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The Interface between European Union Energy,
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Questionnaire*

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

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The EU Third Energy Package, which included a Directive and a Regulation aiming at completion of the single electricity market, is currently attracting a great deal of attention, not least because of the establishment of ACER, the first EU energy regulatory agency. For different reasons, the new Renewable Energy Directive, which is largely aimed at promoting the use of one particular set of sources of electricity (RES-E), is also attracting attention. Both the internal energy market legislation and the RES-E legislation strive to combine energy policy aspirations with legally binding obligations upon EU Member States. Although each of these initiatives was originally conceived within one DG of the European Commission, they have been shaped by different people, at different times. Their implementation moves in parallel, yet with few signs of coordination.

In the background, there is a continuing tension between the competition law and sector-specific energy legislation, evident at EU and national levels and in their interaction. There is also a new Energy Chapter in the Treaty on the Functioning of the EU, which underscores the importance that energy policy now has in the EU and in its agenda-setting. For the national and EU courts, all of the above will raise new issues in the near future. This questionnaire is designed to permit rapporteurs a broad scope to address the above issues, drawing upon their knowledge of national contexts and their wider effects, and particularly how these tensions are being addressed (to the extent that they are being recognised at all so far).

Questions

A. Regulation and Competition Policy

1. Will the limited powers of ACER and the responsibilities placed upon ENTSO-E and ENTSO-G require greater cooperation between

* Original version.

1. national regulatory authorities (NRAs) *inter se* and with the EU to open up the European power and gas sectors to greater cross-border competition, at least at the wholesale supply level?
 2. Or will increased competition turn out to be mainly a task for the competition authorities to ensure progress in dismantling predominantly national markets, for example by stopping discriminatory congestion management practices of transmission system operators, as in the *Svenska Kraftnät* case?
 3. In this context, what is the position of your Member State with respect to enforcement of Competition Law (EU and national) in the energy sector, whether by sector-specific NRAs, by NCAs or a combination of the two?
 4. With respect to NRA roles, powers and duties, are there any peculiarities or difficulties in the position of your Member State (for example, limiting or promoting cooperation with other Member States' NRAs or with respect to the EU Network of Competition Authorities)?
 5. Considering that exemptions from the regulatory regimes for gas and electricity are permitted, what safeguards are in place at the Member State level for protecting 'process' rights such as the right to be heard and access to justice, and which national bodies are responsible in ensuring that these rights are respected?
 6. Are the latest proposals (COM(2010) 726) on market abuse in the energy sector likely to present challenges for the NRAs whether in their sole capacity or as a hybrid with national financial regulatory bodies at Member State and/or EU level?
- B. Promotion and Subsidy of Renewable Energy**
7. Are Directive 2009/28/EC and the purely national subsidy schemes and national RS consumption targets it perpetuates fully compatible with principles and rights established in the Treaty, as interpreted by the Court? For example, does the preclusion of the exchange of instruments evidencing renewable power output between suppliers and generators in different Member States, as a means of proving compliance with minimum renewable electricity consumption quotas or earning feed-in tariffs, interfere with internal trade and distort competition in the electricity market?

8. More specifically, would the Court's decision in the case of *Preussen-energie* still be valid in 2012, given both the substantial expansion of wind and solar power generation output, and the maturing of the EU liberalised markets in power and gas, in the meantime?
9. Are there notable features of your Member State's implementation of the RES 2009 Directive that present challenges and difficulties with respect to cross-border cooperation, if they are provided for at all (joint projects, for example, whether between governments and their authorities or between private parties, and statistical transfers under the Directive)?

C. Climate Change

10. To what extent has the choice of the emissions trading scheme (the EU ETS) to deliver climate change targets had the final word *vis-à-vis* alternative methods such as carbon and energy taxation?
11. Have differences in viewpoints on the above been reflected in legal measures in your Member State and how have they been resolved?

D. Security

12. To what extent has your Member State implemented EU legislative measures on energy security in ways that seek to ensure the functioning of the internal market but which also promote measures of solidarity with other Member States?
13. Has this had any significant impact upon the distribution of domestic institutional responsibilities for such matters (both within the government and public sector and as between public and private)?

