

# Chapter 22. Energy Law

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*A relatively young branch of EU law, EU energy law has quickly grown into a comprehensive regulatory framework. This evolution has produced some enforcement success stories, such as the abolition of energy monopolies or the affirmation of energy consumers' rights. However, our analysis reveals that enforcement is much dependent on the nature of the legal requirement and the political circumstances. Whereas the creation of a dedicated EU agency — the Agency for the Cooperation of Energy Regulators — promises effective and cooperative enforcement, the national energy regulators of the Member States remain responsible for 'hard' enforcement of EU energy law. In this chapter, we explain the development of EU energy law and identify factors of successful enforcement, but also highlight limitations to enforcement. The lesson for the — now uncertain — future is to build consensus on energy policy.*

**Keywords:** Substantive and technical requirements; agencification; indirect enforcement; deterrent enforcement; compliance-based enforcement; co-regulation

## **1. Introduction**

Enforcement of European Union (EU) energy law is a two-sided affair. In the big picture, the EU has successfully liberalized and integrated the European energy markets. It has recognized new rights for energy consumers and ensured more transparent and liquid energy trading. Whereas the energy sector used to be a national domain, today energy is traded and transported across borders, based on common EU rules. Energy is a strategic domain for States individually and for their collaboration with the EU, as revealed by the energy price and supply crisis that started in the winter 2021-22. Yet beyond areas of common interest, differences between the EU and the Member States concerning energy policy goals remain (Szulecki et al. 2016; McCown 2016). As per its usual approach, the EU endeavours to create an internal energy market (IEM), minimum rights for market players and consumers, and to overcome nationalistic reservations against its energy policy goals by harmonizing the legal framework (Chapter 17 in this Handbook). This has resulted in a comprehensive and prescriptive legal framework that relies on a mix of substantive and technical legal requirements to facilitate enforcement. Nevertheless, the implementation of the legal framework, as well as the investigation and sanctioning of breaches starts at Member State level.

In this chapter, we explain the progressive and accelerating evolution of EU energy law from non-existence to an established vein of regulation in a matter of a few decades (section 2). We explore factors for the success in enforcing EU energy law, notably with liberalizing the sector and integrating the segregated national energy markets (section 3). Finally, we comment on current trends and outline possible legal limits to today's enforcement strategy of EU energy law (section 4). Due to space limitations, we focus on the EU's market-building competences and interventions to create the IEM, with electricity and gas as main energy carriers. The full picture is more complex, as the aims of EU energy law have evolved beyond 'simple' market integration (Heffron and Talus 2016). The Treaty on the Functioning of the European Union (TFEU), in Article 194, names sustainability, effective competition and security of supply. Following the Commission's 'Energy Union' strategy (European Commission 2015), recent secondary legislation aims to 'put citizens at [the] core' (Directive 2019/944 — the Electricity Directive — recital (4)). EU energy legislation on aspects of heating and cooling, as well as energy efficiency or support to renewable energy sources now stands alongside market rules. Moreover, the weighting of the different objectives of EU

energy policy constantly evolves in the wake of changing policy preferences. Over time, decarbonization efforts have gained importance. Recent examples of this development include the above-mentioned 'Energy Union' project, the European Green Deal and the 'Fit for 55' package. In February 2022, Russia's invasion of Ukraine pushed issues related to energy security and exploding energy prices to the fore.

That said, a core question for this chapter is the degree to which the EU uses cooperative enforcement strategies to achieve its different energy policy goals. To answer this question, we present case studies that show the diversity of the EU's enforcement strategy in the energy sector. The first group of case studies illustrates the use of deterrent and compliance-based enforcement approaches. They include the liberalization of the sector, unbundling and the technical operation of energy grids, with varying degrees of success. In the second case study, we turn to the European network codes to exemplify how cooperation contributes to enforcement. Our analysis shows that despite considerable success in the past, political disagreement still hampers the successful enforcement of EU energy law. This observation carries even more relevance against the background of the severe energy crisis that began in 2021.

## **2. The legal framework for EU energy**

### **2.1. The treaty framework: enforcement competences and balancing policy aims**

Energy concerns are at the root of European integration: energy was a core subject of the earliest treaties on European economic integration (cf the Treaty of Paris establishing the European Coal and Steel Community, or the Euratom Treaty). In the following, the terms 'EU' and 'EU law' are also used for measures adopted by the European Communities to facilitate reading. However, it was not before the 1990s that the EU successfully commenced liberalizing the national energy markets (Talus 2013). Until then, vertically integrated utilities that operated under the protection of statutory monopolies dominated the electricity and gas sectors. Cracking these monopolies and separating the competition activities of producing and trading energy from the operation of energy networks — still considered a natural monopoly — is a major achievement of EU energy policy.

