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Prepare me softly: European integration in the energy sector

Od miękkiego do twardego prawa. Europejska integracja w sektorze energetycznym

Abstract: The article applies theoretical insights on the role of soft law in the EU legal system to the evolution of the Union's energy policy. The relationship between soft law and hard law remains a topic of scholarly debate, particularly in efforts to establish its precise role within the EU legal system. We identify and examine the key characteristics of soft law in the EU's energy policy. By juxtaposing the qualities of soft law with the evolution of the EU's energy sector, the article determines which features of soft law are particularly relevant to this domain. It highlights key aspects of the interplay between soft law and hard law, demonstrating how the former can serve as a precursor to the adoption of binding legislation.

Keywords: energy market, energy package, energy policy, hard law, hardening, soft law

Abstrakt: Niniejszy artykuł ma na celu zastosowanie teoretycznych rozważań na temat roli prawa miękkiego w systemie prawnym UE do ewolucji unijnej polityki energetycznej. Relacja między prawem miękkim a wiążącymi przepisami prawnymi pozostaje tematem debaty naukowej, w szczególności w celu ustalenia pozycji prawa miękkiego w systemie prawa UE. W artykule zidentyfikowano kluczowe cechy prawa miękkiego w polityce energetycznej UE. Poprzez zestawienie cech prawa miękkiego z ewolucją polityki energetycznej UE artykuł ma na celu określenie, które cechy prawa miękkiego są szczególnie istotne dla tego sektora. Podkreślono w nim kluczowe aspekty relacji między miękkim i "twardym" prawem, wskazując, w jaki sposób pierwsze z nich może służyć jako podstawa do późniejszego przyjęcia wiążących przepisów.

Słowa kluczowe: pakiet energetyczny, polityka energetyczna, prawo miękkie, prawo twarde, rynek energetyczny, utwardzanie prawa

1. Introduction

In the context of the European Green Deal and the Russo-Ukrainian War, energy policy[1] has become one of the most essential policy areas in the EU. Its Treaty-based goals, laid out in Article 194(1) TFEU, are to ensure the functioning of the energy market and to secure the energy supply in the Union. Other objectives are to promote energy efficiency and savings, develop new and renewable forms of energy and promote the interconnection of energy networks. Currently, the EU regulates numerous aspects of energy policy using both hard[2] and soft[3] law, drawing on the existing legal bases and the Member States' call to act decisively in the face of external challenges, e.g. the high dependence on Russian energy or political shocks in the Middle East.

However, the EU's competence to set energy policy was not always as wide-ranging as it is today. Energy was only added to the EU's shared compe-

[1] We use the terms *energy policy* and *energy sector* interchangeably.

[2] E.g. Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources and repealing Council Directive (EU) 2015/652, OJ L 2023/2413, 31.10.2023.

[3] E.g. European Commission of 18 May 2022, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU Plan*, COM/2022/230 final.

tence by the Treaty of Lisbon. For more than 50 years following the adoption of the Treaty establishing the European Economic Community in 1957, energy was a policy area at the core of Member States' sovereignty. Notwithstanding that legal context, the Community institutions regulated some aspects of energy policy, using soft law measures and – sometimes through competence creep – hard law.

In this vein, the article examines the transition from soft law to hard law in the EU's energy policy. The main resources for the analysis are acts adopted by the Commission and the Council before 2009, both hard law and soft law, and the literature on the subject. We argue that by adopting soft law instruments, the Community's objective was to test the Member States' reaction and prepare the regulatory framework for hard law measures, which proved quintessential in the event of Member States' low compliance with the soft law instruments or external energy crises demanding united action to secure energy supplies. Additionally, we find that – unlike in other policy areas (e.g. health or banking and financial services) – EU soft law in energy policy is ineffective during crises and needs to be supplemented by directives or regulations to achieve its objectives.

The first section of the article characterises EU soft law, combining the relevant literature with the CJEU's case law. Then, we present the transition from soft law to hard law in the EU's energy policy prior to the Treaty of Lisbon. In the analysis, we juxtapose the theory of soft law with the continuous hardening of EU legal acts concerning energy policy. On this basis, we discuss the findings of our investigation.

2. European Union soft law

The best way to explain EU soft law is to examine Mario Draghi's famous 2012 speech. The then ECB President declared that the EU "is ready to do whatever it takes to preserve the euro".[4] Apart from putting Frankfurt's weight behind the common currency and reassuring the financial market about the EU's determination to address the Eurozone crisis, the speech itself is the most effective soft law measure ever produced by the EU. Despite its non-binding form and lack of legal value, it immensely contributed to reducing the markets' anxiety and helped the Eurozone get back on track. The speech's particular effects uncover the essence of EU soft law.

