and "possible future . . . legislation in the field of electricity and gas").

9. *Id.* at recital 6 (stating that "a 'European Regulatory Group for Electricity and Gas' should be established to facilitate consultation, coordination and cooperation between the regulatory bodies in Member States, and between these bodies and the Commission, with a view to consolidating the internal market and ensuring the consistent application in all Member States of Directives 2003/54/EC and 2003/55/EC and Regulation (EC) No 1228/2003").

a more formal EU structure with a new agency, which would also be vested with the power to rule on a limited universe of individual regulatory cases.<sup>10</sup>

The Regulation concluded that ACER should be established to “fill the regulatory gap at the Community level and to contribute towards the effective functioning of the internal markets in electricity and natural gas.”<sup>11</sup> Accordingly, with the creation of ACER, “the voluntary cooperation between national regulatory authorities would now take place within a Community structure with clear competences and with the power to adopt individual regulatory decisions in a number of specific cases.”<sup>12</sup>

### B. Organization

While ACER is an EU-level agency (and thus roughly comparable to a “federal” agency in the U.S. legal framework), its powers and responsibilities are much more limited than those of the U.S. Federal Energy Regulatory Commission (FERC).<sup>13</sup> Like ERGEG, ACER is still vested primarily with the responsibility of encouraging the cooperation and coordination among the national “state” regulators.<sup>14</sup> As provided by Article 1 of the Regulation, the Agency’s basic purpose is to assist the Member State’s individual energy network regulatory authorities concerning common rules for the internal market in electricity and in natural gas “in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action.”<sup>15</sup>

The Agency is designed to be independent from electricity and gas producers, transmission and distribution system operators (whether public or private), and consumers.<sup>16</sup> It is also charged with overall market oversight and

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10. Regulation, *supra* note 3, at recital 3 (stating that “it is *widely recognised* by the sector, and proposed by the ERGEG itself, that voluntary cooperation between national regulatory authorities should now take place within a Community structure with clear competences and with the power to adopt individual regulatory decisions in a number of specific cases”) (emphasis added).

11. *Id.* at recital 5. While the Regulation does not reference the “*Attleboro* gap” well known to U.S. energy attorneys, the choice of the term “regulatory gap” suggests that a rather analogous constitutional and institutional analysis was at play.

12. *Id.* at recital 3.

13. *Id.* at arts. 5-11 (detailing power and responsibilities).

14. *Id.* at recital 6 (ACER “should ensure that regulatory functions performed by the national regulatory authorities in accordance” with the directives “concerning common rules for the internal market in electricity” and in natural gas are “properly coordinated”).

15. *Id.* at art. 1(2).

16. *Id.* at art. 12(7) (members of Administrative Board to “act independently and objectively in the public interest, without seeking or following any political instructions”); *see also id.* at art. 14(5) (“When carrying out the tasks conferred upon it by this Regulation and without prejudice to its members acting on behalf of their respective regulatory authority, the Board of Regulators shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity.”); *id.* at art. 18(3) (“members of the Board of Appeal shall be independent in making their decisions” and “shall not be bound by any instructions”); *see also id.* at recital 6 (“it is necessary to guarantee the independence of the Agency from electricity and gas producers, transmission and distribution system operators, whether public or private, and consumers and to ensure the conformity of its actions with Community law, its technical and regulatory capacities and its transparency, amenability to democratic control and efficiency.”).

monitoring responsibilities, including monitoring regional cooperation between transmission system operators in the electricity and gas sectors.<sup>17</sup>

ACER's organizational structure is comprised of four main parts:

- A Director is in charge of the day to day operations of the agency,<sup>18</sup>
- A Board of Regulators exercises regulatory and advisory responsibilities;<sup>19</sup>
- A Board of Appeal may review decisions of the Board of Regulators<sup>20</sup> (which decisions are in turn subject to judicial review before the Court of Justice of the European Communities);<sup>21</sup>
- An Administrative Board appoints the members of the Board of Regulators and the Board of Appeal<sup>22</sup> and approves the work program for the agency.<sup>23</sup>

The Administrative Board has nine members, with a certain number chosen by other EU institutions: two by the EU Commission (the executive), two by the European Parliament, with the remaining five members appointed by the European Council (the heads of state or of government of the EU Member States, together with the President of the EU Commission).<sup>24</sup> Decisions require a two-thirds majority of the members present (except in certain cases as provided by the Regulation).<sup>25</sup>

### C. Principal Responsibilities

The principal responsibilities of the Agency are spelled out in Articles 6, 7, and 8 of the Regulation.<sup>26</sup>

Article 6 details ACER's responsibilities regarding cooperation of transmission system operators.<sup>27</sup> It gives the agency the responsibility of reviewing "draft statutes, list of members and draft rules of procedure" of the transmission network operators for both electricity and gas,<sup>28</sup> as well as the role of monitor execution of certain tasks by those network operators.<sup>29</sup> The Agency has an advisory role in providing an opinion to the network operators with regard to network codes, draft annual work programs, and network development plans "taking into account the objectives of non-discrimination, effective competition and the efficient and secure functioning of the internal markets in electricity and

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17. See, e.g., *id.* at art. 6(2), (6)-(9).