Yet several more decades would pass until the Lisbon Treaty introduced a dedicated legal basis for the shared competence in the field of energy. The Lisbon Treaty defined the following aims of EU energy policy (Articles 4(2)(i) and 194(1) of the TFEU):

- effective competition;
- security of supply;
- sustainable energy supply; and
- further interconnection of the European energy networks.

These aims are realized in the context of the IEM. Energy market integration constitutes another vital objective of EU energy policy — albeit not the only one, as mentioned before. Moreover, despite significant advances, the IEM is still a work in progress, hampered mostly by insufficient cross-border connections (so-called interconnectors). The EU's competence to act in the field of energy also entails the use of enforcement mechanisms.

The EU energy policy goals are structured around the three pillars of security of supply, sustainability and affordability, the so-called 'energy trilemma'. The three pillars of the EU energy trilemma are (1) interrelated, (2) subject to interpretation and (3) to inevitable trade-offs. The weight given to each of the pillars within this trilemma may shift over time, according to short-term priorities. Balancing them against each other in a consistent way requires EU enforcement — no easy task, since the EU and its Member

States have yet to attain unity on a number of important energy issues (Szulecki et al. 2016). Article 194 of the TFEU provides two general pointers. On the one hand, the EU and the Member States are obliged to mutual energy solidarity, which the Court of Justice (ECJ) recently recognized as a legally enforceable obligation in *Germany v Poland* (Case C-848/19 P [2021] ECLI:EU:C:2021:598; for a discussion, see Boute 2020). Furthermore, each Member State is entitled ‘to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply’; however, the scope of this caveat remains quite unclear (Huhta 2021b; Haraldsdóttir 2014).

## 2.2. The secondary legislation framework

The treaties provide the legal basis for the EU to adopt sector-specific secondary legislation (Article 194(2) of the TFEU). For the electricity and gas sectors, EU energy law has increasingly been adopted in the form of ‘packages’. The most recent and fourth iteration, the 2019 ‘Clean Energy for All Europeans Package’, covers only the electricity sector (European Commission nd). However, EU gas legislation is currently being updated as part of the ‘Hydrogen and Decarbonised Gas Markets Package’ (European Commission nd).

Over time, EU energy legislation has grown exceedingly detailed and complex (see Table 22.1 and Table 22.2 below for examples from EU electricity legislation). Whereas the content of the First Energy Package — adopted between 1996 and 1998 — was revolutionary, its volume was modest. It initiated the liberalization process with wide, general rules. With each new package, the sectoral framework became more sophisticated. In 2009, the Third Package added the so-called network codes, a novel type of delegated legislation that establishes harmonized and legally binding, technically detailed rules for the operation of the European electricity and gas networks and markets (Hancher et al. 2021). They are drafted by private actors, and approved by appointed regulators at EU and national level (Eckert and Eberlein 2020; Jevnaker 2015). We discuss the network codes as one of our case studies.

*Table 22.1: Increase in Complexity — Electricity Directives*

Energy Package	Electricity Directive Number	Pages	Provisions	Definitions
First	Directive 96/92/EC	10	29	24
Second	Directive 2003/54/EC	18 (+ 80%)	34 (+ 17%)	31 (+ 29%)
Third	Directive 2009/72/EC	37 (+ 105%)	53 (+ 56%)	36 (+ 16%)
Clean Energy	Directive (EU) 2019/944	72 (+ 95%)	83 (+ 57%)	57 (+ 58%)

*Table 22.2: Increase in Complexity — Electricity Regulations*

Energy Package	Electricity Regulation Number	Pages	Provisions	Definitions
First	—	—	—	—
Second	Regulation (EC) 1228/2003	10	20	8
Third	Regulation (EC) 714/2009	20 (+ 100%)	32 (+ 110%)	9 (+ 13%)
Clean Energy	Regulation (EU) 2019/943	67 (+ 235%)	87 (+ 172%)	41 (+ 356%)

Notes on Tables 22.1 and 22.2: Pages are counted including annexes, except correlation tables. The Clean Energy Package has replaced the two-column page layout of previous Packages with a single-column layout, which might account for some of the increase. Provisions are counted including articles and points in annexes, but not correlation

tables. Paragraphs and subparagraphs are not counted separately. Unmodified reiterations of definitions in different legal acts are counted only once.

