

REPORT OF THE INTERNATIONAL ENERGY LAW AND TRANSACTIONS COMMITTEE

This 2017 Report* summarizes some of the most significant developments in European Union (EU) energy law and policy of the past few years emanating from the ambitious Energy Union Package launched in February 2015.¹ The Energy Union project resulted from the conclusion reached by the European Commission (EC) that Europe’s energy system required a fundamental transformation because of a number of deficiencies.² The following problems were identified by the EC:

- Energy rules are “set at the European level, but in practice [the EU] has [twenty-eight] national regulatory frameworks;”³
- “The retail market is not functioning properly” because households have too few choices of supplier and many “cannot afford to pay their energy bills;”⁴
- The design of the current Internal Electricity Market (IEM) does not provide the incentives for capital investments to replace aging infrastructure;⁵
- Insufficient electricity connections create energy islands and threaten energy security;⁶ and
- The EU has begun to lag other parts of the world in development of low-carbon technologies.⁷

The Energy Union strategy therefore proposed five “dimensions” to address these problems: (1) “[e]nergy security, solidarity and trust”; (2) a fully integrated internal energy market; (3) “energy efficiency contributing to moderation of demand;” (4) decarbonization of the economy; and (5) an energy union for research, innovation, and development.⁸ Each dimension required further implementation measures or legislative action by the EC to achieve the goal of creating an Energy Union.⁹ The proposed implementation measures are contained in a package of legislative proposals issued November 30, 2016 and titled “Clean Energy for All Europeans” (Clean Energy Package), launching a complex review and approval process expected to lead to various revisions and amendments before final action

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1. See generally EUR. COMM’N, ENERGY UNION PACKAGE: A FRAMEWORK STRATEGY FOR A RESILIENT ENERGY UNION WITH A FORWARD-LOOKING CLIMATE CHANGE POLICY (2015).

2. *Id.* at 2; Eur. Union, *European Commission Overview* (Mar. 11, 2018), https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en.

3. Energy Union Package, *supra* note 1, at 3.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Energy Union Package, *supra* note 1, at 4.

9. EUR. COMM’N: CLEAN ENERGY FOR ALL EUROPEANS, <https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans> (last visited Mar. 3, 2018).

is taken sometime in 2018.¹⁰ The package runs to more than 1000 pages and contains “nine legislative proposals and seven non-legislative” document proposals.¹¹ The proposals cover “energy efficiency, renewable energy, electricity market re-design, governance rules for the Energy Union, energy security and eco-design.”¹²

This report summarizes the areas which are likely to be of the most interest to U.S. energy practitioners and which update prior Energy Law Journal committee reports on the EU legal and regulatory framework for the energy sector.¹³ Those areas are: (1) design of the IEM (proposed amendments to the Electricity Directive, and the Electricity Regulation); (2) energy efficiency (revisions to the current Energy Efficiency Directive 2012/27/EC, among others); and (3) renewable energy (amendments to the existing Renewables Directive 2009/28/EC among others).¹⁴ This report does not include the proposals for entirely new measures contained in the Clean Energy Package.¹⁵ In addition, the report addresses the proposed changes to the 2009 regulation establishing the Agency for the Cooperation of Energy Regulators (ACER) and ACER’s revised responsibilities under the newly proposed framework.¹⁶

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10. EUR. COMM’N: COMMISSION PROPOSES NEW RULES FOR CONSUMER CENTERED CLEAN ENERGY TRANSITION (Nov. 30, 2016), <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition>.

11. *Clean Energy Package: Clean Energy for all Europeans*, GREENOVATE! EUROPE, <http://www.greenovate-europe.eu/clean-energy-package-clean-energy-all-europeans> (last visited March 13, 2018).

12. *Id.*

13. *See generally Report of the International Energy Transactions Committee*, 24 ENERGY L.J. 429 (2003) (addressing the initial EU directives beginning the market liberalization process and the so-called “Second Energy Package”); *Report of the International Energy Transactions Committee*, 30 ENERGY L.J. 207 (2009) (summarizing legal and regulatory developments following adoption of the Second Package and leading up to the then-proposed “Third Energy Package”); *Report of the International Energy Law and Transactions Committee*, 33 ENERGY L.J. 285 (2012) (summarizing the five components of Third Energy Package) [hereinafter IELTC Report 2012].

14. *See generally* Directive 2009/72, of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, 2009 O.J. (L 211) 55 [hereinafter Electricity Directive]; Regulation 714/2009 of 31 July 2009, Conditions for Access to the Network for Cross-Border Exchanges in Electricity and Repealing Regulation 1228/2003, 2009 O.J. (L 211) 15 [hereinafter Electricity Regulation]; Directive 2012/27, of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, 2012 O.J. (L 315) 1; Directive 2009/28/EC, of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. (L 140) 16 [hereinafter Renewable Energy Directive].

15. L. HANCHER & B.M. WINTERS, THE EU WINTER PACKAGE 3 (2017) (New Measures of the Clean Energy Package include “new regulation on risk-preparedness in the electricity sector (the Risk Regulation) and a proposed regulation on Governance of the Energy Union (Governance Regulation)”).

16. *See generally* Commission Regulation 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 ACER Regulations].

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I. THE NEW ELECTRICITY MARKET DESIGN

A. *Background*

The introduction to the proposed amendments to the Electricity Directive notes that the Third Energy Package “has led to increased liquidity of European electricity markets and significantly increased cross-border trade . . . [while] [i]ncreased competition [has] helped to keep wholesale prices in check . . . [and] improved the position of consumers in energy markets.”¹⁷ Nonetheless, it finds that “fundamental changes in European electricity markets” have been caused by certain developments: the steeply increased use of intermittent resources, uncoordinated state interventions in wholesale electricity markets, market coupling “by power exchanges and transmission system operators[,]” and the participation of consumers in electricity generation and demand response enabled by smart metering.¹⁸ The purpose of the new electricity market design initiative is therefore “to adapt the current market rules to the new market realities” and “to put consumers

17. EUR. COMM’N, COMMISSION PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COMMON RULES FOR THE INTERNAL MARKET IN ELECTRICITY (RECAST) at 3 (2017), [hereinafter Proposed Electricity Directive]. So called the Third Energy Package because this package of Regulations and Directives is the European Commission’s third iteration of a vision for a “single internal energy market” (IEM) for Europe. The “Third Energy Package” consists of the Electricity Directive, *supra* note 14; Council Directive 2009/73/EC, 2009 O.J. (L 211) 94; Electricity Regulation, *supra* note 14; Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) 1775/2005, 2009 O.J. (L 211) 36; and the ACER Regulations, *supra* note 16.

