

European and International Energy Law

- I. Energy law and the transition of energy supply systems – the political and legal backgrounds
 1. The international law on climate change and its relevance for energy law
 2. Single market and environmental protection in the law of the European Union: Reconciling conflicts in EU energy law
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- II. International energy law: The current state of climate change law and its obligations for the international community
 - 1. The UN Framework Convention on Climate Change
 - 2. The Kyoto Protocol
 - 3. The Paris Agreement

1992 United Nations Framework Convention on Climate Change

<http://unfccc.int/resource/docs/convkp/conveng.pdf>

1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change

<http://unfccc.int/resource/docs/convkp/kpeng.pdf>

UNFCCC

Article 2 - OBJECTIVE

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Article 3 - PRINCIPLES

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

[...]

Article 4 - COMMITMENTS

1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

[...]

2. The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances,

as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

[...]

Article 17 - PROTOCOLS

1. The Conference of the Parties may, at any ordinary session, adopt protocols to the Convention.
2. The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a session.
3. The requirements for the entry into force of any protocol shall be established by that instrument.
4. Only Parties to the Convention may be Parties to a protocol.
5. Decisions under any protocol shall be taken only by the Parties to the protocol concerned.

KYOTO PROTOCOL

Article 3

1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

2. Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol.

3. The net changes in greenhouse gas emissions from sources and removals by sinks resulting from direct human-induced land use change and forestry activities, limited to afforestation, reforestation, and deforestation since 1990, measured as verifiable changes in stocks in each commitment period shall be used to meet the commitments in this Article of each Party included in Annex I. The greenhouse gas emissions from sources and removals by sinks associated with those activities shall be reported in a transparent and verifiable manner and reviewed in accordance with Articles 7 and 8.

[...]

Article 6

1. For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that:

[...]

Article 12

1. A clean development mechanism is hereby defined.

2. The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

3. Under the clean development mechanism:

(a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and

(b) Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

Article 17

The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3 of this Protocol. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article.

Article 18

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

Article 25

1. This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.

Annex A

Greenhouse gases

Carbon dioxide (CO₂)

Methane (CH₄)

Nitrous oxide (N₂O)

Hydrofluorocarbons (HFCs)

Perfluorocarbons (PFCs)

Sulphur hexafluoride (SF₆)

Sectors/source categories

Energy

Fuel combustion

Energy industries

Manufacturing industries and construction

Transport

Other sectors

Other

Fugitive emissions from fuels

Solid fuels

Oil and natural gas

Other

Countries included in Annex B to the Kyoto Protocol for the first commitment period and their emissions targets

(<https://unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/kyoto-protocol-targets-for-the-first-commitment-period>)

Country	Target (1990** - 2008/2012)
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EU-15*, Bulgaria, Czech Republic, Estonia, Latvia, Liechtenstein, Lithuania, Monaco, Romania, Slovakia, Slovenia, Switzerland	-8%
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US***	-7%
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Canada,**** Hungary, Japan, Poland	-6%
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Croatia	-5%
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New Zealand, Russian Federation, Ukraine	0
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Norway	+1%
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Australia	+8%
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Iceland	+10%
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* The 15 States who were EU members in 1997 when the Kyoto Protocol was adopted, took on that 8% target that will be redistributed among themselves, taking advantage of a scheme under the Protocol known as a “bubble”, whereby countries have different individual targets, but which combined make an overall target for that group of countries. The EU has already reached agreement on how its targets will be redistributed.

** Some EITs have a baseline other than 1990.

*** The US has indicated its intention not to ratify the Kyoto Protocol.

**** On 15 December 2011, the Depositary received written notification of Canada's withdrawal from the Kyoto Protocol. This action became effective for Canada on 15 December 2012.