18. *Id.* at art. 17.

19. *Id.* at arts. 14, 15.

20. *Id.* at arts. 18, 19.

21. *Id.* at art. 20.

22. *Id.* at art. 13(1)-(3).

23. *Id.* at art. 13(5).

24. *Id.* at art. 12(1).

25. *Id.* at art. 12(4).

26. *Id.* at arts. 6-8.

27. *Id.* at art. 6.

28. *Id.* at art. 6(1).

29. *Id.* at art. 6(2).

natural gas.”<sup>30</sup> In the event ACER determines that the operators’ draft work programs and network development plans “do not contribute to non-discrimination, effective competition and the efficient functioning of the market or a sufficient level of cross-border interconnection open to third-party access or [otherwise] do not comply with the relevant provisions” of the applicable open access directives, ACER is directed to provide a “duly reasoned opinion as well as recommendations” to the network operators group, as well as to the European Parliament, the European Council, and the European Commission.<sup>31</sup>

In addition, under Article 6 the Agency has responsibilities in the development of non-binding framework guidelines and in encouraging implementation of network codes and in monitoring and analyzing network code implementation, as well as progress of projects to create new interconnector capacity.<sup>32</sup>

Articles 7 and 8 contain important provisions governing the agency’s role involving terms and conditions for access and operational security of cross-border gas or electricity infrastructure. ACER generally has been granted the power to adopt individual decisions in certain situations, including “technical issues, the regulatory regime for electricity and natural gas infrastructure that connects or that might connect at least two Member States and, as a last resort, exemptions from the internal market rules for new electricity interconnectors and new gas infrastructure located in more than one Member State.”<sup>33</sup> Thus, ACER is directed under Article 7 section 7 of the Regulation to “decide on the terms and conditions for access to and operational security of electricity and gas infrastructure connecting or that might connect at least two Member States (cross-border infrastructure), in accordance with Article 8.”<sup>34</sup>

Article 8 spells out the agency’s responsibilities with regard to terms and conditions for access to and operational security of cross-border infrastructure in some detail.<sup>35</sup> For cross-border infrastructure, ACER is directed to

decide . . . those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, *only*: (a) [when] the competent national regulatory authorities have not been able to reach an agreement within a period of six months following referral . . . ; or (b) upon a joint request from the competent national regulatory authorities.”<sup>36</sup>

In such cases, ACER is required, in preparing its decision, to “consult the national regulatory authorities and the transmission system operators concerned.”<sup>37</sup> The Regulation further directs that “[t]he terms and conditions for access to cross-border infrastructure [must] include . . . a procedure for capacity

30. *Id.* at art. 6(3).

31. *Id.* at art. 6(4).

32. *Id.* at art. 6(4)-(7). *See also, id.* at art. 6(8)-(9) for additional responsibilities regarding monitoring implementation of Community-wide network-development plans and the regional cooperation of certain transmission system operators.

33. *Id.* at recital 10.

34. *Id.* at art. 7(7).

35. *Id.* at art. 8.

36. *Id.* at art. 8(1) (emphasis added).

37. *Id.*

allocation[, including] a time frame for allocation, shar[ing] of congestion revenues, and the levying” of certain user fees.<sup>38</sup>

The Regulation also provides a role for the EU executive (the Commission) in these matters, stating that “[t]he Commission may adopt Guidelines on the situations in which the Agency becomes competent to decide upon the terms and conditions for access to and operational security of cross-border infrastructure.”<sup>39</sup>

## II. EU RENEWABLE ENERGY DEVELOPMENTS – FEED-IN TARIFFS AND THEIR CURRENT STATUS

### A. *History of EU Renewable Energy Push and Incentive Mechanisms*

On April 23, 2009, the EU adopted binding targets for the use of renewable energy and biofuels.<sup>40</sup> That Directive required each country to establish a National Action Plan to enable the EU to meet an overall target of producing 20% of total EU energy consumption from renewable energy sources in the electricity sector, with a mandatory minimum target of 10% of transportation fuel produced from biofuels.<sup>41</sup> Member States were required to establish Renewable Energy Action Plans with mandatory quantitative targets to meet the EU’s goal by 2020.<sup>42</sup> On December 15, 2011, the Commission sent an Energy Roadmap “2050” to the European Parliament which further defined the expected direction for Member States.<sup>43</sup>

Most Member States had already introduced a range of different national incentive programs and support mechanisms for renewable energy, including FITs, in response to the earlier directive dealing with renewable energy, and many increased their incentives for renewable energy production. According to the European Commission Staff’s January 31, 2011, Working Document to the European Parliament, twenty-one Member States now use FITs, at least for some technologies and some market segments.<sup>44</sup> A table in that document shows that six use feed-in premiums<sup>45</sup> and six use quotas.<sup>46</sup> Technology specific rules have been introduced in quota regimes.<sup>47</sup> Optional feed-in premiums are made available in more mature markets where project risk is lower, modifying the means of financing (in particular budget/off budget choices) and creating new

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38. *Id.* at art. 8(2).

