EU Energy Law and Fundamental Rights

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1 Introduction

A number of years ago, one of the authors was asked by an economic consultancy to investigate possible fundamental rights implications of proposed new rules on third party access to infrastructure and stranded costs in the water sector.[3] This was – to his shame – the first time that he had given serious consideration to the possibility that fundamental rights law might have an impact upon the substance of the law concerning utilities in general, and in the energy field in particular. Naturally, various questions of procedure (access to justice,[4] rights of the defence, fair trial, etc.) were always presumptively relevant to the energy sector, and were an area where fundamental rights had long acted to shape the design and development of legislation and case law at European and national levels. Yet on closer inspection, and in spite of some high profile fundamental rights cases relating to the energy sector – such as that of the European Court of Human Rights in the *Yukos* case,[5] awarding the very large sum[6] of €1.8 billion to Yukos's former shareholders for breach

[3] A. Johnston, 'Human Rights dimensions of possible stranded costs situations' (unpublished, July 2002) (the substance of its analysis has been published elsewhere in later pieces, which will be referred to below where relevant). This was stimulated by an earlier NERA report: R. Hern *et al.* 'Access Pricing in the UK Water Industry: The Efficient Component Pricing Rule – Economics and the Law' (March 2001) (available at: http://www.nera.com/extImage/3694.pdf).

[4] See, e.g., A. Johnston, 'Maintaining the Balance of Power: Liberalisation, Reciprocity and Electricity in the European Community' (1999) 17 *Journal of Energy and Natural Resources Law* 121, at 135 (esp. the reference to Case 222/86 *UNECTEF* v. *Heylens* [1987] ECR 4097 (ECLI:EU:C:1987:442) in light of missing dispute settlement provisions which might cover claims of lack of reciprocity between national systems in the free trade context).

[5] Application no. 14902/04, *OAO Neftyanayu Kompaniya Yukos* v. *Russia* (ECtHR, judgment of 31 July 2014); Russia's application to transfer the case to the Grand Chamber was subsequently rejected, rendering the earlier judgment definitive: ECtHR, 'Grand Chamber's Panel decisions' (Press Release, ECHR 377 (2014), 16 December 2014). For discussion, see C. Gibson, '*Yukos* v. *The Russian Federation*: A Classic Case of Indirect Expropriation' (Suffolk University Law School, Legal Studies Research Paper 15-10, 20 February 2015; http://ssrn.com/abstract=2567784).

[6] Which pales rather when compared with the US$50 billion award under the Energy Charter Treaty 1994: *Hulley Enterprises and others* v. *The Russian Federation* (Awards of 18 July 2014, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1599).

of property rights under Article 1 of Protocol 1 to the ECHR – there have actually been relatively few direct references to fundamental rights considerations in much of EU Energy Law, at least not until relatively recently.

A related question, which will not be discussed further here, is whether access to energy as such may be considered a fundamental right. As emphasised in the preamble to Electricity Directive (EU) 2019/944, energy services are fundamental to safeguarding the well-being of the EU´s citizens.[7] Rather, we will in the following focus on aspects where fundamental rights may provide legal argument for restricting the requirements following from EU energy market legislation. In this respect, the Electricity Directive emphasises that it respects the EU Charter of Fundamental Rights and that the Directive should be interpreted and applied in accordance with its rights and principles.[8]

The present contribution does not seek exhaustively to examine the nature and scope of the EU law fundamental rights relevant to the energy sector; rather, it first seeks to map out key areas where issues in Energy law in the EU have been, and/or are likely to be, affected by fundamental rights considerations. Then, some of those areas will be examined in more detail, highlighting the implications of fundamental rights for their analysis and development. Finally, some tentative conclusions will be offered.

An appeal against this award was lodged on 28 January 2015 ('Russia has appealed arbitration court ruling in *Yukos* case', Reuters, 6 February 2015; http://in.reuters.com/article/2015/02/06/russia-yukos-court-idINL6N0VG46D20150206): for details, see the Russian Ministry of Finance's Press Release (6 February 2015; http://old.minfin.ru/en/news/index.php?id_4=24358), where Russia alleges that the tribunal: lacked jurisdiction; violated its mandate; failed to give adequate reasons; and had shown "partiality and prejudice towards the Russian Federation".

7 Para (59) of the preamble to the Directive.

8 Para (91) of the preamble to the Electricity Directive (EU) 2019/944.

2 Mapping the Territory, Clearing the Ground

2.1 An outline of possible areas of fundamental rights impact in the energy law field.

No doubt, the table below contains certain omissions as to energy issues which may arise in future, but the breadth of topics collected provides ample material from which to develop analysis of the (likely) impact of EU fundamental rights law in the energy field.

Table 1: Energy-related issues (possibly) affected by EU fundamental rights law.

EU FRs **Energy Issues**	Property / Possessions	Freedom to conduct a business (Freedom of Contract)	Data Protection, Privacy	Fair trial, access to justice	Others?
Merger Control	X	X		X	
Long-term Contracts	X	X		X	
Unbundling	X	X		X	
Capacity Allocation	X			X	
Congestion Management	X	X		X	
TPA, Network Codes, etc	X	X		X	
RES Support Schemes	X	X		X	
Smart Metering (and grids?)			X	X	
Procedures, investigations	(X)			X	
Energy Poverty				X	X?

2.2 Some overarching general EU law and fundamental rights questions

2.2.1 Scope of EU law

(a) Situations where EU Fundamental Rights are applicable

There would seem to be hardly any situations among those considered here where the issue addressed did not already fall within the scope of EU law, either by virtue of the application of the TFEU rules on freedom of movement or competition, or else because it was covered by the terms of EU secondary legislation on the energy sector. Member States will typically be implementing the relevant EU energy legislation or seeking in some way to justify national rules which might derogate from EU rules on free movement or competition: clearly, both scenarios will fall within the scope of application of the EU Charter[9] and/or fundamental rights as general principles of EU law.[10] The likeliest borderline candidate in this regard is the question of energy poverty. The Directives that made up the Third IEM package[11] referred to the concept in places,[12] but included no binding rules on the subject. Rather, at various points the Member States were encouraged to address[13] instances of energy poverty and vulnerable customers as part of their regulation of electricity and gas. The Clean Energy for all Europeans package highlights consumer benefits as a key interest, but does not go much further than the Third IEM package in establishing binding rules on energy poverty for the Member States.[14] The main development appears to be that the Member States are now required to a greater extent than previously to assess their

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9 Article 51(1) EU Charter of Fundamental Rights [2010] OJ C83/389, confirmed that it should be read in conformity with the approach taken to fundamental rights as general principles of law: Case C-617/10 *Åkerberg Fransson* (judgment of 26 February 2013), ECLI:EU:C:2013:105.

10 See, e.g., Case C-260/89 *ERT* [1991] ECR I-2925, ECLI:EU:C:1991:254.

11 See Directives 2009/72/EC [2009] OJ L211/55 (electricity) and 2009/73/EC [2009] OJ L211/94 (gas) [together, 'the Third IEM Directives'], and Regulations 713/2009/EC [2009] OJ L/ (ACER), 714/2009/EC [2009] OJ L211/15 (cross-border trade in electricity) and 715/2009/EC [2009] OJ L211/36 (cross-border trade in gas); for discussion, see generally Johnston & Block, *EU Energy Law* (Oxford: OUP, 2012) (hereafter, 'Johnston & Block'). [I don't understand the point of the bracketed words here, given that the book and names are then given again in full in the next footnote]

12 Johnston & Block, paras. 7.76–7.96.

13 For an example of the difficulty in getting States to take concrete steps to tackle energy poverty, in the face of competing calls on the public purse, see *Friends of the Earth and Help the Aged* v. *Secretary of State for Business, Enterprise and Regulatory Reform* [200] EWHC 2518 (Admin).

14 See in particular Article 28 of Electricity Directive (EU) 2019/944, which broadly corresponds to Articles 3(7) and (8) of Electricity Directive 2009/72/EC.

number of households in energy poverty and establish a national indicative objective to reduce such poverty if it applies to a significant number of households.[15] Moreover, the European Commission in its review of the implementation of the new Electricity Directive 2019/944 shall in particular assess whether customers, and especially vulnerable customers or those in energy poverty, are adequately protected under the Directive.[16]

Insofar as energy poverty questions arise as a result of market or regulatory design questions covered by the relevant EU legislation or the rules of the TFEU, then any relevant fundamental rights considerations would need to be addressed;[17] but as a free-standing issue, it would seem likely that it would – at present – fall beyond the scope of EU law. At the same time, it is possible that some national constitutions' broader provisions concern social rights or quality of life; these might be interpreted to include access to essential energy supplies. This raises the question of domestic law situations interacting with EU Law, where national fundamental rights could be at issue concerning access to energy and energy poverty.

(b) The UK distinctions between ECHR under the HRA and the EU Charter

There were practical fundamental rights implications for courts and applicants/claimants in the UK, which could be relevant for any current Member State where fundamental rights are vulnerable to national legislation. In the face of UK legislation which is found incompatible

15 See Article 29 of Electricity Directive (EU) 2019/944 and Article 3(3) of the Governance Regulation (EU) 2018/1999.

16 Article 69(2) of Directive (EU) 2019/944.

17 One possible example concerns national rules on energy retail price regulation, which might be adopted with a view to protecting those suffering from energy poverty: it is clear that such national rules would require objective justification under EU law, given the scheme of the Third IEM package and the TFEU rules on competition (see Case C-265/08 *Federutility* [2010] ECR I-3377, ECLI:EU:C:2010:205; and Case C-242/10 *ENEL Produzione* (judgment of 21 December 2011), ECLI:EU:C:2011:861). Another point to note is that EU law's universal service requirement concerning electricity (Art. 27 of Dir. 2019/944/EU) provides a start in addressing energy poverty in the sense of requiring access to electricity to be available to all, but does nothing on its own to address concerns of *affordability*, requiring only that it be at "competitive, easily and clearly comparable, transparent and non-discriminatory prices".

with fundamental rights requirements under the UK's Human Rights Act 1998 ('HRA'), the strongest tool[18] at the national court's disposal remains the declaration of incompatibility. But under EU law, it was open to (and indeed positively required of) a UK court to disapply the offending national law rules in favour of the protection of fundamental rights.[19] Thus, EU law could offer stronger protection in a given area or wider protection than the ECHR (and thus the HRA).[20] The complexities of what might survive of such disapplication of UK domestic law in the face of EU law after the UK's withdrawal from the EU pending any formal and final agreement are interesting,[21] but beyond the scope of the present piece.