[4] *Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012*, www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html [access: 12.12.2024].

In line with Draghi's speech, most academics define EU soft law as rules of conduct that are legally non-binding but may produce practical effects and have indirect legal effects.[5] The Treaties do not explicitly mention or define the term *soft law*. In turn, scholarly endeavours to characterise EU soft law contrast it with EU hard law, i.e. regulations, directives and decisions. The latter group are generally legally binding and have specific enforcement and sanction mechanisms which ensure Member States' compliance. Other (EU) hard law qualities that are lacking in EU soft law are the level of detail, the precision of provisions[6] and the prescriptive language.[7] When it comes to the language, EU hard law employs the modal verbs "shall" and "must" to impose obligations, while EU soft law instruments rely mainly on the modal verb "should". Finally, the obvious – but at times misleading – difference between hard and soft law measures is the title of the act in question.

The practical effects of EU soft law include changes in the behaviour and practices of EU Member States and institutions, for example, bringing an infringement case against a Member State following non-compliance with the Commission's reasoned opinion under Art. 258 TFEU. The mere possibility of legal proceedings being initiated may change the Member State's behaviour. The legal effects, on the other hand, refer mainly to soft law's capacity to change the rights and obligations of actors, e.g. creating the expectation that the enacting EU body will comply with the rules it has laid down in a soft law instrument.

EU soft law manifests in various forms beyond Draghi's speech. Article 288 TFEU specifies two types of acts – recommendations and opinions – that "shall have no binding force", thus meeting the main criterion of EU soft law. Recommendations typically guide the interpretation or content of EU law, while opinions present the position of an EU body in a given area. In addition to the Treaty-based measures, EU soft law also includes communications, codes of conduct, conclusions, declarations, frameworks, green papers, guidelines, inter-institutional agreements, notices, resolutions, standards, statements and

[5] See F. Snyder, *The effectiveness of European Community law: Institutions, processes, tools and techniques*, "Modern Law Review" 1993, vol. 56, no. 1, p. 19–54; L. Senden, *Soft law in European Community law*, Hart Publishing, Oxford–Portland 2004, p. 112; L.A. Jimenez, *Beyond bindingness: A typology of EU soft law legal effects*, in: P.L. Láncos, N. Xanthoulis, L.A. Jiménez (eds.), *The legal effects of EU soft law: Theory, language and sectoral insights*, Edward Elgar Publishing, Cheltenham–Northampton 2003, p. 9–32.

[6] Opinion of the Advocate General M. Bobek of 12 December 2017, C-16/16 P, *Belgium v. Commission*, EU:C:2017:959, paras. 123–143.

[7] F. Coman-Kund, C. Andone, *European Commission's soft law instruments: In-between legally binding and non-binding norms*, in: P. Popelier, H. Xanthaki, W. Robinson, J. Tiago Silveira, F. Uhlmann (eds.), *Lawmaking in multi-level settings: Legislative challenges in federal systems and the European Union*, Nomos, Baden-Baden 2019, p. 173–197.

white papers.[8] Potential authors of EU soft law instruments may include the EU institutions (e.g. the Commission) and numerous EU bodies, e.g. EU agencies.

One specific form of EU soft law is the open method of coordination, also known as *soft* or *new* governance.[9] Under this method, EU Member States can voluntarily pursue goals and standards set by the EU in specific policy areas, such as employment, the environment, pension reform, social inclusion, education or the European Semester. The performance of these States is then assessed by the Commission and *peer-reviewed* based on the Commission's recommendations and rankings. Finally, the Commission revises the goals and standards (e.g. through non-binding guidelines), taking into account the practices in the best-performing Member States. Although pursued via non-binding instruments, the open method of cooperation can profoundly change Member States' practical and legal behaviour through processes such as information flow, mutual learning and peer pressure.

Functionally, there are three main groups of EU soft law.[10] The first includes preparatory and informative measures, e.g. proposals for future action. The next group consists of interpretative and decisional tools. Interpretative soft law offers an interpretation that should be applied to EU hard law. Decisional soft law, on the other hand, explains how an EU body will apply specific provisions of EU law in an individual case. Finally, formal and steering instruments comprise the third group of EU soft law instruments. These acts aim to guide the EU's action in a non-binding way.