E. The Treaty

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

Bulgaria

Hristo Kirilov' and Angel Pachev''

A. Regulation and Competition Policy

Questions 1 and 2

We would like to address question 1 and 2 together for consistency purposes.

Electricity

In line with Directive 2003/54/EC and under the Bulgarian Energy Act, the electricity market in the Bulgaria has been fully liberalized since 1.07.2007. The share of opening of the electricity market for 2010 is 27.1% (35% for 2009) with sales on the free market to the amount of 11.28 TWh – in the national market and in the region.¹ The electricity market in Bulgaria is characterized as national and at the same time, relatively well-integrated with the neighbouring countries. According to the NRA², the transmission network of the country has no problems related to congestions in the electricity system. However, certain short periods of congestion occur on the interconnections with certain neighbouring countries of the Republic of Bulgaria, mainly during peak loads in the winter period.

The NRA has been fairly active in order to achieve progress in abiding by the Third Package by means of cooperation with NRAs from neighbouring countries. Although the new Energy Act which intends to fully implement the Third Package is still in not adopted by the Parliament, the NRA has accomplished some results with regards to cross border issues which are described below.

The activities and organization of the market in the country and with the neighbouring countries are regulated by the “Electricity Trading Rules”

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Due to the personal preferences of the authors, some answers will appear in English while others in French. The replies were drafted as follows – Hristo Kirilov: questions 1, 2, 3, 4, 5, 6, 12, 13, 14; Angel Pachev: questions 7, 8, 9, 10, 11, 12.

¹ 2011 National Report – State Energy and Water Regulatory Commission, Bulgaria.

² The NRA is the State Energy and Water Regulatory Commission (SEWRC).

and "Auction Rules for the Allocation of Capacities on the Interconnections between the Control Area of Electricity System Operator EAD – "ESO" EAD (TSO)³, and its Neighbouring Control Areas". These Rules are approved by the NRA.

In 2010 Bulgarian system operator – ESO and the Romanian system operator – CN TRANSELECTRICA SA developed and adopted new "Auction rules for the Allocation of Capacities on the Interconnections between the Control Area of Electricity System". These complement the agreed Common Rules with a procedure for the allocation of intraday transmission capacities using an Auction Office. In 2010 SEWRC⁵ likewise agreed "Common Auction Rules for Allocation of Transmission Capacities on the Interconnections between the Control Areas of Electricity System Operator EAD and HTSO⁶ for 2011 for the interconnection between Bulgaria and Greece. Similar Rules are in process of conclusion with the Republic of Macedonia. The procedures in the new agreed Common Auction Rules between the Bulgarian and Romanian system operators, respectively

³ Following is a short description of the structure the group of companies to which ESO belongs. The Bulgarian Energy Holding (BEH EAD) is a 100% state owned company founded in September 2008. The ownership rights are exercised by the Minister of Economy, Energy and Tourism. BEH EAD includes large energy companies such as National Electric Company EAD (NEK) operating as public provider of electricity power, Bulgartransgaz EAD (functioning as a combined operator in activities such as storage, transfer, and transmission of natural gas) and Bulgargaz EAD, operating as public provider of natural gas. The functions of the electricity system operator, balancing market administrator, and operations and maintenance of the grid are performed by ESO EAD ("ESO") which is 100% owned by NEK. It is envisaged that ESO is transferred to BEH in order to complete the restructuring undertaken by the government. The distribution, operation of the distribution network and public supply is carried out by companies, controlled respectively by EVN, CEZ and E.ON. In compliance with the Law, the existing distribution companies have been restructured, so the activity of public supply is legally separated into new entities, controlled by the same companies.

⁴ The Auction rules have been agreed with the State Energy and Water and Regulatory Commission (SEWRC) of the Republic of Bulgaria with Decision of Protocol № 119 of 23.08.2010, item 1, as an integral part of the protocol agreed with Decision № 154/03.12.2009 of the regulator, 2.1 "Auction Rules for allocation of transmission capacities on interconnection in the control areas "ESO" EAD and CN TRANSELECTRICA SA (TRANSELECTRICA) 2010 "General Auction Rules).

⁵ Decision of Protocol No 159 of 29 Nov 2010, item 9, SEWRC.