2.2.2 Vertical and Horizontal Direct Effect

(a) Of the relevant TFEU provisions and/or EU legislation

So far as the various potentially relevant provisions of the TFEU are concerned, their ability to confer rights upon individuals is subject to the usual restrictions derived from the case law, so that some Treaty provisions are capable of granting rights and imposing obligations between private

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18 Under s. 4 HRA 1998, acknowledging, of course, that where possible some judges have striven hard to find an interpretive solution to such incompatibility under s. 2 HRA 1998: see, e.g., *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

19 E.g. Case C-60/00 *Carpenter* [2002] ECR I-6279, ECLI:EU:C:2002:434, concerning fundamental rights as general principles. And see now *Benkharbouche* v. *Embassy of Sudan* [2014] 1 CMLR 40, nicely showing that the limits under the HRA drove national courts to engage in creative interpretation (albeit in that case one that could not help the applicant under national law) *and*, as a result, leading to the use of EU fundamental rights law as a *stronger* tool (Art. 47 EU Charter of FRs). The Court of Appeal reached the same conclusion, [2015] EWCA Civ 33; the Supreme Court, meanwhile, did similarly, but with barely a mention of the EU Charter.

20 See Case C-300/11 *ZZ (France)* v. *Secretary of State for the Home Department*, ECLI:EU:C:2013:363, and the subsequent domestic ruling of the Court of Appeal: [2013] Q.B. 1136. In Norway, meanwhile, it follows from Norwegian legislation that the main part of the EEA Agreement as well as ECHR apply as Norwegian law with priority before other legislation.

21 See, e.g., A. Young, '*Benkharbouche* and the Future of Disapplication', U.K. Const. L. Blog (24 Oct. 2017) (https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/).

individuals (e.g. Articles 101 and 102 TFEU), while others can only do so vertically upwards as against the state (e.g. Article 34 TFEU). Regulations are in principle capable of operating vertically and/or horizontally, while Directives typically only function to grant rights to private individuals vertically upwards as against the state. This sets the context in which EU fundamental rights may be applicable in cases concerning Energy law.

With regard to the internal energy market Directives which comprise the Clean Energy for all Europeans package, the interesting judgment in *Portgás*[22] seems to reinforce the approach taken in *Foster* v. *British Gas* concerning direct effect: the case concerned a company limited by shares under Portuguese law, yet seen as providing a public-interest service, and so it could be bound by the provisions of an unimplemented Directive (there, on procurement). This is seen by Albors-Llorens[23] as a version of 'intermediate horizontal direct effect', and is of interest here as it shows the potential to expand further the possible scope of application of the EU Charter concerning Member States' implementation of EU law.

(b) Of Fundamental Rights[24]

The EU Charter of Fundamental Rights of the European Union[25] gained status as EU primary law by the Treaty of Lisbon entering into force on 1 December 2009, which amended Article 6(1) of the Treaty on the European Union (TEU). Article 6(1) TEU now sets out that the Union recognises the rights, freedoms and principles set out in the charter "which shall have the same legal value as the Treaties".

The well-known and much discussed *AMS* case[26] suggests that it is possible for fundamental rights under the EU Charter to apply directly

22 Case C-425/12 *Portgás* (CJEU, 12 December 2013), ECLI:EU:C:2013:829, discussed by E. Szyszczak (2014) 5(7) *JECLP* 508, at 512; and A. Albors-Llorens (2014) 39 *E.L. Rev.* 851.

23 A. Albors-Llorens (2014) 39 *E.L. Rev.* 851.

24 D. Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 *ELRev* 479.

25 [2012] OJ C 326/391, 26.10.2012.

26 Case C-176/12 *Association de Médiation Sociale* v. *Union Locale des Syndicats CGT*, EU:C:2014:2.

in cases between private parties, provided that the matter falls within a Member State's implementation of EU law. While on its own facts, the nature of the relevant provision of the Charter (its Article 27 concerning workers' rights to information and consultation) was not such as to be directly effective, the implication is that others certainly can be. By contrast, the subsequent *Egenberger* judgment[27] is careful to explain that the principle of non-discrimination (to be found in Article 21(1) of the Charter) could be invoked between private parties because it was a general principle of law, rather than due to its status under the Charter. The even more recent judgment of the Court in *Bauer and Brosson*[28] shows clearly that, where the provision of the Charter is capable in itself of conferring rights upon private individuals (there, workers), then it can be relied upon directly in a dispute, even between private parties. Thus, it would seem that the potential for the application of fundamental rights under the Charter in such horizontal situations will depend upon the wording of each provision of the Charter and the context within which it is to be applied. The relevance of this framework for our discussion is that it establishes the potential availability of the EU Charter of Fundamental Rights in actions between private parties in the Energy field, as well as when cases involve the position of private individuals *vis-à-vis* the State.

The case of *Alemo-Herron*[29] *is worth dwelling upon under this heading for its apparent beefing up of freedom of contract as part of the coverage of business freedom under Article 16 of the EU Charter of Fundamental Rights.*

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[27] Case C-414/16 *Egenberger* v. *Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257.

[28] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal* v. *Bauer* and *Wilmeroth* v. *Brosson*, ECLI:EU:C:2018:871. These cases make the point especially clearly, since the first was a vertical situation, so that Article 7 of Directive 2003/88/EC sufficed to protect the employee via vertical direct effect against a State body, while the second case was a horizontal situation, under which only Article 31(2) of the Charter could offer protection to the employee, given the bar on horizontal direct effect of directives. See paras. 76 and 87-92 of the judgment.

[29] Case C-426/11 *Alemo-Herron* v. *Parkwood Leisure*, ECLI:EU:C:2013:521, discussed by J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42(4) *Ind. LJ* 434; and M. Bartl & C. Leone, 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review' (2015) 11(1) *Eur. Const. LRev.* 140.

This has potential implications for regulatory attempts to shape, attenuate or even overturn certain contracts which may raise questions under competition law or the broader EU liberalisation scheme for the internal energy market. In this regard, a possible link has been tentatively suggested[30] *between the implications of Alemo-Herron* and some consumer law cases in the energy sector in Germany. In *Schulz and Egbringhoff*,[31] the CJEU acknowledged that, where mandatory national rules apply due to the need to provide for a supplier of last resort so as to ensure that a Universal Service Obligation is respected (as was indeed the case on the facts of both of those cases):

> [a]s those suppliers of electricity and gas are required, in the framework of the obligations imposed by the national legislation, to enter into contracts with customers who request this and who are entitled to the conditions laid down in that legislation, *the economic interests of those suppliers must be taken into account in so far as they are unable to choose the other contracting party and cannot freely terminate the contract*.[32]

While this point does not receive any attention in the remainder of the judgment, it may yet prove of no little significance for suppliers faced in the future with arguments based upon the reasoning in the case: the willingness of the Court to accept the need to consider the supplier's economic interests here shows potential interactions with the approach taken to Public Service Obligations in the cases under Article 106(2) TFEU, and, indeed, the *Altmark* judgment.[33] In these cases, the Court has shown more tolerance for the terms on which Member States confer public service obligations, acknowledging that these functions must be

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30 A. Johnston, 'Seeking the EU "Consumer" in Services of General Economic Interest (with a focus upon the Energy sector)' in D. Leczykiewicz & S. Weatherill (eds.), *The Images of the Consumer in EU Law* (Hart Publishing, 2015), in section D(i)(c) on the links and overlaps between EU energy-specific and EU general consumer protection law.

31 Joined cases C-359/11 and C-400/11 *Schulz* v. *Technische Werke Schussental* and *Egbringhoff* v. *Stadwerke Ahaus* (judgment of 23 October 2014), ECLI:EU:C:2014:2317.

32 At para [44] of the *Schulz* judgment (emphasis added).

33 Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747, ECLI:EU:C:2003:415.

able to be performed under 'economically acceptable conditions' for the undertaking concerned,[34] which would justify *prima facie* infringements of the free movement or competition rules by virtue of Article 106(2) TFEU.[35] In other words, undertakings entrusted with a public service function – like many in the energy field – could enjoy some degree of exemption from the strictures of the TFEU rules on trade and competition, by virtue of how the Member State sets the conditions for the performance of such functions. This shows a measure of acceptance of the interests of suppliers of such services and the need for them to be able to operate under 'economically acceptable conditions'.

One could speculate whether the Court's reasoning in the *Alemo-Herron* judgment[36] concerning the inclusion of freedom to conduct a business – and its incorporation of the principle of freedom of contract – in Article 16 of the Charter of Fundamental Rights of the EU[37] might be used to bolster claims that such energy supplier interests be respected in a proportionate fashion. This might seem no less paradoxical an argument here in the consumer protection scenario than in the employee protection context of *Alemo-Herron* itself,[38] and typically the Court has shown a willingness to interpret EU consumer legislation to provide far-reaching protection for the

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34 Cases C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, ECLI:EU:C:1997:499, at [43]: the question was whether the enterprise would not be able to fulfil its public duties, not the much higher threshold that the Member State must show that the enterprise's financial viability would be threatened as the Commission had argued in its submissions.