39. *Id.* at art. 8(4).

40. Council Directive No. 2009/28, 2009 O.J. (L 140) 16 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0016:0062:en:PDF>.

41. *Id.* at art. 3.

42. *Id.* at art. 4.

43. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050*, at 2, COM (2011) 885/2 (Dec. 15, 2011), available at [http://ec.europa.eu/energy/energy2020/roadmap/doc/com\\_2011\\_8852\\_en.pdf](http://ec.europa.eu/energy/energy2020/roadmap/doc/com_2011_8852_en.pdf).

44. *Commission Staff Working Document: Review of European and National Financing of Renewable Energy*, at 6, SEC (2011) 131 final (Jan. 31, 2011) [hereinafter *Renewable Energy Review*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0131:FIN:EN:PDF>.

45. *Id.* Those countries are the Czech Republic, Denmark, Estonia, Spain, Netherlands, and Slovenia.

46. *Id.* Those countries are Belgium, Italy, Poland, Romania, Sweden, and the United Kingdom.

47. *Id.*

FITs for new technologies because the stable financial revenues from FITs appear to be more effective and efficient in promoting green electricity.<sup>48</sup> In addition, Member States make smaller annual changes to the quotas, to the tariff or premium rates, to the lifetime of the support, and to aspects of eligibility.<sup>49</sup> According to the Commission Staff, all of these changes improve the efficiency of the instrument, but more needs to be done.<sup>50</sup> The Commission Staff also believes the move to market integration; in particular, the evolution to feed-in premiums is too slow and too fragmented.<sup>51</sup>

### B. Current Direction of FITs

In 2011, the market slowed down “due to cuts in subsidies and FITs.”<sup>52</sup> “[M]any larger companies are now talking about operating in a post-subsidy marketplace,” and “[t]he cuts made to FITs in a number of countries like the Czech Republic, Slovakia and France, Italy, the U.K., and Germany have continued in 2011.”<sup>53</sup>

A look at Spain and Germany provides a good snapshot of the progress of FITs. Spain and Germany have been at the forefront of FITs in Europe, and as a result of these incentives, renewable production resources have expanded to the point where reduction in subsidies have occurred as well.<sup>54</sup>

“Both Germany and Spain have adopted the goal of achieving a certain percentage of renewables in their electric generation mix” through the use of FITs, “whereby their electric utilities [were] obligated to purchase renewable electricity at a higher rate than retail.”<sup>55</sup> “In Germany, owners of solar panels have previously received as much as 43 [E]uro cents (64 U.S. cents) per kilowatt-hour” for power. In order to reduce the cost of electricity, “the German Government is scaling back its solar subsidies.” Among the cuts in FITs for roof-top systems, the German Government expects “to get a 16[%] cut; open-field projects a 15[%] cut, and solar installations on agricultural land a 100[%] cut [in 2010].”<sup>56</sup>

Moreover, “Spain’s legislation required 20[%] of its electricity production to come from renewable energy by 2010.”<sup>57</sup> Spain’s National Energy Commission “estimates that 2,945 megawatts of solar capacity were installed by year-end 2008.” However, in 2009, “owing to a sluggish economy and a

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48. DAVID DE JAGER ET AL., FINANCING RENEWABLE ENERGY IN THE EUROPEAN ENERGY MARKET 9 (2011), available at [http://ec.europa.eu/energy/renewables/studies/doc/renewables/2011\\_financing\\_renewable.pdf](http://ec.europa.eu/energy/renewables/studies/doc/renewables/2011_financing_renewable.pdf).

49. *Renewable Energy Review*, *supra* note 44, at 7.

50. *Id.*

51. *Id.*

52. Nicholas Stone, *PV in 2012: The Year of Truth*, PV MAGAZINE (Dec. 22, 2011) (internal quotations omitted), [http://www.pv-magazine.com/news/details/beitrag/pv-in-2012--the-year-of-truth\\_100005327/](http://www.pv-magazine.com/news/details/beitrag/pv-in-2012--the-year-of-truth_100005327/).

53. *Id.*

54. *Feed-In Tariffs Are Good for Expensive Renewables, but Are They Good for Consumers?*, INST. FOR ENERGY RESEARCH (Sept. 10, 2010), <http://www.instituteforenergyresearch.org/2010/09/10/feed-in-tariffs-are-good-for-expensive-renewables-but-are-they-good-for-consumers-2/>.