⁶ "Hellenic Transmission System Operator" SA.

between the Bulgarian and Greek system operators comply with the requirements of Regulation (EC) No 714/2009.

On 18 September 2010 the Turkish power system was synchronized with the interconnected power systems of Continental Europe, marking the start of the parallel trial interconnection as agreed between the Turkish system operator and ENTSO-E TSOs HTSO, ESO-EAD, Amprion and Tennet GmbH (former Transpower).⁷ This trial parallel operation period is organized in three phases, the first two of which have been successfully achieved. On 3 May 2011, ENTSO-E approved moving to the third phase of the trial synchronous operation of the Turkish power system with Continental Europe, starting on 1 June. During the final phase of the trial, limited commercial electricity exchanges are foreseen.⁸ The procedures should be mutually agreed between Bulgaria, Greece and Turkey, and in line with EU rules and ENTSO-E procedures.

The cross-border transfer capacity on the mentioned interconnections is allocated by the Auction Operator in the form of commercial transfer rights. The Auction Operator calculates and allocates the transfer capacities according to the norms and rules of ENTSO-E. For the allocation of the capacities on the Bulgarian interconnections for the region of South East Europe, a monthly allocation model is prepared. Every month, the net transfer capacities (NTC) are calculated, including for certain periods within the month. These capacities are harmonized bilaterally with the neighbouring system operators on the basis of bilateral contracts. For the harmonized NTC, public auctions are announced for transfer capacities. It is obligation of ESO to prepare, keep and publish on its website general and specialized information on its activities on the balancing energy market and on the transactions at freely negotiated prices. According to NRA at this stage this ensures sufficient transparency and non-discrimination of all participants in the auctions for transfer capacities.

At present, there is no electricity exchange organized in the country.⁹ The trade exchanges, including at day-ahead offers, are carried out under

⁷ The parallel operation is achieved by two 400 kV lines to the Bulgarian system and by one 400 kV line to the Greek system.

⁸ <https://www.entsoe.eu/media/news/newsingleview/article/trial-parallel-operation-with-tesas-to-proceed-to-the-final-phase-on-1-june/>.

⁹ A schedule is prepared for the implementation of the exchange. NEK, TSO and the distributors are in process of installing of an information technologies system for an hourly basis exchange. The administration of the exchange will be within the responsibilities of ESO who will be granted a special license for the purposes. It is

the above mentioned Common Auction Rules between the system operators of Bulgaria and Romania and Greece, and under the new Electricity Trade Rules. The open electricity market in 2010 includes the bigger part of the business consumers, connected to high voltage network (HV) and a part of the middle voltage (MV) consumers.

Winding up, cooperation between NRAs is a fundamental instrument to achieve the goals of the Third Energy Package. On the basis of the early stage of implementation of the applicable rules (for example the codes produced in cooperation within ENTSO-E) it is possible to foresee that the initial responsibility for dismantling national markets would be placed on the NRA rather than on competition authorities. While this process is not finished it would be complicated to effectuate control by competition authorities (as *ex post* control). In this sense it is important that real rules and possibilities for cross border competition are put in place. Competition authorities need to have a clear picture of the sector framework in order to decide as to the discretion of the actors and their behaviour within this sector. Of course, if presented with a case which is likely to distort competition and affect trade between member states competition authorities (NCA and EU Commission) should take action. Therefore it seems that the dismantling of national markets would be at the outset a joint task – predominantly for the NRA but also for the EU Commission and perhaps NCA. In other words, although the burden for the preparation and coordination of the rules is placed on the System Operators and ENTSO-E, the cooperation between the NRAs *inter se* and ACER is of utmost importance for a *timely and accurate* setting of the rules envisaged by the Third Package. Omission in this process is likely to create considerable problems for further competition law control by the competition authorities.

Gas

Natural gas public provision is performed by Bulgargaz EAD¹⁶, which has been licensed by SEWRC for this activity. Bulgargaz EAD is the sole public provider who trades at prices, regulated by SEWRC, with market share of 97.9% of the total consumption for 2010. Bulgartransgaz EAD has been licensed for transmission, transit transfer, and storage of natural gas. The natural gas at the entry of the gas transmission system is provided by three

envisaged during the second phase to connect the Bulgarian and Romanian markets.

