FIDE 2012 Questionnaire – **United Kingdom** Report

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

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A. Regulation and Competition Policy

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

Given that ACER is still in the early stages of its existence, it is difficult to provide definitive answers to this and the next question (q.2, *infra*). The creation of ACER aims to fill a regulatory gap at EU level and to contribute towards the effective functioning of the internal markets in electricity and gas. It was established by Regulation 713/2009/EC[1] ('the ACER Regulation') with the mission to assist NRAs in exercising, at EU level, the regulatory tasks which they perform in the Member States and, where necessary, to coordinate their action. Certain key aspects of ACER and its role, tasks, and powers should be highlighted. First, a full grasp of ACER's functioning cannot be acquired simply by reading the ACER Regulation, because various functions and powers are also included in the other legislative instruments of the Third Package (in particular the Electricity[2] and Gas[3] Regulations and the Third Electricity and Gas IEM Directives) and there are regular cross-references between those instruments in that regard.

ACER has a range of tasks with regard to TSOs and networks, including a key role in the development of network codes and development plans, as well as monitoring functions: these are highlighted below in the context of cooperation at the EU level. A range of functions has also been entrusted to ACER *vis-à-vis* NRAs: it may make recommendations to NRAs and market actors to assist them in sharing good practices and is to provide a framework within which NRAs can cooperate with each other (Article 7 of the ACER Regulation). Linked to this is the power of ACER (Article 5 of the Third Electricity IEM Directive) to make recommendations concerning the compatibility of technical safety criteria and rules between Member States, to ensure interoperability between and non-discrimination by national systems. ACER is also charged with

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[1] [2009] O.J. L211/1.

[2] Regulation 714/2009/EC [2009] O.J. L211/15.

[3] Regulation 715/2009/EC [2009] O.J. L211/36.

certain monitoring functions concerning NRAs: NRAs may request ACER to provide an opinion on whether that NRA (Article 7 of the ACER Regulation) or any other NRA (Third IEM Directives: Articles 39 (Electricity) and 43 (Gas)) has complied with the Third Package legislation and Guidelines adopted thereunder. Failure of the NRA in question to comply with ACER's opinion (which is to be issued within three months) under these provisions will lead to ACER informing the Commission of the matter, whereupon the Commission may decide to initiate enforcement proceedings under the TFEU. Under Article 3(1) of the Electricity and Gas Regulations, ACER may also be required by the Commission to issue an opinion on the certification of TSOs (under Article 10(6) of the Third IEM Directives) in connection with the implementation of the unbundling requirements.

In its relationship with NRAs, ACER has also been endowed with the power to adopt binding decisions on certain issues. Under Article 8 of the ACER Regulation, ACER is empowered to adopt decisions concerning cross-border infrastructure (including access thereto and its operational security) *only* where the relevant NRAs have been unable to reach agreement on such matters or where such NRAs jointly request ACER to do so. That provision also lays down the minimum content of such access conditions (Article 8(2)) and procedural rules on the roles of ACER and the Commission thereunder. It has been argued[4] that an agreement between NRAs to disagree is not sufficient 'agreement' to exclude ACER's powers under Article 8, although this is not explicit in its provisions. A similar fall-back role is laid down in Article 9(1) of the ACER Regulation, in conjunction with Article 17(5) of the Electricity Regulation and Article 36(4) of the Third Gas IEM Directive concerning the exemption of new infrastructure from the normal regulatory regime of the Third Package.[5]

Under Article 5 of the ACER Regulation, ACER may also perform a general advisory role to the EU's institutions at the request of the European Parliament, Council of Commission, or on its own initiative, ACER may provide an opinion or recommendation 'on any of the issues relating to the purpose for which it was established'. It is also, under Article 11 of the ACER Regulation, to perform a general monitoring and reporting role with regard to the internal markets in electricity and gas, providing a public annual report, including identifying any barriers to the completion of the internal market and possible proposals for addressing those difficulties. This role is to be conducted in close cooperation with energy NRAs and is 'without prejudice to the competences of competition authorities' (Article 11(1)). ACER's various explicit tasks must also be performed with an eye to the goals of Trans-European Energy Networks and the enhancement of energy security (Recitals 14 and 15 to the ACER Regulation), even though ACER has not been given any specific functions or powers in relation to these issues.

Meanwhile, ENTSO-E was established by Regulation 714/2009/EC[6] with the purpose of ensuring cooperation at EU level between electricity TSOs, thereby promoting the completion and functioning of the internal market. ENTSO-G was created by Regulation 715/2009/EC[7] with the same purpose for the natural gas market.

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[4] F. Ermacora, 'The Agency for the Cooperation of Energy Regulators (ACER)', ch 7 in C Jones (gen. ed.), *EU Energy Law – Volume I: The Internal Energy Market – The Third Liberalisation Package* (Leuven: Claeys & Casteels, 3rd edn., 2010), at 286.
[5] For details, see *ibid*, 288-289.
[6] [2009] O.J. L211/15.
[7] [2009] O.J. L211/36.

The main work of ACER, ENTSO-E, and ENTSO-G is to adopt the necessary network codes and plans for the development of fully and efficient interconnected European markets in electricity and gas. The adoption of network codes is intended to provide the necessary technical rules to ensure non-discrimination, effective competition, and the efficient functioning of the market. In particular, these codes are to cover issues such as: network connection rules; third-party access rules; balancing rules; interoperability rules; capacity allocation; and congestion management rules, etc. Such codes are to be adopted by the European Commission[8] following a procedure involving both the ACER and ENTSO-E or ENTSO-G (as appropriate).[9]

The ACER should first adopt 'framework guidelines' on the basis of an annual work programme from the European Commission, identifying the priorities of actions for a given year. The project for priorities for 2012 and beyond was opened to consultation by the European Commission on 10 March 2011.[10] ACER's guidelines should set out clear and objective principles for the development of network codes.

Such codes are then to be drafted in a project by ENTSO-E/ENTSO-G, on the basis of ACER's framework guidelines and the European Commission's work programme. Projects will be reviewed by ACER and finally approved by the European Commission. Alternative procedures are provided in the event that either ENTSO-E/ENTSO-G or ACER fails to fulfil its tasks (see Article 6 of the Electricity and Gas Regulations). Once adopted, Article 7 of both the Electricity and Gas Regulations provide that 'persons likely to have an interest' in the relevant network code may propose draft amendments thereto: on receipt of such proposals, or under proposals issued on its own initiative, ACER must consult all stakeholders and may make reasoned proposals to the Commission, which may decide to adopt amendments to those codes as a result.

Progress has been made on the development of these Framework Guidelines by ACER. On 29 July 2011, Framework Guidelines were adopted by ACER for the capacity allocation and congestion management for electricity,[11] while on 3 August 2011 it adopted Capacity Allocation Mechanisms for the European Gas Transmission Network.[12]

Besides participating in the development of network codes, ENTSO-E and ENTSO-G are each required to adopt a non-binding EU-wide ten-year network development plan.[13] These plans are to provide adequacy plans at the level of the generation for the electricity market and at

[8] Avoiding potential problems concerning formal rule-making by delegated agencies rather than the Commission, in light of Case 9/56 *Meroni & Co, Industrie Metallurgische v High Authority* [1957-1958] ECR 133. For critical discussion of this general issue, see most recently M Chamon, 'EU Agencies between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) 48 *CMLRev* 1055.

[9] Art 6 of Regulations 714/2009/EC and 715/2009/EC.

[10] Commission Public Consultation Paper, 'Establishment of the priority list for the development of network codes for 2012 and beyond' (10 March 2011) (available at http://ec.europa.eu/energy/international/consultations/20110410_external_dimension_en.htm).

[11] ACER, 'Framework Guidelines on Capacity Allocation and Congestion Management for Electricity', FG-2011-E-002 (29 July 2011).

[12] ACER, 'Framework Guidelines on Capacity Allocation Mechanisms for the European Gas Transmission Network', FG-2011-G-001 (3 August 2011).

[13] Art 8(3) of Regulations 714/2009 and 715/2009.

the level of the supply for the gas market. Under Article 6 of the ACER Regulation, ACER is charged with monitoring the implementation of new interconnector capacity, the implementation of EU-wide network development plans, and regional cooperation between TSOs under the Electricity and Gas Regulations.

This brief overview of the functions of ACER and ENTSO-E/ENTSO-G suggests that, while many of their activities (and the envisaged output thereof) may yet make significant contributions to opening up the European power and gas sectors to greater cross-border competition, some of the impediments to the development of competition within the EU in these sectors will need to be addressed by other means and other bodies. One such area may be to encourage the development of cross-border network infrastructure, with a view to connecting markets in different Member States and thus facilitating competition. This may be addressed by the evolution of the EU's policy and funding regime on Trans-European Energy Networks;[14] another contributor may be the investments made, and/or encouraged by contributions from, the European Energy Programme for Recovery.[15] Other funding sources for infrastructure development may also be significant, including the European Investment Bank,[16] the Structural and Cohesion Funds[17] and the European Regional Development Fund.[18] And, obviously, another will be the application of EU and national competition law to undertakings and practices in the energy sector: the UK position on the role of its NRA and NCA is addressed in the answers to qs. 2 and 3, *infra*.

It should also be pointed out that Ofgem has already been engaged in projects involving co-ordination with other NRAs: an excellent recent example concerns what is known as 'project NEMO', which is a proposed interconnector between Great Britain and Belgium (under the auspices of the North Sea Countries Offshore Grid Initiative[19] and in line with the goals of the EU's energy infrastructure package[20]). On 28 June 2011,[21] the two NRAs launched a consultation on the use of a 'cap and floor' regime for the regulation of the proposed

[14] See Articles 170-172 TFEU, Decision 1364/2006/EC [2006] O.J. L262/1 and Regulation 680/2007/EC [2007] O.J. L162/1.
[15] Regulation 663/2009/EC [2009] O.J. L200/31. For related documentation; see http://ec.europa.eu/energy/eepr.
[16] See Commission, 'Report on the Implementation of the Trans-European Energy Networks in the period 2007–2009', COM(2010) 203 (4 May 2010), at 5.
[17] See Council Regulations 1083/2006/EC (laying down general provisions on the ERDF, ESF, and the Cohesion Fund, [2006] O.J. L210/25) and 1084/2006/EC (establishing a Cohesion Fund, [2006] O.J. L210/79). E.g., under Council Decision 2006/702/EC (on strategic guidelines on cohesion, [2006] O.J. L291/11), support is provided to projects for the development of renewables and the improvement of energy efficiency.
[18] See Council Regulation 1080/2006/EC on the ERDF, [2006] O.J. L210/1: see its Art. 4(9) on energy investments improving certain TEN-E projects.
[19] For the Memorandum of Understanding, see: http://ec.europa.eu/energy/renewables/grid/doc/north_sea_countries_offshore_grid_initiative_mou.pdf.
[20] See Commission Communication, 'Energy infrastructure priorities for 2020 and beyond – A Blueprint for an integrated European energy network', COM(2010) 677 (17 November 2010) (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2010:0677(01):FIN:EN:PDF).
[21] Ofgem, 'Cap and floor regime for regulation of project NEMO and future subsea interconnectors' (Ref. 86/11, 28 June 2011; http://www.ofgem.gov.uk/Europe/Documents1/Cap%20and%20floor%20regime%20for%20regulation%20of%20new%20subsea%20interconnector%20investment5.pdf).

interconnector, and a summary of responses was published in early December 2011,[22] leading to the issue of Ofgem's preliminary conclusions on the proposed regulatory regime later that month.[23]

Finally, the UK's implementation of the EU's third energy package has included specific provisions in its legislation to authorise GEMA/Ofgem to co-operate with other authorities (which includes NIAUR, the NRA for Northern Ireland (on which see the answer to q.4(i), *infra*) and other Member States' NRAs) in relation to gas and electricity (see rr. 34 and 35 of

2. Or will increased competition turn out to be mainly a task for the competition authorities to ensure progress in dismantling predominantly national markets, for example by stopping discriminatory congestion management practices of transmission system operators, as in the *Svenska Kraftnät*[24] case?

The UK answer to this question is strongly dependent upon the position outlined below (under q. 3) with regard to the respective competences of the OFT and Ofgem. While it is clear that competition enforcement will continue to play a key role in the UK regime, there have to date been relatively few examples of the use of competition law (in the Articles 101 and 102 TFEU / UK Competition Act Chapter I and Chapter II prohibitions) in the energy sector. Some specific examples are given in the answer to q. 3 (*infra*) of attempts to use such 'antitrust'-style powers, as well as reliance upon references to the UK's Competition Commission to conduct an investigation into the functioning of the relevant market under the Enterprise Act 2002.

It should also be noted that Ofgem carries out competition assessments of requests from licensed energy suppliers to be exempted under their licence from the regulated regime for their energy prices. A recent example concerns the application by Electricity North West Ltd., which had applied to be permitted to earn an unregulated margin on certain connections work in nine market segments:[25] the application was rejected for six and allowed in the three segments where Ofgem was able to find sufficient evidence of competition and buyer power.

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[22] Ofgem, 'Summary of response to Ofgem and CREG's joint consultation on a cap and flor regime for regulation of project NEMO and future subsea interconnectors' (2 December 2011; http://www.ofgem.gov.uk/Europe/Documents1/Summary%20of%20responses%20to%20Consultation.pdf).

[23] Ofgem's letter of 20 December 2011, outlining these preliminary conclusions, is available at: http://www.ofgem.gov.uk/Europe/Documents1/Preliminary%20conclusions%20letter.pdf. In parallel, Ofgem commissioned a report concerning the potential for offshore transmission co-ordination, which was published on 15 December 2012, suggesting possible reforms to (*inter alia*) the regulatory framework applicable to such transmission. While this is largely focused on domestic UK offshore transmission (typically from large offshore wind farms), certain elements concern regulatory co-operation between NRAs: see Redpoint Energy, *Co-ordination in Offshore transmission – an assessment of regulatory, commercial and economic issues and options* (December 2011; http://www.ofgem.gov.uk/Networks/offtrans/pdc/pwg/OTCP/reports/Documents1/Offshore%20Transmission%20Redpoint%20Report%20-%2015-12-2011.pdf).

[24] Commission Decision of 14 April 2010, Case 39351 *Swedish Interconnectors* (http://ec.europa.eu/competition/antitrust/cases/dec_docs/39351/39351_1223_2.pdf).

[25] Ofgem, 'Decision on Electricity North West Limited's 22 July 2011 application to charge an unregulated margin on certain contestable connections services' (21 November 2011): the reasons for the determination can be accessed at:

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

One approach to the special nature of competition-related problems raised in certain sectors is to introduce detailed specialised sectoral legislation and entrust a sectoral regulator with the task of overseeing activities in that sector,[26] while nevertheless continuing to permit the normal competition rules to apply in that sector as well. The logic behind this idea is that the application of the competition rules in these sectors requires detailed knowledge of the workings and intricacies of the field, so that the combination of the regulatory and competition law functions is likely to be more effective than leaving the latter to the more generalist competition authority. This is the model that has been adopted by the UK when pursuing the liberalisation of the various utilities (electricity, gas, water, rail and telecommunications). A series of regulators was created to perform the oversight function and each of these regulatory bodies is also competent,[27] concurrently with the OFT, to apply the provisions of the Competition Act 1998 (i.e. the Chapter I and Chapter II prohibitions) as well as Articles 101 and 102 TFEU to activities in relation to their respective sectors. This allows the sector regulators to focus upon broad questions of market rules and the structure of the sector, while enabling intervention in individual cases either on the basis of sectoral regulatory powers or (where appropriate) under UK or EU competition law.

This system raises a number of interesting issues, including the extent to which the sector regulators will seek to secure the objective of a liberalised and competitive market by utilising their wide range of *ex ante* regulatory powers to impose licence and other conditions upon companies operating in the sector. Alternatively, the sector regulators could choose to rely more strongly upon the *ex post* application of the competition rules, or a combination of both systems could be employed.[28] Another issue concerns the practical procedural operation of these concurrent competences to apply the competition rules: overlaps could occur between the OFT and any of the sector regulators, but it is also possible that one situation or agreement may touch upon the area of expertise of each of two (or more) sector regulators, particularly in these days of multi-utilities with interests across a range of sectors.

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http://www.ofgem.gov.uk/Networks/Connectns/CompinConn/Documents1/reasons%20behind%20the%20authoritys%20decision%20final.pdf.

[26] For general discussion of these phenomena, see (from a wide-ranging and inter-disciplinary literature), e.g., C. Graham, *Regulating Public Utilities: A Constitutional Approach* (Oxford: Hart Publishing, 2000), D. Helm, *Energy, the State, and the Market: British Energy Policy since 1979* (Oxford: OUP, revised edn., 2004), D. Helm & T. Jenkinson (eds.), *Competition in Regulated Industries* (Oxford: OUP, 1998), D. Newbery, *Privatization, Restructuring, and Regulation of Network Utilities* (2000), T. Prosser, *Law and the Regulators* (Oxford: OUP, 1997) and T. Prosser, *The Limits of Competition Law* (Oxford: OUP, 2005).

[27] By virtue of s. 54 *juncto* Sched. 10, Parts II and III of the Competition Act 1998.

[28] For discussion, see R. Whish & D. Bailey, *Competition Law* (Oxford: OUP, 7th edn, 2012), 977-992. See also: T. Prosser, 'Competition, Regulators and Public Service' in Rodger & MacCulloch (eds.), *The Competition Act: A New Era for UK Competition Law* (Oxford: Hart Publishing, 2000), ch. 10; and G. Monti, 'Utilities Regulators and the Competition Act 1998', in B.J. Rodger (ed.), *Ten Years of UK Competition Law Reform* (Dundee: Dundee University Press, 2010), ch. 6.