18. Proposed Electricity Directive, *supra* note 17, at 3.

at the centre of the new energy system, making it easier for them to become energy producers.”¹⁹

B. Proposed Recast of the Electricity Directive

1. New Role for Consumers

As noted by Greenovate, the proposed amendments “shake up the design of the European energy market, altering the rules on market participation, in order to embrace new technologies and market participants.”²⁰ The new IEM design is premised on the willingness of all consumers—household and small commercial installations, as well as large industrial customers—to participate actively in competitive electricity markets, thereby keeping in check the cost of managing increased penetration of intermittent generation.²¹

An underlying principle of the new IEM model—and of the entire Clean Energy Package—is the need to decarbonize the European economy and the energy sector in particular, by moving away from large fossil-fueled power plants planned by incumbent utilities without consumer input, towards decentralized renewable energy sources (RES) with more consumer participation.²² The EC views active participation by consumers as a key to managing increased intermittent RES such as solar and wind power, and integrating short-term electricity markets “(so-called ‘intraday’ or ‘balancing’ markets)” to address changes in actual production versus forecast production.²³

The proposed amendments to the Electricity Directive introduce several new concepts. The first is the concept of “prosumers” or “active customers”—consumers who take advantage of the falling cost of technology by investing in distributed technologies such as rooftop solar panels and battery storage.²⁴ The second is the dynamic pricing contract which links prices to the spot market to enable consumers to benefit financially from the new opportunities offered by technological advances.²⁵ The third is the concept of “local energy communities”—organizations which manage energy supply and consumption at the community level through “small decentrali[z]ed or distributed generation,” with or without a connection to a local distribution system.²⁶ The EC directs Member States to put in

19. *Id.* at 4; Greenovate! Europe, *supra* note 11.

20. Greenovate! Europe, *supra* note 11 (emphasis omitted).

21. Proposed Electricity Directive, *supra* note 17, at 4-6; *see also* EUR. COMM’N, SECOND CONSUMER MARKET STUDY ON THE FUNCTIONING OF THE RETAIL ELECTRICITY MARKETS FOR CONSUMERS IN THE EU EXECUTIVE SUMMARY 1, 6 (2016) (indicating a consumer market study, conducted between July 2014 and December 2015 by Ipsos, London Economics and Deloitte on behalf of the EC, found that in the previous three years only 24% of consumers had either switched suppliers and/or switched from one tariff to another while remaining with their current company despite the fact that all Member States except for Croatia had implemented the provision of the Electricity Directive giving customers the right to switch electricity companies within a three-week period without paying extra charges).

22. Proposed Electricity Directive, *supra* note 17, at 4.

23. *Id.*

24. *Id.* at 5, 52 (indicating while there is no definition of “prosumers” in the Proposed Electricity Directive, there is a new definition of “Active customer” found in Article 2, definition 6); *see also* GFK BELGIUM, STUDY ON RESIDENTIAL PROSUMERS IN THE EUROPEAN ENERGY UNION (2017) (discussing prosumers in detail).

25. Proposed Electricity Directive, *supra* note 17, at 5, 53.

26. *Id.* at 52, 68-69.

place the appropriate legal frameworks to allow for the activities of local energy communities.²⁷

Fourth, to allow consumers to participate on an equal footing with generators by bidding demand-response offers into the market, the concept of “aggregators” is introduced.²⁸ Such service providers, for a fee, can aggregate the demand response of consumers willing to shift their consumption to off-peak periods.²⁹ Finally, all consumers are given the right to request “smart metering systems” (meters that both transmit and receive data) and access to consumer data.³⁰

2. Barriers to Active Consumer Participation

The amendments to the IEM address certain barriers to consumer participation and capital investments in back-up solutions for intermittent generation. The primary barriers are price caps and state interventions which prevent prices from reflecting scarcity.³¹ Price caps had already been identified as hindering further market development in the EC’s Energy Union Strategy.³² That strategy committed to phasing out prices set at below the cost of generation and encouraged Member States to develop road maps for phasing out price regulation altogether.³³ The Proposed Electricity Directive reiterates the EC’s intention to remove price controls from retail pricing “only with duly justified exceptions.”³⁴

Article 5 of the Proposed Electricity Directive states that “[e]lectricity suppliers shall be free to determine the price at which they supply electricity to customers.”³⁵ It goes on to say that Member States shall protect the energy poor and vulnerable customers “in a targeted manner by other means than public interventions in the price-setting for the supply of electricity.”³⁶ The proposal provides a five-year transition period, after which public interventions in prices for vulnerable customers are only permitted “for reasons of extreme urgency.”³⁷

The Proposed Electricity Directive modifies the Member States’ obligation to provide household and small enterprises with “universal service” at “reasonable” rates by replacing the term “reasonable” with the term “competitive.”³⁸ The “universal service” obligation and the requirement to protect vulnerable consumers have been used by regulatory authorities and Ministries in Member States to keep electric rates low, and price increases have been historically difficult to implement.³⁹

27. *Id.* at 68-69.

28. *Id.* at 69.

29. *Id.*

30. Proposed Electricity Directive, *supra* note 17, at 11, 31, 53.

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 5.

34. *Id.*

35. Proposed Electricity Directive, *supra* note 17, at 58.

36. *Id.* The EC also generally relates vulnerability to poverty elsewhere; *see, e.g., id.* at 76; Electricity Directive, *supra* note 14, at 65.

37. Proposed Electricity Directive, *supra* note 17, at 58.

38. *Id.* at 76.

39. For countries in Central and Eastern Europe, this requirement could present difficult political challenges. In Bulgaria, for example, electricity price increases triggered mass street riots which brought down the

3. Security of Supply and Reliance on Regional Markets

The proposed amendments to the Electricity Directive require Member States to act on a pan-European, or at least regional, basis rather than nationally.⁴⁰ The Proposed Electricity Directive requires the issue of “security of supply” to be addressed on a regional, rather than a national, basis.⁴¹ Currently the issue of security of supply is dealt with in Article 8 of the Electricity Directive, which deals with Tendering for New Capacity. This provision is proposed to be deleted from the Proposed Electricity Directive.⁴² Under the present Article 8, there are two procedures EU Member States can use for adding new generation: (1) the authorization procedure; and (2) the tendering procedure initiated “in the interests of security of supply.”⁴³ The latter procedure is a fall-back procedure and can only be used “where, on the basis of the authori[z]ation procedure, the generating capacity to be built or the energy efficiency/demand-side management measures to be taken are insufficient to ensure security of supply.”⁴⁴