The functioning of exchange will probably start in a test regime during 2012.

¹⁶ See footnote number 3.

external providers (Overgaz Inc., Wintershall, and Gazexport) and one domestic provider (Petreko SARL). The gas transmission system is owned by Bulgartransgaz EAD, whose network connects gas distribution companies and about 386 directly connected consumers. Gas supply in the territory of Bulgaria is carried out through the gas transmission network of Bulgartransgaz EAD and through gas distribution networks owned by the respective gas distribution companies. On the territory of the country there is a transit pipeline owned by Bulgartransgaz EAD, which transfers natural gas to the territories of Greece, FYROM and Turkey at certain points. Local natural gas extraction is minimal – with a market share of 2.1% for 2010.

Wholesale trade in natural gas is carried out by a regulated access of third parties – producers. Natural gas import is on the basis of long-term contracts with Gazprom for domestic consumption and transfer through transit pipelines. Provision of natural gas for consumers in South Western Bulgaria through the transit pipeline for Greece and FYROM is based on a contract with Gazexport. Bulgartransgaz EAD owns and manages transmission and transit pipelines – high pressure, and the underground gas storage Chiren.

At this stage of market development, there is no system congestion, neither on national, nor on cross-border level, since the transmission system projected capacity is 8 billion m³. The actual annual consumption does not exceed 50% of the maximum projected consumption. The allocation of available capacities is on the “first come first served” principle. Transit transmission is carried out by the System Operator on the basis of long-term contracts. There are old contracts with priority access to cross-border capacities. The ratio of capacity needed to serve old contracts to total cross-border capacity is 100%.

The conclusion would be that, although transparency have been slightly improved, balancing rules and imbalance charges are being changed in conformity with the applicable EU rules, the infrastructure and the early stages of alternative supplies sources projects do not permit developing the market at the upstream level. Probably, at least in the South Eastern Europe, the EU Commission is best placed (including through ACER powers and/or its anti-trust hand) to encourage by real means the diversification of supplies. This will be related to the development of Nabucco project, projects for connecting the Caspian region and the Middle East with Central and West Europe, the ideas about construction of interconnections with Romania and Greece

and a LNG terminal at Aegean Sea. A joint European policy towards diversification can contribute to strengthening the individual Member States' bargaining positions in their negotiations with external gas sellers – beyond what these Member States could achieve in the absence of coordination.

Question 3

Bulgarian energy sector is not an exception from the one in other Member States when speaking about competition issues. The infrastructure required for the transmission of electricity and gas is to the date a natural monopoly and the need for security of supply tended to reinforce the justification for government regulation and the grant of exclusive rights. The enforcement of Competition Law in the energy sector is an obligation of both authorities. According to Art. 23 parra. 1, point 1 of the Energy Act, the NRA as a principle must observe that competition on the energy market is not restricted or distorted. According to the second parra. of Art. 23 the NRA, in the performance of its duties, may request that the NCA initiate proceedings under Bulgarian Law on Protection of Competition. In this relation, the enforcement of Competition Law could be considered as a combination of the competencies of both NRA and NCA as all companies in the market are obliged to abide by the competition rules as set in the Law on Protection of Competition.

We consider that Bulgarian NRA and NCA have managed to trace a balance between their competencies in the creation and protection of the energy market. The Commission for Protection of Competition (CPC) has followed the path of economics-based approach towards excessive or unfair prices, which preserves competition law's focus on competitive process and conditions rather than on price regulation. CPC has acted on cases of abuse of dominant position with regards to the ownership of the transmission network on both electricity and gas market.¹¹ Other range of cases dealt by the CPC related to introduction of abusive contractual terms¹², denial to supply, denial to pay the prices for use of transmission network¹³. Habitually, CPC

¹¹ Decision of the CPC № 617/03.06.2010, Yana AD v. EVN.

¹² Decision of the CPC No. 1142/16.12.2008, CEZ – Price for the restoration of suspended services, Decision CPC № 307/31.03.2009, EVN – control mechanism for electricity consumption.

¹³ Decision 1579-14.12.2010, OET and Energy Supply vs. NEK. The applicants complaint that NEK refused to negotiate with the purchase of energy for export to Turkey, CPC found that there is no violation.

would require and rely on the information provided by the NRA and would act by taking into consideration the margin of appreciation of the companies within the regulated sector. NCA is also competent to clear concentrations of companies which in the process of structural transformation of the market is also as an important instrument.