55. *Id.*

56. *Id.*

57. *Id.*

downgrading of its financial rating, the Spanish Government [slashed] subsidies to solar power, subsidizing just 500 megawatts of solar projects over the next 4 years, down sharply from 2,400 megawatts in 2008.” Additionally, in 2010, “the Spanish Government announced a 45[%] cut in their [FITs] for ground-based solar PV panels, and reduced support for large roof-based systems by 25[%] and for small roof-based systems by 5[%].”<sup>58</sup>

“In most EU Member States electric utilities now buy electricity generated from renewable sources produced by individuals and companies.”<sup>59</sup> As of 2010, with the exception of Belgium, Finland, Malta, Romania, and Sweden, these countries have some form of FITs.<sup>60</sup> In 2010, Germany’s FITs prices ranged from a low of .04 Euro/kWh for Hydro to .55 Euro/kWh for Solar PV.<sup>61</sup> In Spain, the 2010 FITs prices ranged from a low of .073 Euro/kWh for Windpower (on Shore) to .34 Euro/kWh for Solar PV.<sup>62</sup>

Both Spain and Germany have been reducing the amount of subsidies in recent years based on new renewable installations. “New solar installations reached a . . . record of 7.5 gigawatts (GW) in Germany in 2011” with the “figure slightly exceed[ing] the 7.4 GW recorded in 2010.”<sup>63</sup>

Germany became the world’s largest solar market by installations and a major sales market [to] U.S.-based First Solar, China’s Suntech, Norway’s Renewable Energy Corp and Germany’s SMA Solar.

But the country has been cutting those favorable tariffs in an effort to force the solar industry to lower its costs . . . and head off steep rises in energy bills for companies and households, which are required by law to pay the [FITs].<sup>64</sup>

Also, additions of solar installations in December 2011 amounted to 3 GW, the German regulatory agency said, “citing preliminary figures and adding that the pace of installations could trigger a 15[%] cut in tariffs under the [F]eed-[I]n law for renewable energy from July 2012, if unabated.” Moreover, “[u]nder previous regulation, it would take the installation of only 225 megawatts (MW) between January and April of [2012] to reach a level that would trigger a 15[%] cut in subsidies from mid-year.”<sup>65</sup>

### C. Future Role

In December 2011, the U.K. Government cut “subsidies for solar power after the U.K. High Court and a panel of lawmakers voiced opposition to the [FIT] plan.”<sup>66</sup> “The U.K. started its program of solar incentives in April 2010, saying at the time that the premium rates would remain in place until April 2012.

58. *Id.* (internal citations and footnotes omitted).

59. *Feed-In Tariffs*, EUROPE’S ENERGY PORTAL, <http://www.energy.eu/> (last visited Feb. 29, 2012).

60. *Id.*

61. *Id.*

62. *Id.*

63. Jose Eckert & Christoph Steitz, *German Solar Boom Strengthens Critics of Subsidies*, REUTERS, Jan. 9, 2012, <http://www.reuters.com/assets/print?aid=USTRE8080FL20120109>.

64. *Id.*

65. *Id.*

66. Marc Roca, *U.K. to Push Ahead with Solar Subsidy Cut After Court Rulings*, BLOOMBERG (Dec. 22, 2011), <http://www.bloomberg.com/news/print/2011-12-21/u-k-to-push-ahead-with-solar-subsidy-cuts-after-court-ruling.html>.



The Government trimmed incentives for the biggest projects on Aug[ust] 1 to prevent a boom in installations.”<sup>67</sup>

### III. ENERGY SAVINGS IMPETUS – DRAFT ENERGY EFFICIENCY MEASURE

#### A. *Recent Energy Efficiency and Energy Savings Measures*

The EU has continued its push to achieve energy savings<sup>68</sup> targets originally established in 2008.<sup>69</sup> In 2009 and 2010, the EU substantially amended three existing Directives dealing with energy efficiency and “recast” them as new Directives. The first was a Directive on the eco-design of energy products issued in 2009.<sup>70</sup> That Directive recognizes that energy savings can be achieved through improved design of products that use, generate, transfer, or measure energy throughout their life cycle.<sup>71</sup> It requires Member States to use technical specifications adopted by recognized standards bodies to apply to designated products and ensure that they are placed on the market only if they comply with the ecodesign standards and bear the “CE” label attesting to the standards.<sup>72</sup> An Annex sets out the method for determining generic ecodesign requirements.<sup>73</sup> Voluntary agreements (known as “self-regulation”) that present alternatives to implementing measures can be considered, subject to certain transparency and participation requirements.<sup>74</sup>

The Commission followed up the Directive on ecodesign with two further initiatives on energy efficiency. In May 2010, the Commission recast and reinforced earlier Directives on the labeling of energy related products<sup>75</sup> and the energy performance of buildings.<sup>76</sup> The scope of the earlier directive on labeling was limited to household appliances.<sup>77</sup> Under Directive 2010/30/EU, labeling and standard product information was made mandatory for energy-related

67. *Id.*

68. Energy savings and energy efficiency are terms often used interchangeably (as they are in this Report). Technically, they have different meanings. ‘Energy efficiency’ means using less energy inputs while maintaining an equivalent level of economic activity or output, while ‘energy savings’ also includes reduction in energy consumption through changes in behavior or decreased economic activity. In practice the two are difficult to disentangle.