The Proposed Electricity Directive would deal with supply security differently. It explains that “the most efficient remedies to national generation deficits are often regional solutions, allowing Member States to benefit from generation surpluses in other countries.”⁴⁵ The EC therefore proposes to conduct a coordinated European-wide capacity adequacy study to determine whether mechanisms are needed in certain countries or regions to promote generation investments.⁴⁶ If that study shows that capacity mechanisms are needed in specific countries, then capacity mechanisms can be introduced.⁴⁷ But the EC states that “fragmented national capacity mechanisms [run the risk of] creating new market barriers and undermining competition[,]” and that coordination is required.⁴⁸

The Proposed Electricity Directive deletes Articles and provisions that could result in fragmentation, including Article 15, which, *inter alia*, gives Member States the right to accord priority dispatch to generating installations using indigenous primary energy fuel, for reasons of security of supply.⁴⁹ Article 4 (dealing with the monitoring of security of supply by Member States) has also been deleted.⁵⁰ Instead, Member States are to monitor resource adequacy based on the

government in 2013. *See, e.g.*, Diana Simeonova, *Bulgarian Government Quits After Protests*, NEWS AU (Feb. 21, 2013, 12:39 AM), <http://www.news.com.au/world/breaking-news/bulgarian-government-quits-after-protests/news-story/5610630c4f3139f59998c68a6548ac12>. At the moment, many of the countries in these regions set household electricity prices below cost.

40. Proposed Electricity Directive, *supra* note 17, at 6.

41. *Id.*

42. Proposed Electricity Directive, *supra* note 17, at 62-63.

43. Electricity Directive, *supra* note 14, at 66-67.

44. *Id.* at 67.

45. *Id.* (emphasis added).

46. *Id.* at 6-7.

47. *Id.* at 6.

48. Proposed Electricity Directive, *supra* note 17, at 7.

49. *Id.* at 86.

50. *Id.* at 77.

European adequacy assessment to be carried out by the European Network of Transmission System Operators for Electricity (ENTSO-E).⁵¹

While national regulatory authorities still retain the task of monitoring security of supply, some of their authority will be transferred to the ACER, “where fragmented national decision-making on issues with cross-border relevance would lead to problems and inconsistencies for the internal market.”⁵² The EC considered creating a single pan-European regulatory authority (equivalent to the Federal Energy Regulatory Commission).⁵³ That proposal was rejected and, instead, the EC opted for increasing ACER’s monitoring authority and creating other European-wide and regional institutions.⁵⁴ Among them are the Regional Operating Centres and a European-wide umbrella organization for Distribution System Operators (DSOs), similar to ENTSO-E, the entity for electric transmission system operators (TSOs).⁵⁵ Both organizations are described below.

B. Proposed Recast of the Electricity Regulation

1. Regional Operating Centres

The Electricity Regulation has been amended a number of times and the recast proposal is almost an entire rewrite of both the Regulation and the Annex to the Electricity Regulation.⁵⁶ The existing Annex deals with management of congestion on cross-border interconnections and creates seven regions for coordinating the auctioning of congested transmission interconnection capacity on Europe’s borders.⁵⁷

The Proposed Electricity Regulation introduces a new concept, called Regional Operational Centres (ROCs), that require participation in regional coordination.⁵⁸ The EC’s rationale, as stated in new Recital 32, is that only closer cooperation can achieve an integrated IEM: “In view of differences in national energy systems and technical limitations of existing electricity networks, the best approach to achieving progress in market integration will often be at a regional level. Regional cooperation of transmission system operators should thus be strengthened.”⁵⁹

The functions of the ROCs are: (i) to perform regional coordination of cross-zonal transmission capacity; (ii) coordinate security analyses; (iii) facilitate regional procurement of balancing power; (iv) coordinate restoration of system outages; (v) size regional capacities; and (vi) perform other tasks complementing the

51. EUR. COMM’N, COMMISSION PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE INTERNAL MARKET FOR ELECTRICITY (RECAST) 53 (2017) [hereinafter Proposed Electricity Regulation].

52. *Id.* at 10.

53. *Id.* at 16.

54. *Id.*

55. Proposed Electricity Directive, *supra* note 17, at 6, 78-84.

56. *See generally* Proposed Electricity Regulation, *supra* note 51.

57. SEE CAO, www.seecao.com/history (last visited March 19, 2018) (illustrating an eighth region was subsequently created for South East Europe (SEE) to include both Member States and countries bordering the EU).

58. Proposed Electricity Regulation, *supra* note 51, at 10.

59. *Id.* at 30.

tasks of the TSOs at the regional level.⁶⁰ Annex I elaborates on these functions and eliminates the seven regions that were created for cross-border congestion management.⁶¹ Instead, the geographic scope of each ROC is to be determined by ENTSO-E, taking into account criteria such as size, synchronous interconnections, and balancing reserves.⁶² ROCs are to be established in legal form by the TSOs of the Member States of the regions where they will operate within one year after entry into force of the new regulation.⁶³ The legal form is required to include liability on the part of ROCs for the consequences of their decisions.⁶⁴

2. Resource Adequacy

Resource adequacy assessments are to be performed on a European-wide basis, using a methodology to be developed by ENTSO-E and approved by ACER.⁶⁵ The methodology must ensure that the assessment is “carried out on [a] bidding zone level” and takes into account, among other things, “future generation, energy storage, demand response, and import and export possibilities and their contribution to flexible system operation.”⁶⁶ When introducing capacity mechanisms to incentivize new investment, Member States must have in place “a reliability standard . . . indicating their desired level of security of supply[,]” which has been set in a transparent manner by the national regulator.⁶⁷ Capacity mechanisms introduced for anything other than “strategic reserves” must allow the “participation of capacity providers . . . in [other] Member State[s] provided there is a network connection between that Member State and the bidding zone” in which the capacity mechanism is to be applied.⁶⁸

3. The DSO Entity

To facilitate the close cooperation of distribution system operators (DSOs), TSOs, and ENTSO-E, the Proposed Electricity Regulation creates a new entity, called the “EU DSO Entity.”⁶⁹ This entity will be made up of DSOs which are not included in a vertically integrated utility or are legally unbundled.⁷⁰ The purpose of the EU DSO Entity is to further “the completion and functioning of the” IEM.⁷¹ The tasks of the new entity include renewable energy resource integration, demand response development, deployment of intelligent metering systems, data security, and working with ENTSO-E on the development of network codes.⁷²

60. *Id.* at 65-66.

61. *Id.* at 65-66.

62. *Id.*

63. Proposed Electricity Regulation, *supra* note 51, at 64.

64. *Id.* at 69.