Thus, in the UK,[29] since the entry into force of the Competition Act 1998 both the OFT[30] and what is now the Gas and Electricity Markets Authority[31] are competent to apply both EU and national competition law to undertakings operating in the energy sector,[32] subject to appeals against their decisions being made to the Competition Appeal Tribunal. Relations between the two bodies in individual cases are governed by the Concurrency Regulations,[33] and are facilitated by a Concurrency Working Party which provides a forum for the exchange of views on current practice.

It should also be noted that NRAs in the different regulated sectors in the UK have shown varying degrees of enthusiasm in their use of general competition law powers to address issues of market power and abuse. In the energy sector, some formal decisions have been issued,[34] although in the early years Ofgem did endeavour to use its *ex ante* regulatory powers to introduce licence conditions which addressed the abuse of market power,[35] rather than relying

[29] It should be noted that the UK is currently considering a significant reform to its competition law regime, in particular with regard to the institutional division of responsibilities for competition law investigation and enforcement. One proposal is to abolish the OFT and to transfer its competition law functions to a new single 'Competition and Markets Authority'. For discussion of the current UK structure, see P.J. Slot & A. Johnston, *An Introduction to Competition Law* (Oxford, Hart Publishing, 2007), esp. 174ff. and 214ff.; and for the government's consultation on the proposed reforms, see: Department for Business, Innovation & Skills, 'A Competition Regime for Growth: A Consultation on Options for Reform' (16 March 2011; http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf).

[30] The Office of Fair Trading: http://www.oft.gov.uk/. N.B. the UK government is currently considering the reform of the UK' institutional structure for competition law enforcement, suggesting the abolition of the OFT and the transfer of its various competition law functions to an enhanced version of the Competition Commission (see …). At the time of writing, these reform proposals remained under review.

[31] Ofgem, the Office of Gas and Electricity Markets, operates under the direction and governance of the Gas and Electricity Markets Authority (GEMA or 'the Authority').

[32] For an ongoing example of an OFT investigation into energy sector activities, see Case CE/9278/10 *Investigation into alleged abuse of dominance by bunker fuel firm CH Jones* (http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/bunker-fuels/).

[33] The Competition Act 1998 (Concurrency) Regulations, S.I. 2004, No. 1077 (http://www.legislation.gov.uk/uksi/2004/1077/contents/made); see OFT, *Concurrent application to regulated industries* (OFT 405, December 2004; http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft405.pdf). For analysis, see Department of Trade and Industry and HM Treasury Report, 'Concurrent Competition Powers in Sectoral Regulation; (URN 06/1244, May 2006; http://www.dti.gov.uk/files/file29454.pdf)

[34] E.g. GEMA Decisions: *London Electricity* (12 September 2003; http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/londonelectricity.pdf), *United Utilities Electricity* (10 February 2004, http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/UnitedUtilities.pdf), *NPower* (9 June 2004, http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/npower.pdf) (all early non-infringement decisions); *Investigation into EDF Energy's alleged abuse of dominance by refusing to supply meter data services* (24 January 2007; http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/gaselectricity.pdf), finding no infringement by withdrawal of data collection and aggregation services (i.e. meter data services) from electricity suppliers not affiliated to EDF Energy; *Investigation into National Grid* (Case CA98/STG/06, 21 February 2008; http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/ofgem.pdf), finding an abuse of dominant position in the market for provision of domestic-sized gas meters.

[35] The Market Abuse Licence Condition (MALC) was introduced into the licences of eight major electricity generators in 1999, two of which rejected the condition, after which Ofgem referred their licences to the Competition Commission. In December 2000 (http://www.competition-commission.org.uk/rep_pub/reports/2001/453elec.htm), the CC rejected the MALC, finding that it could not identify potential adverse effects which needed to be addressed by it and because the competition law rules were considered

upon *ex post facto* enforcement via competition law. Further policy proposals to introduce a Market Power Licence Condition were made by Ofgem in 2009.[36] More recently, however, Ofgem has made use of its powers under competition law, securing an offer of binding commitments[37] from Electricity North West to address competition concerns arising from aspects of the charges which it imposed, as incumbent network operator, on a new entrant to the electricity market (Independent Power Networks), which amounted to a vertical margin squeeze by a dominant company.[38]

The UK's Competition Commission (CC), meanwhile, currently may receive references from the OFT or the sector regulators, after which the CC carries out detailed inquiries into the matter referred (which might concern the operation of regulated industries,[39] market investigations[40] and proposed/completed mergers).[41] With regard to market investigations (on which see the flowchart in Annex B, *infra*), Part 4 of the Enterprise Act 2002 introduced a regime under which the OFT or any of the sectoral regulators may refer a market to the CC if it

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sufficient to deal with any abuse which might arise. This caused Ofgem to withdraw it from the other generators' licences. A further attempt in 2001 by Ofgem to persuade the Department of Trade and Industry to impose a similar MALC under the New Electricity Trading Arrangements was also unsuccessful.

[36] Ofgem, 'Addressing Market Power Concerns in the Electricity Wholesale Sector – Initial Policy Proposals' (Ref. 30/09, 30 March 2009; http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/Documents1/Market%20Power%20Concerns-%20Initial%20Policy%20Proposals.pdf): this was Developed after Ofgem (on 19 January 2009) abandoned a Competition Act investigation into the practices of Scottish and Southern Energy and Scottish Power, which were alleged to have abused market power by withholding generation plant from the wholesale forward market while using the same plant to supply balancing power to NG at excessive prices (see Ofgem's discussion in Appendix 2 of the same document).

[37] On which see OFT, *Enforcement – Incorporating the Office of Fair Trading's guidance as the circumstances in which it may be appropriate to accept commitments* (OFT 407, 2004; http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft407.pdf), 11-17.

[38] Ofgem, 'Notice of intention to accept binding commitments from Electricity North West Limited' (Ref: 158/11, 23 November 2011; http://www.ofgem.gov.uk/About%20us/enforcement/Investigations/CurrentInvest/Documents1/Consultation%20on%20commitments%20for%20ENW.pdf). See also *National Grid* v. *Gas and Electricity Markets Authority* [2009] CAT 14 (http://www.catribunal.org.uk/238/Judgments.html), where the Competition Appeal Tribunal upheld a finding by Ofgem of abuse of a dominant position by National Grid in its renegotiation of contracts with gas suppliers concerning the supply of gas meters (although the fine imposed was reduced from £41.6 million to £30 million, since Ofgem had been involved in discussions with National Grid about the new contracts).

[39] These involve licence modification references and price determination appeals, as well as appeals to the CC against decisions by Ofgem on Energy Code modifications. For the last of these, the CC reviews the Ofgem decision on the merits (but does not substitute its view for that of Ofgem with regard to primary findings of fact): this procedure was introduced by s. 173 of the Energy Act 2004. See, e.g.: Competition Commission, 'An appeal under section 173 of the Energy Act 2004, E.ON UK Plc and GEMA and British Gas Trading Limited' (CC02/07, 10 July 2007), available at http://www.competition-commission.org.uk/appeals/energy/eon_final_decision.pdf.

[40] E.g. the OFT recently decided, after completing a market study, not to refer the market for the retail supply of domestic heating oil to the CC: OFT, 'Off-Grid Energy – Decision not to make a market investigation reference to the Competition Commission' (OFT 1401, 21 December 2011; http://www.oft.gov.uk/shared_oft/market-studies/off-grid/OFT1401.pdf). Earlier, on 5 July 2004, it had referred the market for the supply of domestic bulk LPG to the CC: see Press release 103/04 (http://www.oft.gov.uk/news-and-updates/press/2004/103-04) and the reasons for making the reference (http://www.oft.gov.uk/shared_oft/press_release_attachments/lpg.pdf).

[41] The CC is essentially the successor to the old Monopolies and Mergers Commission, albeit with expanded functions and, in some cases, more extensive remedial powers. For helpful general discussion of the CC's role in these hybrid areas of sector regulation and competition law, see S. Rab, 'From ordered competition – towards a new competitive order? The role of the UK Competition Commission at the interface between sector regulation and competition law' [2009] *European Competition Law Review* 505.

has "reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods and services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods and services in the United Kingdom or a part of the United Kingdom".[42]

While it is clear that the OFT does not intend to exercise its discretion to make such a reference where (*inter alia*) it would be more appropriate to deal with the matter under the CA 1998 (or by using the powers of the sectoral regulators),[43] it is possible that certain abusive practices relating to prices and other conduct may yet be the subject of market investigation references (e.g. where a network of vertical agreements has saturated a market such as to make new entry excessively difficult, or where tacit co-ordination in an oligopolistic market is suspected).[44] The OFT's focus will be upon conduct involving a significant number of undertakings, tending to industry-wide market features or conduct, as evinced by the references made to date.[45] The OFT may start such investigations on its own initiative, as a response to individual complaints or as a means of dealing with the issues raised by a "super-complaint" made to it (concerning features of a market that are harming consumer interests) by a designated consumer body.[46]

Three points should be emphasised so far as market investigations in this context are concerned. First, the practice of the Monopolies and Mergers Commission (the forerunner of the CC) involved many investigations of pricing practices throughout its history, which may suggest that similar references may be made to the CC in the future.

Second, one of the early market investigation references – on the *Supply of bulk Liquefied Petroleum Gas for domestic use* – concerns a market in which 90% of the market is held by the four strongest companies, while a number of areas of the UK are served by only two different companies. In spite of this relatively small number of undertakings involved and the identification by the OFT of a number of fairly common practices that deterred customers from switching suppliers (thus raising a significant barrier to entry to the market), the OFT took the view that "the breadth of issues arising in relation to … bulk LPG [for domestic use]" was such

[42] Section 131(1) EA 2002 (moving away from the old test under the Fair Trading Act 1973, which operated on the basis of whether or not it such features operated in a manner contrary to the "public interest"). Often, this will become apparent after the OFT has conducted a Market Study into a particular sector: on market studies, see s. 5 Enterprise Act 2002 and the OFT's Guidance on *Market Studies* (OFT 519).

[43] OFT 511, paras. 2.1-2.8. The other criteria that must be taken into consideration are: the impact of EC law (especially after the Modernisation Reg. 1/2003/EC); the scale of the problem (does it warrant a reference to the CC?); and whether or not appropriate remedies are available to deal with the problem.

[44] See OFT 511, paras. 2.6 and 2.5, respectively.

[45] These have concerned the *Supply of Store Card Services* (OFT Press Release 47/04, 18 March 2004), the *Supply of bulk Liquefied Petroleum Gas (LPG) for domestic use* (OFT Press Release 103/04, 5 July 2004, as modified by the OFT's statement of 20 October 2004) and the *Supply of home credit* (OFT Press Release 212/04, 20 December 2004).

[46] Section 11 Enterprise Act 2002 established the possibility for so-called 'Super-complaints' to be made (see the OFT's Guideline, *Super-complaints* (OFT 514)). This innovation allows designated consumer bodies (as designated by the Secretary of State for Trade and Industry by order (s. 11(5) Enterprise Act 2002 ('EA 2002'))) to complain to the OFT about "any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers" (s. 11(1) EA 2002). The OFT is required to reply to the super-complainant, informing it how the OFT intends to deal with the matter, within 90 days (s. 11(2) EA 2002). If the OFT's investigation uncovers a competition problem, it may make a reference of the market in question to the CC.

that to take action under Article 81 EC/Chapter I or Article 82 EC/Chapter II would not have been effective in addressing the problems on the market. This reference, coupled with the OFT's assessment that the CFI's *Airtours* judgment[47] may have restricted the scope of the concept of collective dominance,[48] may see oligopolies being addressed via market investigation references in the UK more frequently in the years to come.

Third, if the CC has received a reference and decides that "any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom",[49] then a wide range of remedies would be available to it. These include price regulation, preventing the completion of acquisitions and even divestiture of elements of an undertaking.[50] This renders the market investigation route a particularly attractive one where serious structural changes are required to facilitate competition in particular markets and is a key element of the new UK competition regime that clearly owes its heritage to the earlier legislative provisions of the Fair Trading Act 1973 on scale and complex monopolies. At the same time, the EA 2002 has freed the CC's role in this area from oversight by the Secretary of State for Trade and Industry in all but those cases in which exceptional issues of the public interest are raised.[51]

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

(i) The most significant idiosyncrasy within the UK's NRA arrangements concerns the separate position for Northern Ireland. Responsibility for the overall regulatory framework falls to the Northern Ireland Department for Enterprise, Trade and Investment, while the equivalent to GEMA/Ofgem is the Northern Ireland Authority for Utility Regulation (NIAUR), which has responsibility for administering the licensing regime and the conduct of licence-holders, as well as exercising competition law powers in Northern Ireland (concurrently with the OFT). A Single Electricity Market covers the island of Ireland (i.e. both Northern Ireland and Eire (the Irish Republic)), and from 2007 that single market is jointly regulated by NIAUR and the Irish NRA, the Commission for Energy Regulation (CER). Thus, while these arrangements are specific to the geographic and devolution particularities of the position of Northern Ireland within the UK, the legislative arrangements have actually facilitated particularly close co-operation between NIAUR and CER: therefore, far from being a difficulty, these arrangements positively support and encourage cross-border co-operation between the relevant NRAs and, indeed, market integration in the energy market on the island of Ireland.

(ii) However, it is also notable that the status of bodies such as the UK's Competition Commission (CC) means that (at present, pending possible reforms to the UK competition law

[47] Case T-342/99 *Airtours plc* v *Commission* [2002] ECR II-2585.
[48] OFT 511, para.2.5.
[49] Section 134(1) Enterprise Act 2002.
[50] See Sched. 8 to the Enterprise Act 2002, paras. 8, 12 and 13 respectively.
[51] See ss. 139-148 (i.e. Chapter 2 of Part 4 of the Enterprise Act 2002) and the discussion in CC3, paras. 5.1-5.11.

regime) they are not able to participate as a UK representative in meetings of the EU's ECN (the CC is not a designated body under Article 35 of Regulation 1/2003/EC[52]). With regard to the use by the UK's NRAs of (EU) competition law provisions and/or when operating in areas where such competition law rules are part of the market analysis, the position seems similar: typically, such sector-specific issues would be raised by the OFT as the UK's NCA under the ECN, although given the guidelines on concurrency and co-operation, it is to be expected that co-ordination would take place domestically between the OFT and the relevant NRA prior to any such co-ordination under the ECN. This position seems likely to change in some ways (especially with regard to the position of the CC, given proposals to transfer the OFT's competition law functions to the CC and thus abolish the OFT altogether) as and when the UK's proposed reform to its domestic competition law regime and institutions is developed in the course of the coming months and years.

(iii) The treatment of confidential information in the hands of the OFT and Ofgem[53] is now dealt with by Part 9 of the Enterprise Act 2002 (replacing sections 55 and 56 and Sched. 11 CA 1998). The OFT's Guideline on its *Powers of Investigation* includes a discussion of the position under the CA 1998 and sections 237–247 Enterprise Act 2002,[54] and there is also an OFT Consultation Paper on *The overseas disclosure of information*;[55] together, they explain the unified system for controlling the disclosure of information by UK public authorities to overseas public authorities. The flowcharts reproduced in Annex 1 (below) provide a useful summary of the operation of Part 9.

By virtue of section 237, "specified information"[56] which relates to the affairs of an individual any business of an undertaking must not be disclosed unless that disclosure is permitted under Part 9 of the 202 Act. Insofar as such disclosure is *required* for the purpose of an obligation under EU Law, section 240 makes clear that Part 9 does not prohibit such disclosure. Care will need to be taken when relying upon this heading to ensure that disclosure is indeed for the purpose of such an EU law "*obligation*". This will depend upon the precise wording and implications of the numerous provisions applicable to the OFT and Ofgem under EU legislation: there may be some areas where co-operation might be desirable and useful, and yet is only permitted or encouraged, rather than *required* by such legislation.

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[52] [2003] O.J. L1/1 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT); of course, the CC clearly *is* a national competition authority for the purposes of the same Regulation's provisions concerning potential conflicts between EU and national competition law, and issues of supremacy/priority.

[53] Establishing exactly how far information held by Ofgem is covered by Part 9 of the 2002 Act is by no means straightforward: e.g. under s. 238(1)(b), information acquired pursuant to a function under legislation specified in Sched. 14 to the 2002 Act would be covered by the s. 237 prohibition, yet none of the legislation establishing GEMA and Ofgem and specifying its powers and functions is mentioned in Sched. 14. However, it seems that by virtue of s. 105(11) of the Utilities Act 2000, where Ofgem obtains information under concurrent competition law powers, then the specific competition law disclosure rules apply, in place of those under the 2000 Act. See, further, the text following n. 57, *infra*.

[54] See OFT 404, paras. 6.8–6.13.

[55] OFT 507, http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft507.pdf

[56] Defined in s. 238 as information which comes to a public authority in connection with the exercise of any function it has under Parts 1, 3, 4, 6, 7 or 8 of the 2002 Act

In addition to these general provisions, the Utilities Act 2000[57] also contains provisions imposing a general restriction on disclosure of information obtained by (*inter alia*) Ofgem by virtue of the provisions of the Gas Act 1986 and/or the Electricity Act 1989, where that information "relates to the affairs of any individual or to any particular business" (s. 105(1) of the 2000 Act). To accommodate information received by Ofgem via cross-border exchanges with NIAUR or other Member States' NRAs, r. 36 of the Electricity and Gas (Internal Markets) Regulations 2011[58] inserts new provisions into the 2000 Act (ss. 105(11B) and 105A) which have the effect allowing Ofgem to disclose such information only of the originating NRA "has confirmed in writing that the originating authority would be permitted to disclose the information in the circumstances in question" and that Ofgem itself would be permitted so to disclose such information if it had itself received it under the regime laid down by s. 105 of the 2000 Act.