The specific nature of EU soft law raises questions concerning the reasons for its adoption and its justiciability in the EU legal system. The two principal reasons for the proliferation of EU soft law are the low legislative costs and the possibility to revise it swiftly in response to changing conditions. The latter benefit makes soft law a perfect instrument to govern during crises, as evidenced by Draghi's speech. Regarding the low legislative costs, EU bodies sometimes decide to regulate specific policy areas outside the Treaty-based legislative procedures to speed up the process and circumvent parliamentary and judicial review. Additionally, some contend that the EU executive employs soft law tools when it lacks the competence to establish hard law.[11] Conversely, others argue that

8 P. Hubkova, *Judicial review of EU soft law acts as a matter of the rule of law*, "European Public Law" 2023, vol. 29, no. 2, p. 181–198.

9 J. Scott, D.M. Trubek, *Mind the gap: Law and new approaches to governance in the European Union*, "European Law Journal" 2002, vol. 8, no. 1, p. 1–18, https://doi.org/ 10.1111/1468-0386.00139.

10 L. Senden, *Soft law…*, p. 45.

11 M. Chamon, N. de Arriba-Sellier, *FBF: On the justiciability of soft law and broadening the discretion of EU agencies*, "European Constitutional Law Review" 2022, vol. 18, no. 2, p. 286–314.

the EU typically employs soft law instruments when it regulates a given policy covered by shared or supporting competences for the first time. Accordingly, if the non-binding regulation does not lead to convergence between Member States where the EU deems it particularly important, it moves to adopt hard law (potentially after a Treaty revision).

For a long time, the judicial review of EU soft law was the proverbial elephant in the room, especially considering soft law's potential effects and the reasons behind its adoption. The difficulty is that as a non-binding instrument, EU soft law is not subject to the legality review under Art. 263 TFEU. Consequently, neither EU bodies, the Member States nor their citizens have the standing to bring the action for annulment before the Court. Only if the CJEU determines that the content of a soft law measure brings it close to hard legislation, e.g. through prescriptive language, may it review its legality.[12] While this means that the Court theoretically takes an approach in which the content of the act in question triumphs over its form, the downside is that Luxembourg has not yet applied it to review formally non-binding legislation under Article 263 TFEU.

For now, the main actors that may – albeit indirectly – initiate a soft law review before the CJEU are the national courts, making the preliminary references to Luxembourg. Pursuant to Art. 267 TFEU, the Court can issue preliminary rulings concerning the validity and interpretation of all EU acts, including soft law. The national courts' competence in such matters is reaffirmed by the *Grimaldi* case law, according to which Member States' courts are bound to consider soft law tools to decide the disputes submitted to them, particularly where they cast light on the interpretation of national measures adopted to implement them or where they are designed to supplement binding EU provisions.[13] As a result, being obliged to take EU soft law into account in national proceedings, national courts must also have the opportunity to ask for the Court's clarification regarding the interpretation and validity of those acts.

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[12] Cf. Judgment of the CJ of 20 February 2018, C-16/16 P, *Belgium v. Commission*, EU:C:2018:79; Judgment of the CJ of 25 March 2021, C-501/18, *BT v. Balgarska Narodna Banka (BNB)*, EU:C:2021:249; Judgment of the CJ of 15 July 2021, C-911/19, *Fédération bancaire française (FBF) v. Autorité de contrôle prudentiel et de résolution (ACPR)*, EU:C:2021:599.

[13] Judgment of the CJ of 13 December 1989, C-388/88, *Grimaldi*, EU:C:1989:646.

3. Development of EU energy policy

The EU's involvement in energy policy dates back to 1968, when a Commission memorandum titled "First guidelines for a Community energy policy"[14] was presented to the Council. This soft law act pointed out that there are significant disparities between the energy policies of the Member States and that the lack of cohesion endangers European integration.[15] The Commission proposed that to prevent any disruption to economic and political integration, more decisive measures regarding energy should be adopted.

Previously, the policy had been defined by the Protocol of the Special Council of Ministers of 1964, summarising agreement of the governments of the Member States on energy problems.[16] The Protocol separated energy policy by fuels, dividing it into sections dedicated to coal, hydrocarbons and nuclear power. The intent for the energy policy was to ensure economically reasonable exploitation of available sources of energy while avoiding distortions between the Member States and disruption of the common market. To do that, a development framework was proposed for the three types of fuels mentioned above.