65. *Id.* at 54.

66. *Id.*

67. *Id.* at 55.

68. Proposed Electricity Regulation, *supra* note 51, at 54.

69. *Id.* at 31.

70. *Id.* at 74.

71. *Id.*

72. *Id.* at 75.

II. THE RECAST ENERGY EFFICIENCY DIRECTIVE AND ASSOCIATED MEASURES

A. *The Energy Efficiency Package*

The package implementing the Energy Union’s “energy efficiency first” mantra includes a revised Energy Efficiency Directive, an amended Energy Performance of Buildings Directive, and a new Energy Labelling Regulation for specific products, such as household appliances and some industrial appliances.⁷³ The new Energy Labelling Regulation, which was issued in July 2017 separately from the Clean Energy Package and entered into force on August 1, 2017, repealed the old Energy Labelling Directive.⁷⁴ The Energy Efficiency Package also includes other measures, such as an Eco-Design Plan for the 2016-2019 period and an investment initiative called Smart Finance for Smart Buildings to encourage a more effective use of public funds.⁷⁵

1. The Proposed Energy Efficiency Directive

As drafted in 2016, the Proposed Energy Efficiency Directive would retain the requirement that energy distributors and suppliers increase their energy reductions by 1.5% annually but additionally calls for an EU-wide binding reduction in energy usage of 30% by 2030.⁷⁶ The previous target of a 20% reduction in energy consumption by 2020 was not binding.⁷⁷ According to the EU, this binding target will provide the certainty investors need that “it is worth investing in energy efficiency.”⁷⁸

The other new provisions in the proposed directive include:

- Putting alternative measures to save energy on an equal footing with energy efficiency obligations schemes to provide Member

73. EUR. COMM’N, COMMISSION PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE 2012/27/EU ON ENERGY EFFICIENCY (2016) [hereinafter Proposed Energy Efficiency Directive]; EUR. COMM’N, COMMISSION PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING 2010/31/EU ON THE ENERGY PERFORMANCE OF BUILDINGS (2016) [hereinafter Proposed EPB Directive]; Regulation (EU) 2017/1369, of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, 2017 O.J. (L 198) 1.

74. Regulation (EC) 2017/1369, 2017 O.J. (L 198) 1 (EU); *see also* DIFFERENCE BETWEEN: DIFFERENCES BETWEEN DIRECTIVE AND REGULATION, <http://www.differencebetween.info/difference-between-directive-and-regulation> (last visited Mar. 16, 2018) (“Directives and Regulations are two forms of laws that can be passed by the European Union. A regulation is a legal act that becomes immediately enforceable, while a directive generally imposes obligations on the Member States themselves (rather than on market participants) to implement the Directive through binding national law, leaving the Member States flexibility in how best to transpose that goal into national legislation. Failure by a Member State to transpose a Directive into binding national law can result in the European Commission commencing an ‘infringement’ action against a Member State before the European Court of Justice to compel compliance”).

75. NEW ENERGY EFFICIENCY MEASURES, https://ec.europa.eu/energy/sites/ener/files/documents/technical_memo_energyefficiency.pdf (last visited Mar. 19, 2018).

76. Proposed Energy Efficiency Directive, *supra* note 73, at 2-3.

77. *Id.* at 2.

78. New Energy Efficiency Measures, *supra* note 75; *see* EUR. ENV’T AGENCY, EU STILL ON TRACK TO MEET TARGETS ON RENEWABLES AND ENERGY EFFICIENCY BUT PROGRESS SLOWING DOWN (Nov. 24, 2017) (drawing attention to an EEA analysis indicating that the collective targets of the Member States currently do not add up to the 2020 target of a 20% reduction in energy usage).

States with flexibility in how they achieve the energy savings target;⁷⁹

- Giving consumers improved heating and cooling information and strengthening their rights to metering and billing;⁸⁰
- Simplifying and clarifying how energy savings need to be calculated;⁸¹ and
- Requiring energy poverty to be accounted for when designing energy efficiency schemes.⁸²

The EU concludes that, even though the final costs of implementing energy measures “are passed on to the final consumers . . . they will benefit from the reduced energy bills due to reduced energy consumption.”⁸³

2. The Energy Performance of Buildings Directive

The Proposed EPB Directive makes relatively few changes to the existing directive, which already requires that new buildings become nearly zero-energy by 2020.⁸⁴ An evaluation of the effectiveness of the existing directive “reveals relatively limited regulatory failures . . . [and therefore] includes only targeted amendments, allowing the continued implementation of key provisions in the current Directive that are already delivering and are cost-effective.”⁸⁵ The evaluation also “identifie[d] aspects of the national transposition and implementation that could be further developed through better enforcement, compliance monitoring and evaluation.”⁸⁶ But the EC did find “[o]pportunities for simplification or moderniz[ation] of outdated provisions and streamlining existing provisions in the light of technological progress.”⁸⁷ In addition to those technical amendments, the Proposed EPB Directive:

[I]ntroduces building automation and control systems as an alternative to physical inspections, encourages the roll-out of the required infrastructure for e-mobility (with a focus on large commercial buildings and excluding public buildings and SMEs), and introduces a smartness indicator to assess the technological readiness of the buildings to interact with their occupants and the grid and to manage themselves efficiently. This update of the EPBD will also strengthen the links between public funding for building renovation and energy performance certificates and will incentiviz[e] tackling energy poverty through building renovation.⁸⁸

“On . . . 19 December 2017, the Estonian presidency reached a provisional agreement with the European Parliament on a revised” draft of the Proposed EPB Directive, which included a new feature promoting “electro-mobility” by requiring buildings with ten or more parking spaces to add recharging points for electric

79. Proposed Energy Efficiency Directive, *supra* note 73, at 8.

80. *Id.* at 3.

81. *Id.* at 8.

82. *Id.* at 3.

83. *Id.* at 7.

84. NEARLY ZERO-ENERGY BUILDINGS, <https://ec.europa.eu/energy/en/topics/energy-efficiency/buildings/nearly-zero-energy-buildings> (last visited Mar. 17, 2018).

85. Proposed EPB Directive, *supra* note 73, at 6, 9.

86. *Id.* at 6.