### **2.3. Nature of the legal obligations in EU energy legislation**

The Third Energy Package and the Clean Energy Package each entailed an acceleration and increase of legislative initiatives in the energy sector. We divide the legal requirements under EU energy law into substantive and technical requirements. Substantive requirements establish general principles and obligations for the Member States, but also electricity undertakings; these requirements leave considerable room for interpretation and flexibility. We refer to the provisions on unbundling and the general rules on interconnector capacity management as examples later on. Technical requirements complement the substantive requirements without altering them, thus reducing room for discretion and providing a higher degree of harmonisation. Examples include the 15 per cent electricity interconnection target by 2030 established in Regulation (EU) 2018/1999 (the Governance Regulation) or the technical requirements contained in the network codes. One question for investigation in this chapter is whether these multiple requirements have been accompanied by a specific enforcement strategy and related mechanisms to ensure successful implementation. And if so, what is the relationship between the type of legal requirements and the enforcement mechanisms? The chapter also questions to which extent the separate legal requirements under the different pieces of EU energy legislation are consistently enforced.

### **2.4. Model of enforcement**

We conceptualize enforcement as the bringing into actual effect or operation of a final measure of EU law, according to the underlying aims. We thus focus on compliance, by Member States as well as private actors (for a discussion on compliance, see Ştefan 2017; critical: Batory 2016). Moreover, we discuss elements of ‘soft enforcement’ — such as negotiation and monitoring — as well as ‘hard enforcement’ practices — such as investigating and sanctioning (on the distinction, see Scholten 2022). This allows us to capture important features and dynamics of the EU energy legislation.

#### **2.4.1. The main actors**

The EU’s traditional choice of indirect administrative enforcement also applies in the energy sector (Chapters 3 and 17 in this Handbook). Under the principle of subsidiarity, EU energy law is generally implemented and enforced by the Member States (Scholten 2022; Chiti 2012). In this context, EU law obliges the Member States to create specialized national regulatory authorities (NRAs), which must be independent from political and commercial influence (cf Case C-718/18 2021; Huhta 2021a). Nevertheless, several EU entities participate in energy law enforcement. The Commission’s direct enforcement competences have been a cornerstone of EU energy enforcement, as our case studies in the following section illustrate (for a more complete overview, consult Bergqvist and Herrera Anchustegui 2020; Penttinen 2017). Whereas the NRAs and the Commission carry the responsibility for hard enforcement, the EU Agency for the Cooperation of Energy Regulators (ACER) is an important actor in the context of soft enforcement. According to Article 2(d) of Regulation 2019/942 — the ACER Regulation — ACER serves as a forum where the NRAs can coordinate on cross-border issues and exchange information and best practices.

#### **2.4.2. Enforcement approaches and styles**

At first sight, EU energy enforcement follows a deterrence-based approach. Simply put, a deterrence-based enforcement strategy aims to make non-compliance more costly than compliance (be it in terms of

money, reputation or other values), based on the expected likelihood of sanctioning (Chapter 5 in this Handbook; Gunningham 2010; Lodge 2015). EU law equips both the Commission and the NRAs with tools for deterrence-based enforcement, such as imposing fines or other sanctions (Articles 104, 105 and 258 of the TFEU; Article 41 of the Gas Directive; Article 59 of the Electricity Directive). However, EU law leaves room for compliance-based enforcement, ie enforcement that builds on education, negotiation and cooperation rather than sanctioning (Lodge 2015). The Commission has used compliance-based strategies extensively in the field of energy; this includes both strategic leniency, as well as voluntary commitments under Regulation 1/2003 (Bergqvist and Herrera Anchustegui 2020). Whereas we do not discuss national enforcement in the Member States here, the NRAs devise their own enforcement strategy, which may include compliance-based or ‘smart’ enforcement approaches (Dutch Authority for Consumers and Markets 2016).