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

(i) As a *general* matter, unless specific procedural provisions are made for particular decisions, judicial review is available to challenge decisions taken by Ofgem (including with regard to such exemptions from the regulatory regimes), under the ordinary national administrative law regime.[59] EU law may prove relevant here in certain circumstances, with regard to procedures and remedies, by analogy with the recent CJEU judgment in the *Uniplex* case,[60] concerning the UK's implementation of the EU's Public Procurement Remedies Directive.[61] The UK's implementing rules – the Public Contracts Regulations 2006[62] – provided that:

> "Regulation 47(7)(b) … [p]roceedings must be brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period within which proceedings may be brought".

Regulation 47(7)(b) mirrors the time limit for commencing judicial review proceedings, in rule 54.5 of the Civil Procedure Rules ('CPR'), subject to CPR 3.1(2)(a), which gives the Court discretion to extend time if there is good reason for doing so.

The Court of Justice ruled as follows:

[57] Available at: http://www.legislation.gov.uk/ukpga/2000/27/contents.
[58] S.I 2011, No. 2704 (http://www.legislation.gov.uk/uksi/2011/2704/pdfs/uksi_20112704_en.pdf)
[59] For a helpful general outline (including some energy examples), see M. Clarke & T. Cummins, 'Judicial review in the energy sector: the England and Wales perspective' [2011] *International Energy Law Review* 244.
[60] Case C-406/08 *Uniplex (UK) Ltd.* v. *NHS Business Services Authority* [2010] ECR I-817.
[61] Directive 89/665/EEC [1989] O.J. L395/33.
[62] S.I. 2006, No. 5 (http://www.legislation.gov.uk/uksi/2006/5/contents/made).

(a) the time limit for commencing such proceedings could only start to run when the applicant knew or ought to have known of the breach of the procurement rules (rather than from the date of the breach itself).[63]

(b) Regulation 47(7)(b) created uncertainty because it seemed possible for an application to be rejected *within* the 3-month period if not brought "promptly". Insofar as the UK rules gave a court the discretion to dismiss a case within that period for lack of promptness, the ECJ concluded that the UK had failed properly to implement the Directive.

(c) (Consistently with the first finding), the national court's discretion under Regulation 47(7)(b) had to be exercised to allow an applicant to make its claim beyond the 3-month limit where that was necessary to ensure that an applicant acquiring knowledge much later benefited from an equivalent limitation period.

The relevance of the *Uniplex* judgment here is that the general national rules for bringing an application for judicial review are in essentially identical terms to those under the UK's regulations implementing the Remedies Directive. Thus, where rights derived from EU law may be at stake in the energy sector, the implication is that the reasoning in *Uniplex* might also be applied to the ordinary national system of judicial review, where that system is relied upon to provide an appropriate procedure and remedies for the protection of such EU law rights.

(ii) Under the UK's domestic legislation on electricity and gas (as amended), various specific provisions establish Ofgem's role with regard enforcement, appeals and dispute settlement. Thus, under ss. 25 to 28 of the Electricity Act 1989, various rules are laid down for the enforcement of the preceding provisions of the Act: s. 25 empowers Ofgem to adopt final orders for securing compliance, and procedural requirements to be met by Ofgem before adopting such an order are laid down in s. 26. Ofgem's enforcement options include the possibility of imposing penalties (s. 27, subject to the time limits laid down in s. 27C)., while s. 27E makes clear that an aggrieved licence holder subjected to a penalty may appeal to the High Court against its imposition, amount or date of payment. Under s. 28, Ofgem may serve a notice on a licence holder to provide information and/or documentation, provided that this request is for a purpose connected with the performance of Ofgem's functions. An analogous, and largely identical, set of provisions can be found in ss. 28 to 30F of the Gas Act 1986.

Articles 23(5) of the Second Electricity IEM Directive[64] and 25(5) of the Second Gas IEM Directive[65] were implemented by the Gas and Electricity (Dispute Resolution) Regulations 2009,[66] which inserted various provisions into the Gas Act 1986 (see ss. 27B to 27D) and the

[63] This was vital to Uniplex, since it had not received a "debriefing" letter from the NHS Business Services Authority until 3 weeks after Uniplex had been informed that its tender had not been accepted and only after Uniplex had requested such reasons for the decision. This time difference took Uniplex's application outside the 3-month period from the original decision, yet would have placed it within 3 months from receipt of the debriefing letter.

[64] Directive 2003/54/EC [2003] O.J. L176/37.

[65] Directive 2003/55/EC [2003] O.J. L176/57.

[66] S.I. 2009, No. 1349 (http://www.legislation.gov.uk/uksi/2009/1349/pdfs/uksi_20091349_en.pdf). Under the same Regulations, r. 4 also removed Ofgem's ability to revoke, on 4 months' notice for any reason, an exemption from

Electricity Act 1989 (ss. 44B to 44D). These allow for complaints against a TSO or DSO with regard to the enforcement of various rules aimed at ensuring non-discrimination, effective competition and the functioning of the market (including network access, connection and tariffs). These provisions have now been updated to take account of the new numbering and substance of the provisions under the third package Directives (which now become "Article 37 disputes" for electricity and "Article 41 disputes" for natural gas), as a result of the Electricity and Gas (Internal Markets) Regulations 2011.[67]

(iii) One *specific set of issues* with regard to judicial protection in the context of regulatory accountability for licensing decisions has arisen during the process of implementing the third package in the UK.[68] DECC made two sets of proposals in this area: the first concerned the introduction of a third party right of challenge to the Ofgem decisions on licence modifications; and the second suggested the replacement of the licence modification process (which used a 'consent and refer' model) with a procedure based upon a decision by Ofgem which could then be subject to appeal.[69]

(iii)(a) Third Party Right of Challenge

Ofgem itself had previously addressed this subject in the context of its periodic decisions imposing and adjusting the price caps which apply to energy network owners and operators. Since these decisions are reflected in licence conditions, updating these price caps inevitably involves modifying the relevant conditions. Ofgem consulted in January 2010[70] on whether to allow third parties, in addition to the licence holders themselves, to refer price capping decisions to the CC. Ofgem acknowledged that such a right of challenge, "could improve the effectiveness of the overall regulatory framework, by improving the quality, accountability and legitimacy of Ofgem's decision-making. This is likely to be increasingly important in the future as we are likely to be making more decisions about increasing costs when there is uncertainty about what is the best way for network companies to deliver efficiently over the long term"[71]. The outcome

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TPA requirements in the petroleum and/or gas markets; Ofgem's power to include a specific provision for revocation in any such exemption is retained, however.

[67] S.I 2011, No. 2704 (http://www.legislation.gov.uk/uksi/2011/2704/pdfs/uksi_20112704_en.pdf): see rr. 28 and 29.

[68] I am deeply indebted to Gordon Downie of Shepherd + Wedderburn for access to, and use of, his text concerning these issues prior to their formal adoption in the 2011 Regulations.

[69] Modelled on the procedure employed for appeals against Ofgem energy code modifications laid down in sections 173 to 177 of and Schedule 22 to the Energy Act 2004 and the Electricity and Gas Appeals (Designation and Exclusion) Order 2005, S.I. 2005, No. 1646. These measures make provision for appeals to the CC from Ofgem's code modification decisions: for an introduction to this process, see http://www.competition-commission.org.uk/appeals/energy/introduction_to_the_cc.htm. To date, there have been two appeals, one of which was allowed in part (see http://www.competition-commission.org.uk/appeals/energy/register_of_appeals_listing.htm).

[70] Ofgem consultation paper, 'Regulating Energy Networks for the Future: RPI-X@20 Emerging Thinking – Third party right to challenge our final price control decisions' (20 January 2010; http://www.ofgem.gov.uk/Networks/rpix20/ConsultDocs/Documents1/emerging%20thinking.pdf) ('the Ofgem January 2010 Paper').

[71] *Ibid*., para. 2.6.

of Ofgem's consultation exercise was the production of a set of draft guidelines[72] according to which third parties could seek to influence Ofgem's decision on making a reference to the CC in a price control context.

Matters were then taken up by DECC in the context of its consultation on the implementation of the Third Package. DECC's intervention arose in the context of its proposals to change the nature of the CC's relationship with Ofgem (which will be discussed in the next sub-section, (iii)(a), *infra*) into that of decision-maker and appeal body. In that context, DECC consulted in September 2010[73] on allowing third parties access to the CC in its new appellate role. In the DECC Decision Paper, it reported back on the outcome of this consultation, noting that

> "the majority of respondents that commented on this issue supported extending the right to appeal beyond those directly affected. Generators and supply companies argued that decisions in relation to network licences can have a significant impact on them and supported the proposal that licence holders that are materially affected by a decision should also have a right of appeal. The Government agrees, and in addition considers that as licence decisions can have a material impact on consumers, that a designated consumer body should also have the right of appeal. The Government proposes that Consumer Focus should have a right of appeal in relation to licence decisions that materially affect consumers".[74]

These changes were introduced by the Electricity and Gas (Internal Markets) Regulations 2011[75] (rr. 41 to 44), which have inserted provisions into the Gas Act 1986 (see esp. s. 23B) and the Electricity Act 1989 (see s. 11C) concerning appeals to the CC and those entitled to bring such appeals. These provisions also address the procedure to be followed by the CC, relevant factors to be considered in determining such appeals, the CC's powers on allowing such an appeal and the time limits which apply to the determination of appeals thereunder.

(iii)(b) Shift to a 'decide and appeal' procedure

The second aspect concerns the replacement of the 'consent or refer' procedure for licence modifications with a 'decide and appeal' procedure (modelled on that used in code modification appeals).

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[72] Ofgem document, 'A Guide to Price Control Modification References to the Competition Commission - Licensee and Third Party Triggered References' (4 October 2010; http://www.ofgem.gov.uk/Networks/rpix20/ConsultDocs/Documents1/final%20mod%20guidance.pdf).

[73] Department of Energy and Climate Change - Implementation of the EU Third Package: Consultation on licence modification appeals (September 2010; http://www.decc.gov.uk/assets/decc/consultations/eu-third-package/586-eu-third-package-condoc2.pdf) ('the DECC Appeals Consultation Paper').

[74] DECC Decision Paper, paragraph 2.28. The organisation mentioned in the decision paper, Consumer Focus has been disbanded under the UK Government's review of 'surplus' public bodies: the new 2011 Regulations now refer to the National Consumer Council under the Consumer, Estate Agents and Redress Act 12007 (see its s. 19A, as inserted by the 2011 Regulations), which will (*inter alia*) be the body empowered to bring appeals "in the capacity of representing consumers whose interests are materially affected" by an Ofgem decision (see, now, s. 23B of the Gas Act 1986 and s. 11C of the Electricity Act 1989).

[75] S.I 2011, No. 2704 (http://www.legislation.gov.uk/uksi/2011/2704/pdfs/uksi_20112704_en.pdf).

In considering the implications of these proposals, it is important to note the fundamentally different nature of these two processes, in particular, in relation to the role of the CC. In the licence modification process, the making of a reference to the CC essentially involves Ofgem having to demonstrate to the CC why a licence modification of the sort proposed needs to be made, having regard to all of the relevant interests at play. The CC is required to make a fresh decision on the merits and is not simply confined to examining points of difference between Ofgem and the licence holder. The terms of Ofgem's proposal and its reasoning and the differences between Ofgem and the company represent a useful starting point, but it is for the CC to make up its own mind on the issues as it sees them.

By way of contrast, the role of the CC in hearing an appeal under the code modification process is very different in nature. According to the CC itself, when it is hearing code modification appeals it is acting as

> "a specialist appellate body charged with considering whether a decision of [Ofgem] is wrong [and, whilst] the function of the CC is to provide accountability in relation to the substance of code modification decisions [,] leaving to one side errors of law, it is not our role to substitute our judgment for that of [Ofgem] simply on the basis that we would have taken a different view of the matter were we the energy regulator".[76]

In the DECC Appeals Consultation Paper, a separate consultation on potential reform to the licence modification process was launched as part of DECC's Third Package implementation strategy. In its consultation paper, DECC expressed the view that, "the current licence modification arrangements may not enable the regulator to take independent decisions as, when certain conditions are met, the industry is able to force Ofgem to reconsider its decisions, or have to revert to another body before proceeding". DECC also indicated their belief that it was 'problematic' that certain licensees were in a position individually to prevent modifications of standard conditions without a CC reference because they represent of themselves the relevant blocking minority required to prevent implementation[77].

In view of these claimed[78] deficiencies, DECC decided[79] to abolish the requirement for a CC reference in the event that licence holder consent is not given to a licence modification.

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[76] Competition Commission, 'An appeal under section 173 of the Energy Act 2004: E.ON UK Plc and GEMA and British Gas Trading Limited - Decision and Order' (10 July 2007), para. 5.12.

[77] DECC Appeals Consultation Paper, paragraph 1.4.

[78] It might be suggested that DECC's approach to the implementation of the third package on these issues is open to criticism on a number of levels. First, it would have been possible to conceive of Ofgem and the CC together as constituting the NRA for the purposes of the third package Directives: see Commission Staff Working Paper, Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, The Regulatory Authorities (22 January 2010; http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_regulatory_authorities.pdf), at 9. (At the same time, DECC's approach does obviate concerns about excessive private sector involvement in Ofgem decision-making.) Second, one might question whether the new institutional, appellate arrangements and relationships will in fact produce 'better' outcomes, e.g.: (a) a wider range of potential challengers now exists to Ofgem decisions, which may cause suspension of the decision pending resolution of the appeal; and (b) the less intrusive standard of review envisaged by the CC under the new appellate procedure may encourage less, rather than more, rigorous decision-making by Ofgem. Alongside the likely increase in the number of such

Instead, by virtue of the changes introduced to the Gas Act 1986 (see ss. 23 and 23A) and the Electricity Act 1989 (ss. 11A and 11B) by the 2011 Regulations,[80] Ofgem now has the ability unilaterally to impose a modification subject only to a right of appeal to the CC. While the new provisions contain no express reference to challenges to the CC's decision on such appeals, it is tolerably clear that such CC decisions may be subject to judicial review before the High Court.[81]

6. Are the latest proposals (COM(2010) 726) on market abuse in the energy sector likely to present challenges for the NRAs whether in their sole capacity or as a hybrid with national financial regulatory bodies at Member State and/or EU level?[82]

The Commission proposals[83] on energy market integrity and transparency have now led to the adoption on 10 October 2011 of Regulation 1227/2011/EU on wholesale energy market integrity and transparency.[84] The provisions of this new measure are certainly likely to present challenges for the NRAs, both in their sole capacity but also as a hybrid with national financial regulatory bodies and with national competition authorities (NCAs), at both the Member State and the EU level.

At Union level, NRAs are expected to work with each other and the Agency for the Cooperation of Energy Regulators (ACER),[85] informing ACER of any contraventions of the Regulation.[86] Even though primary responsibility for this task is attributed to ACER, under the Commission proposals it was envisaged that the NRAs will have an extensive role in ensuring efficient market monitoring,[87] and this is confirmed by the final text of the Regulation.[88] Whilst the Regulation envisages a strong degree of co-operation between the NRAs and ACER (see Article 1(1) and (3), Articles 7 to 10 and Article 16), the latter's powers to request NRAs to supply information and to commence investigations in respect of suspected breaches (see Article 16(4)) may create a challenging hierarchical structure for NRAs. In addition, efficient market monitoring may not only entail a potentially substantial strain on available resources, and may involve NRAs in activities where they have minimal expertise to date. This may be alleviated (or

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challenges before the CC (when compared to the old regime) and the increased costs in time and resources this would involve (as acknowledged by the Ofgem January 2010 Paper (see n. …, *supra*)), one might wonder whether the envisaged benefits of the new regime outweigh its likely costs. I am indebted to Gordon Downie for discussion of these criticisms.

[79] Department of Energy and Climate Change, 'Implementation of the EU Third Package – Government Response' (January 2011; http://www.decc.gov.uk/assets/decc/Consultations/eu-third-package/1163-eu-third-package-gov-response.pdf).

[80] See n. 75, *supra*.

[81] Unlike CC decisions in relation to a merger or market investigation reference under the Enterprise Act, against which judicial review may be pursued before the Competition Appeal Tribunal.

[82] I am deeply indebted to Dr Isidora Maletic of Cleary Gottlieb for her work in the preparation of this section.

[83] COM(2010) 726 (8 December 2010) (available at: http://ec.europa.eu/energy/gas_electricity/markets/doc/com_2010_0726_en.pdf).

[84] [2011] O.J. L326/1 (8 December 2011); it entered into force on 28 December 2011 (by virtue of its Article 22).

[85] ACER was established under Regulation 713/2009/EC of the European Council and of the Parliament of 13 July 2009, establishing an Agency for the Cooperation of Energy Regulators, [2009] O.J. 211/1 (14 August 2009).

[86] Article 11 of the Commission proposal; Article 16 of the Regulation.

[87] Recital 13 and Article 6 of the Commission proposal.