87. *Id.*

88. *Id.* at 2.

cars and in new or substantially renovated non-residential buildings, to include one electric charging point for every five parking spaces.⁸⁹ Once formally adopted, the new EPB Directive “will be published in the Official Journal” and Member States will have twenty months to transpose it into their national legislation.⁹⁰

3. New Energy Labeling Regulation

The new Regulation includes a group of energy efficiency classifications. As described by a German energy efficiency consulting firm:

According to the new Regulation products shall only be labeled with the energy efficiency classes A to G. The currently existing classes A+, A++ and A+++ for further differentiation within class A will be omitted. Besides the information about the actual energy efficiency class, the full spectrum of classes has to be shown on the label.⁹¹

The new labelling system, which affects producers, distributors, importers and dealers, will come into the market in 2020.⁹²

The new Regulation also requires a new product database to be created which will allow consumers to compare the energy efficiency of various products.⁹³ There will also be a non-public part of the database to be used by “market surveillance authorities” and the EC for market monitoring (called surveillance in the EU).⁹⁴

III. THE RECAST RENEWABLE ENERGY DIRECTIVE

A. *Proposed Revamping of EU’s RES Stimulus Policies*

Since 2009, the EU’s policies for encouraging the development and deployment of renewable resource technologies across three major sectors of the energy economy – electric generation, heating/cooling, and transportation – have been embedded in its current Renewable Energy Directive.⁹⁵ On November 30, 2016, the EC proposed, as part of its larger package of “clean energy for all” initiatives, a major revision of the 2009 Directive, seeking to make its performance more market-oriented, to bolster its ability to reach more ambitious deployment goals,

89. ENERGY EFFICIENT BUILDINGS-PRESIDENCY SECURES PROVISIONAL DEAL WITH EUROPEAN PARLIAMENT, <http://www.buildup.eu/en/news/energy-efficient-buildings-presidency-secures-provisional-deal-european-parliament-0> (last visited Mar. 17, 2018).

90. *Id.*

91. Ute Binder, *New EU Regulation for Energy Labelling*, ERP (Aug. 17, 2017), <https://1cc-consulting.com/en/new-eu-regulation-for-energy-labelling>.

92. *Id.*

93. *Id.*

94. *Id.*

95. See generally Renewable Energy Directive, *supra* note 14; see also IELTC Report 2012, *supra* note 13 (explaining the general background on this directive and its implementation).

and to integrate it with a raft of other post-2009 energy directives, either already effective or in the proposal stage.⁹⁶

The 2009 Directive, which established an EU-wide target of 20% consumption of renewable resources in the electricity sector by 2020, was predicated on member countries meeting individualized, mandatory targets set forth in their respective National Action Plans.⁹⁷ The analysis supporting the November 2016 “recast” proposal, while noting the significant progress already attained towards the 2020 goal (with the renewable share of electric generation growing “from 10.4% in 2007 to 17% in 2015”), warns that the current regulatory structure and incentives – coupled with investor uncertainty – are unlikely to achieve the ultimate 2020 goal, much less the higher target of 27% renewable penetration by 2030 sought by governing EU authorities.⁹⁸

Politically, the stepped-up goal for 2030 of at least 27% market share for renewables in the electricity sector is driven by a European Council agreement dating from October 2014.⁹⁹ The Council envisioned the establishment of a new “framework” for climate and energy policy that would, among other things, allow the EU to attain the 27% minimum collective goal in a manner that is “*binding at the EU level*[,]” but fulfilled through individual country contributions “guided by the need to deliver collectively for the EU.”¹⁰⁰ The European Parliament has urged the EC to adopt an even loftier goal for the 2030 horizon of a minimum 30% renewables in the electricity consumption mix.¹⁰¹

By late November 2017, the Parliament’s Industry, Research and Energy (ITRE) Committee issued a report recommending that full Parliament adopt a 35% renewable energy goal for 2030, with the Committee’s “rapporteur” observing that a more ambitious target was necessary to achieve the region’s pledges in the Paris Climate Agreement.¹⁰² The 35% goal may come with some wiggle room – allowing individual countries to fall short by 10% of the collective goal – and the Committee’s entire set of recommendations (involving both the RES and efficiency “recasts”) was subject to full Parliamentary debate and action in January 2018 and further revisions may be made as the approval process continues in 2018.¹⁰³

The EC’s February 2017 staff memorandum noted that the retooling of the existing Directive features a methodological shift away from binding, country-

96. EUR. COMM’N, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROMOTION OF THE USE OF ENERGY FROM RENEWABLE SOURCES (RECAST) 2, 5, 21 (2016) [hereinafter Proposed RES Directive].

97. IELTC Report 2012, *supra* note 13, at 290.

98. Proposed RES Directive, *supra* note 96, at 2.

99. *Id.*

100. *Id.* (emphasis added).

101. *Id.* (explaining, as with the Council, the Parliament has called upon the EC to craft enabling legislation).

102. Press Release, Eur. Parl. Indus. Research, & Energy Comm., Cleaner Energy: New Binding Targets for Energy Efficiency and Use of Renewables, (Nov. 28, 2017) [hereinafter Parliament 11/28/17 Press Release].

103. Greenovate! Europe, *Parliament toughens position on Clean Energy Package*, GREENOVATE! EUROPE (Dec. 5, 2017), <https://www.greenovate-europe.eu/news/parliament-toughens-position-clean-energy-package> (discussing the higher goal recently embraced by the ITRE adding that the Committee backed off from demanding that the goals be “binding” on individual nations).

specific targets for renewable energy penetration in the electric sector.¹⁰⁴ The retooled Directive favors an EU-wide, collectively binding target, buttressed by mechanisms to track and, to the extent necessary, spur individual countries to achieve the objectives they have identified.¹⁰⁵

The EC has credited the 2009 Directive for ensuring that all but one of the member states are “currently on track” to achieve their 2020 targets, and all members have developed “comprehensive policies” not only in the electricity sector but also the heating/cooling and transport sectors.¹⁰⁶ Moreover, the analysis found that “national[ly] binding targets were the most important driver” of the member states’ RES policies, which relied primarily on “support schemes” (i.e., subsidies) to stimulate RES deployment.¹⁰⁷

The vulnerabilities the EC had identified in the current regulatory regime fall into diverse categories: first, the “flexibility and cooperation mechanisms” among member states (e.g., joint projects, joint support schemes) have hardly ever been used; second, the “transparency” of origin of a supplier’s electricity mix is insufficient; and third, a number of member state support schemes for renewable energy (a feature permitted, but not required, under the 2009 Directive) have not been “efficient and responsive to market signals.”¹⁰⁸

The latter problem has been exacerbated by time lags in making adjustments to support schemes, resulting in market distortions and, in certain cases, high support costs.¹⁰⁹ Conversely, some such adjustments were “made too abruptly, or even retroactively” in a way that has shaken market and investor confidence.¹¹⁰ Finally, the national character of support schemes has inhibited the EU from exploring the full benefits of European market integration – an opportunity that will become increasingly important as the region stretches to reach more ambitious trajectories in the coming years.¹¹¹

The EC currently projects an attainment level of 24.3% renewables consumption in the electric sector by 2030, which would fall short of the 27% (or better) targets the EU’s governing bodies have already envisioned, as well as the level pledged in the 2015 Paris agreement on climate change.¹¹² Such a shortfall, the

104. PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROMOTION OF THE USE OF ENERGY FROM RENEWABLE SOURCES (RECAST) 2 (2017).