69. Energy savings was one of three “20-20-20 by 2020” targets laid out in the “Climate and Energy Package” of legislation adopted by the European Parliament in December 2008 and described in the *2009 Committee Report*, *supra* note 2. Those targets were: (1) achieving a 20% reduction in greenhouse gases below 1990 levels by 2020; (2) using renewable energy sources for 20% of the EU’s energy consumption by 2020; and (3) reducing primary energy consumption by 20% over projected levels by 2020. *Citizens’ Summary: EU Climate & Energy Package*, EUROPEAN COMM’N (Dec. 19, 2008), [http://ec.europa.eu/climateaction/docs/climate-energy\\_summary\\_en.pdf](http://ec.europa.eu/climateaction/docs/climate-energy_summary_en.pdf).

70. Council Directive No. 2009/125, 2009 O.J. (L 284) 10 (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:285:0010:0035:EN:PDF>.

71. *Id.* at recital 4.

72. *Id.* at art. 3.

73. *Id.* at Annex I.

74. *Id.* at art. 17.

75. Council Directive No. 2010/30, 2010 O.J. (L 153) 1 (EU), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:153:0001:0012:EN:PDF>.

76. Council Directive No. 2010/31, 2010 O.J. (L 153) 13 (EU) [hereinafter Directive 2010/30/EU], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:153:0013:0035:EN:PDF>.

77. Council Directive No. 92/75, 1992 O.J. (L 297) 16 (EEC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:297:0016:0019:EN:PDF>.

products having “a significant direct or indirect impact on the consumption of energy.”<sup>78</sup> All suppliers or dealers placing such goods on the market or in service are required to attach labels to the products which contain information from test reports or design calculations, when available, “relating to the consumption of electric energy, other forms of energy and where relevant other essential resources during use.”<sup>79</sup> “[M]eans of transport for persons or goods” and “second-hand products” are exempted from the labeling requirements.<sup>80</sup> The Directive describes in detail the methods for setting ecodesign requirements by Member States.<sup>81</sup> Public supply and public service contracts above a designated threshold level must endeavor to procure only the products having the highest energy efficiency and highest energy performance.<sup>82</sup>

Similarly, the scope of the earlier Directive<sup>83</sup> on the energy performance of buildings was found wanting because it did not contain a precise methodology for calculating cost-optimal levels of minimum energy performance levels and was not mandatory.<sup>84</sup> Under Directive 2010/31/EU, Member States are required to establish minimum standards for the performance of new buildings and existing buildings undergoing major renovations.<sup>85</sup> By December 31, 2020, “all new buildings are [to be] nearly zero-energy buildings,” and by December 31, 2018, all “new buildings occupied and owned by public authorities are [to be] nearly zero-energy buildings.”<sup>86</sup> A “nearly-zero energy building” is defined as one with “very high energy performance, as determined in accordance with Annex I,” with the “nearly zero” or “very low amount of energy required” to come from renewable resources.<sup>87</sup> Buildings that could be exempted from the energy performance standards include places of worship and buildings of historic or architectural significance.<sup>88</sup> Member States are to ensure the issuance of certificates attesting to the buildings energy performance when a building is constructed, sold, or rented to a new tenant and for all public buildings with a usable floor space of over 500 m<sup>2</sup>.<sup>89</sup> The threshold of 500 m<sup>2</sup> for public buildings is to be lowered to 250 m<sup>2</sup> on July 9, 2015.<sup>90</sup> Performance levels are to take into account climatic conditions.<sup>91</sup>

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78. Directive 2010/30/EU, *supra* note 76, at art. 1(2).

79. *Id.* at art. 4.

80. *Id.* at art. 1(3).

81. *Id.* at Annex I.

82. *Id.* at art. 9.

83. Council Directive No. 2002/91, 2003 O.J. (L 1) 65 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0065:0065:EN:PDF>.

84. *Commission Proposal for a Directive on the Energy Performance of Buildings (Recast)*, at 2, COM (2008) 780 final (Nov. 13, 2008).

85. Directive 2010/30/EU, *supra* note 76, at art. 4(1).

86. *Id.* at art. 9(1).

87. *Id.* at art. 2(2).

88. *Id.* at art. 4(2).

89. *Id.* at art. 12(1).

90. *Id.*

91. *Id.* at art. 1(1).