[88] See Article 7 of the Regulation.

indeed exacerbated) by the acknowledgment that NCAs[89] and other more general market monitoring bodies (see the 'competent financial authority' referred to in Article 2(9)) may also be part of the overall monitoring framework. Further, such monitoring is also likely to prove particularly difficult where trading activities and related investigations on market abuse encompass a number of jurisdictions: as energy markets (and related transactions) begin to spread across national borders, the need for intensive co-ordination between NRAs (and other relevant bodies) may increase significantly.

Furthermore, under the Regulation the NRAs have responsibility for ensuring that the prohibitions on insider trading and market manipulation are respected and are therefore seen as being vital to the effective enforcement of the Regulation across the Member States.[90] This task may again prove testing for the NRAs: as acknowledged in the Commission's Impact Assessment accompanying the proposal for the Regulation, an "energy-specific meaning of insider information or market manipulation" remains to be "practically established".[91] The Regulation endeavours to provide relatively detailed definitions of these terms (see Article 2(1), (2) and (3)), and the Commission proposals[92] and the final text of the Regulation envisage that the NRAs should have vast investigatory powers for the exercise of this role, such as the right to carry out on-site inspections and request a court to impose the temporary prohibition of a professional activity.[93] Thus for instance the EESC has observed that the powers conferred on the NRAs are "both comprehensive and penetrating"; at the same, however, it has emphasised the need "for greater certainty of enforcement of the regulation in this area", suggesting the possibility of permitting only "a relatively short period for Member States to fulfil their obligation to guarantee that the authorities are granted these powers of investigation".[94]

A certain degree of useful guidance may perhaps be found in the current framework of the Market Abuse Directive (MAD).[95] Indeed, the Commission itself – whose proposals for a Regulation were based on the advice of the Committee of European Securities Regulators (CESR) and the European Regulators Group for Electricity and Gas (ERGEG) on the need for a tailored market abuse regime for energy sector products not covered by the MAD – has stressed the important links between the two legislative initiatives.[96] It should be noted, however, that the MAD is itself under review: the Commission adopted legislative proposals on the revision of the MAD on 20 October 2011,[97] and that, in particular, the specific definition of "inside information" used in relation to commodity derivatives has already come under scrutiny. An

[89] See Article 7(2) and (3), Article 10(1), Article 12(1), Article 16(1) and (3) of the Regulation.
[90] Article 13 of the Regulation.
[91] COM(2010) 726, at 21.
[92] Article 10 and Recital 19 of the Commission proposal.
[93] Article 13(2) of the Regulation.
[94] Opinion of the European Economic and Social Committee on the 'Proposal for a regulation of the European Parliament and of the Council on energy market integrity and transparency', para.5.4.
[95] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation, [2003] O.J. L 96/16 (12 April 2003).
[96] CESR and ERGEG advice to the European Commission in the context of the Third Energy Package (CESR/08-527, CESR/08-998, CESR/08-739), presented to the Commission in October 2008-January 2009.
[97] See Commission proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (COM(2011) 651) and Commission proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (COM(2011) 654) (both: 20 October 2011). For the relevant documentation and developments, see: http://ec.europa.eu/internal_market/securities/abuse/index_en.htm.

added layer of difficulty for NRAs in this regard may be provided by the expectation that they will also need to interact closely with competent financial authorities to deal in a coordinated manner with market abuse on wholesale energy markets, including both commodity markets and derivatives markets.[98]

The Commission proposals also referred to the possibility of adopting delegated acts clarifying further the legislative framework put forward, which may entail a number of additional latent duties and challenges for NRAs. The final text of the Regulation (while adding some detail on such delegated rule-making) retained this possibility: see Articles 6, 8(2) and 8(6),[99] and 20 of the Regulation.

At the same time, however, the Commission stressed the need to respect subsidiarity and highlighted the centrality of NRAs to the anticipated legislation. Indeed, in the Explanatory Memorandum to the proposal for a Regulation, the Commission explained that NRAs and other Member State authorities, such as financial regulators and competition authorities, have a direct interest in the market results in the wholesale energy markets sector and can contribute an indispensable understanding of the various markets across the Member States.[100] These roles were retained, and indeed that of the NCAs enhanced, in the final text of the Regulation. Thus, there will clearly be a wide range of co-operation and co-ordination issues for NRAs under this Regulation, at the national level, between Member States and with ACER at the EU level.

B. Promotion and Subsidy of Renewable Energy

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

There are two main issues to address here: are national RES-support schemes "trading rules" at all, within the meaning of Article 34 TFEU; and whether those schemes and the Second Renewables Directive which presumes their existence (on which, see …, *infra*) are compatible with the TEU and TFEU.

(i) 'Trading rules'?

[98] Recital 21 of the Commission proposal.

[99] N.B. the Commission and Council have attached conflicting 'Statements' to the official text of the Regulation concerning the exercise of such Commission delegated/implementing powers under Article 8(2)(a) and 8(6)(a): the Commission considers that such matters could only be addressed by legislative measures, while the Council is adamant that the text of the Regulation specifically requires the Commission to adopt such implementing acts and that this is a 'legally binding' obligation: see [2011] O.J. L326/1, at L326/16.

[100] Explanatory Memorandum to the proposed Regulation, para. 4.3.3.

One can question whether FiT mechanisms, and especially the current German FiT law (the *Erneuerbare Energien Gesetz* (EEG)), amount to a "trading rule" or measure falling within the scope of Article 34 TFEU. *PreussenElektra* only dealt with the predecessor of the EEG, the StrEG. Advocate General Jacobs suggested in his Opinion[101] that the StrEG did not serve the purpose of securing energy supply.[102] But the current German EEG is more specific on this point. Paragraph 1(1) EEG[103] strongly emphasises that the law serves the purpose of the sustainable development of national energy supply as well as promoting electricity generated from renewable sources ('RES'). Paragraph 1 further states that RES are domestic energy sources which are able to contribute to the independent supply of energy and to the security of supply. The German FiT law also enables Germany further to diversify its national energy mix in order also to fulfil its obligation from the law on phasing out of Nuclear Power in Germany "*Gesetz zur geeordneten Beendigung der Kernenergienutzung zur gewerblichen Erzeugung von Elektrizität*".[104]

The TEU and TFEU are based upon the principle that the EU may act to legislate only in fields where the Treaty has conferred competence upon the EU to act (see Article 5 TEU). In areas of activity where that competence is shared between the EU and its Member States, the EU must establish a legal basis for its action and must also justify the need for action on the EU level (satisfying the principle of subsidiarity) and for that extent of action (proportionality). Only then can a Member State be required to apply EU legislation in place of its own national rules on the subject. However, Member State rules which fall within the scope of directly effective provisions of the EC Treaty (such as Article 34 TFEU) may still need to be disapplied at national level unless they can be justified according to the Treaty, the Court's case law or any relevant EU legislation. The extent of this impact of such Treaty provisions obviously depends upon the scope of such provisions, as interpreted by the CJEU.

It must be evaluated on a case-by-case basis whether or not any given national measure, such as the FiT mechanism, constitutes a measure having equivalent effect in the light of the wording of Article 34 TFEU and thus amounts to a trade measure. It could be argued that a national FiT system itself might not be a measure which has an effect equivalent to a rule which regulates the cross-border trade in electricity. Instead, it could be argued that a FiT system amounts to a political instrument for the promotion of renewable energy which serves a complex variety of elements within a national energy policy. This argument is reinforced by current discussions concerning the further development of FiT systems such as the German law by opening the national FiT system up to allow access to the national support mechanism for

[101] Para. 209 of the Opinion of Advocate General Jacobs in *PreussenElektra*. It should be remembered, however, that the Advocate General: pointed out (para. 195) that the Court was not fully informed of the relevant facts on the issues relating to the free movement of goods, suggested that the oral procedure might be reopened to gain more information and highlighted that only tentative conclusions on those matters were possible in the circumstances (both para. 196).

[102] It should be noted, however, that the Court clearly did not reach the same overall conclusion as its Advocate General on the case; yet the Court's reasoning does not allow us to draw specific conclusions as to its position on this particular issue.

[103] Promotion of Renewable Energy Sources Act (Gesetz zur Förderung Erneuerbarer Energien), as amended in 2004, BGBl. I 2004, p. 1918 *et seq*.; http://www.erneuerbare-energien.de/inhalt/5982/.

[104] Bundesgesetzblat Teil I Nr. 26, 26 April 2002

electricity produced outside the relevant national system.[105] To this extent, therefore, it can be argued that there is strong evidence that, were the issue to be raised before the CJEU again, the Court might well recognize it as a national energy policy instrument and not a trade mechanism.[106]

Under the originally proposed definition of 'support mechanism' for the Second Renewables Directive and the introduction of a new trade system (which were later abandoned), Member States' arguments in favour of their national support mechanisms being treated as policy and not trade instruments would arguably have been weakened. This was especially the case in view of the fact that the proposal would no longer privilege a support mechanism restricted to generators established on the national territory, as was (arguably) ensured under Directive 2001/77/EC and which would seem to endure under the Second Renewables Directive.

This argument is based upon the following provisions of the First Renewables Directive. First, some of the Recital 14 acknowledged that Member States operate different support mechanisms at national level. Further, Recital 10 clarifies that the guarantee of origin required by the Directive's Article 5 did not require a Member State to recognise a purchase of a guarantee of origin from another Member State as contributing towards the first Member State's obligation, nor does the guarantee of origin imply the right to benefit from that other Member State's national support mechanisms. Recital 12 highlighted that the EU's Guidelines for State aid for environmental protection recognise the need for public support in favour of renewable energy sources ('RES'), and that is still true today. In general terms, Recital 1 emphasised that there is a strong need for the EC to promote RES to achieve environmental and sustainable development goals. Meanwhile, Art. 2(d) of the First Directive defined the "consumption of electricity" as primarily including "*national* electricity production" (emphasis added). In conjunction with the provisions of Article 3, concerning the setting and monitoring of *national* indicative RES targets, and with the Annex to the First Directive (which specified the reference values for those national targets), this establishes an argument that the Directive specifically envisages that Member States can adopt national RES promotion measures the benefit of which could be limited purely to national generation capacity.[107]

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[105] Moreover there is one aspect which is often neglected in the discussion of 'trade measures': at time of the *PreussenElektra* case there was (both for the judgment and for the Opinion of Advocate General Jacobs) little data available as to what other Member States do in view of installing and keeping their support mechanisms reserved for the national RES production (at the time of the facts of the case, Dir. 2001/77/EC had not yet been adopted). In fact, all EU Member States have national support mechanisms which restrict access to national generation only, including Finland with its tax support mechanism. It is also not impossible that the British system might introduce such restriction in the future, at least in light of cherry-picking. This information then leads us back to the questions whether, first, such national measures are really' trading rules' at all and, second, even if they do amount to trading rules can they nevertheless be justified under either Case 120/78 *Cassis de Dijon* [1979] ECR 649and its progeny or Art. 30 EC (as discussed in *PreussenElektra* itself).

[106] On the issue of distinction between a trade measure and a policy instrument, see Matthies in E. Grabitz & M. Hilf, *Kommentar zur EU*, Art. 30, para. 8; see also D. Fouquet & U. Prall, 'Renewable Energy Sources in the Internal Electricity Market: The German Feed-In Model and its Conformity with Community Law' (2005) 2 *Journal for European Environmental & Planning Law* 309 *et seq.*, and 316 *et seq.*; on the question of the definition of 'trade measures' and of 'support mechanisms' in the proposed directive and the explanations of the proposal given by the European Commission, see D. Fouquet & T. Johansson, 'European renewable energy policy at crossroads – focus on electricity and related support mechanisms' (2008) 36 *Energy Policy* 4079.

[107] This argument also reflects the position taken by the German Government: Official comment to Commission and Council, 'Consequences of the COM proposal for a trading system for GOs' (31 March 2008).

At the same time, it should be acknowledged that nothing in the text of the First Directive explicitly and clearly guaranteed the justifiability of such national RES support measures against the application of, e.g., Article 34 TFEU requiring the possibility of access to the benefit of such national measures by electricity generated in another Member State.[108]

(ii) Compatibility with the EU Treaties

This issue involves similar arguments to those addressed in answer to q.8, *infra*, in terms of justifying trade restrictions in light of environmental goals, and so the reader is directed to the next section for discussion of this question.

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

In some Member States, support schemes impose a purchase obligation, which obliges suppliers to purchase all renewable electricity produced in a certain region at a fixed price (i.e. a feed-in tariff, as discussed above).[109] In 1998, a German court referred three questions regarding the interpretation of what was then the EC Treaty to the European Court of Justice (ECJ).[110] These questions were raised in proceedings between PreussenElektra AG and Schleswag AG, two German electricity suppliers, concerning the German RES-E feed-in tariff rules. The German *Stromeinspeisungsgesetz* (StrEG)[111] laid down a system to ensure that energy produced from renewable sources can gain access to the grid and thus to the national market. In line with the policy to support renewable energy, all "electricity supply undertakings which operate a general

[108] E.g. the asterisk footnote to the Annex to the Directive only explicitly stated that Member States may assume that the EU's *State aid* rules and guidelines allow the adoption of national support measures: nothing is said about the free movement rules in that connection. Further, it could be argued Art. 4 of Dir. 2001/77/EC actually seemed to indicate the opposite – "the Commission shall evaluate the application of mechanisms used in Member States according to which a producer of electricity, on the basis of regulations issued by the public authorities, receives direct or indirect support, and which could have the effect of restricting trade". The reference to trade restrictions goes further than a mere 'effect upon trade' required under the State aid rules, and seems to be a reference to Art. 28 EC (now Art. 34 TFEU) considerations.

[109] 'Staff Working Paper: The support of electricity from renewable energy sources', SEC(2008) 57 (23 January 2008), at 12.

[110] Case C-379/98 *PreussenElektra* v. *Schleswag* [2001] ECR I-2099; discussed inter alia in: M Bronckers and R van der Vlies, 'The European Court's *PreussenElektra* judgment: Tensions between EU principles and national renewable energy initiatives' [2001] ECLR 458; J Baquero Cruz and M de la Torre, 'A Note on *PreussenElektra*' (2001) 26 ELRev 489; E Durand, G Block, and D Haverbeke, 'L'arrêt *PreussenElektra* de la Cour de Justice du 13 mars 2001: une étape décisive dans la promotion de l'électricité produite à partir de sources d'énergie renouvelables' (2002) *Revue juridique de l'Entreprise publique: Cahiers juridiques de l'Electricité et du gaz* 117; and A. Johnston *et al*, 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects' (2008) 17(3) *European Energy and Environmental Law Review* 126, esp. at 131–137.

[111] Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz, 7 December 1990, BGBl. I p 2633 *et seq*; 1994 p 1618 *et seq*; 1998 p 730 *et seq*; see <http://www.umwelt-online.de/recht/energie/ein_ges.htm>. See now the Erneuerbareenergiengezetz 2009 (Renewable Energies Law), to be amended by its 2011 incarnation, which enters into force in January 2012 (for a consolidated version (in German), see: <http://www.erneuerbare-energien.de/files/pdfs/allgemein/application/pdf/eeg_2012_bf.pdf>).

supply network" were obliged to purchase all of the renewable electricity[112] produced within their area of supply.[113] Furthermore, they had to pay a fixed minimum price for that electricity, calculated on the basis of the average nationwide sales price for electricity. These prices were set at such a level as to provide, in effect, a subsidy to generators of renewable electricity. Under the original incarnation of this law in 1990, price levels had been set at 90 per cent of the average sales price for wind-generated electricity[114] and 75 per cent for other sources (increased to 80 per cent by an amendment passed in 1994).[115] Over time, the level of subsidy in real terms had risen as production levels and efficiency, particularly in the wind power sector, had increased. The Commission had been keeping a close eye on these developments and had voiced its concerns that the German system was incompatible with EU State aid law. It had even suggested changes to the method for the calculation of the subsidies involved.[116] Changes wrought by the 1998 legislation[117] implementing Directive 96/92/EC provided for a new compensation mechanism for the distributor in cases of "hardship". The ECJ had to decide whether the German law was in line with the Treaty rules on quantitative restrictions on imports and measures having equivalent effect (now Article 34 TFEU) and State aid (now Article 107 TFEU).

With regard to Article 34 TFEU, the original legislation referred only to the obligation on the electricity suppliers to purchase electricity generated from renewable sources 'within their area of supply': as drafted, this could only cover power produced in Germany. The introduction in 1998 of a new rule concerning "off-shore installations" seems to underline the national focus of this obligation: renewable electricity produced in an installation situated outside a supplier's area must be purchased by the operator of the network located closest to that installation.[118] When read with the new paragraph 1 of the 1998 law, it is clear that the obligation applies only to electricity that has been generated in Germany. There are some significant difficulties in making an assessment of the purchasing obligation under Article 34 TFEU: the exact impact of the 1998 law on the importation of electricity from other Member States was at best unclear; it was difficult to establish whether imports of renewable electricity were even technically feasible and it was especially tricky to distinguish such power from that generated from conventional sources.[119]

(i) Difficulties posed by the Court's previous case law

PreussenElektra raises some important questions in that it constitutes a further threat to the already shaky consistency of the Court's case law on discriminatory restrictions to trade. As is well known, the ECJ has introduced a double system of justifications: indistinctly applicable rules – capable of hindering trade – may be justified according to the mandatory requirements of public interest, whilst discriminatory restrictions may be justified only according to the

[112] From specified sources: water, wind, sun, and biomass (para.1 StrEG 1998).
[113] Para. 2(1), StrEG 1998 (BGBl 1998 I, 730).
[114] Para. 3(2), StrEG 1990 (BGBl 1990 I, 633).
[115] BGBl 1994 I, 1618.
[116] Letter to the German Government, 25 October 1996, following complaints by the electricity supply undertakings about the impact of the renewables purchasing obligation upon them.
[117] *Gesetz zur Neuregelung des Energiewirtschaftsrechts* (Law reforming the Law on the Energy Supply Industry) (BGBl 1998 I, 730).
[118] Para. 2(2), StrEG 1998.
[119] Para. 195 of the Opinion of Advocate General Jacobs in *PreussenElektra*, delivered on 26 October 2000 (hereafter, 'the Opinion'). The Court made a similar point in para. 79 of its judgment.