### **2.4.3. Networks, agencies and rule-making**

Rule-making is another aspect we highlight in this chapter. Hoping that harmonized, objective technical requirements would accelerate the creation of the IEM and reduce the weight of political considerations, the EU adopted a sophisticated procedure for the development of sectoral technical requirements under the European network codes and guidelines, based on mandatory cooperation and negotiation among key actors in the sector. This cooperation, introduced with the Third Energy Package, builds on previous self-regulation structures in the energy sector. In the past, the European transmission system operators (TSOs), as well as the NRAs, each formed informal networks for cross-border coordination and exchanging best practices (Chapter 9 in this Handbook; Lavrijssen and Hancher 2009). However, the EU did not trust that voluntary cooperation would guarantee the achievement of its energy policy aims (Klopčič et al. 2020; Schneider 2018). Thus, the Third Energy Package transformed the TSO networks into ENTSO-E and ENTSOG — the ‘European Network of Transmission System Operators’ for Electricity and Gas, respectively. The ENTSOs provide a platform for the exchange of opinions and practices and play an important role in the creation and implementation of the network codes and guidelines (Vlachou 2018).

Similarly and as in other sectors, an EU agency — ACER — has been created to institutionalize cooperation among NRAs (Chapters 10 and 11 in this Handbook; Chamon 2016). In addition to its ‘soft’ enforcement powers, the agency is competent to adopt legally binding technical requirements. In this context, it is important to recall that Article 18(5) of the ACER Regulation prescribes the adoption of decisions with two-thirds majority in ACER’s Board of Regulators, which is composed of representatives from the European NRAs. Hence, the agency’s decisions always spring from negotiation, but not necessarily from consensus or even unanimity, as up to one third of the NRAs may not support a decision by ACER and could be less eager to enforce it.

## **3. Factors influencing the enforcement success**

We define successful enforcement as the actual fulfilment of enforcement objectives via specific tools, preferably via preventing violation, rather than via sanctioning (Scholten 2021). The yardstick in the case of EU energy law is the achievement of EU energy policy aims. After describing some specific challenges related to measuring success with EU energy enforcement, we use case studies to illustrate why EU energy enforcement has been partially successful thus far, and which factors limit success. In particular, our examples are chosen to illustrate when the EU relies on the deterrent effect of prosecution and sanctions, and when the EU prefers to proceed in a compliance-based manner.

### **3.1. Challenge: energy policy goals caught in a ‘trilemma’**

The ‘trilemma’ affecting the EU energy objectives makes gauging the success of EU energy law enforcement challenging. To implement the Energy Union strategy, the Governance Regulation establishes a system of integrated planning and reporting on objectives and targets related to e.g. the share of renewables, the level of energy efficiency and energy savings, and the rate of interconnection (Banet 2022). Yet other aims remain more subjective, such as the level of energy security that will fluctuate in priority according to circumstances, as exemplified by the Russian invasion of Ukraine and the following disruptions on the energy markets. Moreover, while target models have been established for the electricity and gas markets, the criteria for the completion of the IEM itself appear to be constantly evolving.

To better measure progress towards the IEM, ACER has developed objective indicators as part of its monitoring duties. Examples include the difference between energy prices on neighbouring markets, or the volumes of cross-border energy trade (ACER and CEER 2021b). The Commission undertakes similar endeavours in its reports on the ‘State of the Energy Union’ (European Commission 2021). However, these indicators have no legal force. Moreover, it is striking how much the views of ACER and the Commission diverge. ACER consistently highlights that much work remains to be done to complete the IEM and emphasises that energy prices for end consumers have risen continuously (ACER and CEER 2021b, 12-18; 2021a, section 4.1). In contrast, the Commission proclaimed the completion of the Energy Union years ago (European Commission 2019, 1). A recent study by Klopčič et al. based on a EU-wide survey among NRAs and energy traders backed the Commission’s optimism and concluded that the respondents ‘mostly agree on the fact that the EU has a nearly functional [IEM]’. However, the authors point out that other respondents might have answered differently (Klopčič et al. 2020).

These examples show that the EU’s energy policy objectives are subject to subjective judgments and upheavals. This can give political considerations considerable weight. There is consensus between the EU and its Member States on the general orientation of EU energy policy, with more divergences as to the weight of the specific aims. Disparities may particularly arise in terms of security of supply, interconnection and energy mixes. Balancing the different policy objectives and interests at play necessitates a diversified enforcement strategy. We hypothesize that the EU adapts its enforcement strategy according to the level of political consensus on energy policy aims, with a preference for compliance-based enforcement where consensus is weak. Moreover, the EU tends to adopt detailed technical requirements in areas necessary for the advancement of the IEM. The adoption of an interconnectivity target of 15 per cent and a 70 per cent minimum cross-border capacity threshold are examples of this.