35 For further discussion, see A. Johnston, n. 28, above, section 3.2.2 of that chapter.

36 N. 27, *supra*, discussed (critically) by J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfer of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42(4) *Ind LJ* 434.

37 [2010] OJ C83/389.

38 E.g. in other recent cases, the Court has emphasised that "the freedom to conduct a business is not absolute, but must be viewed in relation to its social function [and may] be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest" (Case C-281/11 *Sky Österreich* v. *Österreichischer Rundfunk* (CJEU, 22 January 2013), ECLI:EU:C:2013:28, [45]-[46]. In *Alemo-Herron*, the distinction relied upon by the Court was that the UK measure adversely affected the "core content" (*Sky Österreich*, at [49]) or "very essence" (*Alemo-Herron*, at [35]) of that freedom, in a way that it had not found in the *Sky Österreich* case.

consumer,[39] as well as a refusal to give much weight to the argument in consumer cases to date.[40] Still, the link to the need to ensure "the performance, under economically acceptable conditions, of the tasks of general economic interest which [the member State] has entrusted to an undertaking"[41] would be relevant in a situation such as that in *Schulz and Egrbinghoff*, where the energy supplier concerned has been appointed as a supplier of last resort.

3 Selected topics in Energy Law with Fundamental Rights implications

The focus here will be on areas raising issues which are (relatively) particular to the energy sector. Thus, some examples readily identifiable from the table (in 2.1, above) will not be examined separately here, since they raise questions largely identical to those arising in that area generally: e.g. in EU merger control law, the issue of divestment as a condition of merger clearance will always raise questions of property rights, business freedom and the proportionality of a Commission decision to require sale of assets, etc. The same applies to the possibility of structural remedies under Articles 101 and/or 102 TFEU, in conjunction with Regulation 1/2003/EC, and to the general procedural questions arising in competition and State aid law (hearings, rights of the defence, access to justice, etc.).

Below, an outline diagram (Diagram 1, annexed at the end of this chapter) is reproduced which seeks to set out the basic structure of energy networks, business links, etc., using the electricity supply industry as the example: the idea of this is to help to illustrate the context in which

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39 See, e.g., H Unberath and A Johnston, 'The Double-headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 *CMLRev* 1237, esp. 1252ff and, generally: S Weatherill, *EU Consumer Law and Policy* (Cheltenham, Edward Elgar, 2nd edn, 2014); and N Reich *et al*, *European Consumer Law* (Antwerp, Intersentia, 2nd edn., 2014).

40 See Case C-12/11 *McDonagh* v. *Ryanair* (CJEU, 31 January 2013), ECLI:EU:C:2013:43, [60]-[64], where the EU objective of ensuring a high level of protection for consumers is emphasised.

41 Case C-157/94 *Commission* v. *Netherlands* [1997] ECR I-5699, ECLI:EU:C:1997:499, at [43].

sections 3.1 and 3.2 below raise issues of EU trade, competition and of course fundamental rights law.

3.1 Unbundling

3.1.1 An outline of unbundling

The idea of 'unbundling' the management, legal corporate status and even ownership of the energy network is a core element of the EU's energy legislation. Most of the ex-incumbent electricity and gas companies were typically vertically integrated, which can create difficulties for liberalizing these markets:

> [t]hey have an inherent interest in retaining their customers, market share, and thus profitability. When competition is introduced, the ex-monopolists hold a 100% market share. Thus, any gain in market share by new competitors means a loss in market share by the ex-incumbent. It is perfectly natural that the ex-incumbent will endeavour to prevent any loss of market share. Where the ex-incumbent owns the network, it has a natural incentive to make third party access to it as difficult as possible.[42]

In essence,[43] unbundling seeks to:

- introduce competition where possible within the system, including through trade from other countries, thus enhancing the system's responsiveness to changes (on matters such as input costs, etc.);
- reduce incentives to cross-subsidise up- or downstream business using profits garnered from control over natural monopoly assets in transmission and distribution (as illustrated by Diagram 1, above) or otherwise favour such other parts of the business (e.g. via sharing market-sensitive information): this should also

[42] C. Jones (gen. ed.), *EU Energy Law – Volume I: The Internal Energy Market* (Leuven: Claeys & Casteels, 3rd edn., 2010), 10.

[43] For details, see Johnston & Block, ch. 3.

encourage the network operator to focus on its own issues and performance, rather than being run to serve the interests of associated up- or downstream parts of a vertically integrated business;
- encourage investment and innovation across the system;
- ease the supervisory tasks entrusted to the National Regulatory Authority ('NRA'), concerning issues like tariffs, market monitoring and transparency;
- enable – if this were thought desirable by the relevant Member State – privatisation of (elements of) the energy supply system.

Alongside these potential benefits, unbundling in general, and ownership unbundling in particular, also impose various costs upon system operators, users and customers; for some, these costs may well outweigh the benefits to be gained from unbundling.[44] These costs may include:

- one-off transaction costs on asset sales and/or structural reorganisation;
- replacing internal processes with a series of contracts (time delays, ongoing transaction costs);
- the need for regulation of natural monopoly assets, which itself imposes costs on society or at least users of the system;
- more generally, unbundling models stopping short of full ownership unbundling require policing the limits of such other approaches, which imposes further regulatory oversight costs, and compliance costs on the part of the undertaking;
- the loss of (easy?) government ability to achieve policy goals through the energy system.

There are also arguments for moving beyond functional and legal separation to require the full ownership unbundling of the transmission

[44] See, e.g., M. Mulder, V. Shestalova and M. Lijesen, 'Vertical separation of the energy-distribution industry' (CPB No 84, 2005) and B. Baarsma *et al*, 'Divide and Rule. The Economic and Legal Implications of the Proposed Ownership Unbundling of Distribution and Supply Companies in the Dutch Electricity Sector' (2007) 35 *Energy Policy* 1785.

system operator, which essentially reside in improving or enhancing various elements of the benefits outlined above.[45]

Under the current EU legislative framework, Member States are required to use of one three basic models for Transmission System Operators:

> (1) the ownership unbundling model (which is the basic principle and the default model[46] from the EU Commission's perspective), was first introduced in Article 9 of the Third Electricity and Gas IEM Directives, and is now included in Article 43 of Electricity Directive (EU) 2019/944 with respect to the electricity sector. This requires complete separation of the ownership of the transmission business from other levels up- and/or downstream (generation, distribution, supply, etc.);
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> (2) the independent system operator (ISO), provided for by Articles 44 and 45 of the (EU) 2019/944 (previously Articles 13 and 14 of Electricity Directive 2009/72/EC) and Articles 14 and 15 of the Gas Directive 2009/73/EC. Ownership of the network can still be held by the vertically integrated entity, but the transmission network must itself be managed by an independent system operator, which must be entirely separate from the vertically integrated company and which is to perform all network operator functions; or
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> (3) the independent transmission operator (ITO), detailed in Articles 46 to 51 of the Electricity Directive (EU) 2019/944 (previously Articles 17 to 23 of the Electricity Directive 2009/72/EC) and Articles 17 to 23 of the Gas Directive 2009/73/EC. Hereunder, separation of the transmission activities must be achieved through the establishment of an ITO, which must be responsible for the maintenance, development, and operation of the net-

[45] See, further, M. Pollitt, 'The Arguments For and Against Ownership Unbundling of Energy Transmission Networks' (2008) 36 *Energy Policy* 704.

[46] See, e.g., the Third IEM Directives, recitals 11 (Elec.) and 8 (Gas).

works, even though those networks remain the property of the vertically integrated company.

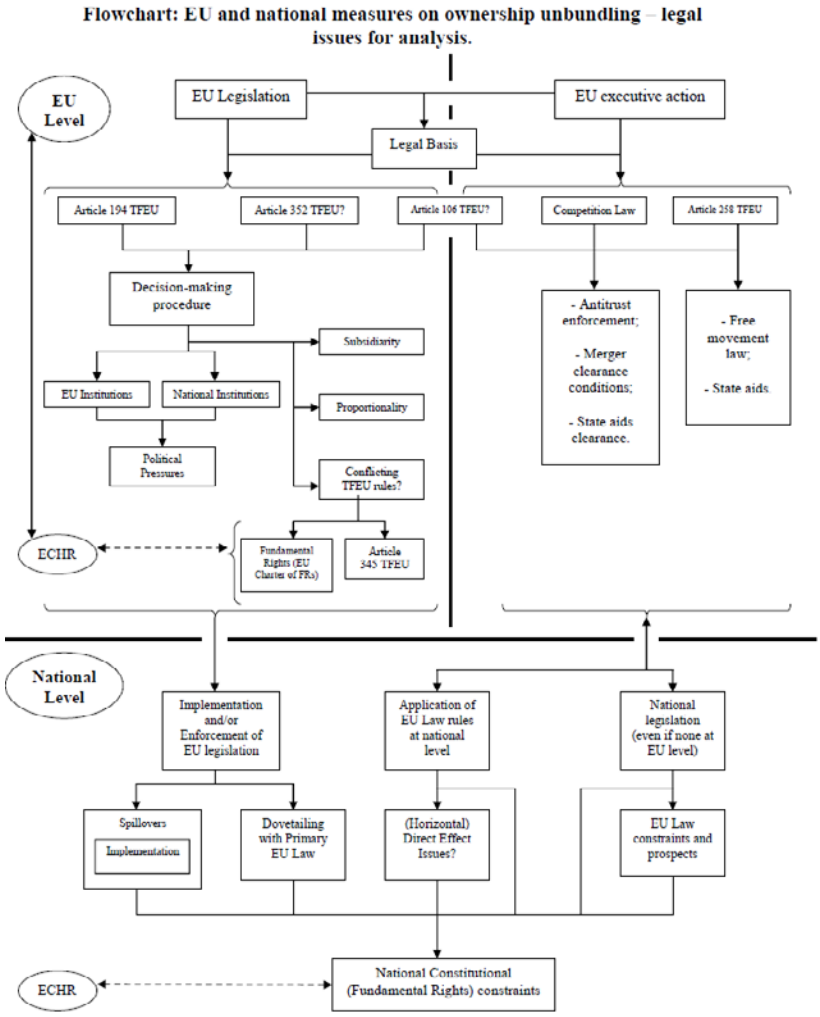
Once a Member State has adopted the first model, under the Directives it is not permitted to 'regress' back to a weaker unbundling model in future. It should be emphasised that these Directives provide a significant amount of detail concerning the national rules which will be required to govern the ISO and, in particular, the ITO models, in an attempt to ensure that these options "provide the same guarantees regarding independence of action of the network in question and the same level of incentives on the network to invest in new infrastructure that may benefit competitors".[47] The concomitant of providing these alternatives is that the NRA will have a significant role to play in ensuring the respect of these detailed rules by the transmission system operator:[48] from a fundamental rights perspective, this is significant, in that it may render the NRA the appropriate defendant if any of its regulatory activity is found to be disproportionate in its effects upon that operator.