105. *Id.* at 2, 4-5.

106. EUR. COMM’N, EXECUTIVE SUMMARY OF THE REFIT EVALUATION OF THE DIRECTIVE 2009/28/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2 (2016) [hereinafter REFIT Executive Summary].

107. *Id.* at 2-3 (The Commission Staff Working Document also praises the 2009 Director for helping to trigger a European-led surge in “global investment and technology cost reductions that were still unimaginable a few years ago”).

108. EUR. COMM’N, REFIT EVALUATION OF THE DIRECTIVE 2009/28/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 5, 23-25, 41 (2016) [hereinafter REFIT SWD].

109. REFIT Executive Summary, *supra* note 106, at 3 (noting, however, that the slowness of adjustments is contrasted with the unexpectedly rapid decline in renewable technology costs).

110. *Id.*; see EUR. COMM’N, EUROPEAN COMMISSION GUIDANCE FOR THE DESIGN OF RENEWABLES SUPPORT SCHEMES (2013); Council Communication 2014 O.J. (C 200) 1 (relating that the EC has not stood still in the face of distortions stemming from national support schemes: it has issued guidance on the reform of renewable energy support schemes in 2013 and continued a push towards “more market based support mechanisms” in its 2014 Guidelines on State aid for environmental protection and energy).

111. REFIT SWD, *supra* note 108, at 6.

112. Proposed RES Directive, *supra* note 96, at 2.

EC fears, would undermine a number of ancillary benefits including: more jobs from renewable resource industries; the mantle of global leadership in developing and deploying renewable resource solutions; energy supply diversity and security; direct consumer participation in the grid; reductions in greenhouse gas emissions; and the “avoided costs” of imported fossil fuels that can be displaced by indigenous, renewable energy sources.¹¹³

B. *Paradigm Shift for Reaching EU Renewable Resource Targets*

As noted above, the EC concluded that a revised framework for EU-wide and national RES target attainment is needed.¹¹⁴ The case for fundamental change is strengthened, notes the EC, by the inherent uncertainty in predicting levels of renewable electric energy likely to be achieved by 2030 under the current regime, as well as “the significant investment effort” that will be required (approaching €254 billion “to fill the gap” for renewable electric generation alone) – a challenge that “calls for early, clear and stable policy signals.”¹¹⁵

The proposed revisions to the RES Directive are also intended to avoid a scenario where some member states – specifically, the best performing ones – end up carrying a disproportionate share of the burden in reaching the collective EU target, while the lagging countries do not feel sufficiently incentivized to increase their renewable energy production and consumption, resulting in more costly deployment than necessary and greater distortion of the markets than if participation were more broadly spread.¹¹⁶

The EC proposes a revamped framework to reach the 2030 goals with an “EU-level binding target, which is not translated into national targets.”¹¹⁷ To encourage compliance in the electric sector, the proposal endorses “cost-effective national support schemes” and other framework conditions, including cross-border participation.¹¹⁸ Noteworthy in this connection is the companion proposal on Energy Union Governance – a coordinating element that cuts across the entire energy and climate package and entails (1) formulating national plans; (2) reporting and monitoring on progress in achieving such plans; and (3) a gap filling/corrective measure to be activated in 2025, when the EC “will undertake a more thorough review of the renewable energy progress.”¹¹⁹

The EC document contrasts the significant amount of new investment required to meet more ambitious market penetration targets for renewables with the

113. *Id.* at 2-3; see EUR. COMM’N, CLEAN ENERGY FOR ALL— THE REVISED RENEWABLE ENERGY DIRECTIVE, https://ec.europa.eu/energy/sites/ener/files/documents/technical_memo_renewables.pdf (last visited Mar. 20, 2018) (indicating the current savings at around €20 billion per year).

114. *Id.* at 2.

115. *Id.* at 3 (indicating, however, elsewhere in the document, the EC forecasts a need for €1 trillion over the 2015-30 horizon in capital investment to reach renewable electric generation goals).

116. *Id.*

117. Proposed RES Directive, *supra* note 96, at 3.

118. *Id.*

119. *Id.*; see generally EUR. COMM’N, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK (2016) (containing more information on the paramount importance of the Energy Union).

sagging rate of such investment since 2011.¹²⁰ The year 2015 saw a 60% drop from 2011 (down to \$48.8 billion), a decline that could not be explained merely by the downward trend in RES technology costs.¹²¹ Consequently, while the EU has not lost its position as the global leader in renewable energy investment per capita, the rest of the world is catching up.¹²² On the plus side, the EC depicts a timely opportunity to attract new capital: European investment funds are looking to invest in renewable energy projects, with “private investors [seeking] to engage in concrete projects across the EU,” viewing low-carbon projects “as a strategic sector” for investment.¹²³

C. Motivating Increased Use of Renewables Across All Three Energy Sectors

The EC’s proposed reforms and underlying principles for framing a set of policies to propel greater development and use of renewables address not only the electricity sector but also the heating/cooling and transport sectors, which have experienced their own unique challenges.

With regard to the heating and cooling sector, the EC acknowledged that the uptake of renewable technologies has been slow, with 75% reliance on fossil fuels absorbing 68% of the EU’s total natural gas imports, at an annual cost of €44 billion.¹²⁴ It attributed the slack uptake rate to a lack of a formal policy on the EU level and, in consequence, fragmented markets in the EU region and insufficient investor certainty.¹²⁵ The underutilization is a missed opportunity, the EC believes, because “renewable heating has [been] shown to substantially reduce costs” in actual systems.¹²⁶

The reforms will provide EU members with options to increase the RES market share of heating/cooling supply, with a goal of raising that share by one full percentage point per year through 2030.¹²⁷ The revised provisions will also open up access to “district heating and cooling systems for producers of renewables, under certain conditions.”¹²⁸

With respect to transport fuels, while the EU claims to be the world’s largest advanced biofuels producer, Europe remains heavily dependent on fossil fuels, with oil meeting 94% of the fuel needs of ships, cars, trucks, and airplanes.¹²⁹ The revised Directive aims to reduce oil’s dominance – thereby diversifying and decarbonizing the sector’s energy consumption – by: (1) imposing an obligation on transport fuel suppliers to progressively increase the proportion of renewable and low-carbon fuels (advanced biofuels and non-biologic renewable fuels) on a from 1.5% to 6.8% between 2021 and 2030 – a figure that must include at least 3.6%

120. *Id.*

121. *Id.*

122. Proposed RES Directive, *supra* note 96, at 3.

123. *Id.* at 3-4 (citing also the European Fund for Strategic Investments as part of the Investment Plan for Europe and the European Structural and Investment Funds).