It is not surprising that in 1968 the Commission agreed the proposed goals of energy policy set out in the Protocol of 1964.[17] However, citing the peculiarities and specific needs of the energy sector, the Commission argued that greater supervision over the sources supplying energy is needed. It even went so far as to propose the possibility of influencing their use at the European level. The most interesting proposals included harmonising the national provisions regarding equipment for electric power stations, the transport of hydrocarbons and the quality of oil. It is worth pointing out that harmonisation measures are typically adopted by acts of hard law, so realising this goal would inevitably lead to a certain hardening of energy policy. Even a basic harmonisation for environmental protection was proposed, to the extent that pollution can affect the quality of energy products. It seems reasonable to state that at that time the

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14 First guidelines for a Community energy policy, Memorandum presented by the Commission to the Council on 18 December 1968, COM/68/1040.

15 Ibidem, p. 5.

16 Protocol of Agreement on energy problems, reached between the Governments of the Member States of the European Communities at the 94th meeting of the Special Council of Ministers of the European Coal and Steel Community, held on 21 April 1964 in Luxembourg, OJ 69, 30.04.1964, p. 1099–1100.

17 First guidelines for a Community energy policy, Memorandum presented by the Commission to the Council on 18 December 1968, COM/68/1040, p. 6.

Commission assumed the role of a "policy entrepreneur" within the EU and went on to remain active in the process of creating the energy policy.

Soon after, in 1972, a relevant hard law measure was adopted, i.e. a Council regulation introducing the obligation for Member States to notify the Commission about imports of crude oil and natural gas.[18] In the preamble to the regulation, the Council expressed its approval for the principles of the energy policy proposed by the Commission and underscored the fact that establishing the policy required the most accurate information possible on the supply and demand of oil and natural gas. Moreover, the Commission was authorised to adopt additional provisions to implement the regulation,[19] which it did in 1973.[20]

The next milestone for EU energy policy came in the 1980s, which started with yet another soft law measure: the Commission-inspired Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States.[21] The Resolution brought many interesting insights to the energy policy. It underscored the value of the existing framework for coordinating and harmonising energy policies and the need to "put the concept of Community solidarity into practice", explaining that the Member States should make comparable efforts to achieve the goals of the energy policy. In the Resolution, the Council provided an updated set of policy goals, now including greater integration, promotion of technological innovations and intra-Community energy balance. To achieve these ambitious goals, the Commission was requested to (i) make recommendations and proposals to increase cohesion of the Member States' energy policies, (ii) collect annual reports on the energy situations of the Member States and (iii) submit biannual surveys of the progress made in the energy policy.[22] Effectively, the Commission was appointed as coordinator of the common energy policy. To allow for efficient coordination of the policy, Member States were obliged to not only work towards the established goals, but also to provide the Commission with the annual reports. The year 1995 was presented as a checkpoint for policy development.

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18 Regulation (EEC) No. 1055/72 of the Council of 18 May 1972 on notifying the Commission of imports of crude oil and natural gas, OJ L 120, 25.05.1972, p. 3-6, Art. 1.

19 Ibidem, Art. 4.

20 Regulation (EEC) No. 1068/73 of the Commission of 16 March 1973 applying Council Regulation (EEC) No. 1055/72 of 18 May 1972 on notifying the Commission of imports of crude oil and natural gas, OJ L 113, 28.04.1973, p. 1–13.

21 Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States, OJ C 241, 25.09.1986, p. 1–3.

22 Council Resolution of 16 September 1986, OJ C 241, 25.09.1986, p. 3.

The Commission followed up the Resolution in 1988 by publishing yet another soft law act: "The Internal Energy Market" working document.[23] Reference is made to the 1985 White Paper on completing the internal market,[24] pointing out that the internal energy market should also be built in line with the general internal market provisions in the White Paper. In "The Internal Energy Market", the Commission lists a few policy tools that should be used to develop the EU energy sector. The primary tool is applying the Treaties and secondary legislation to ensure that competition is respected and solidarity is encouraged.[25]

The most interesting aspect for this article is the fourth tool, which is Commission-specific initiatives in the area of energy. It is argued that these actions allowed the Union to affirm its identity in this field, while respecting existing differences.[26] The document goes on to describe in detail the various areas of the energy sector. For each type of fuel, a set of obstacles for integration and corresponding solutions are proposed. For example, in the oil sector, the Commission proposed to harmonise the taxation rules, especially VAT rates, and to review provisions regarding commercial monopolies.[27] Although "The Internal Energy Market" is without doubt a document of great value as a historical testimony of the energy policy, equipped with supporting statistical data, it does not include a great number of precise provisions for developing policy. It reads more as a policy guide than a comprehensive roadmap of incoming legislation. However, it ultimately led to the adoption of formal hard law proposals in the form of draft directives.