2009 Copenhagen Accord

Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009

<http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>

2011 Cancun Agreements

Decision 1/CP.16 - The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention,

<http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>

Decision 1/CMP.6 - The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session

<http://unfccc.int/resource/docs/2010/cmp6/eng/12a01.pdf>

2012 Durban Decisions

Decision 1/CP.17 - Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action

Decision 2/CP.17 - Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention

<http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf>

Decision 1/CMP.7 - Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its sixteenth session

<http://unfccc.int/resource/docs/2011/cmp7/eng/10a01.pdf>

2015 Paris Agreement, 2016 Entry into force

https://unfccc.int/sites/default/files/english_paris_agreement.pdf

2018 Katowice Climate Package (COP 24 / CMP 14 / CMA 1.3)

<https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package>

2021 Glasgow Climate Pact (-/CP.26 / -/CMA.3)

https://unfccc.int/sites/default/files/resource/cma2021_L16_adv.pdf

https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf

“36. Calls upon Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phase-out of unabated coal power and inefficient fossil fuel subsidies, recognizing the need for support towards a just transition; [...]”

“20. Calls upon Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition; [...]”

PARIS AGREEMENT

Article 2

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2° C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5° C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 3

As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.

Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

[...]

9. Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement and be informed by the outcomes of the global stocktake referred to in Article 14.

10. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall consider common time frames for nationally determined contributions at its first session.

11. A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

12. Nationally determined contributions communicated by Parties shall be recorded in a public registry maintained by the secretariat.

13. Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

Article 6

1. Parties recognize that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity.

2. Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement. [...]

Article 7

1. Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2.

2. Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change. [...]

Article 8

1. Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement. [...]

Article 9

1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.
2. Other Parties are encouraged to provide or continue to provide such support voluntarily.
3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts. [...]

Article 14

1. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.

2. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall undertake its first global stocktake in 2023 and every five years thereafter unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Agreement. [...]

ENERGY CHARTER TREATY

Article 2 - Purpose of the Treaty

This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

Article 10 - Promotion, protection and treatment of investments

1. Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties to make investments in its area. Such conditions shall include a commitment to accord at all times to investments of investors of other Contracting Parties fair and equitable treatment. Such investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. [...]

Article 13 - Expropriation

1. Investments of investors of a Contracting Party in the area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') except where such expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation.

III. EU energy law and policy: A multi-dimensional project

- Market
- Security
- Climate protection
- Consumers

Law-making powers of the European Union.

1. Primary and secondary EU law.
2. The conferral of competences.

Article 5 TEU

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. [...]

3. The relationship between EU competences and competences of the Member States.
4. Instruments for rule-making by the European Union.

Specific features of European Union law.

1. The principle of supremacy.
2. The principle of direct effect.
3. Direct effect of EU directives.
4. State liability for breach of EU Law.

Article 288 TFEU

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

1. The Treaty of Lisbon and the introduction of Art. 194 TFEU

Article 194 TFEU

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Article 191 TFEU

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Article 192 TFEU

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: [...]

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. [...]

2. The single market in energy: An EU target for more than 20 years
 - a. Primary law: The framework for the Single Market (market freedoms and state aid law)
 - b. Secondary legislation: Designing the markets for electricity and gas

a) Primary law: The framework for the single market

Article 26 TFEU

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

[...]

Article 34 TFEU

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

ECJ, 11/7/1974, Case 8/74 – Dassonville, ECR 1974, p. 837

Article 35 TFEU

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36 TFEU

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

ECJ, 20/2/1979, Case 120/78 – Rewe (Cassis de Dijon), ECR 1979, p. 649

*ECJ Case 72/83 – Campus Oil, ECR 1984 p. 2727

*ECJ Case C-379/98 – PreussenElektra, ECR 2001 p. I-2099

*ECJ Case C-573/12 – Ålands vindkraft

*ECJ Case C-492/14 – Essent Belgium

Article 107 TFEU

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market: [...]

3. The following may be considered to be compatible with the internal market: [...]

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; [...]

*ECJ Case C-379/98 – PreussenElektra, ECR 2001 p. I-2099

*ECJ Case C-206/06 – Essent Netwerk Noord, ECR 2008 p. I-5497

*ECJ Case C-262/12 – Vent de Colère !

*ECJ Case C-405/16 P – Germany v Commission

Article 108 TFEU

[...]

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

Article 108 TFEU

[...]

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 170 TFEU

1. To help achieve the objectives referred to in Articles 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

2. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union.

Article 171 TFEU

1. In order to achieve the objectives referred to in Article 170, the Union:
 - shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,
 - shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,
 - may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific projects in Member States in the area of transport infrastructure.

The Union's activities shall take into account the potential economic viability of the projects.