### **3.2. Deterrence and compliance: the search for the right mix**

The right mix between deterrent and compliance-based enforcement should deliver the best enforcement results (Chapter 5 in this Handbook; Gunningham 2010; Ayres and Braithwaite 1992). However, the ‘big stick’ is not always available in the field of energy, where the Member States endeavour to retain as much control as possible. The following sections provide examples to illustrate how the EU — and in particular the Commission — has adapted the use of its limited competences to the political climate to increase enforcement success in each case.

#### **3.2.1. Early success with liberalization: a top-down approach based on substantive requirements**

Implementing its liberalization targets in the energy sector has been a major priority for the EU. The EU managed to abolish the monopoly position of the energy incumbents and to overcome the resistance of several Member States to initiate liberalization reforms — at a time where it did not yet possess explicit

competence in the field of energy. What was the key to this success against all odds? Surprisingly, deterrence. The EU deftly used its limited legislative and enforcement competences to facilitate the adoption of harmonized EU legislation on the energy markets. In the long run, this early success contributed to the progressive establishment of energy as an EU policy area.

The Energy Monopoly judgments by the ECJ were a catalyst for this development (Case C-157/94; Case C-158/94; Case C-159/94; Case C-160/94). After several decades of cautious restraint in energy matters, the Commission used the free movement provisions and its competence to initiate infringement proceedings under the current Article 258 of the TFEU to proceed against electricity and/or gas monopolies in several Member States. It did not matter that the Commission remained unsuccessful in most proceedings. The fact that the ECJ even discussed whether these energy monopolies breached EU law swept away the notion that energy was 'off limits' to EU regulation. In turn, this motivated the Member States to come to the EU negotiation table and helped clearing the way for the adoption of the First Energy Package.

In other instances, compliance-based enforcement proved successful, especially within competition policy. The Commission's sector inquiries keep the Member States and sectoral undertakings on their toes, while also identifying blind spots in the existing regulatory framework. One example is the 2007 inquiry in the electricity and gas sectors (European Commission 2007). The inquiry revealed several factors that impeded further progress with liberalization, mostly related to the fact that many energy incumbents remained vertically integrated. Whereas the Commission initiated several competition law proceedings, most suspected offenders got off lightly by offering voluntary commitments, or even informal promises to refrain from the practices at issue in the future (see, for example, European Commission 2008). Apparently, the threat to sanction vertical integration alone was sufficient to achieve compliance. At the same time, the adoption of structural remedies by several large incumbents may have helped achieve a regulatory goal: the adoption of a stricter unbundling regime in the Third Energy Package (Jones 2019). Similarly, following the 2016 sector inquiry, the Clean Energy Package established harmonized rules on so-called capacity mechanisms, which previously constituted an epitome of national energy sovereignty (European Commission 2016; see also Articles 21 and 22 of Regulation 2019/943 — the Electricity Regulation; Leiren et al. 2019).

In line with theoretical expectations, threatening to pursue implementation gaps, backed up with 'surgical strikes', strengthens compliance by the industry and even helps to build political consensus on refining the regulatory framework for the sector. Nonetheless, too many instances of centralized EU enforcement would cause resistance at Member State level. Moreover, the Commission lacks the capacity to pursue all breaches of EU energy law. Thus, the NRAs were created to facilitate enforcement at Member State level. This distributes enforcement on a greater number of shoulders, but gives national policy considerations greater room (Maggetti 2019).

### **3.2.2. Politics as a limit to enforcement: the issue of insufficient cross-border capacity**

Given our focus on the policy objective of market integration, the low utilization rate of many electricity interconnectors provides another interesting case study. Insufficient cross-border capacity is a long-standing obstacle to completing the IEM (Recital (27) of Electricity Regulation). To increase interconnector utilisation, the Electricity Regulation (Article 16(4)), as well as Regulation 715/2009 (Article 16(1) of the Gas Regulation) establish substantive requirements that oblige the TSOs to maximise trade capacity while maintaining system reliability. In turn, limiting cross-border capacity to allow for internal electricity flows — so-called 'congestion displacement' — is illegal (Rumpf 2020). Nevertheless, numerous electricity TSOs

curtail cross-border capacity. Whereas the TSOs claim the curtailments are necessary to safeguard the security of the congested national grids, another reason may well be that increasing trade capacity would also increase network operation costs, which are borne by the final consumers.