### B. *Energy Efficiency Progress Reports*

A Commission Staff assessment of the state of play in the EU<sup>92</sup> found that, at the rate of implementation of the current energy efficiency policies in Member States through the end of 2009, a reduction of 8.9% in primary energy consumption would be achieved by 2020.<sup>93</sup> A subsequent progress report by Commission Staff on the implementation of the Energy Efficiency Action Plan 2006 (EEAP 2006) through the third quarter of 2010 similarly found that the policy framework of EEAP 2006 had not been fully implemented.<sup>94</sup> The EEAP 2006 had set out ten priority actions covering the main energy-using sectors that would have the potential to reduce energy consumption in the EU by 14% in 2020, as compared to a projection.<sup>95</sup> To reach the goal of reducing primary energy consumption by 20% in 2020, the EEAP 2006 stated that further action would have to be taken.<sup>96</sup> The Commission Staff noted that, while the EEAP 2006 brought about many positive developments, it was likely to achieve only half of the 14% in energy savings hoped for.<sup>97</sup> The Commission Staff postulated that one reason the EEAP 2006 did not achieve its target was because the list of eighty-five measures made the document appear to be of a technical nature to be implemented by the Commission, rather than by Member States.<sup>98</sup> In addition, “it lack[ed] clear objectives for the different sectors and the measures [were] not directly interlinked.”<sup>99</sup> The Commission Staff concluded that, among other things, a new overarching energy efficiency framework with a longer-term perspective and more ambitious measures were needed to achieve the European Communities’ goals.<sup>100</sup>

Based on these assessments, the EU decided to adopt a new energy efficiency strategy, which would “enable Member States to further decouple . . . energy use from economic growth.”<sup>101</sup> In December 2010, it adopted its Energy 2020 plan for defining the priorities for the next ten years and setting out the actions to be taken to achieve its goals, including its goal of decarbonization through reduced energy consumption.<sup>102</sup> To give fresh momentum to energy efficiency, the Commission published a new Energy Efficiency Plan (EEP 2011)

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92. *Commission Staff Working Document: State of Play in the EU Energy Policy: Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy*, SEC (2010) 1346 final (Nov. 10, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0639:FIN:EN:PDF>; see also, *Communication from the Commission: Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy*, COM (2010) 639 Final (Nov. 10, 2011) [hereinafter *Energy 2020*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0639:FIN:EN:PDF>.

93. *Commission Staff Working Document: Impact Assessment: Energy Efficiency Plan 2011*, at 20, SEC (2011) 277 final (Mar. 8, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0277:FIN:EN:PDF>.

94. *Commission Staff Working Paper: Progress Report of the Energy Efficiency Action Plan 2006: Energy Efficiency Plan 2011*, SEC (2011) 275 final (Mar. 8, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0275:FIN:EN:PDF>.

95. *Id.* at 4.

96. *Id.*

97. *Id.* at 48.

98. *Id.* at 47.

99. *Id.*

100. *Id.* at 48.

101. *Energy 2020*, *supra* note 92, at 6.

102. *Id.*

in March 2011.<sup>103</sup> In June 2011, it followed this up with a legislative proposal to transform certain aspects of the EEP 2011 into binding measures.<sup>104</sup>

### C. Proposed Energy Efficiency Directive

The Proposed Energy Efficiency Directive (Proposed EED) has three main components, as described below. The first deals with energy usage by requiring public buildings to undergo a minimum amount of renovations each year. The second establishes an energy efficiency supply obligation, while the third requires development of national plans for efficient cogeneration, heating, and cooling. Each element of this strategy contains a number of measures.

The first measure to reduce end-use energy consumption is aimed at the public sector. The Proposed EED notes that “[t]he total volume of spending by the public sector is equivalent to 19% of the [EU]’s gross domestic product” and the public sector is therefore “an important driver to stimulate market transformation towards more efficient products, buildings and services, as well as to trigger behavioural changes in energy consumption by citizens and enterprises.”<sup>105</sup> Because building renovation is crucial to reducing GHG emissions and because buildings owned by public bodies have high visibility, the Proposed EED states that it is “appropriate to set an annual rate of renovation of all buildings owned by public” authorities.<sup>106</sup> Article 4, section 1 therefore requires Member States to ensure that, as of January 1, 2014, 3% of the total useful floor area over 250 m<sup>2</sup> in buildings “owned by their public bodies is renovated each year to meet the minimum energy performance requirements [established] by the Member State.”<sup>107</sup> Public bodies are required to publish an inventory of buildings they own, the floor area of each building, and the energy performance of each building, by January 1, 2014.<sup>108</sup> Member States are also required to “ensure that public bodies purchase only products, services and buildings” that meet the high-energy performance standards listed in Annex III of the Proposed EED.<sup>109</sup>

The second measure designed to reduce energy usage involves creation of an energy efficiency obligation requirement. Under the second measure, “all energy distributors or retail energy sales companies” are required to “achieve annual energy savings equal to 1.5% of their energy sales, by volume, in the previous year.”<sup>110</sup> This amount of energy savings among final customers is to exclude energy used in transportation.<sup>111</sup> The methodology to use in calculating the savings is found in Annex V(2) to the Proposed EED. The Proposed EED gives Member States the option of achieving the same energy savings among

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103. *Communication from the Commission: Energy Efficiency Plan 2011*, COM (2011) 109 final (Mar. 8, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0109:FIN:EN:PDF>.