Article 171 TFEU (continued)

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 170. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

3. The Union may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks.

Article 122 TFEU

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

b) Secondary legislation: Designing the markets for electricity and gas

Article 114 TFEU

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

[...]

The Players on the Energy Market:

- Consumers
- Energy companies (formerly vertically-integrated energy companies)
 - Production/generation
 - Supply
 - Transmission systems operator (transmission grids ~ 220/330 kV)
 - Distribution system operator (distribution networks ~ 110 kV)

- National regulatory authorities
- Agency for the cooperation of energy regulators (ACER)
- European Commission

aa) The electricity market directives until 2009

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

- beginning of market liberalisation
- admission of new electricity suppliers to Member States' markets
- (certain) customers can choose their electricity supplier
- third party access to electricity networks

Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC

- market liberalisation for all customers
- regulated third party access
- unbundling of supply, generation and networks (accounting, organisational, legal)

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC

- consumer protection
- ownership unbundling
- certification of transmission system operators
- independent national regulatory authorities

National regulatory authorities

Article 35 - Designation and independence of regulatory authorities

1. Each Member State shall designate a single national regulatory authority at national level. [...]

4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:

(a) is legally distinct and functionally independent from any other public or private entity;

(b) ensures that its staff and the persons responsible for its management:

- (i) act independently from any market interest; and
 - (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37.
5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:
- (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and

(b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

Article 36 - General objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 37, in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies:

(a) promoting, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, secure and environmentally sustainable internal market in electricity within the Community, and effective market opening for all customers and suppliers in the Community and ensuring appropriate conditions for the effective and reliable operation of electricity networks, taking into account long-term objectives;

- (b) developing competitive and properly functioning regional markets within the Community in view of the achievement of the objectives referred to in point (a);
- (c) eliminating restrictions on trade in electricity between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate electricity flows across the Community;
- (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer oriented, and promoting system adequacy and, in line with general energy policy objectives, energy efficiency as well as the integration of large and small-scale production of electricity from renewable energy sources and distributed generation in both transmission and distribution networks;

(e) facilitating access to the network for new generation capacity, in particular removing barriers that could prevent access for new market entrants and of electricity from renewable energy sources;

(f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration;

(g) ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection;

(h) helping to achieve high standards of universal and public service in electricity supply, contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.

Article 37 - Duties and powers of the regulatory authority

1. The regulatory authority shall have the following duties:

(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;

(b) ensuring compliance of transmission and distribution system operators and, where relevant, system owners, as well as of any electricity undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross-border issues;

(c) cooperating in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency; [...]

6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

(a) connection and access to national networks, including transmission and distribution tariffs or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks;

(b) [...]; and

(c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.

7. The methodologies or the terms and conditions referred to in paragraph 6 shall be published.

8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

[...]

CJEU, Judgment of 2 September 2021, C-718/18 - Commission v Germany

bb) Promoting the supply with energy from renewable sources

Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC

3. The European Energy Union

- a. Political goals
- b. Legislative acts

Main areas of conflict

- The general structures of energy supply systems and the energy mix in the Member States
- The integration of renewable energies and national support schemes
- Grid extension and sustainability

COM(2015) 80 final: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, p. 4:

“The Energy Union strategy has five mutually-reinforcing and closely interrelated dimensions designed to bring greater energy security, sustainability and competitiveness:

- Energy security, solidarity and trust;
- A fully integrated European energy market;
- Energy efficiency contributing to moderation of demand;
- Decarbonising the economy, and
- Research, Innovation and Competitiveness”.

“Clean Energy for All Europeans”

EU collective goal:

- Emissions reduction of greenhouse gases
- increase energy efficiency
- reach a share of renewable energy in overall final energy consumption

Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action [...]

Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources

Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency

Directive on the promotion of the use of energy from renewable sources

Article 2 - Definitions

For the purposes of this Directive, the relevant definitions in Directive 2009/72/EC of the European Parliament and of the Council apply.

The following definitions also apply:

(1) 'energy from renewable sources' or 'renewable energy' means energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas;;
[...]