The Commission investigated instances of congestion displacement in the Swedish Interconnectors case (European Commission 2010) and the DE/DK Interconnector case (European Commission 2018). In these cases, the Commission established that congestion displacement leads to market foreclosure and entails a discrimination against foreign producers and consumers—a clear breach of the EU energy policy aims. Both cases were resolved through voluntary commitments of the concerned TSOs. However, more than ten years after the Swedish Interconnectors case, the Swedish TSO Svenska kraftnät is still curtailing trade capacity at the Swedish borders, without the Swedish NRA taking action (ACER 2022b). In contrast, the measures undertaken by the German TSO TenneT as a reaction to the DE/DK Interconnector case have improved the utilization of the concerned interconnector.

This notwithstanding, at the same time and just a few kilometres to the east, TenneT regularly curtailed another interconnector: the Baltic Cable on the German-Swedish border. Yet the Commission did not investigate this instance of congestion displacement. While the Baltic Cable belongs to an independent third-party owner instead of an incumbent TSO, the ECJ clarified in *Baltic Cable* (Case C-454/18) that this difference must not lead to any discrimination vis-à-vis regular TSOs (Rumpf and Hancher 2021). The owner brought an action against TenneT before the German NRA and, subsequently, the German courts. However, despite largely identical facts, the decisions by the German institutions diverge completely from the Commission's assessment in the aforementioned cases. Whereas the German institutions did address the applicable EU legislation, their interpretation clearly favoured national interests over the aims of EU energy policy: their failure to enforce the pertinent EU rules on the Baltic Cable avoided higher network operation costs in Northern Germany (Rumpf 2019).

This outcome suggests that national actors may not enforce substantive requirements of EU energy law as sternly as EU institutions when policy preferences diverge (cf Chapter 6 in this Handbook). Whereas the Commission readily threatened sanctions in *Swedish Interconnectors* and *DE/DK Interconnector*, the competent NRAs remained passive in the face of systematic congestion displacement. Interestingly, this did not change after the Commission's intervention. In fact, the Commission's complete discretion in choosing whether to pursue a violation of EU rules may even limit the deterrent effect of its interventions (Batory 2016). Following the Commission's interventions, the Swedish and German NRAs might have felt that lightning would not strike the same place twice, ie that the Commission would not initiate new proceedings against the same undertaking in the same Member State. While more research is required to verify this assumption, this would limit the deterrent effect of intervention by the Commission.

### **3.2.3. The 70 per cent rule: successful enforcement by numbers?**

To reduce the scope for unjustified interconnector curtailments in the national interest, the EU adopted a specific measure to combat congestion displacement in the Clean Energy Package — the 70 per cent rule (Article 16(8) of the Electricity Regulation). This rule obliges the electricity TSOs to provide a minimum level of cross-border capacity for electricity trade. The 70 per cent rule is an example for a technical requirement that complements the substantive requirements on capacity management. It is even reinforced with a specific enforcement duty of the NRAs (Article 59(1)(h) of the Electricity Directive). However, the apparent simplicity of 'enforcement by numbers' falls short of the complexity of capacity management in practice.



Most importantly, the NRAs do not seem to share a uniform understanding of the details underlying the 70 per cent rule, eg how to determine the reference capacity that the numerical threshold is based on. This creates a risk that the Member States will apply the rule inconsistently — and according to their own policy preferences. In turn, this undermines enforcement of the 70 per cent rule, under both a deterrent and a compliance-based approach. To counteract, ACER issued a recommendation on the application of 70 per cent rule shortly after its adoption (ACER 2019a). Yet subsequent monitoring reports by the agency show that not all NRAs implement this non-binding recommendation (ACER 2020). In another recent attempt to harmonize the monitoring of the available trade capacity, ACER published a non-binding ‘practical note’ (ACER 2022c). However, several NRAs have declared reservations against important aspects of ACER’s proposed approach.

Hence, the impact of the 70 per cent rule may well remain limited until the Member States — represented by their NRAs — have obtained a common understanding on the issue of congestion displacement and a consequent willingness to investigate and sanction breaches. This illustrates the importance of strategies for building such consensus, which we will address in the coming section.