The reason for providing some detail concerning unbundling is that its goals and detailed regulation will prove crucial in any analysis of the fundamental rights implications of EU or national rules which establish or further extend the unbundling principles: *prima facie*, rules which strongly control the enjoyment of property (i.e. the transmission business) held by a company, even to the extent of requiring that property to be sold *and* specifying certain key characteristics of those allowed to buy it, amount to a restriction upon rights to free enjoyment of property and possessions under Article 1 of the First Protocol to the ECHR and/or Article 17(1) of the Charter.

47 Commission, 'Proposal for the Third Package Directives', COM(2007) 195 (19 September 2007).

48 For detailed discussion, see Johnston & Block, paras. 3.32-3.94.

Diagram 2: Flowchart on legal issues raised by national ownership unbundling measures



The flowchart reproduced in Diagram 2 (above) tries to locate the relevance of such fundamental rights arguments within the EU law firma-

ment, noting the potential impact of fundamental rights upon the EU's law-making process and competence as well as their relevance to national implementation of EU law and national level law-making, where EU fundamental rights law may operate as a constraint upon national competence and autonomy.[49]

3.1.2 Ownership unbundling and fundamental rights

Despite the relative paucity of case law to date, the issue remains one of real significance: strong views have been expressed[50] that the far-reaching implications of unbundling in general, and ownership unbundling in particular, require strong and cogent justifications if the intrusion upon property rights is to be found proportionate. Praduroux and Talus, on the other hand, have concluded that there does not appear to be a conflict between fundamental rights and general principles of EU law on the one hand and ownership unbundling on the other hand.[51] The key fundamental right in question is likely to be the right to property laid down in Article 1 of the First Protocol to the ECHR (and the corresponding terms of Article 17 of the EU's Charter of Fundamental Rights). In short, provided the transmission assets are *sold* off, thus ensuring that their current owners receive some compensation in return for their inability any longer to own such assets, it seems that this should amply satisfy the proportionality requirements imposed by the ECHR under this provi-

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[49] This was developed from A. Johnston, 'Ownership Unbundling: Prolegomenon to a Legal Analysis', ch, 23 in M. Bulterman, L. Hancher, A. McDonnell & H. Sevenster (eds.), *Views of European Law from the Mountain* – Liber Amicorum *Piet Jan Slot* (Alphen aan den Rijn: Kluwer Law Intetnational, 2009).

[50] See, e.g.: J-C Pielow, G Brunekreeft, and E Ehlers, 'Legal and Economic Aspects of Ownership Unbundling in the EU' (2009) 2(2) *Journal of World Energy Law & Business*[96] (see the comment in reply by K. Talus & A. Johnston, (2009) 2(20 *Journal of World Energy Law & Business* 149)[:] and E. Ehlers, *Electricity and Gas Supply Network unbundling in Germany, Great Britain and The Netherlands and the Law of the European Union: A Comparison* (Antwerp: Intersentia, 2010).

[51] S. Praduroux and K. Talus, 'The third legislative package and ownership unbundling in the light of the European fundamental rights discourse' (2008) 9 *Competition and Regulation in Network Industries* 3-28.

sion.[52] A brief discussion is required to justify this assertion, which is based upon the broader case law under the ECHR, given that the issue has yet to be addressed directly under EU (fundamental rights) law.[53]

3.1.2.1 'Deprivation of property'?

The main test for 'deprivation' of property under Article 1 of the First Protocol is the extinction of the owner's rights in the property, usually by means of a legal transfer of those rights to another by operation of law or the exercise of a legal power to do so. Ownership unbundling mandated by EU law would appear to conclude that the only way to promote competition would be to force current incumbents to transfer certain companies or assets to new market entrants. Such a move would be a State act and would no doubt be laid down in the relevant legal framework (thus satisfying the basic conditions for such a deprivation).[54] However, even in this hypothetical situation, the typical method would be to force the *sale* of such assets, thus ensuring some form of compensation for

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52 It can be noted that the rationale underlying the fundamental rights analysis under the ECHR (mirrored in many national systems) is very similar to the basis upon which claims to recover stranded costs have been developed and subsequently analysed under EC law in the State aids field. See Commission Communication relating to the methodology for analysing State aid linked to stranded costs (26 July 2001), which document is available on the internet at: https://ec.europa.eu/competition/state_aid/legislation/stranded_costs_en.pdf. See further the brief article by B. Allibert, 'A methodology for analysing State aid linked to stranded costs, and first cases', (2001) *Competition Policy Newsletter*, Number 3, October 2001, pp. 25-27, discussing the Decisions taken by the Commission on the applications by Austria, Spain and the Netherlands.

53 The same structure of discussion could also apply to rules mandating third party access (TPA) to energy networks at the transmission and distribution levels, although we are not aware that it has been utilised in practice.

54 It should be noted that the reference to 'the general principles of international law' as a condition for such deprivation of property has been held by the European Court to be relevant *only* in the situation where the party claiming interference with his possessions is *not* a national of the expropriating state: see *James* v. *U.K.* (1986) 8 EHRR 123, confirmed in *Lithgow* v. *U.K.* (1986) 8 EHRR 329, at (*inter alia*) para. 115. However, given the approach of the Court to compensation in deprivation cases (considered briefly below), the inapplicability of the public international law principle (requiring compensation to be given to non-nationals for deprivation of their property) is unlikely to make much difference in practice.

the incumbent operator. The *adequacy* of the compensation that such a method might provide falls to be considered below.

3.1.2.2 Justifying an infringement?

In all situations where an infringement by means of some interference with possessions has been shown, the state must show that this interference was justifiable to escape a finding that its conduct has been unlawful. There are separate elements[55] to be considered here, but it should not be forgotten that there is an essential link between how the public interest is defined and the shape of the proportionality argument that follows. The question of compensation is part of that proportionality analysis, but given its centrality to the ownership unbundling scenario, it will be highlighted separately in what follows.

3.1.2.2.1 Public interest/General interest

Any justification for an infringement upon the right to the peaceful enjoyment of possessions must state the grounds upon which that interference is to be made. The Strasbourg Court has tended to be deferential to the Member States' definitions and explanations of why a certain restriction was necessary: for example, leasehold enfranchisement legislation in the U.K. was held to be a policy calculated to enhance social justice within the community and therefore was 'properly described as being "in the public interest"'.[56]

On the case law as it stands, therefore, it seems highly likely that the type of public/general interest ground that would be relied upon by the state in the ownership unbundling scenario (such as benefiting overall social welfare by the introduction of competition) would be difficult

[55] Clearly, ownership unbundling rules under EU law meet the criterion of being 'conditions provided by law' which is necessary for any justifiable infringement of Convention Rights. This basis in law must be accessible, sufficiently certain and must provide protection against arbitrary abuses. Thus, it is not only a requirement to be able to point to a positive legal provision empowering the body in question to take the action of which the applicant complains; there is also an element of the 'Rule of Law' about this requirement. These criteria seem satisfied in the case of ownership unbundling under EU law.

[56] *James* v. *U.K.* (1986) 8 EHRR 123, at para. 49.

and perhaps impossible to characterise as not being acceptable under the Convention. However, while the ground of public interest may be legitimate, it must still be analysed whether the means chosen to fulfil that ground were proportionate to the benefit to be gained.

3.1.2.2.2 Proportionality

Although there is no express reference to a proportionality test in the wording of Article 1 of the First Protocol, it is clear from the Strasbourg Court's jurisprudence that such a requirement is inherent in that Article. Proportionality is a general principle of the Convention and requires there to be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[57] In the context of Article 1 of the First Protocol, the Strasbourg Court has developed a requirement that a 'fair balance' must be struck 'between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[58] This approach is followed by the Court in all cases of infringement of Article 1 of the First Protocol, whether concerning deprivation, control of use, or more general interference with the enjoyment of possessions.

It is important to note that the intensity of the proportionality test applied will vary according to the severity of the infringement in question. 'Deprivation of property is inherently more serious than a control of its use',[59] thus suggesting that it will be more difficult to argue that the action of a public body in depriving a company of its property is a proportionate way to achieve the public interest goal at issue. In any application of the idea of fair balance, however, it is clear that two elements will be key: first, is there any entitlement for the property owner to compensation for the interference suffered? Second, is there any procedure open to the applicant to challenge the measure that has caused the interference with his possessions? In the parallel stranded costs situation, a good example of

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57 *James* v. *U.K.* (1986) 8 EHRR 123, at para. 50.

58 *Sporrong and Lönnroth* v. *Sweden* (1982) 5 EHRR 35, para. 69.