Article 3 - Binding overall Union target for 2030

1. Member States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 32 %. The Commission shall assess that target with a view to submitting a legislative proposal by 2023 to increase it where there are further substantial costs reductions in the production of renewable energy, where needed to meet the Union's international commitments for decarbonisation, or where a significant decrease in energy consumption in the Union justifies such an increase.
2. Member States shall set national contributions to meet, collectively, the binding overall Union target set in paragraph 1 of this Article as part of their integrated national energy and climate plans in accordance with Articles 3 to 5 and 9 to 14 of Regulation (EU) 2018/1999. In preparing their draft integrated national energy and climate plans, Member States may consider the formula referred to in Annex II to that Regulation.

If, on the basis of the assessment of the draft integrated national energy and climate plans submitted pursuant to Article 9 of Regulation (EU) 2018/1999, the Commission concludes that the national contributions of the Member States are insufficient for the collective achievement of the binding overall Union target, it shall follow the procedure laid down in Articles 9 and 31 of that Regulation.

3. Member States shall ensure that their national policies, including the obligations deriving from Articles 25 to 28 of this Directive, and their support schemes, are designed with due regard to the waste hierarchy as set out in Article 4 of Directive 2008/98/EC to aim to avoid undue distortive effects on the raw material markets. Member States shall grant no support for renewable energy produced from the incineration of waste if the separate collection obligations laid down in that Directive have not been complied with.

4. From 1 January 2021, the share of energy from renewable sources in each Member State's gross final consumption of energy shall not be lower than the baseline share shown in the third column of the table in Part A of Annex I to this Directive. Member States shall take the necessary measures to ensure compliance with that baseline share. If a Member State does not maintain its baseline share as measured over any one-year period, the first and second subparagraphs of Article 32(4) of Regulation (EU) 2018/1999 shall apply.

5. The Commission shall support the high ambition of Member States through an enabling framework comprising the enhanced use of Union funds, including additional funds to facilitate a just transition of carbon intensive regions towards increased shares of renewable energy, in particular financial instruments, especially for the following purposes:

(a) reducing the cost of capital for renewable energy projects;

(b) developing projects and programmes for integrating renewable sources into the energy system, for increasing flexibility of the energy system, for maintaining grid stability and for managing grid congestions;

(c) developing transmission and distribution grid infrastructure, intelligent networks, storage facilities and interconnections, with the objective of arriving at a 15 % electricity interconnection target by 2030, in order to increase the technically feasible and economically affordable level of renewable energy in the electricity system;

(d) enhancing regional cooperation between Member States and between Member States and third countries, through joint projects, joint support schemes and the opening of support schemes for renewable electricity to producers located in other Member States.

6. The Commission shall establish a facilitative platform in order to support Member States that use cooperation mechanisms to contribute to the binding overall Union target set in paragraph 1.

Article 4 - Support schemes for energy from renewable sources

1. In order to reach or exceed the Union target set in Article 3(1), and each Member State's contribution to that target set at a national level for the deployment of renewable energy, Member States may apply support schemes.
2. Support schemes for electricity from renewable sources shall provide incentives for the integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way, while avoiding unnecessary distortions of electricity markets as well as taking into account possible system integration costs and grid stability.
3. Support schemes for electricity from renewable sources shall be designed so as to maximise the integration of electricity from renewable sources in the electricity market and to ensure that renewable energy producers are responding to market price signals and maximise their market revenues. [...]

Article 5 - Opening of support schemes for electricity from renewable sources

1. Member States shall have the right, in accordance with Articles 7 to 13 of this Directive, to decide to which extent they support electricity from renewable sources which is produced in another Member State. However, Member States may open participation in support schemes for electricity from renewable sources to producers located in other Member States, subject to the conditions laid down in this Article.

When opening participation in support schemes for electricity from renewable sources, Member States may provide that support for an indicative share of the newly-supported capacity, or of the budget allocated thereto, in each year is open to producers located in other Member States.

Such indicative shares may, in each year, amount to at least 5 % from 2023 to 2026 and at least 10 % from 2027 to 2030, or, where lower, to the level of interconnectivity of the Member State concerned in any given year. [...]

Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action [...]

- Integrated National Energy and Climate Plans
- Commission monitoring system: non-binding recommendations for an increase in the level of ambition
- 'gap-filling' mechanism
- regional cooperation

Article 3 - Integrated national energy and climate plans

1. By 31 December 2019, and subsequently by 1 January 2029 and every ten years thereafter, each Member State shall notify to the Commission an integrated national energy and climate plan. The plans shall contain the elements set out in paragraph 2 of this Article and in Annex I. The first plan shall cover the period from 2021 to 2030, taking into account the longer term perspective. The subsequent plans shall cover the ten-year period immediately following the end of the period covered by the previous plan.