One proposal was a draft Council Directive on the transit of electricity through transmission grids, which was soon adopted, in 1990.[28] It introduced the requirement to notify the Commission and national authorities about electricity transit contracts and it established conditions for such transit, including non-discriminatory and fair treatment for all parties involved.[29] It is an interesting case of EU provisions having direct impact on the energy systems of Member States

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23 Commission of the European Communities of 2 May 1988, *The Internal Energy Market* (Commission Working Document), COM/88/238 final.

24 Commission of the European Communities of 14 June 1985, *Completing the Internal Market*, White Paper from the Commission to the European Council, COM/85/310 final.

25 Commission of the European Communities of 2 May 1988, *The Internal Energy Market* (Commission Working Document), COM/88/238 final, p. 11.

26 Ibidem, p. 12.

27 Ibidem, p. 54–55.

28 Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids, OJ L 313, 13.11.1990, p. 30–33.

29 Art. 3 of Directive 90/547/EEC.

without the Treaties providing a direct competence for such measures. The preamble of the Directive indicated as its legal basis Article 100a of the Treaty establishing the European Economic Community, a provision on the internal market and its functioning which does not mention energy systems. In line with the Commission's proposal, it was stated that integration of the European energy market is essential for completing the internal market.

Following the developments in the 1980s, the Commission intensified its efforts to introduce an energy policy to the EU. The efforts were now strengthened by the 1992 addition of "measures in the sphere of energy" by the Treaty on European Union. In 1995 two major soft law documents were published: the "For a European Union Energy Policy" Green Paper[30] and "An Energy Policy for the European Union" White Paper.[31] Both documents sought to establish a more solid and structured energy policy within the EU, building on the newly obtained foundation in the TEU. While the Green Paper's aim was to "usher in a broad debate"[32] on what should be the aims of the energy policy, the White Paper reached further, stating that the Commission was ready to "use all of the provisions of the Treaties" to, inter alia, establish a framework for cooperation with the Member States in order to achieve jointly defined aims.[33] Noting the lack of energy provisions in the acquis, a review of existing legislation was conducted. The Commission pointed out the need to introduce a clear division of responsibilities in various areas of the EU energy policy. The main idea behind this era of EU energy policy was to create an internal energy market. To do so, liberalisation and harmonisation measures were proposed.

What followed was one of the undisputable milestones of the EU energy policy, namely the adoption of the First Energy Package, consisting of two directives: one for the electricity market[34] and one for the gas market.[35] The groundbreaking character of these acts stems from the fact that they both introduce a number of binding, enforceable provisions that the Member States all had to implement in their national legal systems. The First Energy Package introduced many con-

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30 Commission of the European Communities of 11 January 1995, *For a European Union energy policy*, Green Paper, COM (94) 659 final.

31 Commission of the European Communities of 13 December, *An energy policy for the European Union*, White Paper, COM (95) 682 final.

32 Ibidem, p. 2.

33 Ibidem.

34 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.01.1997, p. 20–29.

35 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.07.1998, p. 1–12.

cepts and principles that are still fundamental to energy law, such as the third party access (TPA) rule or the definition of a vertically integrated undertaking. Another novelty in the sector was the Council Decision laying down measures for the development of trans-European energy networks in 1996.[36]

Although the legislative development of the late 20th century was certainly a success of the EU energy policy, the early 21st century came with new challenges for the freshly integrated European energy sector. The bloc's dependence on external energy imports reached 50% and was growing, while the main suppliers of oil and gas were not as reliable as had been assumed.[37] Predicting possible hardships resulting from that unreliability, the Commission published another soft law act in 2000, the Green Paper "Towards a European Strategy for the Security of Energy Supply".[38] The Commission acknowledged that the internal energy market had been achieved,[39] which confirms the effectiveness of the previous measures. However, the general state of the common energy policy was seen as insufficient and inefficient, leaving the European Union with too few instruments to tackle energy challenges.[40] For the first time, renewable energy sources were recognised as a potential foundation for the future EU energy system, fulfilling both the security and environmental needs of the union. The Commission underscored the need for more harmonised taxation measures for energy products, citing that the tools at the time varied from product to product and from Member State to Member State.[41] It was noted that the lack of harmonisation created a risk of distorting competition between the Member States. Another policy constraint listed in the Green Paper was the underdeveloped international transmission system for electricity and natural gas.[42]

The 2000 Green Paper marks a new era of EU energy policy, in which soft nudges to integrate European energy stopped being sufficient for the ambitious goals of the Union. Apart from the adoption of two new iterations of gas and electricity directives, the second energy package introduced in 2003 includ-

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36 Council Decision 96/391/EC of 28 March 1996 laying down a series of measures aimed at creating a more favourable context for the development of trans-European networks in the energy sector, OJ L 161, 29.06.1996, p. 154–155.