(exhaustively listed) Treaty derogations. However, environmental protection was not a matter of sufficient concern when the Treaty was drafted and is thus not mentioned as one of the grounds which allows a departure from the Treaty.

The Court, however, has found that environmental protection was to be considered as one of the mandatory requirements: usually mandatory requirements may be invoked only to justify non-discriminatory restrictions;[120] however, this was not the case in the *Walloon Waste*[121] case. Here, the Commission attacked a discriminatory measure aimed at avoiding waste dumping in one of the Belgian regions. Belgium argued that the measure was justified on environmental protection grounds, whilst the Commission argued that such measure, being discriminatory, could not be so justified. Environmental protection might very well be a mandatory requirement of public interest, but it is not listed in what is now Article 36 TFEU and thus could not be invoked to justify discriminatory restrictions. The Court faced a conundrum: was it to declare the measure unlawful even though it had been adopted in pursuance of an interest widely held to be of great importance? Or was it to disregard its own case law so as to be receptive to the challenges faced by modern industrial societies? The Court chose a pragmatic approach: environmental protection is indeed a primary goal of the EU, and Member States' measures which pursue such goals as the one at issue may be so justified. It might be wondered whether this 'sensible' and pragmatic approach has not contributed to the Member States' inaction as far as Treaty amendments are concerned: although there have now been rounds of Treaty amendments since the *Walloon Waste* case, environmental protection has not yet been added to the list of the Article 36 derogations. Thus, it was to be expected that sooner or later a similar problem would arise again; and in *PreussenElektra* the Court again demonstrated its receptiveness to the need to protect the environment. Whilst the Court's preference for allowing Member States to pursue environmental protection is welcome, *PreussenElektra* added confusion and legal uncertainty for economic operators and national courts: to what extent can discriminatory measures be justified on grounds not contained in Article 30? Is environmental protection the only ground which can be added to the list, or, as *Decker*[122] suggests, are there others? Does the distinction between indistinctly applicable measures and discriminatory measures, and between mandatory requirements and the Treaty derogations, still hold good?

(ii) The Opinion of Advocate General Jacobs

Advocate General Jacobs found that Article 34 TFEU applied to the German system, since, according to consistent case law electricity is to be considered a good. On the basis of established case law, there was for Advocate General Jacobs little difficulty in establishing that such a measure has an effect equivalent to a quantitative restriction: *Campus Oil*[123] had made clear that any obligation to purchase a certain amount of products from a national source acts so as to restrict the ability of importing that same product from another Member State. By its restriction to German-produced renewable electricity, the StrEG favoured the "marketing of

[120] Case 302/86 *Commission v Denmark* (Danish Bottles) [1988] ECR 4607, para. 9. The Court had already found in Case 240/83 *Procurateur de la République* v. *Association de Défense des Brûleurs d'Huiles Usagées* [1985] ECR 531 that environmental protection is one of the EU's essential objectives which might justify limitations to trade imposed by the EU itself.
[121] Case C-2/90 *Commission* v. *Belgium* (Walloon Waste) [1992] ECR I-4431.
[122] Case C-120/95 *Decker* v. *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.
[123] Case 72/83 *Campus Oil* v. *Ministry for Industry and Energy* [1984] ECR 2727.

electricity of German origin to the detriment of imported electricity": indeed, Schleswag asserted that it had been offered Swedish renewable electricity at a reasonable price, but had been forced to decline to purchase it due to its obligation to take all of the wind-generated electricity from its own supply area.[124] Could this infringement be justified?

In this context, the key (and difficult) issue is the argument that environmental protection could justify the restriction. First of all, it is important to characterize the nature of the restriction in question: here, it is clear that renewable electricity of foreign origin is treated differently, both in law and in fact, from that produced in Germany.[125] The interveners, Germany and the Commission, sought to rely upon environmental protection. In this context, and after having criticized the reasoning in the *Walloon Waste* case, Advocate General Jacobs stated that that case demonstrated that it might be desirable that directly discriminatory measures be justifiable on environmental protection grounds. Thus, highlighting the confused state of the case law, he found the time ripe for the Court to clarify its position and that "a more flexible approach" is desirable in case of the imperative requirement of environmental protection. In order to strengthen his view, the Advocate General relied upon Article 11 TFEU – which states that environmental protection is one of the principles informing all Community policies – finding that Article 11 is not merely programmatic but rather imposes legal obligations. Further, he found that, since environmental measures are likely to be inherently discriminatory – a consideration reflected also in Article 191(2) TFEU (ex 174(2) EC), which provides that 'environmental damage should as a priority be rectified at source' – the exclusion of discriminatory measures from the environmental protection justification would risk undermining the very purpose of the national measure. He thus suggested that environmental protection could be properly invoked in this case and proceeded to analyse the proportionality of the measure. He found that the fact that the measure was trying to rectify the damage produced by greenhouse gas emissions failed to satisfy the proportionality requirement, since energy produced from renewable sources outside Germany would reduce greenhouse gas pollution to the same extent. As to the whether or not the measure was justified because of possible loss of energy through transmission over long distances, the Advocate General left the assessment to the national court.

(iii) The judgment of the Court

The ECJ found the rules at issue "not incompatible" with Article 34 TFEU; after having found the measure to be capable – at least potentially – of hindering intra-EU trade, it proceeded to assess whether 'such a purchase obligation is nevertheless compatible with Article [34]', having regard to its aim and/or the particular features of the electricity market.

The Court referred to various sources and reasons which made the measure not incompatible with Article 34: thus the measure sought to combat greenhouse gases, one of the main causes of climate change which both the Community and the Member States have pledged to combat in international Conventions. Further, the policy also aimed at protecting 'the health and life of humans, animals and plants' (an express derogation under Article 36 TFEU), and

[124] Paras. 200–202 of his Opinion. Without arguing the point, Advocate General Jacobs advised that, even if a *de minimis* rule does exist under Art 34 TFEU, the figure of 1 per cent of total German electricity consumption provided by renewables could not be viewed as negligible. Hence, the mechanism of the StrEG was in principle an infringement of Art 34 TFEU.
[125] Para.220 of his Opinion.

Article 11 TFEU requires environmental protection to be integrated in EU policy. The Court referred to the First Electricity IEM Directive[126] then in force and to the fact that it is difficult to determine the origin of electricity once it is introduced in the distribution system. It drew support for this view from the Commission's proposal that a system of certificates of origin for electricity produced from renewable sources should be established in order to make trade in that type of electricity reliable and possible in practice. It the concluded that 'in the current state of Community law concerning the electricity market, legislation such as … [that at issue] is not incompatible with Art. [28] of the Treaty.'

(iv) Analysis

The Advocate General's suggestion that the Court should expressly allow discriminatory measures to be justified on environmental protection grounds, although attractive in principle, poses some problems: Article 11 TFEU provides that environmental protection must be integrated in the definition and implementation of all EU policies mentioned in what is now Article 3 TEU,[127] which includes the establishment of the internal market. It is thus clear that, in the case of secondary legislation, a measure that allowed discrimination to occur would be compatible with the Treaty if it was necessary for the protection of the environment. This would hold true even though secondary legislation must comply with Articles 34 and 36: Article 11 seems to be *lex specialis* in this respect.

The problem, however, is whether Article 11 also constitutes a derogation from other Treaty provisions: i.e. whether it can be considered as *lex specialis* in respect of the prohibition for Member States to introduce quantitative restrictions and measures having equivalent effect. Article 11 seems to impose an obligation only upon the EU legislator: it is difficult to interpret it as a limitation on the Treaty free movement rights in the absence of EU harmoni**z**ing legislation. At the time of the *PreussenElektra* judgment, no such EU harmoni**z**ing rules concerning renewables had been adopted and, as discussed above (see …, *supra*), even the recent Second Renewables Directive provides only limited references to national RES-E support schemes and their status.

This might be the reason why the Court avoided following Advocate General Jacobs's analysis, preferring instead its rather Delphic reasoning: it is worth noting that the Court avoided mentioning both discrimination and justifications (whether Treaty derogations or mandatory requirements), suggesting instead that, rather than being justified, a discriminatory measure which pursues an environmental protection aim does not fall within the scope of application of Article 34. A similarly tortuous path had been followed in *Walloon Waste*, in which the Court relied upon what is now Article 191 TFEU in order to find that the measures at issue were not in fact discriminatory.

The environmental protection cases, possibly together with *Decker*, might then suggest a shift in the definition of measures having equivalent effect. If previously discriminatory measures would have been automatically caught by Article 34, it is possible that from now on a discriminatory measure falls within Article 34 only insofar as not justified by the mandatory

[126] Directive 96/92/EC [1997] O.J. L27/20 (30 January 1997).
[127] This principle has also been incorporated in Art 37 of the Charter of Fundamental Rights for the European Union [2000] O.J. C364/1 (18 December 2000).

requirements or the Treaty derogations. Thus a measure, whether discriminatory or indistinctly applicable, would fall within the scope of application of Article 34 only insofar as not justified by the mandatory requirements or by the Treaty derogations. There is no textual limitation to such an interpretation, since it is for the Court to interpret whether or not a measure has an effect equivalent to a quantitative restriction. (However, it should be borne in mind that for consistency's sake this solution can be endorsed only if it is of general application and not limited to environmental protection cases. Whether this is a desirable outcome is for the Court to decide.) The main reason which might lead to the Court choosing to avoid such a development are that, first, to do so would risk adopting what would amount to a judicial amendment to a Treaty provision and this would do very little to increase the legitimacy of the Court's activities. Should these concerns be too strong, and should the Court **conclude** that the problem arises only in environmental protection cases, then it could give a broader interpretation to the protection of health of animals, humans**,** and plants. By reading these three grounds conjunctively as opposed to disjunctively, the Court could include the protection of the environment in Article 36 TFEU. If we examine the judgment carefully:

- in paragraph 74 the Court highlighted that the EU and its Member States are members of UNFCCC and Kyoto Protocol, and also emphasized the importance of these environmental objectives as evinced by various Resolutions adopted, and programmes (such as ALTENER)[128] developed, by the EU;

- in paragraph 75 the Court tied this discussion in with protection of health and life of humans, animals, and plants, and thus explicitly connected such objectives with Article 36 TFEU (i.e. the express Treaty derogations from Article 34); and

- then, in paragraph 76 the Court underlined the legal requirement laid down in the EC Treaty itself that environmental objectives must be integrated into other EU policies (relying upon what is now Article 11 TFEU).

Drawing the strands of the earlier discussion together with this summary, this suggests that reliance upon Article 11 TFEU, possibly in conjunction with Article 36 TFEU, may well provide the most secure foundation for the approach taken by the Court in *PreussenElektra*, without doing significant violence to the approach taken by the Court in its previous case law on mandatory requirements under Article 34.

It might also be objected that the outcome in *PreussenElektra*, allowing the directly discriminatory German rules to escape censure, is at odds with the result in *Outokumpu*. By contrast with the situation in *Outokumpu*,[129] however, the rules at issue in *PreussenElektra* seemed to have been adopted in pursuit of a more complex policy: not the production of green electricity per se, but the production of green electricity in the region. In that regard, Advocate General Jacobs's suggestion – that, if there were a method to certify the origin of green electricity, the rules would not be necessary – did not take into account the fact that environmental policy might be *regional*. Indeed, he recogni**z**ed earlier in his Opinion that

[128] See <http://ec.europa.eu/energy/res/altener/index_en.htm> for details of the ALTENER and ALTENER II programmes on renewable energy, whose objectives are now incorporated in the EC's 'Intelligent Energy – Europe' programme (on which see <http://ec.europa.eu/energy/intelligent/index_en.html>).
[129] Case C-213/96 *Outokumpu* [1998] ECR I-1777.

environmental policy is likely to be discriminatory due to this kind of regional basis.[130] This is entirely consistent with Article 191(2) TFEU, which provides that environmental damage should be rectified at source.

Thus, imported green electricity might not ensure the achievement of the purpose of a regional development of renewable energy which avoids concentration of pollution in those EU regions in which it is more difficult and expensive (due to a lack of natural resources) to produce green electricity. In this sense, the German policy not only pursued a national interest which deserves protection, but also an EU interest in a balanced development. It is, therefore, possible that the difference between the German and Finnish policy might justify the different findings of the Court in the two cases. The Finnish policy was directed at ensuring that green energy could compete with imported as well as domestic, non-green electricity and the draconian rule was not strictly necessary. The German system, on the other hand, was directed at 'subsidising' the regional production of green electricity: in this way, the additional costs of producing that type of electricity would be redistributed amongst all German consumers. The rule was thus necessary to achieve this goal.

(v) Implications

The judgment is a clear recognition by the ECJ of the perceived need for EU action, since the EU has committed itself to emissions cuts under the Kyoto Protocol. The Court also emphasized the way in which such action accords with declared policy priorities and earlier programmes within the EU. This statement forms a major contextual point for the rest of the relevant 'considerations' which it went on to take into account. It was also clear that major legislative proposals were known to be under discussion, both in the field of greenhouse gas emissions trading schemes[131] and of a climate change programme in general.[132] The Court's permissive and hands-off approach here made sense in a climate of relative uncertainty as to the exact shape of future, specific legislative proposals in a sensitive area, and the decision had an important impact upon the RES-E policy under construction both at the EU level (in the First Renewables Directive) and in the other Member States (e.g. Belgium, the Netherlands, and Denmark),[133] since it legitimized the German policy and recognized that the Member States had a very substantial margin of manoeuvre in choosing and implementing particular RES-E support schemes, allowing Member States to implement national RES-E support schemes. This is a major reason for the extensive discussion here of the reasoning and outcome in *PreussenElektra*: after the adoption of the Second Renewables Directive, it is possible that the Court may adopt a more rigorous approach to national RES-E promotion schemes in future, now that a more advanced stage in the liberalization of the electricity market has been reached after the adoption of the Third Package. In that context, the inclusion of Recital 25 and Article 23 in the Second Renewables Directive, alongside the inclusion of Article 194(2) TFEU in the post-Treaty of

[130] See para.226ff of his Opinion.
[131] Commission, 'Green Paper: Greenhouse Gas Emissions Trading within the EU', COM(2000) 87 (8 March 2000).
[132] See the Commission proposal at the time to establish a 'European Climate Change Programme': Communication, COM(2000) 88 (8 March 2000).
[133] I de Lovinfosse, *How and Why do Policies Change? A Comparison of Renewable Electricity Policies in Belgium, Denmark, Germany, the Netherlands and the UK* (Brussels: PIE Peter Lang, 2008), 70–71; S Poli, 'National Schemes Supporting the Use of Electricity Produced from Renewable Energy Sources and the Community Legal Framework' (2002) 14 *Journal of Environmental Law* 221.

Lisbon Title XX of the TFEU on the environment, may prove significant in protecting Member State discretion in this field (see the discussion in answer to q. 14, *infra*).

One might also highlight the potential dangers of the perhaps blunter approach under Article 34 TFEU, not allowing for the practical difficulties that might be encountered in the relevant situations under such national renewables promotion schemes. For example, Advocate General Jacobs suggested in his Opinion that the proportionality of the German measures might undergo quite strict testing by the national court when the case returned to it from the ECJ. He made a number of comments which highlighted particular areas in the operation of the StrEG which he thought would need further and careful investigation: it suffices here to highlight his argument that the generation of electricity from renewable sources in other Member States which could then be sold to Germany would be equally effective in securing reductions in greenhouse gas emissions, thus meaning that (for him) the claimed environmental justification for the restrictive effects of the StrEG upon trade was not proportionate to the goal to be achieved.

Interestingly, however (and published in the Official Journal almost contemporaneously with the Opinion of Advocate General Jacobs in *PreussenElektra*), the Commission in its Explanatory Memorandum to the proposal for what became the First Renewables Directive, explored some of these trade issues in the context of possible future harmonization. The danger of Advocate General Jacobs's suggestion that the nationality ground be removed and foreign electricity allowed access to the German grid on similar terms 'is that the co-existence of different schemes, even if open to foreign producers, may lead to distortions of the market, e.g. when all [renewables] producers will try to benefit from the national system offering the best conditions, e.g. in terms of prices paid'.[134] Furthermore, there was a generally perceived wisdom shared among those in the drafting and negotiation process that we are still at too early a stage to propose the exact shape of any more comprehensive harmonization of these schemes – the Commission, the Economic and Social Committee, and the European Parliament were at one on this issue. And it is tolerably clear that this position continues to prevail today.