104. *Commission Proposal for a Directive of the European Commission and of the Council on Energy Efficiency and Repealing Directives 2004/8/EC and 2006/32/EC*, COM (2011) 370 final (June 22, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0370:FIN:EN:PDF>.

105. *Id.* at recital 14.

106. *Id.* at recital 15.

107. *Id.* at art. 4(1).

108. *Id.* at art. 4(3).

109. *Id.* at art. 5.

110. *Id.* at art. 6(1).

111. *Id.*

final energy customers through alternative measures.<sup>112</sup> “[S]mall energy distributors and small retail energy sales companies” with sales of less than 75 GWh of energy per year, which employ less than ten persons or have an annual turnover of less than two million EUR may be exempted from the energy efficiency obligation.<sup>113</sup>

An additional measure for reducing end-user energy usage involves providing consumers with the tools to make more energy efficient decisions. Included in these tools are energy audits and energy management systems. The Proposed EED would require Member States to “develop program[s] to encourage [homeowners] and small and medium[] enterprises to undergo energy audits” by qualified or accredited auditors.<sup>114</sup> Additional encouragement to change behavior is to be provided by giving customers information on their energy usage. Under Article 8, “final customers for electricity, natural gas, district heating or cooling and district-supplied domestic hot water [must be] provided with individual meters that accurately measure . . . energy consumption,” and at such time as smart meters are installed in accordance with the requirements of the Electricity and Natural Gas Directives, energy efficiency must be “taken into account [in] establishing the minimum functionalities of such meters.”<sup>115</sup> Member States are also required to ensure that “no[] later than January 1, 2015, . . . billing is accurate and based on actual consumption.”<sup>116</sup> Customers must also be given the “choice of either electronic or hard copy billing.”<sup>117</sup> In the event of non-compliance by distributors and energy retail sales companies with their energy efficiency, audit, and metering obligations, Member States are required to impose penalties that are “proportionate and dissuasive.”<sup>118</sup>

The third prong of the Proposed EED addresses energy heating and cooling. Article 10 of the Proposed EED obligates Member States to establish a national heating and cooling plan by January 1, 2014.<sup>119</sup> The plan for the application of high-efficiency cogeneration and efficient district heating has to include, *inter alia*, “measures to be adopted up to 2020 and up to 2030 to realise the potential” “for additional high-efficiency cogeneration” and maximizing the use of waste heat and renewable resources to meet heat and cooling demand in urban spatial planning.<sup>120</sup> “[A]ll new thermal electricity” generating plants “with a total thermal input exceeding 20 MW” must be equipped to allow “the recovery of waste heat by means of a high-efficiency cogeneration unit” and must be “sited in a location where waste heat can be used by heat demand points.”<sup>121</sup> Refurbishment of an existing plant with a total rated thermal input of over 20 MW is required to meet the same conditions.<sup>122</sup> The construction or

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112. *Id.* at art. 6(9).

113. *Id.* at art. 6(8).

114. *Id.* at art. 7(1).

115. *Id.* at art. 8(1).

116. *Id.* at art. 8(2).

117. *Id.*

118. *Id.* at art. 9.

119. *Id.* at art. 10(1).

120. *Id.* at Annex VII(1)(e)-(f).

121. *Id.* at art. 10(3).

122. *Id.* at art. 10(6).

refurbishment of industrial installations triggers the same requirements.<sup>123</sup> Exemptions from these requirements are permitted under certain conditions, including when “a cost-benefit analysis shows that the costs [of cogeneration] outweighs the benefits in comparison with . . . providing the same amount of electricity and heat with separate heating and cooling.”<sup>124</sup> Electricity produced from high-efficiency cogeneration is eligible for guarantees of origin issued by individual Member States and which other Member States have an obligation to recognize.<sup>125</sup>

Member States are required to draw up an inventory of installations using fuel for combustion that have a “rated thermal input of 50 MW or more” and those installations refining mineral oil or gas.<sup>126</sup> National regulatory authorities are required to take energy efficiency into consideration with respect to network tariffs, dispatch, and connection of high efficiency cogeneration installations.<sup>127</sup> Finally, with respect to energy service providers, Member States are required to ensure that certification schemes for energy service providers are available by January 1, 2014<sup>128</sup> and that these services are made available for small and medium enterprises.<sup>129</sup>