37 M. Natorski, A. Herranz Surrallés, *Securitizing moves to nowhere? The framing of the European Union energy policy*, "Journal of Contemporary European Research" 2008, vol. 4, no. 2, p. 71–72.

38 Commission of the European Communities of 29 November 2000, *Towards a European strategy for the security of energy supply*, Green Paper, COM (2000) 769 final.

39 Ibidem, p. 3.

40 Ibidem, p. 9–10.

41 Ibidem, p. 56.

42 Ibidem, p. 69–70.

ed the Regulation of the Parliament and the Council regarding cross-border exchanges in electricity and conditions for access to related infrastructure.[43] The Regulation provided depth to the Council Decision of 1996, significantly expanding the set of measures applicable to electricity networks in order to achieve the Commission's goal of integrating European energy systems. An analogous regulation for the natural gas sector was adopted in 2005.[44] All of the acts included in the second package and the following regulation constitute hard law measures.

Another noteworthy development of that era is the adoption of the Council Directive concerning measures to safeguard the security of natural gas supply,[45] which in an especially decisive way realised the goals of energy policy, as described in the most recent Green Paper. Not only were the Member States obliged to create natural gas reserves in their national systems according to rules set out in the Directive and to report doing so to the Commission, but a Gas Coordination Group was also established to coordinate the implementation of these measures. In doing so, the Directive significantly interfered with the national energy policies, clearly showing that security of the energy system was the priority of the policy at that time.

The energy policy cycle repeated once again before the adoption of the Lisbon Treaty, with a third legislative package adopted in 2009. The package was preceded by two pieces of soft law published by the Commission: the 2006 Green Paper, "A European Strategy for Sustainable, Competitive and Secure Energy",[46] and the 2007 Communication, "An Energy Policy for Europe".[47] These documents were very similar in content, providing yet another policy framework for the energy sector and focussing on sustainability, security and competitiveness. However, due to the Russian–Ukrainian conflicts in 2005 and 2006, which resulted in gas supplies being cut off, they impart an increased sense of urgency. The Commission underlined in the Green Paper that it had been specifically

[43] Regulation (EC) No. 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L 176, 15.07.2003, p. 1–10.

[44] Regulation (EC) No. 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, OJ L 289, 3.11.2005, p. 1–13.

[45] Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply OJ L 127, 29.04.2004, p. 92–96.

[46] Commission Green Paper of 8 March 2006, *A European strategy for sustainable, competitive and secure energy*, Green Paper COM/2006/105 final.

[47] Communication from the Commission to the Council and the Parliament, *An energy policy for Europe*, COM/2007/1 final.

asked by heads of state and governments to take forward the energy policy.[48] It further confirms that the previous Green Paper from 2000 was a milestone in the development of the policy, but that more momentum is needed.[49] On 1 January 2007 the Commission's Communication provided a concrete action plan for the Green Paper and the "new European Energy Policy".[50] It directly stated that effective regulation is needed, so that national regulatory bodies would have harmonised levels of power and independence.[51]

The goal was achieved with a set of regulations that enhanced energy transmission networks and established three new European authorities: the Agency for the Cooperation of Energy Regulators (ACER)[52] and two European Networks of Transmission System Operators, for electricity[53] and gas.[54] The third legislative package was very impactful for the policy, with most of its acts remaining in force until at least 2020; Regulation 715/2009 is still binding at the date of this publication. These were the last major energy-related pieces of European legislation before adoption of the Treaty of Lisbon. Most of them were issued on the basis of Articles 95 and 100 of the Treaty establishing the European Community, which pertain to the functioning of the internal market.

In 2009, with the Treaty of Lisbon entering into force, the TFEU was finally equipped with a dedicated Title XXI, which relates to energy policy. Article 194 is its legal centrepiece, setting out the principles and goals of the policy, as well as a dedicated legislative procedure. From this point onward, hard law acts referring to energy matters have been adopted on this basis, excluding crisis and environmental protection measures, which have dedicated provisions.

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48 Commission Green Paper of 8 March 2006, *A European strategy…*, p. 4.

49 Ibidem.

50 Communication from the Commission to the Council and the Parliament. *An energy policy for Europe*, COM/2007/1 final, p. 5.

51 Ibidem, p. 8.

52 Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.08.2009, p. 1–14.

53 Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003, OJ L 211, 14.08.2009, p. 15–35.