(vi) National RES-support schemes and possible future EU legislation

To achieve energy policy goals, renewable energy is promoted across Europe. On the EU level, the First Renewables Directive 2001/77/EC provided an important framework for national support schemes. Partly induced by this legislation, Member States have put in place a range of support measures for promoting renewable energy, instruments that compensate for the various market failures that leave renewable energy at a competitive disadvantage compared to conventional energy, in particular the negative externalities of fossil fuels and security of energy supply. According to the Commission,[135] the different support schemes which have been implemented by the Member States can be divided into four main categories:

(i) quota obligations;

[134] 'Proposal for a Directive of the European Parliament and of the Council on the promotion of electricity from renewable energy sources in the internal electricity market' COM(2000)279 final, [2000] O.J. C311/320 (31 October 2000) (originally submitted by the Commission on 31 May 2000), at 6. Advocate General Jacobs's Opinion in *PreussenElektra* was handed down on 26 October 2000.

[135] 'Staff Working Paper: The support of electricity from renewable energy sources', SEC(2008) 57 (23 January 2008).

(ii) tendering;

(iii) feed-in tariffs and premia; and

(iv) fiscal incentives.

In 2005, in accordance with the First Renewables Directive, the European Commission reported on the application and coexistence of the different support mechanisms for RES-E.[136] The report found that, in general, the effectiveness and efficiency of support schemes differed widely across the Member States. Whilst harmonization of support schemes was considered a long-term objective, persistent barriers to the development of RES-E and the low level of competition in the electricity market implied that such harmonization would be premature. The report concluded that the Commission should closely monitor support schemes and report again in 2007.

On 23 January 2008, the European Commission presented an updated review of the performance of support schemes.[137] This report, however, revealed that, 'despite the requirements of Directive 2001/77/EC and the efforts of Member States, major barriers to the growth and integration of renewable electricity remain'. The harmonization of support schemes remained a long-term goal on economic efficiency, single market and State aid grounds, but according to the Commission 'harmonisation in the short term is not appropriate'.[138] Finally, this analysis suggested that a high priority should be given to removing administrative barriers and improving grid access for renewable energy producers.

It should also be noted that, as a result of the fears expressed during the legislative process which led to the adoption of the Second Renewables Directive,[139] the final text of the Directive contains a number of provisions which appear designed to safeguard Member States' autonomy in the framing of their national support measures. Thus, Recital 25 emphasizes that:

> for the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. One important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes …

Further, Article 23 underlines that any Commission proposals based upon its report evaluating the implementation of the Directive shall 'neither affect the 20% target nor Member States' control over national support schemes and co-operation measures'.[140] It seems that this can only be bolstered by the introduction of Article 194(2) TFEU, which provides that EU measures in the

[136] 'Communication: The support of electricity from renewable energy sources', COM(2005) 627 (7 December 2005).
[137] SEC(2008) 57, n. 135, *supra*..
[138] *Ibid*, 17.
[139] See the discussion in the text following n. 104, *supra*.
[140] Indeed, the European Council's Conclusions of 4 February 2011 invited the Commission 'to strengthen its work with Member States on the implementation of the [Second Renewables Directive], *in particular as regards consistent national support schemes* and co-operation mechanisms', (CO EUR 2, CONCL 1; 8 March 2011; http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119175.pdf), para. 9 (emphasis added).

sphere of energy "shall not affect a Member State's right to determine the conditions for exploiting its energy resources [or] its choice between different energy sources".[141]

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

At the time of the UK's publication of its National Renewable Energy Action Plan (NREAP) in accordance with Article 4 of the Second RES Directive 2009/28/EC, the government had to admit that "no procedures have yet been established or proposed" for arranging a statistical transfer or joint project.[142] In its subsequent treatment of the "estimated potential for joint projects", DECC predicted some possible shortfalls in meeting the interim targets for RES deployment, but also noted the 'significant potential for further offshore wind generation in the North Sea [leading to] joint projects [which] could contribute to maximising both business benefits and efficient resource use'. It acknowledged, however, that "[s]ubstantial further work is needed to inform our next steps on this, so we are not setting out specific proposals on the level of excess production at this point".[143] In its ongoing work on offshore network development, DECC commissioned a high-level review on joint projects and interconnections in the context of RES deployment, analysing the cost-benefit of various possible projects from an overall UK perspective, while also acknowledging that these factors might play differently when viewed from the perspective of investors pursuing interconnector construction and operation (given the technical, practical, contractual and regulatory risks involved for such investors).[144] This has not, as yet, led to specific developments concerning joint projects in this area,[145] nor would the UK appear to have adopted any specific provisions to address such projects or statistical transfers.

More recently, in both DECC's 'UK Renewable Energy Roadmap' of July 2011[146] and its subsequent 'First Progress Report on the Promotion and Use of Energy from Renewable Sources for the United Kingdom - Article 22 of the Renewable Energy Directive 2009/28/EC',[147] the potential benefits of trading with our EU Member States were recognised and the use of the flexibility mechanisms as a contingency measure was highlighted as a possibility, but still no

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[141] See also Art 192(2)(c) TFEU, which provides for unanimity in Council decision-making on 'measures significantly affecting a Member State's choice between different energy sources'.

[142] Department of Energy and Climate Change (DECC), 'National Renewable Energy Action Plan for the United Kingdom – Article 4 of the Renewable Energy Directive 2009/28/EC' (available at: http://www.decc.gov.uk/en/content/cms/meeting_energy/renewable_ener/uk_action_plan/uk_action_plan.aspx).

[143] *Ibid.*, at 149 (para. 4.7.3).

[144] Sinclair Knight Merz, 'Offshore Grid Development for a Secure Renewable Future – a UK Perspective (June 2010) (available at: http://www.decc.gov.uk/assets/decc/What%20we%20do/UK%20energy%20supply/futureelectricitynetworks/800-offshore-grid-development-secure-renewable.pdf).

[145] The latest changes to the UK's regime on offshore network development can be accessed at: http://www.decc.gov.uk/en/content/cms/meeting_energy/network/offshore_dev/offshore_dev.aspx

[146] Available at: http://www.decc.gov.uk/en/content/cms/meeting_energy/renewable_ener/re_roadmap/re_roadmap.aspx.

[147] Available at: http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/renewable-energy/3992-first-progress-report-on-the-promotion-and-use-of-.pdf: see para. 11 (at 30-31).

specific procedures had been established. As a result, it can be assumed that there may be significant difficulties in pursuing the use of such flexibility mechanisms, although the government could no doubt rapidly adopt enabling (secondary) legislation[148] to facilitate statistical transfers under Article 9 of the Second RES Directive as and when a potential surplus against its renewables targets appears likely.

Within the DECC, the Office for Renewable Energy Deployment (ORED)[149] has been established, and while its current foci (financial support for renewables, identifying and addressing barriers to timely deployment of established RES technologies, and bringing forward technologies still at early stages of development) are domestically oriented, there is no reason why its work could not, in the future, be directed more towards facilitating inter-Member State co-operation in the renewables field.

C. Climate Change

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

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

(i) General and the Climate Change Act 2008

The UK has employed, and will continue to employ, a wide range of legal measures and policy tools to address climate change targets. For example, since April 2001 the UK has imposed a Climate Change Levy which aims to encourage businesses to improve energy efficiency and reduce greenhouse gas emissions. Its scope *ratione personae* covers industrial and commercial energy supplies to the industrial, commercial, agricultural, public and service sectors, while *ratione materiae* the levy is imposed upon natural gas, electricity, petroleum and hydrocarbon gas supplies of energy (with various exemptions, including electricity generated from renewable sources and fuel used by high quality combined heat and power schemes).[150] The funds raised by the levy are recycled back to business through a 0.3% cut in their national insurance contributions and the remainder is used to support energy efficiency and low-carbon technologies. The UK was also among the earliest adopters within the EU of a domestic emissions trading regime,[151] specifically designed with the intention of acclimatising UK

[148] E.g. under s. 2(2)(a) of the European Communities Act 1972.
[149] See: http://www.decc.gov.uk/en/content/cms/meeting_energy/renewable_ener/ored/ored.aspx.
[150] For the latest rates, see: http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_InfoGuides&propertyType=document&id=HMCE_PROD1_027235.
[151] The Greenhouse Gas Emissions Trading Scheme Regulations 2003, S.I. 2003, No. 3311 (31 December 2003, http://www.legislation.gov.uk/uksi/2003/3311/contents/made). See J. Dahlgreen, 'Emissions Trading in the United Kingdom: The Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 and the Greenhouse Gas Emissions Trading Regulations 2005' (2006) 8(2) *Environmental Law Review* 134.

businesses to the operation of such a system, in anticipation of the impending introduction of the EU's own ETS.[152]

Alongside the targets set at EU level in the EU ETS Directive,[153] the UK recently adopted its own far-reaching and ambitious climate change legislation in the form of the Climate Change Act 2008.[154] The key provisions of the Act cover the following issues:[155]

- a legally binding target of at least an 80% cut in greenhouse gas emissions by 2050, to be achieved through action in the UK and abroad, as well as a reduction in emissions of at least 34% by 2020. Both targets are against a 1990 baseline;
- a carbon budgeting system that caps emissions over five-year periods, with three budgets set at a time, to help the UK to stay on track for its 2050 target. The first three Carbon budgets[156] will run from 2008-12, 2013-17 and 2018-22, and were set in May 2009. The Government must report to Parliament its policies and proposals to meet the budgets, and this requirement was fulfilled by the UK Low Carbon Transition Plan;[157]
- the creation of the Committee on Climate Change[158] (CCC) – a new independent, expert body to advise the Government on the level of carbon budgets and on where cost-effective savings can be made. The Committee will submit annual reports to Parliament on the UK's progress towards targets and budgets, while the Adaptation Sub-Committee of the Committee on Climate Change will provide advice to, and scrutiny of, the Government's adaptation work. The Government must respond to these annual reports, ensuring transparency and accountability on an annual basis;
- the inclusion of international aviation and shipping emissions in the Act or an explanation to Parliament why not – by 31 December 2012. The CCC is required to advise the Government on the consequences of including emissions from international aviation and shipping in the Act's targets and budgets. Projected emissions from international aviation and shipping must be taken into account in making decisions on carbon budgets;

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[152] Although it should be noted that the UK scheme differed from that finally adopted at EU level in various important respects, having: been a voluntary scheme with State-provided incentives to encourage participation; had a narrower range of participants (excluding direct emissions from electricity or heat generation (except where produced and used on-site)); involved a different compliance mechanism (non-payment of incentives and reduction of allowances, rather than actual penalties); and taken a different approach to the integration of the ETS with other environmental programmes, such as the UK's Renewables Obligation scheme, Climate Change Agreements (CCAs) and the Climate Change Levy (CCL). CCAs continue to operate in the UK: they provide a 65% discount from the CCL for energy-intensive industries, provided that such industries meet targets for reducing carbon emissions or improving energy efficiency (see: http://www.decc.gov.uk/en/content/cms/emissions/ccas/ccas.aspx).

[153] Directive 2009/29/EC [2009] O.J. L140/63.

[154] Which became law on 26 November 2008. For the text, see: http://www.decc.gov.uk/en/content/cms/legislation/cc_act_08/cc_act_08.aspx.

[155] This summary is largely drawn from the DECC's webpage on the 2008 Act: http://www.decc.gov.uk/en/content/cms/legislation/cc_act_08/cc_act_08.aspx. See, further, H. Townsend: 'The Climate Change Act 2008: will it do the trick?' [2009] *Environmental Law Review* 116, and 'The Climate Change Act 2008: something to be proud of after all?' (2009) 7 *Journal of Planning & Environment Law* 842.

[156] See: http://www.decc.gov.uk/en/content/cms/emissions/carbon_budgets/carbon_budgets.aspx.

[157] See: http://www.decc.gov.uk/en/content/cms/tackling/carbon_plan/lctp/lctp.aspx.

[158] See: http://www.decc.gov.uk/en/content/cms/tackling/committee/committee.aspx.

- limits on international credits. The Government is required to "have regard to the need for UK domestic action on climate change" when considering how to meet the UK's targets and carbon budgets. The CCC has a duty to advise on the appropriate balance between action at domestic, European and international level, for each carbon budget. The Government must set a limit on the purchase of credits for each budgetary period – for the first budgetary period, a zero limit was set in May 2009, excluding units bought by UK participants in the EU Emissions Trading System;
- further measures to reduce emissions, including: powers to introduce domestic emissions trading schemes more quickly and easily through secondary legislation – the first use will be the Carbon Reduction Commitment Energy Efficiency Scheme;[159] measures on biofuels; powers to introduce pilot financial incentive schemes in England for household waste; powers to require a minimum charge for single-use carrier bags (excluding Scotland);
- a requirement for the Government to report at least every five years on the risks to the UK of climate change, and to publish a programme setting out how these will be addressed. The Act also introduces powers for Government to require public bodies and statutory undertakers to carry out their own risk assessment and make plans to address those risks;
- a requirement for the Government to:
  - issue guidance by 1 October 2009 on the way companies should report their greenhouse gas (GHG) emissions, and to review the contribution reporting could make to emissions reductions by 1 December 2010;[160]
  - use powers under the Companies Act 2006 to make reporting mandatory, or explain to Parliament why it has not done so, by 6 April 2012;[161]
- new powers to support the creation of a Community Energy Savings Programme[162] by extending the existing Carbon Emissions Reduction Target[163] scheme to electricity generators.

(ii) A UK Carbon Price Floor within the EU Emissions Trading System

Within the framework of the EU ETS, meanwhile, after its 2011 Budget statement, the current UK government is committed to the establishment of a carbon 'price floor' for the UK (thus

[159] See: http://www.decc.gov.uk/en/content/cms/emissions/crc_efficiency/crc_efficiency.aspx.

[160] Defra published the 'Guidance for UK businesses and organisations on how to measure and report their GHG emissions' on 30 September 2009 (http://www.defra.gov.uk/publications/files/pb13309-ghg-guidance-0909011.pdf). It published a report, 'The contribution that reporting of greenhouse gas emissions makes to the UK meeting its climate change objectives: a review of the current evidence', on 30 November 2010 (http://archive.defra.gov.uk/environment/business/reporting/pdf/corporate-reporting101130.pdf). See, generally: http://www.defra.gov.uk/environment/economy/business-efficiency/reporting/.

[161] The Government published 'Measuring and reporting of greenhouse gas emissions by UK companies: a consultation on options' on 11 May 2011 (http://www.defra.gov.uk/consult/2011/05/11/ghg-emissions/) seeking views on whether or not regulations should be introduced to make it mandatory for some UK companies to report on their GHG emissions within the directors' report to meet the UK's climate change objectives.

[162] See http://www.decc.gov.uk/en/content/cms/funding/funding_ops/cesp/cesp.aspx. The CESP targets households in low-income areas, aiming to improve energy efficiency and reduce fuel bills, and is delivered by community-based partnerships between community groups, energy companies and local authorities. At the time of writing, there were over 160 CESP schemes in operation in Great Britain.

[163] See: http://www.decc.gov.uk/en/content/cms/funding/funding_ops/cert/cert.aspx.

securing a minimum carbon price), after the expression of concerns about achieving emissions reductions targets under the EU ETS at the prevailing carbon price levels. There have been suggestions in the policy community that the achievement of genuine CO_2 reductions under the current meshed European and national systems within the EU will require a much higher carbon price, with a minimum price to safeguard and encourage investment decisions by business and financiers, and to incentivise innovation, research and development. This has become particularly pressing in the face of reductions in emissions due to the recent recession across the EU, which has led to significant falls in the carbon price. Yet no moves have been made at EU level to secure such a minimum price under the EU ETS. This has led to discussions in some Member States (such as the UK)[164] about introducing some form of domestic carbon tax to ensure a minimum carbon price.[165] The aim of such a tax would be to design the market so as to incentivise and facilitate the 'right' kinds and amounts of (environmentally sustainable, etc) investment. Essentially, a tax-based system would seek to establish a carbon tax ('z') on top of the cost of an emissions allowance ('x'), at a level to ensure that the overall 'cost of carbon' always reached at least a certain minimum amount ('y'): i.e. $x + z \geq y$.

In its recent White Paper, 'Planning our electric future: a White Paper for secure, affordable and low-carbon electricity',[166] DECC explained that:

> 2.2.3 Having certainty about the price of carbon is particularly important given the long lead times between the decision to invest in low-carbon generation and the plant generating electricity. High levels of uncertainty over future profitability and rates of return could increase the cost of capital for investors and deter investment altogether. If uncertainty is too great, investment will either not go ahead or capital could be diverted to less risky but more polluting forms of generation. If developers have confidence that the Government will support the carbon price over the long term, this should make a significant difference to investment decisions for new low-carbon generation.
>
> 2.2.4 … Although the EU ETS has achieved certainty over EU net emissions, along with a strong signal regarding the future level of the declining cap, the level of this cap (and associated carbon price) is not consistent with the pace and scale of decarbonisation that is needed for the UK to meet its 2050 targets. Thus the carbon price signal resulting from this cap has not been stable, certain or high enough to encourage sufficient investment in low-carbon electricity generation in the UK.