“[O]n December 20[, 2011,] . . . the [European Parliament]’s environment committee adopted an amendment to the [Proposed EED] to set aside a volume of allowances in the third phase of the [EU’s Emissions Trading Scheme (ETS)].”<sup>130</sup> The phase runs from 2013 to 2020.<sup>131</sup> This amendment is intended to stop the undermining of the ETS carbon price, which would otherwise drop because the Proposed EED is expected to reduce carbon emissions by 2020, thereby undermining “incentives for heavy industry to invest in low carbon technologies.”<sup>132</sup> “The price of EU carbon allowances surged more than 30%” after this amendment was adopted.<sup>133</sup> The environment committee then adopted a second amendment setting the volume of set asides at 1.4 billion allowances, at the high end of the range of set-asides used by the European Commission in its analysis of the set-aside concept.<sup>134</sup>

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123. *Id.* at art. 10(8).

124. *Id.* at art. 10(4).

125. *Id.* at art. 10(10).

126. *Id.* at art. 11.

127. *Id.* at art. 12.

128. *Id.* at art. 13.

129. *Id.* at art. 14.

130. Siobhan Hall, *EP Committee Vote on Efficiency, CO2 Set Aside Delayed to Feb 28*, PLATT’S ELEC. POWER (Jan. 6, 2012, 6:48 AM), <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/ElectricPower/8768375>.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

#### D. *Opposition to Directive*

The obligation imposed on public authorities to renovate 3% of the buildings they own each year has met with stiff resistance from municipal governments.<sup>135</sup> For example, the British Local Government Association issued a statement estimating the cost of compliance with this requirement at “£50 billion over the next 33 years.”<sup>136</sup> It stated that this requirement, at a time when governments are struggling to meet budget projections, will require cuts to core services, including trash collection and care for the elderly.<sup>137</sup> But the full annual cost to taxpayers “could run into billions when properties owned by the [National Health Service], [the] Ministry of Defence and other parts of the public sector are included.”<sup>138</sup>

In addition to Britain pushing to delete these provisions entirely, other countries like Germany and the Netherlands in the EU object to the 1.5% savings target.<sup>139</sup> The Netherlands proposes to delete this provision, arguing that countries should be free to establish savings levels themselves.<sup>140</sup> Italy, France, and Denmark, all of which already have supplier-side obligations, support the scheme on condition that changes are introduced.<sup>141</sup> The financial crisis has made it hard to find the capital needed to invest in energy efficiency technologies, even if in the long term such investments pay healthy dividends.<sup>142</sup> In all, some 1,800 amendments are being considered by the European Parliament’s energy committee, which will make the final determination, after which negotiations to finalize a common text will have to be negotiated among the Energy Community, the European Union Council, and the European Parliament.<sup>143</sup> As of the writing of this Report, a full vote by the Parliament, which was originally scheduled for April 17, 2012, has been delayed and no fixed time table has been established for its passage.<sup>144</sup>

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135. Robert Watts, *Europe Plan to ‘Green’ Public Buildings to Cost £50bn*, TELEGRAPH (Nov. 26, 2011 9:00 PM), <http://www.telegraph.co.uk/earth/greenpolitics/8917961/Europe-plan-to-green-public-buildings-to-cost-50bn.html>.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Difficult Energy Efficiency Directive Pushed Back by Member States to 2012*, AIE EUROPEAN ASS’N OF ELEC. CONTRACTORS (Dec. 15, 2011 12:02 PM), [http://www.aie.eu/aie/news/DIFFICULT\\_ENERGY\\_EFFICIENCY\\_DIRECTIVE\\_PUSHED\\_BACK\\_BY\\_MEMBER\\_STATES\\_TO\\_2012](http://www.aie.eu/aie/news/DIFFICULT_ENERGY_EFFICIENCY_DIRECTIVE_PUSHED_BACK_BY_MEMBER_STATES_TO_2012).

140. *Backstage Battle over Energy Efficiency Directive*, EURACTIV (last updated Nov. 7, 2011), [http://www.euractiv.com/energy-efficiency/backstage-battle-energy-efficiency-directive-news-508705?utm\\_source=EurActiv+Newsletter&utm\\_campaign=150e75674b-my\\_google\\_analytics\\_key&utm\\_medium=email](http://www.euractiv.com/energy-efficiency/backstage-battle-energy-efficiency-directive-news-508705?utm_source=EurActiv+Newsletter&utm_campaign=150e75674b-my_google_analytics_key&utm_medium=email).

141. *Id.*

142. *Energy Efficiency Directive in Limbo*, EURACTIV (last updated Dec. 19, 2011) [hereinafter *Directive in Limbo*], <http://www.euractiv.com/energy-efficiency/energy-efficiency-directive-limbo-news-509728>.

143. Hall, *supra* note 130.

144. *Directive in Limbo*, *supra* note 142.

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