2. The integrated national energy and climate plans shall consist of the following main sections:

(a) an overview of the process followed for establishing the integrated national energy and climate plan consisting of an executive summary, a description of the public consultation and involvement of stakeholders and their results, and of regional cooperation with other Member States in preparing the plan, as established in Articles 10, 11 and 12 and in point 1 of Section A of Part I of Annex I;

(b) a description of national objectives, targets and contributions relating to the dimensions of the Energy Union, as set out in Article 4 and Annex I;

(c) a description of the planned policies and measures in relation to the corresponding objectives, targets and contributions set out under point (b) as well as a general overview of the investment needed to meet the corresponding objectives, targets and contributions;

(d) a description of the current situation of the five dimensions of the Energy Union, including with regard to the energy system and greenhouse gas emissions and removals as well as projections with regard to the objectives referred to in point (b) with already existing policies and measures;

(e) where applicable, a description of the regulatory and non-regulatory barriers and hurdles to delivering the objectives, targets or contributions related to renewable energy and energy efficiency; [...]

Article 31 - Response to insufficient ambition of integrated national energy and climate plans

[...]

3. Where, on the basis of its assessment of the integrated national energy and climate plans and their updates pursuant to Article 14, the Commission concludes that the objectives, targets and contributions of the integrated national energy and climate plans or their updates are insufficient for the collective achievement of the Energy Union objectives and, in particular, for the first ten-year period, for the Union's 2030 targets for renewable energy and energy efficiency, it shall propose measures and exercise its powers at Union level in order to ensure the collective achievement of those objectives and targets. With regard to renewable energy, such measures shall take into consideration the level of ambition of contributions to the Union's 2030 target by Member States set out in the integrated national energy and climate plans and their updates.

Article 32 - Response to insufficient progress towards the Union's energy and climate objectives and targets

1. Where, on the basis of its assessment pursuant to point (b) of Article 29(1), the Commission concludes that insufficient progress is made by a Member State towards meeting its objectives, targets and contributions, its reference points for renewable energy, or in implementing the policies and measures set out in its integrated national climate and energy plan, it shall issue recommendations to the Member State concerned pursuant to Article 34.

In its recommendations in the area of renewable energy, the Commission shall take into consideration the relevant circumstances indicated by the Member State in accordance with the second subparagraph of Article 5(1). The Commission shall also take into consideration renewable energy projects for which a final investment decision has been taken, provided that those projects become operational in the period 2021 to 2030 and have a significant impact on a Member State's national contribution.

In its recommendations in the area of energy efficiency, the Commission shall take due account of the objective criteria listed in points (a) and (b) of Article 6(1) and the relevant national circumstances indicated by the Member State in accordance with Article 6(2).

2. Where, on the basis of its aggregate assessment of Member States' integrated national energy and climate progress reports pursuant to point (a) of Article 29(1), and supported by other information sources, as appropriate, the Commission concludes that the Union is at risk of not meeting the objectives of the Energy Union and, in particular, for the first ten-year period, the targets of the Union's 2030 Framework for Climate and Energy, it may issue recommendations to all Member States pursuant to Article 34 to mitigate such a risk.

In the area of renewable energy, the Commission shall assess if the national measures provided for in paragraph 3 are sufficient to achieve the Union's renewable energy targets. In the case of insufficient national measures, the Commission shall, as appropriate, propose measures and exercise its power at Union level in addition to those recommendations in order to ensure, in particular, the achievement of the Union's 2030 target for renewable energy.

In the area of energy efficiency, the Commission shall as appropriate, propose measures and exercise its powers at Union level in addition to those recommendations in order to ensure, in particular, the achievement of the Union's 2030 target for energy efficiency.

In the area of energy efficiency, such additional measures may in particular improve the energy efficiency of:

(a) products, pursuant to Directive 2009/125/EC of the European Parliament and of the Council (34) and Regulation (EU) 2017/1369 of the European Parliament and of the Council (35);

(b) buildings, pursuant to Directives 2010/31/EU and 2012/27/EU; and

(c) transport.