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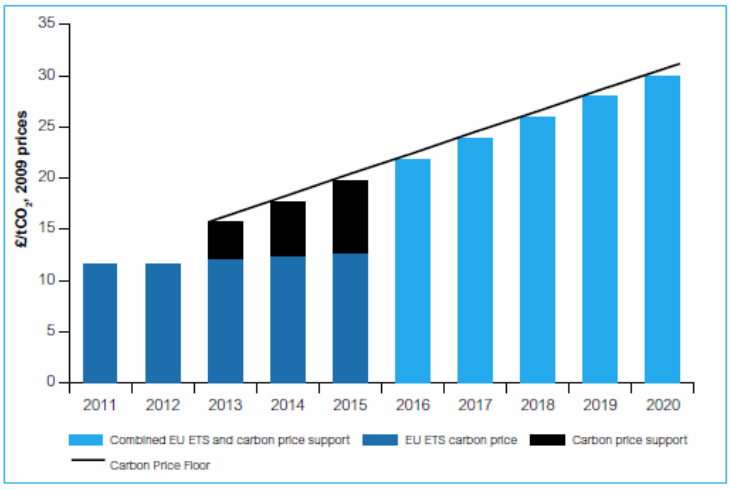
[164] On 8 February 2010, the UK Parliament's Environmental Audit Committee considered this issue and called for the government seriously to consider measures, including a carbon tax, to set a floor for carbon prices: to set a floor for carbon prices to set a floor for carbon prices (see press release: http://www.parliament.uk/parliamentary_committees/environmental_audit_committee/eacpn080210.cfm; and Report, 'The role of carbon markets in preventing dangerous climate change': http://www.publications.parliament.uk/pa/cm200910/cmselect/cmenvaud/290/29002.htm, esp. Section 4). Carbon taxes are already levied in Finland, the Netherlands, Sweden, Denmark, the UK and France (in order of the date of their introduction): for an overview, see J Sumner, L Bird & H Smith, 'Carbon Taxes: A Review of Experience and Policy Design Considerations' (National Renewable Energy Laboratory (USA), Technical Report, NREL/TP-6A2-47312, December 2009: http://www.nrel.gov/docs/fy10osti/47312.pdf).

[165] See, on the general question, P Wood & F Jotzo, 'Price Floors for Emissions Trading' (FEEM Working Paper 118.2009, 7 January 2010: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532701), suggesting that firms should pay some form of extra fee or tax to implement such a 'price floor' policy.

[166] July 2011, available at: http://www.decc.gov.uk/assets/decc/11/policy-legislation/EMR/2176-emr-white-paper.pdf.

2.2.5 To enable a secure low-carbon transition in the UK power sector and encourage investment, the Government believes that there is a strong rationale to provide greater certainty and support to the carbon price faced by the sector. Therefore, the Government has moved to providing a stronger carbon price to promote investment in low-carbon generation over the longer term, to allow investors to include it as part of their investment appraisal.

As a result, in the Finance Act 2011[167] (passed on 19 July 2011), amendments have been made to Schedule 6 to the Finance Act 2000 by inserting a new paragraph 42A, subjecting the supply of commodities to be used in the producing electricity to what are to be known as the "carbon price support rates" (see Schedule 20 to the Finance Act 2011, para. 6) and empowering the Inland Revenue Commissioners to make regulations to give effect to these new provisions. The new levy will enter into force from 1 April 2013 and its proposed rates are based upon the difference between the proposed price floor and the future market price for carbon under the EU ETS for 2013, with future rates to be published by the government in subsequent budgets, according to the then prevailing carbon price.[168] The measure will be used to target a price floor of £30/tCO in 2020 rising to £70/tCO2 in 2030 (based on 2009 real prices, after removing the effect of inflation). The Figure below is taken from the White Paper[169] and shows the planned evolution of the UK's carbon price floor over the coming years.



Thus, the UK has chosen to complement the operation of the EU ETS with a form of carbon taxation specifically designed (in the UK's view) to enhance the effectiveness of the EU ETS in incentivising more, and more rapid, investment in the decarbonisation of the UK power generation sector. However, DECC has also acknowledged that the carbon price floor will not, on its own, be sufficient to encourage the necessary investment and will thus be combined with a Feed-in Tariff mechanism, in pursuit of the UK's twin climate and RES goals.[170]

[167] Available at: http://www.legislation.gov.uk/ukpga/2011/11/pdfs/ukpga_20110011_en.pdf.
[168] White Paper (July 2011), n. 166, *supra*, para. 2.2.8.
[169] *Ibid*., para. 2.2.6 (at 35).
[170] *Ibid*., at 2.2.10ff.

It may also be argued that an alternative way to achieve this goal of a carbon price floor would have been to introduce reserve prices under the mechanism for auctioning allowances under the EU ETS. Under the latest incarnation of the EU ETS Directive,[171] an auctioning process will be used for allocations of allowances from 2013 onwards: to date, the vast majority of allowances has been allocated for free, with only very small proportions (up to 5% in the first phase and up to 10% in the second) being auctioned. Under a system mainly based on auctioning, a provision adopted at EU level allowing for the setting of reserve prices in such auctions would provide (depending upon its precise formulation) a harmonised solution to this problem across the EU, unlike the suggestions in the preceding paragraph (which would proceed on the basis of national taxation measures in any Member State which wished to introduce them). This might well have been a preferable approach,[172] so far as general EU law considerations are concerned, since one could envisage a range of difficult questions being raised with regard to the domestic taxation proposal. For example, the rules on internal taxation under Article 110 TFEU (ex 90 EC) may prove challenging, particularly if the national system were to respond to potential protests by large domestic electricity consumers by imposing some form of border tax adjustments against imported products which would not be subject to the higher effective UK carbon price. Alternatively, EU State aids law might prove a challenge if the response to such imports were instead to exempt certain domestic emitters from the tax, and of course such exemptions would themselves call into question whether the very goals of the tax-based approach to securing a minimum carbon price would actually be achieved. Indeed, it might be argued that the unilateral adoption by one Member State of a carbon price floor in the manner employed by the UK amounts to a fundamental undermining of the goals and operation of the EU ETS itself, leading to the probable lowering of the carbon price under the EU ETS outside the UK, effectively creating two different prices within the EU.[173] Finally, it has been argued that the combination of multiple climate policy instruments can often lead to one (such as a price floor via carbon tax, generous Feed-in Tariffs and/or renewable energy obligations) undermining another (e.g. by reducing the carbon price in the market substantially, thus leaving unchanged the overall price signal to market participants).[174]

D. Security

[171] See Art. 10, Directive 2009/29/EC [2009] O.J. L140/63.

[172] Although it must be conceded that there may be little appetite among the Commission, Council and European Parliament to return to the amendment of the EU ETS so soon after the adoption of the 2009 Directive. Thus, much may turn on whether a reserve auction price might be introduced into the EU ETS through the Commission's envisaged Regulation on auctioning, to be adopted under Art 10(4) of the new Directive by 30 June 2010 conducted according to the 'regulatory committee with scrutiny' variant of the comitology process, under Art 23(3) of Directive 2009/29/EC. Nevertheless, it also seems inconsistent to pursue unilateral measures at a time when the interdependence between EU Member States' energy systems and needs is increasingly accepted: see, e.g., P D Cameron, 'From Producer to Consumer: the UK's Changing Energy Strategy in the EU' in P Andrews-Speed (ed.), *International Competition for Resources: The Role of Law, the State and of Markets* (University of Dundee Press, Dundee 2008), 45.

[173] CDC Climat Research, 'Carbon Price *Flaw*? The impact of the UK's CO2 price support on the EU ETS' (Climate Brief, No. 6, June 2011).

[174] S. Fankhauser, C. Hepburn and J. Park, 'Combining Multiple Climate Policy Instruments: How not to do it' (Centre for Climate Change Economics and Policy, Working Paper No. 48, February 2011).

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

There are various joint Ofgem activities with other NRAs where regulatory approval (e.g. TPA, unbundling and exemptions therefrom) is required for inter-Member State interconnections:[175] while, strictly, such activities concern the implementation and application of aspects of the Third Energy IEM Package which are not *per se* focused on security of supply, the smooth functioning and economic viability of such infrastructure in providing further sources of supply to those at either end of such interconnectors clearly also potentially contributes to enhancing supply security, not only in the UK but also the other Member State(s) to which it would be (further) connected. While these activities do not amount to an overt measure of "solidarity with other Member States", they may sometimes operate to have just that effect in times of supply shortage.

Further, Ofgem is currently considering market-based amendments to Uniform Network Code (on which see the discussion in answer to q. 13, *infra*). There are also proposals to amend the UK gas supply security arrangements, made under the Gas Security of Supply Significant Code Review: Ofgem asserts that these focus on providing further, finer incentives for market participants, while leaving more "interventionist" proposals for further study. Such developments seek to retain and use the market to pursue specific goals such as supply security,[176] although they do not yet involve elements of solidarity between Member States.[177]

Beyond these examples, the UK has yet to adopt specific legislative provisions directed at the promotion of measures of solidarity with other Member States in the field of supply security, perhaps because, given its largely[178] island status, the development of (e.g.) joint storage facilities or other direct measures is rendered more difficult by dependence upon the (costly) development of greater cross-border transportation capacity.

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[175] See, e.g.: Ofgem, 'Revised access rules for England-France Interconnector (IFA)' (21 November 2011; http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=96&refer=Europe); Ofgem, 'Approval of the access rules for the EirGrid East-West Interconnector (EWIC)' (3 October 2011; http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=88&refer=Europe); and Ofgem, 'Preliminary conclusions on the regulatory regime for project NEMO and future subsea electricity interconnector investment' (conclusions jointly agreed with CREG, the Belgian NRA) (20 December 2011; http://www.ofgem.gov.uk/Europe/Documents1/Preliminary%20conclusions%20letter.pdf).

[176] Although see the criticism of the Ofgem proposals as using the cover of the EU's Gas Security of Supply Regulation as an "excuse" to move away from market-based security of supply. This is seen as worrying given that economic analysis of various scenarios suggests that such supply emergencies are *highly* unlikely to occur in any case; rather, the issue is what price the UK would have to pay to ensure that it attracts the gas supplies which it needs, which is a short-term problem and nothing to do with "longer-term security": see P. Noël, 'International Gas Markets & GB Gas Supply Security Policy' (Presentation to Ofgem, 21 November 2011; available at: http://www.eprg.group.cam.ac.uk/wp-content/uploads/2011/11/PN_SecurityGasSupply_Ofgem_111121_SEC.pdf).

[177] Indeed, in the past the UK has worked with non-EU Member States on supply security issues, including Norway (to secure gas imports from Norwegian-owned fields by direct connection to the UK offshore gathering system) and tentatively with Russia (examining the possibility of a direct pipeline to the UK from Russia, by-passing intermediary EU Member States): see S. Dow, 'Energy Law in the United Kingdom', in M.M. Roggenkamp, C. Redgwell, I. del Guayo and A. Rønne (eds.), *Energy Law in Europe* (Oxford: OUP, 2nd edn., 2007), ch. 15, at paras. 15.41-15.42.

[178] There is, of course, the land border between Northern Ireland and the Republic of Ireland.

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

(i) General

Since privatisation, the UK energy legislation[179] has formally provided for the sharing of powers between the responsible government minister and the independent regulator (specifically, the Director General of Ofgem); in practice, however, any ministerial authority has been delegated to the Director and Ofgem has generally[180] been seen to act independently of government (as is, of course, now clearly required by the Third Internal Energy Market (IEM) Directives[181]).

Under section 172 of the Energy Act 2004,[182] the UK government is statutorily obliged to report annually to Parliament on the availability of electricity and gas for meeting the reasonable demands of consumers in Great Britain; further, various provisions of EU legislation[183] oblige the UK government to monitor security of electricity and gas supply and to publish reports on those issues. This obligation has been discharged through the publication of an 'Energy Markets Outlook' document in 2007, 2008 and 2009, and is now contained in an annual 'Statutory Security of Supply report'.[184]

(ii) Gas Security of Supply Regulation

[179] The Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000 (all as amended over the years by various pieces of legislation).

[180] N.B., however, the very recent judgment in *R (Homesun Holdings Ltd and others)* v. *Secretary of State for Energy and Climate Change* (n.y.r., judgment of Mitting J., Q.B.D., 22 December 2011), where the judge queried (*obiter*) whether an attempt by DECC to reduce the level of subsidy provided by the UK's Feed-in Tariff for small-scale renewables properly fell within DECC's powers, as opposed to being a matter for Ofgem alone.

[181] See Article 35(4)-(5) of the Third IEM Electricity Directive 2009/72/EC [2009] O.J. L211/55, and Article 39(4)-(5) of the Third Gas IEM Directive 2009/73/EC [2009] O.J. L211/94, and the Commission's 'Staff Working Paper: Interpretive Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas – The Regulatory Authorities' (Brussels, 22 January 2010); these issues are further discussed by E Cabau, 'National Regulatory Authorities', in C Jones (Gen ed), *EU Energy Law, Volume I: The Internal Energy Market – The Third Liberalisation Package* (3rd edn, Leuven: Claeys & Casteels, 2010), ch 6.

[182] As amended, most recently by s. 80 of the Energy Act 2011. See also s. 47ZA of the Electricity Act 1989 (as inserted by s. 79 of the Energy Act 2011, requiring GEMA/Ofgem to "prepare a report on the future demand for, and supply of, electricity in Great Britain" (s. 47ZA(1)(a)), to be sent to the Secretary of State (s. 47ZA(1)(b)).

[183] *Viz*: Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing 2003/55/EC, augmented by Article 13 of Regulation 2010/994/EC of 20 October 2010 concerning measures to safeguard security of natural gas supply and repealing Council Directive 2004/67/EC; Directive 2009/72/EC of 13 July 2009 concerning common rules for internal market in electricity and repealing Directive 2003/54/EC, augmented by Article 7 of Directive 2005/89/EC of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment and other relevant legislation.

[184] The most recent of which, for 2011, was published on 8 November 2011 (http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/energy-security/3425-statutory-security-of-supply-report-2011.pdf). All of these documents, which have been prepared jointly by DECC and Ofgem, with input from National Grid, are accessible at: http://www.decc.gov.uk/en/content/cms/meeting_energy/en_security/sec_supply_rep/sec_supply_rep.aspx.

The UK has chosen[185] to render the Department for Energy and Climate Change ('DECC') the responsible 'Competent Authority' for the purposes of Article 3(2) of the Gas Security of Supply Regulation.[186] Charles Hendry, the Energy Minister, told Parliament: "[a]s competent authority, DECC will be responsible for implementing the measures in the regulation intended to improve EU security of gas supply. These include: preparing a risk assessment, developing a preventative action plan and emergency plan, and regular monitoring of security of gas supply at a national level, involving the industry, National Grid and Ofgem as appropriate". On the DECC website, it is stated that the "implementation [of the Regulation] is being taken forward [by DECC] as a joint project with Ofgem and National Grid",[187] suggesting that some delegation of the functions of the Competent Authority may be being envisaged by the UK government.

Under the Regulation, specific tasks of that Competent Authority may be delegated, although the Competent Authority must supervise the performance of any such delegated tasks (Article 2(2)). The roles and responsibilities of the different actors must be specified to ensure a 'three-level approach' (first industry, then Member States, then the EU) (Article 3(4)). The Competent Authority's key roles will be to: conduct a full Risk Assessment of the factors affecting gas supply security (Article 9); and draw up both a 'Preventive Action Plan' (PAP) (to remove and/or mitigate the risks identified) and an 'Emergency Plan' (to address supply disruption) (Article 4). Consultations are required among Competent Authorities at regional level, and with Commission, *before* the adoption of such national plans (Article 4(2)), and this may lead to the adoption of joint plans at regional level involving more than one Member State, in addition to those adopted at national level (Article 4(3)). Once adopted, the plans are notified (under Article 4(5)) to the Commission for it to assess (according to the procedure and criteria laid down in Article 4(6) to (8)) whether they are:

- effective to mitigate the risks identified (Article 4(6)(b)(i));
- inconsistent with the risk scenarios or plans of another Competent Authority (Article 4(6)(b)(ii));
- likely to endanger the gas security of supply of another Member State or of the EU as a whole (Article 4(6)(b)(iii)).

If difficulties are identified by the Commission, it may require the amendment or review of the PAP and/or Emergency Plan, and may in certain circumstances (under Article 4(6)(b)(iii)) even present specific amendment recommendations.

During an emergency, the Competent Authority will receive on a daily basis the information which natural gas undertakings are obliged to provide under Article 13(2), including gas supply and demand forecasts for the next three days, daily gas flows (at cross-border connections, points connecting a production, storage, or LNG facility to the network) and the number of days for which supplies to protected customers can be ensured. Once an emergency has passed, the Competent Authority must within six weeks report to the Commission, assessing

[185] *Hansard*, 19 January 2011, Column 40WS (see: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110119/wmstext/110119m0001.htm#11011945000106).
[186] Regulation 994/2010/EU [2010] OJ L295/1 (12 November 2010).
[187] See: http://www.decc.gov.uk/en/content/cms/meeting_energy/en_security/eu_sec_reg/eu_sec_reg.aspx.

the emergency, measures taken to address it, and their impact (including generally economically and on the electricity sector) (Article 13(5)).

The current UK legal framework concerning the gas network, its functioning and operation is mainly contained in the Gas Act 1986 (as amended), the Gas Safety (Management) Regulations 1996 and in the various relevant codes established by Ofgem and the operators' licences. In its 'Gas Security of Supply Significant Code Review (SCR) Initial Consultation',[188] Ofgem has described this framework and its operation and the reader is referred to that helpful summary for further details.

In its recent 'Risk assessment for the purpose of EU Regulation 994/2010 on security of gas supply',[189] DECC has noted that:

> 2.5 Parliament has given Ofgem a new power in the Energy Act 2011[190] to sharpen commercial incentives on gas market operators to ensure sufficient gas is available to reduce the likelihood, duration and severity of a gas shortage. Ofgem is conducting the Gas Security of Supply Significant Code Review (Gas SCR) to consider how current market arrangements could be improved to further enhance security of supply. This review is considering potential changes to the gas emergency arrangements as well as the rationale for further interventions including obligations on shippers, suppliers or the system operator.
>
> 2.6 Providing timely and accurate information on supply and demand, risks and drivers to the market is key to maintaining a well functioning market and hence security of supply. It is also important for Government, transmission system operators (TSOs) and Regulators. As noted in the section below, information is provided to the market through a combination of extensive daily /real time information, a number of regular reports and, where necessary, supplemented with one off assessments and reports.