59 See *Gillow* v. *U.K.* (1989) 11 EHRR 335 for a clear recognition of this point.

the procedural element is provided by Article 24 of Directive 96/92/EC,[60] under which Member States were allowed to develop plans to compensate incumbent companies for stranded costs. These plans were then to be submitted to the European Commission within a certain period of time for their examination in accordance with the EU's State aid rules. Equally, the absence of any such procedure may well lead to a finding that the interference is a disproportionate one that fails to respect the balance to be struck between the competing interests at stake.[61]

3.1.2.2.3 Compensation

It would appear that there is no absolute right under the Convention to receive compensation in return for an interference with the right to the peaceful enjoyment of one's possessions. Rather, the availability and extent of any compensation falls to be considered as part of the overall analysis of the proportionality of the interfering measure. However, it is also accurate to state that the more serious the infringement of the right to peaceful enjoyment of one's possessions, the stronger the presumption that at least some compensation must be paid for the 'fair balance' of interests to be respected.

With regard to the deprivation of possessions and compensation, only in 'exceptional circumstances' will the taking of property without compensation be justifiable; otherwise, the protection afforded by Article 1 of the First Protocol 'would be largely illusory and ineffective'.[62] However, while compensation should normally be an amount 'reasonably related to [the] value' of the property taken, there is no 'guarantee [of] a right of full compensation in all circumstances, since legitimate objectives of public interest, such as pursued in measures of economic reform …, may

60 [1996] O.J. L27/20.

61 See *Sporrong and Lönnroth*, n. 51, *supra* for a good example, although here it was the combination of the failure to provide any means of compensation *with* the lack of any opportunity to challenge the measures which seemed to tip the balance overall. This illustrates the interlinked nature of the proportionality analysis in such cases, covering many different and yet connected issues.

62 *Lithgow v. U.K.*, n. 47, *supra*; see esp. paras. 80-83.

call for less than reimbursement of the full market value … '.[63] This seems to imply that there is a proportional relationship between the nature and extent of the public interest, on the one hand, and the individual burden to be borne, on the other. That is to say that 'the greater the public gain to be achieved by the legitimate aim, the greater the financial burden the property owner can be expected to bear. To this extent the state enjoys a wide margin of appreciation in calculating compensation terms'.[64] Generally, the defendant States have not been successful in arguing that their case falls within the 'exceptional circumstances' needed to escape the need to provide compensation.[65] However, there are examples where the Court has been rather deferential to the terms upon which compensation has been calculated.[66] Overall, therefore, it would appear that ownership unbundling would be likely to survive a challenge based upon fundamental rights under EU law, at least if the approach of the Strasbourg Court under the ECHR is any guide.

3.1.3 Ownership unbundling and Article 345 TFEU

The Grand Chamber judgment of the Court in *Netherlands* v. *Essent* is the only case where the Court of Justice has dealt with a privatisation ban

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63 *Ibid*.

64 Rook, *Property Law & Human Rights* (London: Blackstone Press, 2001), p. 72.

65 D. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 532 suggest that a possible example might be seizure of property during times of war (see now D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: OUP, 4th edn., 2018), while D. Rook, *Property Law & Human Rights* (London: Blackstone Press, 2001), p. 71, n. 2 suggests that a local authority landlord exercising the remedy of distress for rent might be another.

66 See *Lithgow* v. *U.K.*, n. 47, *supra*, where the calculation of the compensation paid to a company which was to be nationalised was made on the basis of the value of its shares at a point before the announcement of the nationalisation plan, rather than on the basis of company assets held at the date of nationalisation. The Court acknowledged that such a broad public interest issue as nationalisation legislation involved the consideration of a very wide range of competing interests, which the Member State and its national authorities were best placed to assess. Overall, the Court found that adequate reasons did exist for the compensation criteria chosen and, as a result, held the U.K. to be within its margin of appreciation and thus found no violation of the Convention.

related to the sale of shares in electricity and gas DSO organisations under Article 345 TFEU governing national systems of ownership rights.[67] The Court found that the privatisation ban fell within the scope of Article 345 TFEU, but that the prohibition nevertheless constituted a restriction on the free movement of capital pursuant to Article 63 TFEU. The judgment is, however, more ambiguous concerning the potential influence of the principle in Article 345 TFEU on considering legitimate justification grounds.[68] Haraldsdottir argues that the role of the neutrality principle enshrined in Article 345 TFEU must be viewed in relation to the specific merits of each case, where the application of the principle may depend on the social function or strategic importance of the property at issue.[69] Based on this reasoning, the decision in *Netherlands* v. *Essent* may also be seen as not contradicting the reasoning of the EFTA Court in *Hjemfall*, where the Court noted that Norway could pursue a system of public ownership for its hydropower resources, provided the objective is pursued in a non-discriminatory and proportionate manner, with reference to the equivalent provision to Article 345 TFEU in Article 125 EEA.[70] Finally, it is notable that the CJEU judgment in *Netherlands* v. *Essent* did not refer even once to fundamental rights protection in general, the ECHR, EU or national fundamental rights law, focusing instead solely upon Article 345 TFEU and the free movement of capital under EU law.

3.2 Disputes concerning terms and conditions under EU electricity guidelines

Electricity Regulation (EC) No. 714/2009 in the Third IEM package and the subsequent Electricity Regulation (EU) 2019/943 of the Clean Energy package both set out procedures for the adoption of more detailed

67 Joined cases C-105/12 to C-107/12, ECLI:EU:C:2013:677.

68 K. Haraldsdottir, 'The nature of neutrality in EU law: Article 345 TFEU' (2020) 45(1) *E.L. Rev.* 2020 3-24.

69 *Ibid.*

70 Case E-02/06, *EFTA Surveillance Autority* v. *Norway* (judgment of 26 June 2007).

network codes and guidelines for the electricity market.[71] It would go far beyond the scope of this article to provide detailed description and analysis of this elaborate legislation and its adoption process.[72] The point we would like to make here is merely related to access to justice as a fundamental right in challenges raised under the legislative framework.

The network codes may cover a wide range of areas, such as network security and reliability rules, network connection rules and rules regarding harmonised transmission tariff structures, as well as a number of other areas.[73] In addition, the Commission may adopt guidelines for practice following similar procedures.[74] They are adopted as Commission Regulations pursuant to a process where the European Network for Transmission System Operators for Electricity (ENTSO-E) and the EU Agency for the Cooperation of Energy Regulators (ACER) play central roles in the drafting process.

Four electricity network codes and four guidelines have so far been adopted as Commission Regulations.[75] The guidelines adopted are Commission Regulations (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management (CACM),[76] (EU)

71 Electricity Regulation (EC) No. 714/2009 provides the legal basis for adopting network codes and guidelines in Articles 6 and 18, respectively. The new Electricity Regulation (EU) 2019/943 sets out similar legal bases in Articles 59 and 61.

72 For a more thorough analysis, see L. Hancher, A.-M. Kehoe and J. Rumpf, 'The EU Electricity Network Codes and Guidelines; A Legal Perspective', Research Report Florence School of Regulation (2020).

73 See further Article 8(6) of the Electricity Regulation.

74 Article 18 of the Electricity Regulation 714/2009 and Article 59 of Electricity Regulation 2019/943.

75 For further information and access to the codes, see: https://electricity.network-codes.eu/network_codes/ (last visited 17 December 2020).

76 We should note here the potential relevance of fundamental rights to the operation of rules on capacity allocation and congestion management. In short (as discussed further below in section 3.3 on renewables support schemes), contractual rights to transmission capacity may count as possessions under fundamental rights law (Art. 17 EU Charter FRs and Article 1 of the First Protocol to the ECHR), such that *prima facie* interference with them by regulatory rules such as CACM will require justification on public interest grounds, following the structure discussed above in section 3.1.2 on ownership unbundling and fundamental rights. To our knowledge, to date the fundamental rights dimension has never been raised in (any dispute concerning) the application of these CACM rules.

2016/1719 establishing a guideline on forward capacity allocation (FCA), (EU) 2017/1485 establishing a guideline on electricity transmission system operation (SOGL) and (EU) 2017/2195 establishing a guideline on electricity balancing (EB).

A specific feature of the guidelines is that they provide a basis for adopting even more specific terms and conditions (TCMs). Approximately 200 TCMs need to be adopted and a large number of actors are involved in the process.[77] All four guidelines establish a system where national regulatory authorities (NRAs) shall adopt further TCMs based on proposals primarily from the TSOs (and in some cases from the Nominated Electricity Market Operators (NEMOs), i.e. the power exchanges) within a number of areas comprised by the guidelines. Some TCMs shall apply to all Member States and therefore be adopted by all NRAs,[78] some are applicable on a regional basis and shall be adopted by the NRAs in the region,[79] and some are applicable on a State-by-State basis and shall be adopted individually by each and every NRA.[80]

In cases where the NRAs are not able to reach agreement on a TCM, or where the NRAs decide to forward the case, ACER may adopt the final TCM.[81] ACER may also provide its opinion on a draft TCM earlier in the process. Moreover, in the new Electricity Regulation 2019/943, ACER also has the legal powers to revise and approve TCMs where all EU NRAs need to agree pursuant to the guidelines.[82]

Given that the TCMs may in practice turn out to be of great importance for electricity market design within a number of areas, ACER's powers to decide on TCMs are of considerable importance. Parties challenging the decisions of ACER may bring them before ACER's Board of Appeal.[83] A recent and important case before the General Court, *Aquind*

77 ACER's Annual Activity Report 2017.

78 See e.g. Commission Regulation (EU) 2017/1485 (SOGL), Article 6(2).

79 See e.g. SOGL Article 6(3).

80 See e.g. SOGL Article 6(4).

81 See further Electricity Regulation (EU) 2019/943 Articles 5 and 6(10).

82 Electricity Regulation (EU) 2019/943, Article 5(2).

83 See Article 28 of Electricity Regulation (EU) 2019/943 as well as Articles 25-27 on the composition etc, of the Board of Appeal.

v. *ACER*, concerned, *inter alia*, a complaint that the Board of Appeal had only carried out a limited review of the complex technical and economic assessments involved in the case.[84] This raises some interesting questions from the perspective of access to justice as a fundamental right.[85]

In *Aquind* v. *ACER*, the applicant had submitted a request for an exemption from the access conditions for its Aquind interconnector. The national NRAs in France and the UK had not been able to agree on the exemption request and the case was forwarded to ACER, whicrh refused the request for an exemption. ACER's decision was appealed to the Board of Appeal, which upheld ACER's decision. In its decision, the Board of Appeal held, with reference to case law, that ACER's economically and technically complex assessments were subject to a limited judicial review by the Board of Appeal and that it was confined to ruling on whether ACER had committed manifest errors in its assessments.