54 Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005, OJ L 211, 14.08.2009, p. 36–54.

4. Analysis

The development of the EU energy policy offers a unique insight into different roles of soft law in the Union's legal system. Because of the long absence of explicit energy provisions in the Treaties, the development of necessary legislation required a specific approach that would allow binding legal acts to be adopted outside the existing legislative framework. Soft law proved effective in that regard, allowing policy fundamentals to be introduced to the Community stakeholders before they are established in hard law.

A clear pattern is present in the history of EU energy law that all major hard law regulations and directives were preceded by soft law measures. The trend continues today and can be seen in such documents as the European Green Deal or the REPowerEU. It can therefore be confirmed that in this case, soft law is to be considered a preparatory measure for future legislative developments.

By adopting the soft law analysed herein, the Commission realises its role as a "policy entrepreneur" or a "policy manager". The term refers to policy-shaping activities performed by the Commission in areas dominated by Member States.[55] Energy is without doubt such an area. As described in the previous section of the article, the policy entrepreneurship in this sector can be regarded as successful. Notwithstanding the lack of explicit Treaty provisions, the Commission was able to steer the debate so as to allow for progressively more impactful energy measures to be adopted, from reporting obligations and very general safety measures in the 1970s and 1980s to the harmonised gas and electricity markets and the creation of ACER in 2009. It is remarkable how much European intervention was allowed without an explicit competence stemming from the EU Treaties. These soft law documents certainly played a part in making that happen.

While this *modus operandi* successfully navigated the EU through the transition from soft law to hard law, eventually ensuring an effective policy and high degree of compliance with legislation, the first steps on the way went against the principle of conferral. The EU's action in energy policy lacked an explicit legal basis in the Treaties until the adoption of the Lisbon Treaty, which regulates the sector in a separate Treaty title. Most of Brussels' endeavours in this area preceding the Treaty change, e.g. adopting hard law directives and regulations, are questionable from the perspective of dividing competences between the EU and its Member

[55] See also E. Schön-Quinlivan, M. Scipioni, *The Commission as policy entrepreneur in European economic governance: A comparative multiple stream analysis of the 2005 and 2011 reform of the Stability and Growth Pact*, "Journal of European Public Policy" 2016, vol. 24, no. 8, p. 1172–1190; B. Laffan, *From policy entrepreneur to policy manager: The challenge facing the European Commission*, "Journal of European Public Policy" 1997, vol. 4, no. 3, p. 422–438.

States and remain at odds with the rule of law. Equally dubious is the Commission's reasoning from the 1988 Resolution, linking the full attainment of the internal market with far-reaching integration in the energy sector. Viewing the early stages of European integration in the energy sector from this perspective, we can use another phrase and characterise it as "competence creep".

Another important factor for adopting more decisive measures was the so-called "policy windows", signals from a broader policy environment that encourage response from international agents.[56] In the history of European energy, these windows were mainly caused by destabilised fuel supply chains, environmental protection goals and efforts to prevent climate change. External threats to stability present a perfect opportunity to increase integration within the EU; as the Commission pointed out in its 2006 Green Paper: "The EU has not just the scale but also the policy range to tackle the new energy landscape".[57] Situations of crisis helped the Member States to understand that and (willingly) cede some competence.

Due to the specific nature of the energy policy, EU soft law tools – viewed separately from the hard law acts that followed them – played a limited role in integrating the energy sectors of the Member States. Taking the form of communications, green papers and white papers, they are mainly soft law measures with preparatory and informative functions. On the one hand, this is understandable, as more far-reaching soft law acts – i.e. interpretative and decisional tools – are usually intertwined with hard law regulations that did not exist at that time. On the other hand, the fact that the Community executive used the less wide-ranging soft law in the early stages of European integration in the energy sector explains the subsequent need for more binding legislation to influence the Member States' behaviour and legal systems. This is even more evident when considering that most European capitals viewed securing energy supplies and guaranteeing adequate energy reserves as a purely national competence.

The preparatory and informative soft law tools are not well-suited to addressing potential crises. After the 2000 non-binding Green Paper identified the bloc's overreliance on external energy imports, the solution was to adopt the second energy package in the form of hard law regulations. The pattern repeats throughout the next stages of European integration in the energy sector. Its most recent iteration is the non-binding REPowerEU Communication – proposing

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[56] See also P. Copeland, S. James, *Policy windows, ambiguity and Commission entrepreneurship: Explaining the relaunch of the European Union's economic reform agenda*, "Journal of European Public Policy" 2013, vol. 21, no. 1, p. 1–19.