NRA will endeavour to abide by its obligations to control competition process as an ex-ante regulator. Performing its duties NRA may ask for the opinion of the NCA before issuing its act as far as it concern general (administrative) acts. Additionally, under the Energy Act the NRA has also powers to control issues relating to possible denial of access to networks by the electricity system operator or the distribution system operator. The control nevertheless is oriented towards the functioning of the electricity system rather than to preserving competition or avoiding abuses of dominant position. Furthermore, all disputes relating to the implementation of the provisions of Electricity Trade Rules are referred to the regulator for resolution under the procedure of the Energy Act.

Question 4

No peculiarities or difficulties could be recognized.

Question 5

The acts of the NRA (licensing, registration, rules, decisions) and NCA (decisions, clearances) are subject to judicial control as administrative acts. The judicial review procedure is governed by the Code of Administrative Procedure. The first judicial instance is the Three Chamber of the Supreme Administrative Court; the second (cassation instance) is the Five Chamber of Supreme Administrative Court.

Question 6

There is no public discussion up to the moment of the proposal to our knowledge. For the purposes of this discussion however, in relation to Bulgarian context, we would like to share our opinion that the development of the market in Bulgaria will certainly require the introduction of such a control mechanism. There is a necessity to improve transparency and explicitly prohibit insider trading and market manipulation on the wholesale energy markets. Monitoring of trade on markets and the powers of ACER to require member states to start investigations into possible market abuses will require

close cooperation between the SEW/RC and Bulgarian Financial Supervision Commission at national level. The creation of mechanism of exchange of information between both authorities will be of utmost importance but the concrete form is still to be designed.

B. *Promotion et subvention en faveur des énergies renouvelables*

Questions num. 7 et 8

Il nous semble opportun d'adresser ces deux questions ensemble.

La directive 2009/28/CE¹⁴ met l'accent sur deux moyens principaux aux fins de la réalisation des objectifs contraignants nationaux concernant l'utilisation de l'énergie produite à partir de sources renouvelables (énergie SR), à savoir les régimes d'aides et la coopération entre États membres et avec pays tiers (article 3, paragraphe 3). Cette coopération comprend également la possibilité de transferts statistiques entre États membres, prévue à l'article 6 de cette directive.

Il convient de mentionner, en premier lieu, que la proposition de la Commission européenne de directive relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables¹⁵, présentée en janvier 2008, prévoyait notamment la possibilité pour les États membres de prévoir un système de transferts, entre des personnes établies dans des États membres différents, de garanties d'origine avec incidence sur le respect des exigences relatives objectifs nationaux. Au cours de la procédure d'adoption de la 2009/28/CE, le législateur européen a toutefois renoncé à cette idée. Dans sa version finale, cette directive précise que les garanties d'origine ne servent qu'à prouver au client final qu'une part ou une quantité déterminée d'énergie a été produite à partir de SR (articles 2, second alinéa, point j), et 15, paragraphe 2, dernier alinéa) et établit le système de transferts statistiques entre États membres (article 6) comme instrument de souplesse en ce qui concerne le respect des objectifs contraignants nationaux. Par conséquent, un transfert de garanties d'origine reste possible mais seul le transfert statistique permet à un État membre d'inclure une quantité

d'énergie SR produite dans un autre État membre aux fins du respect de son objectif contraignant.

Sans qu'il y ait lieu de rentrer dans les considérations du législateur européen derrière cette décision il convient de se demander si l'absence d'incidence du transfert de garanties d'origine sur le respect des objectifs contraignants nationaux constitue une entrave au marché intérieur et à la concurrence.