Ofgem has since published its Draft Policy Decision on the Gas Security of Supply Significant Code Review,[191] and has held a seminar to elicit reactions from interested parties.[192] The final decision on this policy is expected circa May 2012. The main focus of the draft proposals is to

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[188] Ref 02/11 (11 January 2011, available at: http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/GasSCR/Documents1/Initial%20Consultation%20-%20Gas%20Security%20of%20Supply%20Significant%20Code%20Review.pdf), at 13-14.

[189] November 2011, available at: http://www.decc.gov.uk/media/viewfile.ashx?filetype=4&filepath=11/meeting-energy-demand/energy-security/3428-risk-assessment-eu-reg-sec-supply.pdf&minwidth=true.

[190] By directing market-based changes to the Uniform Network Code for the purpose of either or both decreasing: the likelihood of a Gas Supply Emergency occurring; and the duration or severity of such an Emergency which occurs. See s. 81 of the Energy Act 2011 (http://www.legislation.gov.uk/ukpga/2011/16/section/81/enacted), which inserts a new s. 36C into the Gas Act 1986.

[191] Ofgem, 'Gas Security of Supply Significant Code Review – Draft Policy Decision' (Ref. 145/11, 8 November 2011; http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/GasSCR/Documents1/Draft%20Policy%20Decision%20Gas%20Security%20of%20Supply%20Significant%20Code%20Review.pdf)

[192] Ofgem, 'Minutes of the opening seminar for draft policy decision on the Gas Significant Code Review' (Seminar: 30 November 2011; minutes published 16 December 2011; http://www.ofgem.gov.uk/MARKETS/WHLMKTS/COMPANDEFF/GASSCR/SEMWRKSHP/Documents1/Gas%20SCR%20Opening%20Seminar%20Draft%20Policy%20Decision%20Minutes.pdf).

sharpen incentives for market players to ensure adequate supply security,[193] while possible "further interventions" are said to require further study before any decision to pursue (any of) them could be taken.[194] In particular, Ofgem is prepared to consider the imposition of various storage interventions, which might include: new build of a regulated or semi-regulated storage facility; a storage obligation, either on (e.g.) suppliers or the system operator; and strategic storage held by (e.g.) the government or system operator. Clearly, certain aspects of such interventions might shift security of supply responsibilities significantly, as between central government, the NRA and market participants.

Ultimately, given the ongoing development of these policies and their associated measures in the UK at present, it is as yet too early to reach definitive conclusions as to the precise distribution and delimitation of the relevant roles and responsibilities under the Gas Security of Supply Regulation.

E. The Treaty

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

The precise implications of this new provision remain to be seen in practice: e.g. it is unclear exactly what the difference is between the effective veto with regard to fiscal matters offered to Member States by the unanimous Council voting requirement in Article 194(3), and the position under the second paragraph of Article 194(2), where it is merely stated that such measures adopted under the ordinary legislative procedure (i.e. co-decision with the European Parliament and qualified majority vote by the Council) 'shall not affect a Member State's right'. It may be argued that under Article 194(2) a Member State may opt out of the national application of an EU legislative measure passed according to the procedure specified, but it may *not* veto the very adoption of that measure as EU law in the first place. Whatever the correct interpretation, it is possible that this provision may have an impact upon the behaviour of any Member State during discussions of Commission (legislative) proposals on various aspects of energy and environmental policy, although it remains to be seen how easily certain proposed actions might be discouraged, blocked or undermined by national objections based upon the wording of Article 194 TFEU. Finally, it is not impossible that Member States might seek to make use of the provisions on enhanced co-operation (see Article 20 TEU) when addressing sensitive energy and/or environmental issues where the potential constraints of Article 194 TFEU may apply. Indeed, it has even been suggested that measures might be pursued via Schengen-type arrangements (or even separate treaties) in some energy-related fields,[195] although after the advent of Article 194 TFEU such proposals may fall foul of the application by analogy of the Court's case law developed under the old Article 47 TEU concerning the TEU–EC Treaty inter-

[193] For details, see Ofgem, 'Draft Policy Decision', n. 191, *supra*, section 4.
[194] Ofgem, 'Draft Policy Decision', n. 191, *supra*, section 5.
[195] N. Ahner, J.-M. Glachant and A. de Hauteclocque, 'Legal Feasibility of Schengen-like Agreements in European Energy Policy: the Cases of Nuclear Cooperation and Gas Security of Supply' (EUI Working Paper RSCAS 2010/43, http://cadmus.eui.eu/bitstream/handle/1814/13976/RSCAS_2010_43.pdf?sequence=1).

relationship[196] (and which itself will now have to adapt to the new wording under Article 40 TEU and the new Treaty structure),[197] where it was careful to examine the attempt to use powers under the TEU if they might undermine or be in conflict with express or implied powers under the EC Treaty.[198]

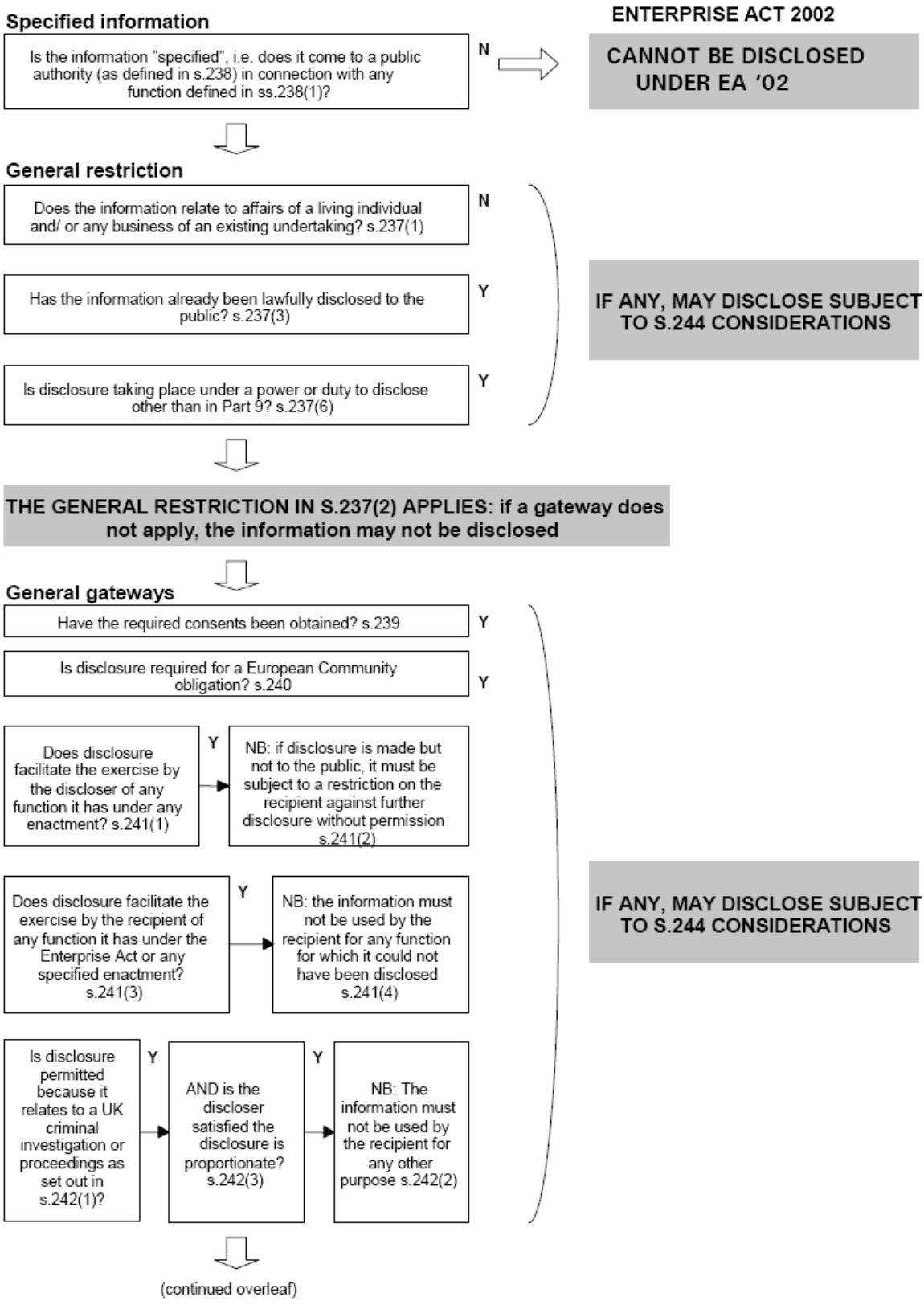
[196] See, e.g., Case C-91/05 *Commission* v. *Council* ('*ECOWAS*') [2008] ECR I-3651.

[197] Since no priority is given to TFEU competence over CFSP competence; rather, Art. 40 TEU "provides equal protection against mutual encroachment" (A. Dashwood *et al*, *Wyatt & Dashwood's European Union Law* (Oxford: Hart Publishing, 6th edn., 2011), at 908).

[198] Indeed, priority was given to the use of EC competences in such cases of conflict: see the *ECOWAS* case (n. , *supra*). See, further, A. Dashwood & M. Maresceau, *The Law and Practice of EU External Relations* (Cambridge: CUP, 2008), esp. 102ff.

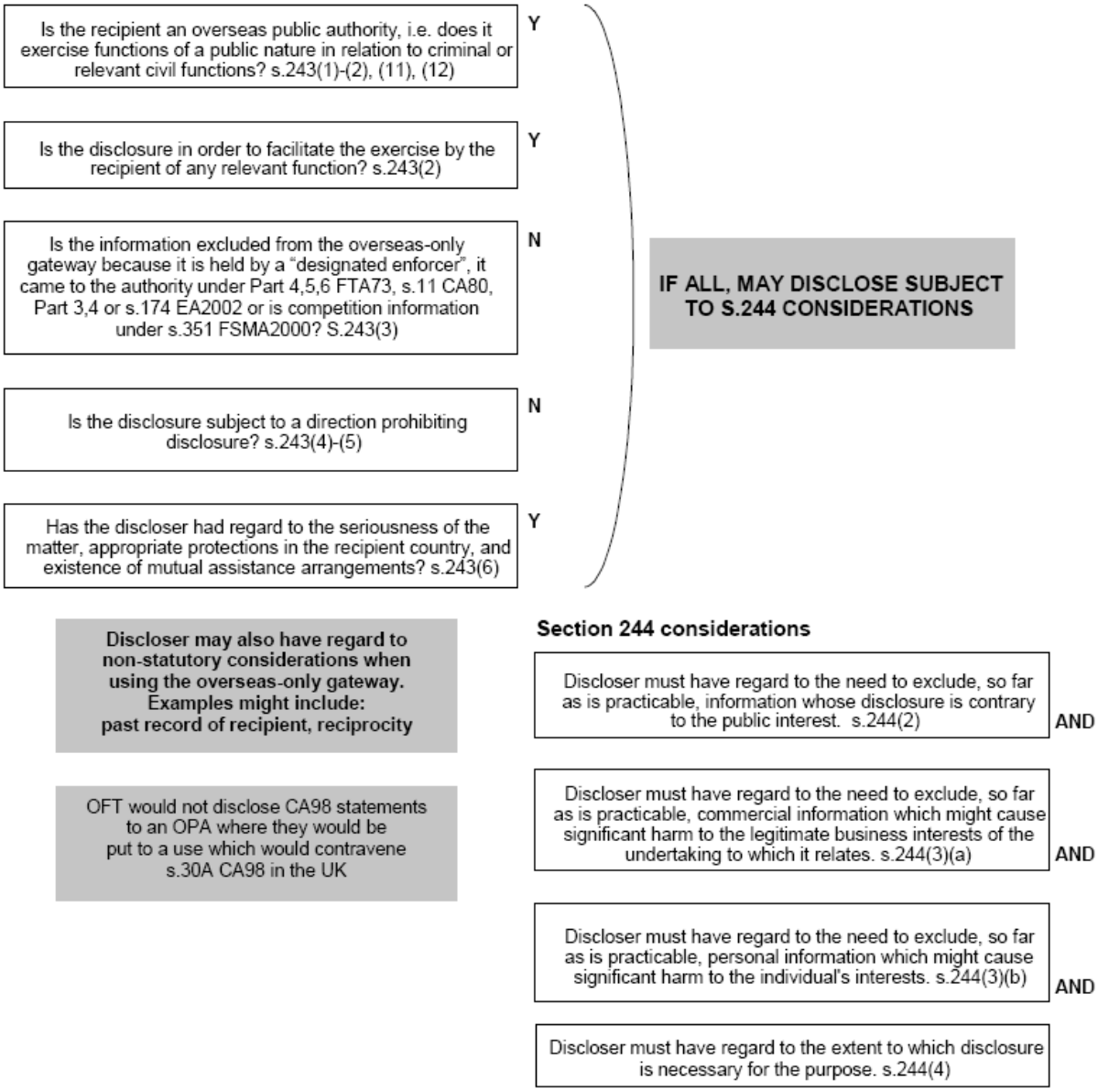
Annex

A DIAGRAM EXPLAINING DISCLOSURE PROVISIONS IN THE ACT

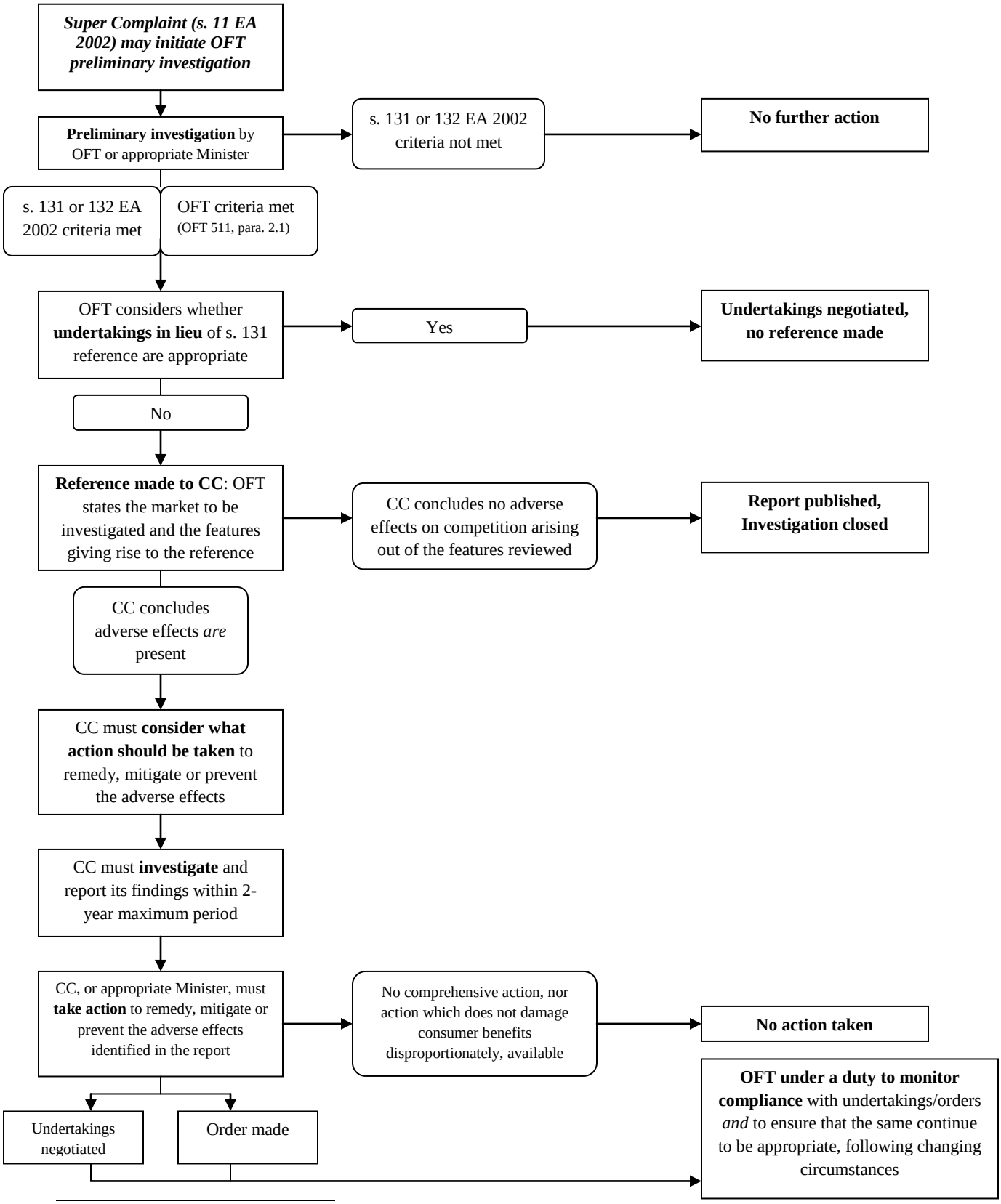


ANNEXE A (ctd.)

Overseas-only disclosure gateway



Annex B: Market Investigation flowchart*



* © Herbert Smith's EU and Competition briefing – May 2003, p. 6 [with minor additions by Angus Johnston, 2005].