124. Eur. Comm’n, *supra* note 113.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*; see generally INT’L RENEWABLE ENERGY AGENCY, INNOVATION OUTLOOK: ADVANCED LIQUID BIOFUELS (2016) (indicating advancement in liquid biofuels since 2009).

advanced biofuels; (2) capping food-based biofuel contributions in meeting the renewable energy target (to be set at 7% beginning in 2021 and progressively scaling down to 3.8% by 2030); and (3) introducing national databases designed to facilitate the tracing of fuel origins marketed as renewable.¹³⁰

The late November 2017 recommendations of the EU Parliament's ITRE Committee include an increase in the proportion of renewable fuels in the transport sector.¹³¹ The Committee proposes that Parliament adopt a minimum 12% renewable fuels target in the sector's fuel mix, with each Member State expected to hit or exceed the target.¹³²

The proposed new framework for stimulating progress in developing and deploying renewable energy resources underscores its co-dependency with other energy market reforms under consideration.¹³³ Uppermost in this respect are the Market Design recast (discussed above), which is intended to enhance the value of renewable electricity products by developing and integrating flexible, short-term markets, and the Energy Union Governance initiative, which is the chief vehicle for marshaling the efforts of member states to achieve a collective, EU-wide target for renewables without imposing mandatory country-by-country targets.¹³⁴

D. Implications of Brexit for European Energy Market Collaboration and "Green Energy" Goals

The expected withdrawal of the United Kingdom (UK) from the European Union in early 2019 raises the question of how the UK will participate in the EU's energy markets in the future, integrated electric systems, and how it will interact with EU administrative bodies, or joint project financing programs. An extensive study conducted at the behest of the European Parliament's ITRE Committee by Breugel, a Brussels-based economic think tank, examined these questions and concluded that (1) the impact on EU nations and citizens would be limited and manageable; (2) it would *not* be in Britain's interests to discriminate against EU energy companies doing business in the UK; but (3) there would be an immense number of important details to be worked out among the parties in a relatively short span of time.¹³⁵

The EU-commissioned study distilled the following observations:¹³⁶

(1) *Energy trading*: As a participant in the World Trade Organization (WTO), Britain will likely be granted the right to import and export energy with other WTO members in Europe free of tariffs.¹³⁷

130. Eur. Comm'n, *supra* note 113 (explaining step 2 is intended to reduce indirect land-use change impacts).

131. Parliament 11/28/17 Press Release, *supra* note 102.

132. *Id.*

133. Proposed RES Directive, *supra* note 96, at 5.

134. *Id.*

135. GUSTAV FREDRIKSSON ET AL., THE IMPACT OF BREXIT ON THE EU ENERGY SYSTEM 12 (2017).

136. *Id.* at 12-15.

137. *Id.* at 12.

(2) *System coordination*: Even as the EU is developing operational protocols to reduce seams and unify the region's energy markets, Britain could choose to opt out of such joint optimization schemes.¹³⁸

(3) *Project finance*: The UK will presumably lose access to various EU-based energy project financing vehicles – e.g., the European Investment Bank, the European Fund for Strategic Investment; the Connecting Europe Facility; the EU Horizon 2020 Program; and the European Energy Programme for Recovery – although some kind of accommodation could be arranged in Brexit negotiations.¹³⁹

(4) *Joint regulatory bodies*: It is unclear whether Britain will continue to participate in the collaborative efforts to harmonize grid regulation at the transmission or distribution levels that are instrumental in consolidating the national energy markets into the EU's vision of a single internal market.¹⁴⁰

(5) *EU renewables and efficiency targets*: Britain may agree to remain harnessed to the collective EU goals and national commitments for increasing renewable resources and driving energy efficiency as well as participating in the Energy Union governance mechanisms, in exchange for the right to participate in the EU's internal energy market; if not, some readjustment of the EU's collective and national targets may be required.¹⁴¹

(6) *Nuclear facilities and waste*: The UK is a participant in Euratom but has indicated its intention to withdraw from this collaboration in the ownership and responsibilities for nuclear generation equipment safeguards and radioactive waste; if Britain proceeds in this intent, that will require complex and potentially controversial negotiations.¹⁴²

The study noted that, despite the mutual self-interest of Britain and the remaining EU nations in continuing and building upon joint energy policy and operational initiatives, there is another dynamic that pulls in the opposite direction.¹⁴³ The UK's vote on Brexit has signaled a desire to reclaim British sovereignty over important matters, whereas EU endeavors often entail a dilution of national sovereignty for the greater good. Moreover, the remaining EU nations have a disincentive to allow Britain to cherry-pick which joint practices it likes.¹⁴⁴

The Breugel study also considered how the Republic of Ireland will affect Brexit energy negotiations. The Republic of Ireland's grid is closely integrated with that of Northern Ireland and relies heavily on energy trade (in both electricity and gas) between itself and the UK.¹⁴⁵ The study's authors speculated that the need to avoid pulling the rug out from under Ireland's energy markets may lead to

138. *Id.* (opting-out could disproportionately impact Ireland).

139. *Id.* at 12-13.

140. Fredriksson et al., *supra* note 135, at 13 (citing ACER, ENTSO-E (the electric transmission network coordinator) and ENTSO-G (the counterpart for gas) as example regulatory bodies).

141. *Id.* The study adds that these adjustments should not be "dramatic," as Britain's goals were generally in line with those of other European countries; but some individual nations may be "significantly" affected.

142. *Id.* at 14.

143. *Id.* at 12.