The Court disagreed with the Board of Appeal, emphasizing, *inter alia*, that the establishment of the Board of Appeal was part of a general tendency under EU law to establish appellate bodies where agencies have been given significant decision-making powers in complex issues.[86] The interpretation of the then prevailing Electricity Regulation (EC) 714/2009 did not, in the Court's opinion, support a limited scope of review parallel to the Court's own limited reviews of complex technical and economical decisions by the administration. Rather, the Court held that a limited review by the Board of Appeal would entail that the Court, when a case is brought before it, would carry out a limited review of a limited review.[87] Consequently, the decision of the Board of Appeal was annulled by the General Court.

Carrying out a full review of complex technical and economic assessments as required by the Court can, however, be a challenging task for a Board of Appeal with limited time and resources. Given the ongoing process of establishing a large number of TCMs for the European energy

84 Case T-735/18, *Aquind Ltd.* v. *ACER* (judgment 18 November 2020), ECLI:EU:T:2020:542.

85 See Article 47 of the EU Charter of Fundamental Rights.

86 Case T-735/18, para. 51.

87 Case T-735/18, para. 58.

market, there is every reason to assume that the number and complexity of appeals will only increase over time. If such a development is not followed by corresponding increases in the resources made available to the Board of Appeal, it may simply not be possible to carry out full reviews of decisions within acceptable time limits. This, in turn, may raise questions relating to whether such a system guarantees access to justice as a fundamental right for applicants challenging ACER decisions.

3.3 Renewable Energy Support Schemes

Fundamental rights considerations may arise in various guises in the renewables field. First, in making the shift from one support system to another (or to establishing a system in the first place), transitional regimes with phase-ins and phase-outs will be required. Ensuring appropriate treatment of pre-existing certificates and/or entitlements under the prior system will be crucial as a practical matter to secure support and credibility for the new policy and its legal framework, but could also raise difficult questions under fundamental rights law.[88]

UK litigation concerning often abrupt government changes to renewables support schemes has raised the issue of fundamental rights protection for those relying upon government schemes as the basis for entering into various contracts, only to have those contracts undermined by later changes in the rules applying to such schemes.[89] There have been public law challenges to policy changes made by governments as a result of austerity: judicial review has often focused upon fundamental rights to reject policy change, although it has also achieved the same result via (traditional) canons of statutory interpretation. In *Friends of the*

[88] See, e.g., A Johnston, 'Legal issues raised by the introduction of take-or-pay contracts for renewables deployment in the UK', in B. Delvaux, M. Hunt and K. Talus (eds.), *EU Energy Law and Policy Issues - The Energy Law Research Forum Collection* (Euroconfidentiel/European Study Service, 2008), Section 4, ch. 4.

[89] A. Johnston, 'Recent Renewables Litigation in the UK: Some Interesting Cases' (2015) 13(3) OGEL.

Earth v. *Department of Energy and Climate Change*,[90] the courts at first instance and appellate level concluded that the changes to the Feed-in Tariff scheme for smaller-scale renewables operated retrospectively for a particular category of schemes which had qualified for the old tariff, by removing vested rights to receive that higher tariff for 25 years and instead replacing it with the new, lower tariff after only 4.5 months. No express authorisation for such retrospective operation could be found in the parent legislation which empowered the government to adopt the new rules in secondary legislation. This case can be contrasted with the decision in *Solar Century Holdings* v. *Secretary of State for Energy & Climate Change*,[91] concerning the decision to end the Renewable Obligation scheme (for new solar farms with capacity >5MW) two years earlier than it had originally intended. Here, the judge found that the scheme had to be understood as balancing a range of objectives, meaning that there could be no legitimate expectation that it might not be changed prior to its planned end date. Further, insofar as there was a measure of retrospective impact upon stranded investments made by the applicants – in having begun the process of seeking accreditation for their installations, which would now be wasted effort in view of the changes –, these were held not to amount to vested rights, so that the consultation conducted, the grace period offered for phasing in the new rules, and the reasons given by the government for making the changes were all satisfactory and did not render the impact upon such investments unfair in the circumstances.

In neither case was the issue of fundamental rights crucial to the analysis or the judgments of the courts: the assessment and outcome turned entirely on statutory interpretation, the aims of the schemes and the reasons for amending them, in the context of potentially vested rights and possible retrospectively applicable rules involved in the policy changes. Yet it should be noted that questions of the status of such 'vested rights' in the *Friends of the Earth* case could easily have triggered analysis under Article 1 of the First Protocol to the ECHR concerning the quiet

[90] [2011] EWHC 3575 (Admin), upheld: [2012] EWCA Civ 28, [2012] Env LR 25.

[91] [2014] EWHC 3677.

enjoyment of possessions. This is evident from the analysis in the next group of cases.

These cases concerned actions for damages under the HRA/ECHR, brought by solar installation companies against UK government: *Infinis* v. *GEMA*[92] *and Breyer Group*[93]. *It has been striking that these claims have been successful. Their focus was upon whether damages were available for breach of Article 1 of the First Protocol to the ECHR under the UK's HRA 1998. In Infinis*, this was due to GEMA's failure to accredit two renewables generating installations so that they earned ROCs for given periods; in *Breyer*, meanwhile, the claims concerned planned renewables installations that had been abandoned as a result of the proposed change in government policy on renewables support, and whether the interests held by the claimants were sufficient to found a claim in damages.

In *Infinis*, neither the first instance judgment nor that of the Court of Appeal engaged in extensive discussion of the HRA, the ECHR or the case law thereunder. Once the detail of the analysis of the various schemes and secondary legislation had been completed, just 13 paragraphs in Lindblom J.'s judgment[94] (including the arguments of the parties)[95] and 5 paragraphs in the Court of Appeal[96] were devoted to the claim for just satisfaction under fundamental rights law. Nevertheless, the willingness of the judiciary in these cases to accept this line of argument is significant, as is the absence of any attempt to identify or introduce a threshold[97] criterion which would assess the (more or less) flagrant nature

92 [2013] EWCA Civ 70.

93 *Breyer Group* v. *Department of Energy and Climate Change* [2014] EWHC 2257 (QB) and *Department of Energy and Climate Change* v. *Breyer Group* [2015] EWCA Civ 408. See, most recently, Solaria Energy UK Ltd v. Department for Business, Energy And Industrial Strategy [2020] EWCA Civ 1625, where the result in *Breyer* was essentially followed on the substance (although the claim was ultimately dismissed on limitation grounds).

94 [42]-[47], [56], [65] and [103]-[107].

95 [56] and [65], for *Infinis* and the Authority, respectively.

96 [23]-[27].

97 As opposed to considering the matter as part of the overall assessment of the need to award damages and their quantification: see [2011] EWHC 1873 (Admin), at [47].

of any breach[98] of a fundamental right (as would commonly be found in many continental jurisdictions and, indeed, in the case law of the Court of Justice of the EU, concerning both Member State liability under the *Francovich* line of cases[99] and liability of the EU's own institutions[100]). Instead, the focus of Lindblom J. was on a demonstrable and direct causal link between the violation and the loss or damage,[101] and the need to achieve *restitution in integrum*, placing the applicant, so far as possible, in the same position as if his ECHR rights had not been breached.[102] In particular, "[w]here the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded".[103]

GEMA had conceded at first instance that Infinis's claim to be accredited was sufficiently established to amount to a possession for the purposes of the Article 1 claim, but it endeavoured to withdraw that concession on appeal, and argued that Infinis held no sufficient legitimate expectation that could be recognised as founding an Article 1 claim, in the absence of settled case law or a judicial declaration recognising the validity of such a claim (relying on the *Kopecky* v. *Slovakia* judgment[104] of the Strasbourg Court). This was firmly rejected by the Court of Appeal. Sullivan L.J. clarified that the *Kopecky* case required that a legitimate expectation

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98 Lindblom J. described the situation as follows: "[t]hough acting in good faith, [GEMA] misapplied the statutory scheme, and the claimants were unlawfully denied that to which they were statutorily entitled" (at [106]). From this, Coulson J. in *Breyer* (n. …, above) concluded that an *unlawful* act which amounted to an infringement upon rights under Article 1 of the First Protocol to the ECHR meant that such an interference could not be justified (at [135]-[137]): see further the discussion in section 3.2, below.

99 Case C-6/90 *Francovich and Bonifaci* v. *Italy* [1991] ECR I-5357, ECLI:EU:C:1991:428, and Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur* v. *Germany* and *R* v. *Secretary of State for Transport* ex p *Factortame (No. 3)* [1996] ECR I-1029, ECLI:EU:C:1996:79.

100 Case *Aktien-Zuckerfabrik Schöppenstedt* v. *Council of the European Communities* [1971] ECR 975, ECLI:EU:C:1971:116.

101 [2011] EWHC 1873 (Admin), at [47], citing *Kingsley* v. *United Kingdom* [2002] 35 EHRR 177.