3. Where, in the area of renewable energy the Commission concludes, based on its assessment pursuant to Article 29(1) and (2), that one or more of the reference points of the indicative Union trajectory in 2022, 2025 and 2027 referred to in Article 29(2) were not met, Member States that have fallen below one or more of their national reference points in 2022, 2025 and 2027 as referred to in point (a)(2) of Article 4 shall ensure that additional measures are implemented within one year following the date of reception of the Commission's assessment in order to cover the gap compared to their national reference point, such as:

- (a) national measures to increase deployment of renewable energy;
- (b) adjusting the share of renewable energy in the heating and cooling sector set out in Article 23(1) of Directive (EU) 2018/2001;
- (c) adjusting the share of renewable energy in the transport sector set out in Article 25(1) of Directive (EU) 2018/2001;
- (d) making a voluntary financial payment to the Union renewable energy financing mechanism set up at Union level, contributing to renewable energy projects and managed directly or indirectly by the Commission as set out in Article 33;
- (e) using cooperation mechanisms set out in Directive (EU) 2018/2001.

Such measures shall take into account the Commission's considerations as set out in the second subparagraph of paragraph 1 of this Article. The Member States concerned shall include those measures as part of their integrated national energy and climate progress report.

4. From 1 January 2021 onwards, the share of energy from renewable sources in each Member State's gross final consumption of energy shall not be lower than a baseline share that is equal to its mandatory national overall target for the share of energy from renewable sources in 2020 set out in Article 3(4) of Directive (EU) 2018/2001. If a Member State does not maintain its baseline share as measured over a one-year period, the Member State concerned shall take, within one year, additional measures such as those as set out in points (a) to (e) of the first subparagraph of paragraph 3 of this Article sufficient to cover the gap within one year.

Member States fulfilling the obligation to cover the gap to the baseline shall be deemed to be in compliance with the obligations set out in the first sentence of the first subparagraph of this paragraph and in Article 3(4) of Directive (EU) 2018/2001 throughout the period where the gap occurred.

For the purposes of point (d) of the first subparagraph of paragraph 3 of this Article, Member States may use their revenues from annual emission allowances under Directive 2003/87/EC.

5. Where a Member State's share of energy from renewable sources falls below one or more of its national reference points in 2022, 2025 and 2027 as referred to in point (a)(2) of Article 4, it shall include in the next integrated report submitted to the Commission pursuant to Article 17 an explanation of how it will cover the gap compared to its national reference points.

6. Where, in the area of energy efficiency, without prejudice to other measures at Union level pursuant to the third subparagraph of paragraph 2 of this Article, the Commission concludes, based on its assessment pursuant to Article 29(1) and (3), carried out by the years 2022, 2025 and 2027 that progress towards collectively achieving the Union's energy efficiency targets referred to in the first subparagraph of Article 29(3) is insufficient, it shall propose measures and exercise its power at Union level in addition to those set out in Directive 2010/31/EU and Directive 2012/27/EU to ensure that the Union's 2030 energy efficiency targets are met.

7. Each Member State concerned referred to in paragraph 3 of this Article shall detail the additional implemented, adopted and planned measures as part of its following progress report referred to in Article 17.

8. Where, in the area of interconnections, the Commission concludes, based on its assessment pursuant to Article 29(1) and (4), in the year 2025 that progress is insufficient, the Commission shall cooperate with the Member States concerned by the year 2026 with the aim of addressing the circumstances encountered.

Article 33 - Union renewable energy financing mechanism

1. By 1 January 2021, the Commission shall establish the Union renewable energy financing mechanism referred to in point (d) of Article 32(3) to tender support for new renewable energy projects in the Union with the aim of covering a gap in the indicative Union trajectory. Support may be provided, inter alia, in the form of a premium additional to market prices, and shall be allocated to projects bidding at the lowest cost or premium.

[...]

Article 36 - Monitoring of the governance mechanism

In the context of the State of the Energy Union as referred to in Article 35, the Commission shall inform the European Parliament and the Council on the implementation of the integrated national energy and climate plans. The European Parliament and the Council shall, on an annual basis, address the progress achieved by the Energy Union on all dimensions of Energy and Climate policies.