144. *Id.*

145. Fredriksson et al., *supra* note 135, at 14.

closer integration of regulatory policies and markets between the UK and the remaining EU Member States than might otherwise be the case.¹⁴⁶

E. UK Reports Substantial Headway for Renewables in Generation Mix

Reports from Great Britain indicate the nation is making substantial headway in displacing carbon dioxide-producing generation with renewables and low-carbon dioxide (i.e., nuclear) generation. The *Financial Times* reported in early January 2018 that the year 2017 represented the first in which low-carbon dioxide producing electric generation edged out sources producing carbon dioxide (coal and gas-fired generation) in market share.¹⁴⁷

Specifically, renewables (solar, wind, hydro, and biomass) claimed slightly over a 29% of market share in 2017, up from 25% the preceding year.¹⁴⁸ Together with nuclear power (providing 21% of the UK's generation), these sources provided just over 50% of the country's electric energy.¹⁴⁹ In contrast, coal-fired generation – which the UK plans to eliminate by 2025 – fell to just 7% of the generation mix; while since 1990, the country has registered a 42% drop in carbon dioxide emissions – the most of any country among the G7 developed nations.¹⁵⁰ In contrast, according to the article, Germany still depends on coal for 40% of its electricity.¹⁵¹

Despite the milestones achieved in 2017, the UK has a long way still to go if it is to achieve its stated ambition of reducing carbon dioxide emissions by 57% (compared to 1990 levels) by 2032, the *Financial Times* article continued.¹⁵² Most of the reductions in carbon emissions thus far (80%) have come from displacing coal with other forms of power production, with the transportation sector having made scant decarbonization progress.¹⁵³ In the long run, the country aims to force adoption of electric vehicles by banning sales of new petrol or diesel-fueled cars in 2040.¹⁵⁴

IV. THE PROPOSED ACER REGULATION (RECAST)

As noted above, the Agency for the Cooperation of Energy Regulators (ACER) was originally established pursuant to a 2009 regulation that created the agency and vested it with certain defined responsibilities for inter-Member State energy transactions, and with the task of coordinating certain types of regulatory decisions among the national energy regulators.¹⁵⁵ In light of the significant changes proposed in the various other components of the 2016 package discussed above, significant revisions are also being proposed for ACER, embodied in a

146. *Id.* at 15.

147. Andrew Ward, *Most of Britain's Energy is Low-Carbon for First Time*, FIN. TIMES (Jan. 2, 2018), <https://www.ft.com/content/437c4e8a-efc0-11e7-ac08-07c3086a2625>.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. Ward, *supra* note 147.

153. *Id.*

154. *Id.*

155. *See generally* ACER Regulations, *supra* note 16.

proposed recasting of the original 2009 regulation. The newly proposed ACER regulation is referred to here as “Proposed ACER Regulation.”¹⁵⁶ The proposal explains that its objective is to better align ACER’s powers, responsibilities and procedures with the various substantive changes in the EU’s energy markets to be made by the other proposed Directives:

It appears appropriate to also adapt regulatory oversight to the new realities of the market. All main regulatory decisions are currently taken by national regulators, even in cases where a common regional solution is needed. While ACER has been successful in providing a forum for the coordination of national regulators with diverging interests, its main role is currently confined to coordination, advising and monitoring. While market actors increasingly cooperate across borders and decide on certain matters concerning grid operation and electricity trading with qualified majority at a regional or even Union level, there is no equivalent for these regional decision-making procedures at regulatory level. Regulatory oversight therefore remains fragmented, leading to a risk of diverging decisions and unnecessary delays. Strengthening the powers of ACER for those cross-border issues which require a coordinated regional decision would contribute to faster and more effective decision-making on cross-border issues. National regulators, deciding within ACER on those issues through majority voting, would remain fully involved in the process.¹⁵⁷

In considering revisions to the institutional regulatory arrangements, the European Commission considered a legislative option that would have transformed ACER into something the Proposed ACER Regulation characterizes as “a pan-European regulator.”¹⁵⁸ The EC concluded that this option would have required a significantly increased budget and staff.¹⁵⁹ In addition, however, the EC responded to concerns that such an approach could have overly reduced the role of the national regulatory authorities.¹⁶⁰ Accordingly, the Proposed ACER Regulation maintains the existing procedure through which certain decisions require approval by a majority of the national regulators.¹⁶¹

The precise changes made in the institutional organization and powers of ACER are extensive and would require a much longer report. The following excerpt from the Proposed ACER Regulation is long but sets out the issues related to these changes:

The independent national regulatory authorities (NRAs) play a major role in providing regulatory oversight over their national energy sector. A system which becomes more and more interdependent between the Member States both when it comes to market transactions and system operation requires, however, regulatory oversight beyond national borders. ACER is the body established to provide such regulatory oversight as far as situations are concerned which cover more than two Member States. The main role of ACER as a coordinator of the action of national regulators has been preserved; limited additional competences have been assigned to ACER in those areas where fragmented national decision-making on issues with cross-border relevance would lead to problems or inconsistencies for the internal market. For example, the creation of regional operational centres (ROCs) in the [recast Electricity

156. EUR. COMM’N, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS (RECAST) (2016) [hereinafter Proposed ACER Regulation].

157. *Id.* at 7-8; *see also* Commission Regulation 2015/1222, art. 9, 2015 O.J. (L 197) 24, 36-39 (EU).

158. *Id.* at 17.

159. *Id.*

160. *Id.*

161. *Id.*

Regulation as proposed by COM(2016) 861/2] calls for supra-national monitoring which needs to be performed by ACER, as the ROCs cover several Member States. Similarly, the introduction of an EU-wide coordinated adequacy assessment in the [recast Electricity Regulation as proposed by COM(2016) 861/2] calls for a regulatory approval of its methodology and calculations that may only be attributed to ACER as the adequacy assessment is to be performed across Member States.¹⁶²

162. Proposed ACER Regulation, *supra* note 156, at 10. The reader is directed to the Proposed ACER Regulation for a redlined version of the existing Regulation, showing the multiple changes proposed and further explanation of EC's intent. In particular, the reader is directed to pp. 22-24 of the Proposed ACER Regulation which sets out a chapter by chapter summary of the recast regulation. Chapter I: describes the role, objectives and tasks of ACER and the type of acts that it can adopt, and provides for rules on consultations and monitoring. As noted above with respect to the adoption of electricity network codes, ACER is given a greater role than previously. The Proposed ACER Regulation gives the agency jurisdiction ("competence" in European legal terminology) to decide on "terms, methodologies and algorithms for the implementation of electricity network codes and guidelines." The revised chapter further defines a new tasks concerning coordinating aspects of the Regional Operational Centres (ROCs) and related matters. Chapter II: addresses revised organisational rules. As noted above, the principal aspects of the governing structure are retained. The summary sets out a justification for the changes stating that even with the revisions, the structure "strikes a fine-tuned balance of powers between the different actors." Chapter III: addresses financial provisions. Chapter IV: updates several individual provisions including setting out a number of "otherwise largely unchanged" provisions relating to staff and liability.

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