102 *Ibid*., [45]-[46], and [2013] EWCA Civ 70, [26]-[27]: both citing *Anufrijeva* v. *Southwark London B.C.* [2004] QB 1124 (at [57]-[59], *per* Lord Woolf C.J.) and *R (on the application of Greenfield)* v. *Secretary of State for the Home Department* [2005] UKHL 14 (http://www.bailii.org/uk/cases/UKHL/2005/14.html) (at [10], *per* Lord Bingham of Cornhill).

103 *Anufrijeva* (n. 57, above), at [59].

104 [2005] 41 EHRR 43 (ECtHR).

must "be of a nature more concrete than a mere hope and based on a *legal provision or a legal act* such as a judicial decision" (his emphasis). For Sullivan L.J., the right to accreditation under a statutory scheme was perfectly adequate to found Infinis's legitimate expectation, and it was not necessary that it should be based upon "*both* a legal provision giving the applicant an entitlement to some pecuniary benefit *and* a legal act such as a judicial decision confirming that entitlement"; one or the other would suffice.

The *Infinis* judgments stand as a robust affirmation of the principle that statutory entitlements under such renewables promotion schemes amount to a clearly defined legitimate expectation that pecuniary benefits will be received where the qualifying conditions are satisfied. The protection of such expectations – or vested rights, as they were described once accreditation had been granted, as in the *Friends of the Earth* case discussed above – is crucial to the predictability of the policy framework and investment climate relied upon in setting up such schemes, with a view to encouraging capital investment, and renewables development and deployment in any national electricity generating system.

The *Breyer* litigation, meanwhile, followed on from the conclusions in the *Friends of the Earth* case discussed above, and addressed the difficult question of what sorts of interests held by the claimants would qualify for protection under Article 1 of the First Protocol to the ECHR, such that interference with those interests would sound in damages. The claimants were companies who had been involved in renewables installation projects which had been abandoned because they would not have been completed in time to meet the cut-off date under the government's proposed new scheme. In summary, concluded contracts (and those so close to final formal conclusion that an agreement was already clearly reached) qualified, as did marketable goodwill that could be established at the time of the interference by the change in the scheme's rules. But other interests such as possible loss of future goodwill and unconcluded contracts did not amount to possessions protected under the ECHR.

The Court of Appeal agreed with almost all of the first instance judge's conclusions in *Breyer*, differing only on the point that the government's

proposal itself was not an unlawful interference *per se* as a result of the *Friends of the Earth* judgment; rather, it had to be open for proposals to be made and consulted upon.[105] At the same time, the fact that the proposal was made was acknowledged to be an interference, and one which failed at the proportionality stage to strike a fair balance between the interests of investors in renewables schemes and the public interest, as the first instance judge had also concluded.[106]

Finally, it is also notable that all discussion in these UK cases concerned the HRA and ECHR: no references at all were made to EU law and its possible fundamental rights implications. Practically speaking, the HRA approach was possible here because the relevant national rules have been secondary legislation (or lower), meaning that the HRA's mechanisms *could* offer protection on fundamental rights grounds: the story might have been different had primary legislation been involved. In those Member States where fundamental rights offer protection at the constitutional level, there may similarly be less pressure to resort to EU law fundamental rights arguments, yet adding this element alongside arguments based upon domestic constitutional law and the ECHR could prove important in future cases, especially where EU law's supremacy might offer stronger protection for claimants affected by drastic and financially damaging changes in government policy, whether in the renewables field or elsewhere.[107]

105 [2015] EWCA Civ 408, [81], [83].

106 *Ibid*., [99]: "[i]n view of (i) DECC's statements that April 2012 was the cut-off date, (ii) the statements that there would be no retrospective tariff changes, (iii) the scale of the investments made by the claimants (and others who were in the same position) in reliance on these statements, and (iv) the fact that the losses caused by the interference with their possessions were dwarfed by the savings achieved by DECC as a result of the interference"; upholding [2014] EWHC 2257 (QB), [145]-[147].

107 Note the similar issue concerning government policy change in the energy sector which arose in Germany following the government's decision to phase out nuclear power from the German electricity system. The legality of this decision and its detailed terms and conditions reached the Bundesverfassungsgericht, which ruled on the case in late 2016 (BVerfG, judgment of the First Senate of 6 December 2016 – 1 BvR 2821/11, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/12/rs20161206_1bvr282111en.html) and again in 2020 (BVerfG, Order of the First Senate of 29 September 2020 – 1 BvR 1550/19, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/09/rs20200929_1bvr155019en.html). In 2016,

3.4 Smart Grids and Smart Metering[108]

The development of smart metering and smart grids are often highlighted as an important technological development in the transition to a low-carbon energy sector.[109] The Electricity Directive defines a "smart metering system" as "an electronic system that is capable of measuring electricity fed into the grid or electricity consumed from the grid, providing more information than a conventional meter, and that it is capable of transmitting and receiving data for information, monitoring and control purposes, using a form of electronic communication".[110] Smart

the Constitutional Court found that parts of the legislation (2011 original and 2018 amendments) were unconstitutional due to violations of the principle of proportionality concerning the power of use of and disposition over property, and in 2020 it held that the State's new legislation had failed adequately to address this violation. See: L. Kramm, 'The German Nuclear Phase-Out After Fukushima: A Peculiar Path or an Example for Others?' (2012) 3(4) *Renewable Energy Law and Policy Review* 251 for the background; T. Leidinger, 'The judgement of the Federal Constitutional Court on the nuclear phase-out in Germany. Every light has its shadow' (2017) 62(1) *Internationale Zeitschrift für Kernenergie* 26, on the 2016 judgment; and R. Fleming, 'German Atomic Energy Act Amendment Illegal - Case Comment BVerfG 1 BvR 1550/19' (13 November 2020, http://energyandclimatelaw.blogspot.com/2020/11/german-atomic-energy-act-amendment.html), on the 2020 Order.

108 Note that these issues stretch far beyond smart meters and grids in the energy sector, as discussions and implementation of smart(er) cities increase: see L. Edwards, 'Privacy, Security and Data Protection in Smart Cities - A Critical EU Law Perspective' (2016) 2(1) *European Data Protection Law Review* 28.

109 See, e.g., C.W. Gellings, *The Smart Grid: Enabling Energy Efficiency and Demand Response* (Lilburn (GA), USA: Fairmont Press, 2009) for a helpful (if US-centric) overview; S. Pront-van Bommel, 'Smart Energy Grids within the Framework of the Third Energy Package' (2011) 20 *EEELRev.* 32; S. Vanwinsen, 'Smart grids: Legal Growing Pains' (2012) 21 *EEELRev.* 142; and P.M. Connor *et al.*, 'Policy and regulation for smart grids in the United Kingdom' (2014) 40 *Ren & Sust Energy Revs* 269. See also M. Goulden *et al.*, 'Smart grids, smart users? The role of the user in demand side management' (2014) 2 *Energy & Soc Sci* 21; D. Xenias *et al.*, 'UK smart grid development: An expert assessment of the benefits, pitfalls and functions' (2015) 81 *Ren Energy* 89, esp. at 93 and 96; and N. Balta-Ozkan *et al.*, European smart home market development: Public views on technical and economic aspects across the United Kingdom, Germany and Italy' (2014) 3 *Energy Research & Soc Sci* 65, esp. at 67, 72 and 75.

110 Art. 2(23), Electricity Directive (EU) 2019/944.

grids may more loosely be defined as grids that by their design encourage decentralised electricity generation and energy efficiency.[111]

An important aspect of smart metering (and to some extent smart grids) is that it facilitates real-time measurement of electricity consumption. This, in turn, opens up the possibility of incentivising consumption at times when the aggregate electricity consumption is low by facilitating hourly electricity market pricing for consumers. Customers will then, for example, have an incentive to charge their electric vehicles or to wash their clothes at times with the lowest electricity prices, contributing to evening out the periods of peak demand. Combined with other technology provided through app management and new service-based market actors, the need for building new electricity generation capacity to ensure electricity supply in peak load hours may then be reduced, contributing to reducing the impact on the environment and climate, and reduced costs for society.

At the same time, smart metering generates new customer data, raising questions concerning privacy and data protection. In this respect, the preamble of Electricity Directive (EU) 2019/944 sets out rather broadly that the Directive respects and shall be interpreted in accordance with the Charter, in particular with respect to data protection issues,[112] and that 'the privacy of final customers and the protection of their data shall comply with relevant Union data protection and privacy rules',[113] primarily the General Data Protection Regulation (GDPR).[114] The issues of privacy and data protection raise a number of questions, which to some extent also involve fundamental rights aspects. Yet this new status of the protection of personal data as a fundamental right has implications that have not necessarily been clearly or carefully worked through.[115] This is

[111] See para. 51 of the preamble to the Electricity Directive (EU) 2019/944. For an earlier piece on smart meters as a key part of developing the smart grid, see Pront-van Bommel, n. 107, *supra*.

[112] Para. 91 of the preamble to Electricity Directive (EU) 2019/944.

[113] Art. 20(c), Electricity Directive (EU) 2019/944.

[114] Reg. 2016/679/EU [2016] O.J. L119/1.

[115] See, for example, O. Lynskey: 'Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order' (2014) 63 *ICLQ* 569, and *The*

not the place to pursue detailed analysis of the finer points of data privacy law and policy in general, or its sophisticated application to smart grid operation and the installation and use of smart meters. Nevertheless, it is important to highlight this area as one where the relatively newly-found status of data privacy as a free-standing EU law fundamental right could yet have implications for the energy sector and its customers.[116] As one smart meter company representative has commented:

> When it comes to the protection of utility assets, our experience shows us that utilities are completely aware of the risks and that they are requesting adequate security for their end-to-end solutions. The real challenge for the utility, however, is the protection of the end-consumer and their personal data. … [I]n addition to transmitting data securely, it is at least equally important for utilities to adopt secure organizational procedures governing the use of and access to their IT systems – and for them to ensure that the privacy of end-consumer data is ensured while it is being stored and processed.[117]

These concerns will no doubt be familiar to anyone who has worked in a large company or institution handling significant volumes of personal data, where the requirements of data protection and privacy legislation have brought new obligations and risks to data controllers, and have engendered far-reaching changes in practice concerning data storage, transfer and the like.[118] These concerns at the consumer end are height-

Foundations of EU Data Protection Law (OUP, 2015); and G. González-Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU* (Heidelberg: Springer, 2014).