À cet égard, il convient de souligner que l'existence du système de garantie d'origine tient à la nature spécifique de la marchandise qu'est l'énergie qui, si l'on prendrait l'exemple de l'énergie électrique, se caractérise par le fait que, une fois produite, il est souvent difficile, voire impossible, d'identifier quelle partie a été produite à partir de SR et quelle à partir de sources conventionnelles. La Cour de justice a prêté attention à cette circonstance dans son arrêt du 13 mars 2001, dans l'affaire C-379/98, *PreussenElektra*¹⁶, lorsqu'elle a apprécié la compatibilité d'une réglementation nationale imposant une obligation aux entreprises d'approvisionnement d'acheter l'électricité produite à partir de SR dans leur zone d'approvisionnement avec les dispositions du droit de l'Union relatives à la libre circulation des marchandises. Avant de conclure que, en l'état de l'époque du droit de l'Union relatif au marché de l'électricité, une telle réglementation n'était pas incompatible avec la liberté fondamentale précitée, la Cour s'est référée à la nature spécifique de l'électricité et au besoin d'un système de certificats d'origine reconnus mutuellement.

Dans le même souci de faciliter les échanges transfrontaliers d'énergie SR mais aussi pour permettre une information et sensibilisation du consommateur final au sujet de la part dans la production qu'occupent les SR, la directive 2009/28/CE a mis en place un système de garanties d'origine assorti d'une obligation de reconnaissance mutuelle (article 15, paragraphe 9). Cependant, ce mécanisme est-il suffisant, dans le contexte de cette directive, pour enlever les obstacles aux échanges transfrontalier de l'énergie SR? Il convient de relever que, aux termes de l'article 3, paragraphe 1, les objectifs nationaux contraignants sont exprimés en termes de quantité d'énergie SR dans la consommation nationale. Or, les fournisseurs d'énergie seront dissuadés de s'approvisionner en énergie d'origine SR auprès d'un producteur dans un autre État membre, étant donné que cette énergie n'a pas d'incidence sur le calcul de leur contribution à la réalisation de l'objectif

¹⁴ Directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables et modifiant puis abrogeant les directives 2001/77/CE et 2003/30/CE. JOUE L 140, p. 16.

¹⁵ Proposition de directive du Parlement européen et du Conseil relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, COM/2008/19 final.

¹⁶ CJCE 13 mars 2001, *PreussenElektra*, C-379/98, Rec. I-2099.

national contraignant. Dans ces circonstances, il semblerait que la directive 2009/28/CE pourrait, en effet, aboutir à certaines restrictions aux libertés fondamentales. Toutefois, une mise en balance de ces impératifs avec l'objectif de protection de l'environnement comme celle effectuée dans l'arrêt PreussenElektra, précité, s'impose.

Il importe de relever que, ainsi que certains auteurs l'estiment¹⁷, conférer aux garanties d'origine une importance aux fins de la contribution à la réalisation des objectifs nationaux contraignants et de l'accès à des schémas d'aide et permettre le transfert de ces garanties indépendamment de l'énergie produite reviendrait à créer une nouvelle marchandise – la garantie d'origine, et partant un nouveau marché européen. En effet, les producteurs d'énergie SR pourraient, par l'intermédiaire de transferts de garanties d'origine, opter pour le schéma de subvention national le plus avantageux, ce qui mettrait en concurrence les schémas de subvention des différents États membres. Or, il est douteux qu'une telle concurrence soit bénéfique pour lesdits schémas et pour la réalisation de l'objectif de protection de l'environnement, notamment, en termes de contrôle des États membres de la réalisation de leurs objectifs contraignants. Il est utile, à cet égard, de mentionner qu'un nombre d'États membres appliquent des mécanismes nationaux de *certificats verts* aux fins de la subvention des productions d'énergies SR, certificats dont l'achat est imposé en quantités définies aux fournisseurs d'électricité, ce qui assure un suivi plus aisé de l'évolution de la part d'énergies SR dans la consommation nationale.

En deuxième lieu, il convient de souligner que la directive 2009/28/CE ne prévoit pas de liste exhaustive des moyens à employer pour atteindre les objectifs contraignants nationaux et n'opère pas une harmonisation complète des régimes d'aides. Les États membres restent donc libres dans leurs choix de schémas de subvention ainsi qu'en ce qui concerne leur organisation, leur pouvoir étant néanmoins encadré par l'impératif de respecter le droit de l'Union.