### **3.3. Cooperation for increased compliance and easier enforcement: the case of the network codes**

The preceding sections illustrate that success with EU energy enforcement depends on political consensus both upfront and at implementation stage. The EU is currently developing harmonized technical requirements in pursuit of continued enforcement success. This section uses the European network codes for electricity and gas, introduced under the Third Energy Package, as an example. These codes cover areas such as the technical operation of the European gas and electricity grids, but also establish rules concerning cross-border energy trade. The network codes are adopted as delegated EU regulations and hence directly enforceable according to Article 288(2) of the TFEU. They constitute the last link between EU energy policy and its effect on the ground. While not a classical enforcement measure, the network codes are highly relevant for enforcement success because they establish detailed harmonized technical requirements that eliminate blind spots in the sectoral regulatory framework. However, success has been mixed so far.

The network codes assign the creation of sectoral ‘hard law’ to private energy undertakings — not only through consultations, but also by enlisting them in the drafting of energy legislation. The complexity of the process leading to the adoption of the network codes, established in the Electricity Regulation (Article 59) and the Gas Regulation (Article 6), only allows for an abridged overview here (for details, refer to Hancher et al. 2021; Vlachou 2018; Jevnaker 2015). At the outset, EU energy law enumerates the areas for which network codes may be developed. The Commission determines in a ‘priority list’ for which of these areas network codes are to be developed. Next, ACER creates non-binding ‘framework guidelines’ that serve as a blueprint for each future network code. Until this stage, stakeholders are only involved through mandatory consultations. This changes when ENTSO-E or ENTSOG are tasked with developing a draft for each network code—however within the limits of the pertinent framework guideline. Finally, the draft is scrutinised by ACER before the Commission decides on its adoption.

This process builds on previous self-regulation structures. It mirrors the merits and perils commonly associated with self-regulation in the literature (Chapter 5 in this Handbook; Baldwin et al. 2011; Black 2001). Among these, a knowledge transfer from the industry to the regulators and a greater potential for acceptance of — and compliance with — the resulting expert-made rules constitute important advantages in a technically complex area as the energy sector. At the same time, the process clearly seeks to keep a

check on the industry's considerable epistemic authority (Eckert and Eberlein 2020). In its zeal to impede that the industry abuses this authority to prioritize its own interests over EU policy goals, the EU may have eroded industry autonomy to a point where the network codes no longer yield all of the benefits of self-regulation.

We note that the Commission and ACER retain full control during all stages of this process. Moreover, enforcement of the network codes is not delegated to the industry, but remains with the NRAs and the Commission. Given the EU's tight grip on the network codes, they constitute 'co-regulation', rather than self-regulation (Chapter 5 in this Handbook; Schneider 2018; Black 2001, 118-99). Consequently, the network codes have not yielded the full benefits associated with self-regulation.

First, the knowledge transfer has remained incomplete. Especially in the electricity sector, dissent impeded the adoption of network codes for cross-border trade. Instead of adopting these network codes unilaterally (Article 59(13) of the Electricity Regulation), the Commission created so-called guidelines. In contrast to network codes, the guidelines contain few technical requirements and require further implementation through so-called methodologies. The methodologies are once again drafted by the industry, indicating an incomplete transfer of knowledge.

Second, the resulting harmonized rules do not enjoy unrestricted acceptance. Instead of a cooperative atmosphere of peer review, we observe a certain entrenchment that often sparks legal litigations. Such litigations frequently concern methodologies in the electricity sector, where they bind considerable resources and cause significant delays (ACER 2019b; 2022a). However, the General Court's 2022 judgment in *MEKH v ACER* shows that they also concern gas network codes (Case T-684/19). What is more, it is not only private drafters that raise such challenges, but also dissident NRAs that were overruled during qualified majority voting in ACER's Board of Regulators (see, for example, Case T-631/19 *BNetzA v ACER*; Case T-332/17 *E-Control v ACER*), and even some Member States (see Case T-283/19 *Germany v ACER*). The underlying disputes frequently mirror the political preferences of the involved parties (ACER 2019b). Thus, instead of producing consensus, the network codes rather highlight areas of contention—which may or may not be resolved in the process.

### **3.4. Implications for future research and practice**

Our overview suggests that success of EU energy enforcement depends on political consensus, both under deterrent and compliance-based strategies. The effectiveness of detailed technical requirements to ensure successful enforcement is limited where political consensus is absent, as the case of the 70 per cent rule indicates. Therefore, the success of EU energy enforcement may be curbed by the fact that the effects of EU energy policy regulation are often politically awkward (Chapter 6 in this Handbook). The deployment of wind farms or energy networks often triggers local resistance, the deregulation of energy prices raises concerns of energy poverty, and energy efficiency measures are hardly popular with house owners that carry the investment costs. In some instances — as with congestion displacement — ignoring EU energy law may reduce energy prices in the short term, limiting the deterrent effect of potential EU sanctions considerably. The question whether national actors gain political capital by 'defying Brussels' would merit further research.