116 Specifically with regard to smart metering and data protection/privacy issues, see R. Knyrim & G. Trieb, 'Smart metering under EU data protection law' (2011) 1(2) *Int Data Priv L* 121 and N.J. King & P.W. Jessen, 'Smart Metering Systems and Data Sharing' (2014) 22 *Int J Law & Info Tech* 215.

117 'Smart metering in Europe: The Challenges Are Greater' (http://www.engerati.com/article/smart-metering-europe-challenges-are-greater, 16 September 2014), reporting the comments of Oliver Iltisberger (Executive V.P. for Europe, Middle East and Africa) of Landis+Gyr (http://www.landisgyr.co.uk/).

118 See, generally, C. Kuner: *European Data Protection Law: Corporate Compliance and Regulation* (2nd edn., Oxford: OUP, 2007); *Transborder Data Flows and Data Privacy*

ened by the far-reaching potential of smart metering to grant access to all kinds of data concerning their energy usage and, thereby, their daily behaviour and preferences. And that is before the prospect which is often raised that external actors might be able to intervene remotely in a consumer's energy usage to manage it for them, whether in response to emergencies or on a more general level. For some, if this were to promise cost savings and greater economic and environmental efficiency, this might be a welcome involvement in their lives; for others, it threatens unacceptable intrusion into their lives and their privacy at home.

There is insufficient space to provide a full analysis of the data privacy and fundamental rights concerns regarding smart meters here,[119] but it is important to outline some key issues and their possible implications. First, which data are covered? Some data are obviously personal in nature: name, address, billing data and payment methods. Others, however, must also be included, where they are linked to a natural person who can be identified via the meter's identification number, such as: metering and consumption data, and data required for customer switching. This is because they reveal the economic situation of the data subject[120] and are thus caught by the GDPR.[121]

Further, 'data gathered from smart meters can also be used for other purposes. Energy data allow for a better understanding of customer segmentation, customer behaviour and how pricing influences usage. As such, those data might be used for specific profiling exercises, e.g. to gather sensitive information on the end-user's energy-based footprint

Law (Oxford; OUP, 2013); and C. Kuner. L.A. Bygrave, C. Docksey & L. Drechsler, *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford: OUP, 2020).

119 E.g. there are important practical questions under the GDPR (Arts. 4(7)-(10), and 24-30) concerning who is the data controller (very often the distribution system operator in the first instance), processor or authorised third party in relation to smart meter data; and the detailed rights of the data subject under the GDPR: to be informed when data is collected and processed, to have access to the data (Arts. 13-15); to object to certain processing activities (Art. 21); and to data portability (Art. 20).

120 A. Fratini & G. Pizza, 'Data protection and smart meters: the GDPR and the "winter package" of EU clean energy law' (22 March 2018, http://eulawanalysis.blogspot.com/2018/03/data-protection-and-smart-meters-gdpr.html), a discussion which predated the final adoption of the 2019 Clean Energy Package.

121 Art. 4(1), Reg. 2016/679/EU [2016] O.J. L119/1.

in his/her private environment, his/her behavioural habits and preferences by analysing the information collected through the meters'.[122] Furthermore, 'the potential risks associated with the collection of detailed consumption data are likely to increase … where energy data can be combined with data from other sources, such as geo-location data, data available through tracking and profiling on the internet, video surveillance systems and radio frequency identification (RFID) systems. The critical issue is in fact that smart meters could constitute the entrance gateway to get a privileged access to the digital domain of a household'.[123] Indeed, this can even extend to being able to identify whether a person is at home, even which television programmes an individual watches, and other aspects of their habits, preferences and behaviours.[124]

As a result, it has long been clear that the processing of such data must be subjected to analysis to ensure that it is conducted on lawful grounds. Already in 2011, the Article 29 Working Party, working under the old Data Protection Directive,[125] identified five possible grounds for lawful processing in the smart metering context: consent, contract, performance of a task carried out in the public interest or exercise of official authority, legal obligation, and legitimate interests, and these remain valid concerns today. Consent is likely to remain the crucial area as smart meters become ever more widespread, as the technology that they contain will continue to develop and may enable more wide-ranging uses to be made of the data which they gather. Thus, consent will need to be fully informed, with regular updates to end-users on what the data can and will be used for,[126] and at a sufficiently granular scale to ensure that the range of uses is

122 Fratini & Pizza, n. 118, *supra*.

123 *Ibid*.

124 M.H. Murphy, 'The Introduction of Smart Meters in Ireland: Privacy Implications and the Role of Privacy by Design' (2015) 38(1) *Dublin University LJ* 191.

125 Directive 95/46/EC [1995] O.J. L281/31.

126 See, e.g., Energy UK, 'Privacy Charter for Smart Metering' (https://www.energy-uk.org.uk/publication.html?task=file.download&id=3190), where significant detail is provided on what the information collected will be used for, when and how it will be collected, who else may be given access to the information, how the end-user will be kept informed about the use of such information from smart meters, and the energy consumer's rights in relation to these data. At the same time, it should be noted that

appreciated. Further, it must be possible to revoke consent in a workable manner and not to become locked into that consent, should an end-user's situation or opinion change.

As a matter of proportionality – a crucial issue in assessing the fundamental rights dimensions of data privacy in the smart metering context – serious questions should be asked as to whether the data collected is necessary or merely beneficial for the functioning of the system involving meters, grids, and the achievement of the benefits claimed for such smart metering. Thus, if the goal is to enable end-users to manage their own energy usage in a more timely, efficient and cost-effective fashion, then only minimal communication of energy data outside of the home is required, so as to allow billing to take place. If it is suggested that this fails to pass on information needed for, e.g., more responsive grid management, then information could be aggregated to provide data at a scale that is granular enough to serve that purpose, while not identifying individuals where this is not necessary to the systemic benefits to be gained.[127] Failure to consider these issues at early stages in the design and planning process has caused problems in various countries;[128] now that the issue is squarely on the agenda, there should be no excuses for failing to consider the data privacy questions, conducting impact assessments and keeping consumers fully informed of what information their meter will communicate about them and how it will be used.

the list of uses is specifically stated not to be exhaustive and that energy suppliers will inform the end-user of other such uses.

127 Murphy, n. 122, *supra*, citing K. Kursawe, G. Danezis & M. Kohlweiss, 'Privacy-Friendly Aggregation for the Smart-Grid', in S. Fischer-Hübner and N. Hopper (eds.), *Proceedings of the 11th Privacy Enhancing Technologies Symposium* (Waterloo, July 2011; http://research.microsoft.com/pubs/140692/main.pdf); and A, Cavoukian, 'Privacy by Design … Take the Challenge' (Information and Privacy Commissioner of Ontario, 2009; http://www.prvacybydesign.ca/content/uploads/2010/03/PrivacybyDesignBook.pdf).

128 I. Brown, 'Britain's Smart Meter Programme: A Case Study in Privacy by Design' (2014) 28 *IRLCT* 172, 180; C. Cuijpers and B.J. Koops, 'Smart Metering and Privacy in Europe: Lessons from the Dutch Case', in S. Gutwirth *et al* (eds.), *European Data Protection: Coming of Age* (Dordrecht: Springer Netherlands, 2013), 281.

4 Conclusions

The above discussion has given an overview of a range of areas of EU Energy law where fundamental rights have been, or seem likely to be, relevant. There emerges from the analysis in this paper a clearer idea of the *roles* played by fundamental rights in energy law and policy developments in the EU. Three broad roles can be discerned.

First, fundamental rights are helping – whether alongside or as a limit upon competition and free movement law – to define an acceptable range within which the EU and its Member States can pursue certain energy-related goals and policies. The unbundling discussion offers a nice illustration, showing acceptable 'bands' for regulatory intervention, safeguarding a degree of business and contractual freedom and autonomy, while acknowledging the justifiable trade and competition goals pursued by challenging the pre-existing structures. Similarly, the UK cases concerning damages claims for attempts retrospectively to change the rules concerning renewable energy show that care must be taken when designing such regimes. *Ex ante*, this should bring greater care to how the system should be set up and thought should be given to including transitional mechanisms within the scheme from the outset; a need has also been established, during the ongoing management of such schemes, for the protection of the interests of the very private investors which it was hoped would be incentivised to facilitate renewables deployment.

Second, the fundamental rights arguments have often brought a clearer focus and stronger analysis to address particular issues more coherently. Thus, policy consistency and reliability has been shown to be crucial to encouraging investment, whether in renewables, grid and network infrastructure or 'ancillary' services like smart metering: an acknowledgment that those who invest in such property and businesses have interests worthy of protection helps to concentrate the policy-maker's mind on such questions of consistency, coherence, predictability and dependability. Meanwhile, an appreciation of the privacy dimensions of smart metering serves to improve the design of such meters and the

systems that will use them, as well as to reassure the consumer that their data will not be used or disseminated in ways unacceptable to them, without their rights being respected. This is key to building consumer trust in the system.

Finally, and for the proper fundamental rights lawyer utterly unsurprisingly, the examples discussed in this paper reinforce the traditional role for fundamental rights of securing and enhancing the accountability of the State and government in its activities where the exercise of public power affects individual rights and interests, including those of businesses operating under their legal system.

Diagram 1: Vertical Integration in the Electricity Supply industry