[57] Commission Green Paper of 8 March 2006, *A European strategy…*, p. 5.

to reduce the EU's dependence on Russian fossil fuels in the face of the 2022 Russo-Ukrainian war – and the subsequent hard law legislation.

The soft law/hard law dynamic in the EU energy sector stands in contrast to the notion of soft law as a crisis management tool. Unlike in the energy sector, soft law was among the main instruments the EU executive used to address the Eurozone crisis or the COVID-19 pandemic. Especially during the latter crisis, non-binding acts influenced certain aspects of the Member States' health policy independent of hard law legislation. Apart from the explanation that the function of EU soft law is sector-specific, we observe that the soft law adopted in the energy sector is genuinely *soft*. In contrast, the acts adopted in the health or banking and financial services policies tend to exhibit certain hard law qualities.

The last observation touches upon the potential judicial review of soft law and the possibility of verifying whether it is genuinely non-binding and adopted in accordance with the Treaty provisions. As it stems from our analysis, one may hardly suspect the soft law acts adopted in the energy sector of having hidden hard law effects. There is little to no reason for judicial control over preparatory and informative soft law instruments in the field of energy policy, as they merely propose a course of common action that is then established in hard law legislation. From this vantage point, soft law presents the Commission or Council's view on the need to integrate certain aspects of the energy sector, setting the scene for more detailed provisions in the form of binding regulations and directives. Notably, the views expressed in soft law are not binding upon the institutions or Member States. They could be transformed into hard law using Treaty-based legislative procedures. The resulting legislation could then be subject to a complete judicial review at the EU level, including through the action for annulment under Art. 263 TFEU, thus potentially addressing the problem of competence creep.

5. Conclusions

The article examined the transition from soft law to hard law in the EU energy policy prior to the Lisbon Treaty. Drawing on the existing literature on EU soft law and the legislation adopted by the Community institutions before 2009, we identified four characteristics of the legalisation[58] concerning the European energy sector.

[58] For more on legalisation, see F. Terpan, *Soft law in the European Union: The changing nature of EU law*, "European Law Journal" 2015, vol. 21, no. 1, p. 68–96.

Firstly, the role of soft law in the EU energy sector proves to be limited to gauging the Member States' reaction to Brussels' interference with their national energy policies and eventually (softly) preparing them for binding legislation. The function of the soft law in the area of energy policy is purely preparatory and informative, devoid of hidden hard law effects. It is also a perfect means to allow the Commission to act as a "policy entrepreneur" without creating negative consequences for the EU legal system. If the Member States disagree with the vision sketched out in a given preparatory soft law document, the institutions no longer pursue it through binding legislation, thus leaving the national competence intact.

Secondly, we observe that the reasons for adopting soft law in the EU energy sector are related to the general attempt to provide energy security to the Member States and the so-called "policy windows". On the one hand, the Brussels-inspired push to integrate the national energy policies came from the need to secure adequate energy supplies from reliable partners in the face of numerous energy crises in the 20th century. Additionally, the Commission justified the plans for further integration in this respect with the aspiration of completing the internal market. On the other hand, the specific external threats to the energy security of the Union presented the institutions with a perfect explanation of the need to harmonise or even unify certain aspects of the energy sector. In both cases, soft law instruments served as harbingers of what would come in a policy area primarily governed by national law.

Thirdly, although we do not find reasons to contest the soft law on energy policy because of its limited role in legalising the EU energy policy, we do identify such reasons for the hard law acts which de facto put into practice the visions outlined in the non-binding tools. Adopting directives and regulations concerning the energy sector prior to the Lisbon Treaty solely on the basis of Article 100a of the EEC Treaty can arguably be considered a transgression of the principle of conferral. In this context, it seems that the hardening of the energy policy at the EU level was generally supported by the Member States, as they did not challenge the hard law with annulment. On the other hand, the mere fact that the energy regulations and directives were adopted through legislative procedures confirms the finding that the majority of the Member States did not oppose deeper integration in the energy policy.

Lastly, unlike in most EU policy areas, soft law in energy policy is not the main instrument for crisis management. This is likely due to the nature of the energy sector as a policy that was long governed by national capitals and associated with the core of national sovereignty. In consequence, soft law usually only

identifies the internal or external threats to EU energy security, which are later addressed in binding legislation. We categorically emphasise that the content of most of the soft law instruments issued before the adoption of the Lisbon Treaty did not even informally change the practices of the Member States (practical effects). The soft law tools merely presented the Member States with a certain course of action for solving common problems. The soft law on the energy sector is thus wholly dependent on the binding acts which transform it into practice.

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