La compatibilité des schémas nationaux de subventions avec le droit de l'Union fait le plus souvent l'objet de controverses sous l'angle des règles relatives à la concurrence et celles relatives aux libertés de circulation. Ainsi, l'article 3, paragraphe 3, dernier alinéa, de la directive 2009/28/CE précise que la décision des États membres sur le point de savoir dans quelle mesure

ils soutiennent l'utilisation de l'énergie SR est sans préjudice des articles 107 et 108 TFUE. La Commission adresse cette question notamment dans ses lignes directrices de 2008 concernant les aides d'État à la protection de l'environnement¹⁸, qui se fondent sur le principe que les effets positifs de l'aide doivent compenser ses effets négatifs en terme de distorsion de la concurrence.

La Bulgarie a transposé la directive 2009/28/CE par la loi relative à l'énergie de sources renouvelables (ZEV1) du 3 mai 2011¹⁹. Les mesures incitatives à la production d'énergie SR prévues par le droit bulgare sont listées aux articles 17 et 18 de cette loi. Ces mesures consistent, principalement, en l'accès garanti aux réseaux de transport et distribution de l'énergie SR (ce qui constitue, par ailleurs, une obligation découlant directement de l'article 16 de la directive 2009/28/CE) avec transport, distribution et construction de l'infrastructure nécessaire garantis, l'obligation d'achat de l'énergie SR, la fixation de tarifs préférentiels pour l'achat d'énergie électrique SR à l'exclusion de celle produite dans des centrales hydroélectrique avec une puissance supérieure à 10 MW, ainsi qu'en la subvention directe de certains projets de production d'énergie de chauffage ou de refroidissement à partir de SR.

Il convient de mentionner, au passage, que ces mesures semblent souffrir de certaines imperfections. En effet, la ZEV1 établit un système de prévision annuelle des productions électriques de SR qui peuvent être raccordées au de transport (article 22 de la ZEV1). Après épuisement de cette prévision le raccordement peut être refusé (article 23 de la ZEV1). En outre, l'article 29 de la ZEV1 prévoit le paiement d'une avance en cas de conclusion d'une promesse de contrat de raccordement qui semble concerner uniquement les producteurs d'énergie SR.

Les mesures décrites aux articles 17 et 18 de la ZEV1 n'ont pas été notifiées par la Bulgarie à la Commission européenne au titre de l'article 108, paragraphe 3, TFUE. Se pose donc la question de savoir si lesdites mesures constituent des aides d'État, au sens de l'article 107, paragraphe 1, TFUE qui devaient être notifiées. Il convient de mentionner, par ailleurs, que la Bulgarie a, toutefois, notifié son projet d'appliquer pendant une période de deux ans une taxation réduite aux biocarburants, contre lequel la Commission, par lettre du 9 avril 2010, n'a pas soulevé d'objection, en considérant que cette mesure constitue une aide d'État, au sens de l'article 107, paragraphe

¹⁷ Voir A. Johnston, K. Neuhoff, D. Fouquet, M. Ragwitz et G. Resch, *The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects*, *European Energy and Environmental Law Review*, Vol. 17, June 2008, n° 3, p.126.

¹⁸ Lignes directrices concernant les aides d'État à la protection de l'environnement, JOUE C 82, p. 1.

¹⁹ *Държавен вестник* n°35, du 03/05/2011.

1, TFUE, mais bénéficie de la dérogation prévue à l'article 107, paragraphe 3, sous c), TFUE, au titre de l'objectif de protection de l'environnement.²⁰

S'agissant de mesures telles que l'obligation d'achat à un tarif déterminé d'énergie SR et l'accès au réseau garanti que cet achat implique, de nouveau l'arrêt PreussenElektra, précité, fournit des enseignements. Par cet arrêt, la Cour de justice, a fait de l'exigence d'engagement direct et indirect de ressources de l'État une des conditions indispensables aux fins de la qualification d'une nationale mesure d'aide d'État. Cette jurisprudence a été confirmée par la suite par la Cour, entre autres, dans un arrêt du 17 juillet 2008, dans l'affaire C-206/06, *Essent Network Noord*²¹. La Cour a considéré, en substance, que la réglementation nationale imposant une obligation aux les entreprises d'approvisionnement d'acheter, à des prix minimaux, de l'électricité produite à partir de SR dans leur zone d'approvisionnement échappait à la qualification d'aide d'État par ce qu'elle n'engageait pas directement ou indirectement de ressources de l'État, les entreprises d'approvisionnement étant principalement des entreprises privées.