Thus, the EU cannot pursue a policy of the heavy hand in the energy sector. Giving ACER 'hard' enforcement powers may be possible under the ECJ's *Meroni/ESMA* doctrine (Case C-270/12; Case 9/56; Chapter 10 in this Handbook). However, this step would certainly meet resistance from the industry (Maggetti 2019). Therefore, the EU should instead explore means to build consensus on policy aims. With

the creation of ACER, the EU has facilitated cooperation among the NRAs and the exchange of best practices. This exchange may help pragmatic, as well as economically and technically sound solutions to emerge. Moreover, a dedicated forum for enforcers may further shield the NRAs from political preferences of their home governments (Bach et al. 2015).

The EU's approach to cooperation and co-regulation in the energy sector provides another opportunity for research. Whereas the network codes' contribution to successful enforcement seems more modest than intended, they have yielded significant progress in some areas, for instance with a tighter 'coupling' of the European energy markets (ACER and CEER 2021b). In an attempt to increase the efficiency of the underlying process, the EU has bolstered ACER's powers and given the agency the power to revise proposals for electricity network codes (Article 59(11) of the Electricity Regulation) and methodologies (Article 5(6) of the ACER Regulation). The recent proposal for a revised Gas Regulation follows the same principles. This further restraint of self-regulation in the energy sector may prove problematic, since the EU depends on knowledge and innovation from the industry more than ever for meeting the challenges of the energy transition.

Energy is a complex policy area, and in this chapter, we could only deal with aspects of market integration. We believe that our findings apply also to other facets of energy policy, such as energy efficiency. However, we are well aware that these findings require further corroboration. In particular, future research could shed light on whether 'new' enforcement strategies (such as smart enforcement or responsive regulation) could further increase enforcement success. A related question would be a more exact scrutiny of ACER's role. Is the agency gradually becoming an EU enforcement agency, or is its role one of mediation? And, perhaps even more importantly: which of the two options would bring most to the table? Another element that we have not been able to shed light on is private enforcement (see Chapter 2 in this Handbook). In view of an increasingly complex regulatory framework for the energy sector, the EU has not yet found the ideal trade-off between specificity, on the one hand, and accessibility and flexibility, on the other. The regulatory framework for energy may have grown too complex for most private parties to identify breaches and proceed against them, although EU law provides some safeguards such as for network tariffs (Banet 2020). This issue would merit dedicated research, in particular since (excessive) complexity is an established issue also in other sectors (Baldwin 1990).

#### **4. Outlook**

Is the enforcement of EU energy law successful? There does not seem to be a definitive answer to this question. Several of the EU's energy policy goals carry a strong subjective element, and they are constantly evolving. Often, it is a question of whether one considers the glass half empty or half full: the Commission has a tendency to proclaim the achievement of energy policy goals, whereas ACER generally points to progress as well as setbacks. In our view, the EU is overall successful regarding enforcement in the energy sector. However, our examples illustrate that advancement in several critical areas is delayed and erratic. The simple fact that the Commission's and ACER's resources are limited speaks against a hard enforcement strategy to address remaining enforcement gaps at EU level. Such an approach could also entail a hardening of opposing positions. Instead, the EU should build on the consensus represented in the adopted harmonised legislation to overcome remaining points of contention. This would likely contribute more to continued success with energy law enforcement than any particular enforcement tool (McCown 2016, 55).

We see reason to be optimistic, despite the energy price crisis that shakes the European energy markets in 2022. The Commission was quick to promote a common approach for emergency measures to address high energy prices, through both a non-binding temporary crisis framework and a Council regulation (European Commission 2022a, Regulation 2022/1854). The endorsement of a price cap on gas used for electricity production in Spain and Portugal illustrates that the Commission follows a pragmatic enforcement approach during the crisis (European Commission 2022b). At the same time, the EU and its Member States started a dialogue on a structural reform of the energy market rules (Pollitt et al. 2022). The adoption of short-term market intervention measures by the Council preserved so-far the balance between continuous reliance on EU energy market rules and short term national priorities. Renegotiating EU market rules more largely will need to build on the best practices and efforts by all parties to ensure implementation and enforcement in periods of transition for both the IEM and the energy system.

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