Cette jurisprudence fournit une ligne de démarcation très nette et en même temps critiquable car elle fait de la seule participation privée ou publique le critère de détermination de l'existence ou non d'engagement de ressources de l'État. Le cas bulgare en ce qui concerne, par exemple, l'énergie électrique semble assez clair, à cet égard, l'une des grandes entreprises de distribution étant détenue à 33 pourcent par l'État bulgare, et pour le reste par l'État tchèque. Pour les deux autres entreprises de distribution, la participation de l'État bulgare s'élève également à 33 pourcent.

Suivant la jurisprudence PreussenElektra, l'obligation d'achat d'énergie électrique à un tarif préférentiel devrait être considérée normalement comme ne constituant pas une aide d'État et partant compatible avec le droit de l'Union. Il est toutefois peu contestable que ce régime, comme tout régime similaire d'un autre État membre, est susceptible de procurer un avantage concurrentiel aux producteurs d'énergie SR. Ainsi, la Cour elle-même l'a relevé au point 54 de l'arrêt PreussenElektra, précité, qu'une telle obligation apporte un avantage économique certain aux producteurs concernés, en ce qu'elle garantit sans risque des gains supérieurs à ce qu'ils réaliseraient en son absence. Il semble, par ailleurs, généralement admis que la promotion de l'énergie SR implique une distorsion de la concurrence sur les marchés existants, une distorsion qui est nécessaire pour permettre aux

producteurs de cette énergie de surmonter les obstacles aux entrées aux marchés qui résultent des coûts de production et coûts initiaux élevés associés à l'énergie SR, face à l'absence de suffisante répercussion de l'impact environnemental de la production d'énergie à partir de sources conventionnelles sur le prix de cette énergie.²² Toutefois, si l'objectif à long terme devait être celui de rétablir la concurrence sur les marchés en cause, une fois les énergies SR s'y étant affirmées et pouvant effectivement faire concurrence aux sources conventionnelles, il semble logique, d'une part, que la distorsion de la concurrence susmentionnée soit de nature temporaire et, d'autre part, que les subventions en faveur des énergies SR soient à un niveau qui permette uniquement de compenser le désavantage concurrentiel dont ces énergies sont frappées.

Le critère dégagé dans l'arrêt PreussenElektra, précité, a eu un impact sur le droit de l'Union en la matière, qui dépasse le secteur de l'énergie. Toutefois, cet arrêt semble n'être en vigueur, en ce qui concerne le domaine énergétique, qu'aussi longtemps que les énergies SR n'ont pas atteint la capacité de faire concurrence effective aux énergies produites à partir de sources conventionnelles. En effet, le critère dégagé dans ledit arrêt ne tient pas compte du besoin d'une distorsion temporaire et proportionnée de la concurrence ni de l'évolution des marchés énergétiques suite à leur libéralisation ou des répercussions de l'impact environnemental sur les prix des énergies polluantes.

À cet égard, il convient de relever que la ZEV (article 32) impose que le tarif préférentiel pour l'achat de l'électricité SR soit actualisé annuellement et qu'il soit établi en fonction de certaines valeurs variables, telles que les coûts d'investissements, le retour de l'investissement et les coûts environnementaux. Un tel mécanisme semble, par définition, être davantage apte à s'inscrire dans la logique d'une distorsion temporaire et proportionnée de la concurrence sur le marché de l'électricité.

Question num. 9

La possibilité de transferts statistiques et de la mise en place de schémas de coopération avec d'autres États membres ou avec des pays tiers est bel et bien prévue par la réglementation bulgare (articles 14 à 16 de la ZEV).

²⁰ JOUE 2010 C 125, p.1.

²¹ CJCE 17 juillet 2008, *Essent Network Noord e.a.*, C-206/06, Rec. I-5497.

²² Voir J. Krzeminska, *Are Support Schemes for Renewable Energies Compatible with Competition Objectives? An Assessment of National and Community Rules*, The Yearbook of European environmental law, vol. 7 (2007), p. 125.

Par ailleurs, l'article 17 de cette loi cite expressément ces schémas en guise de mesures incitatives à la production d'énergie SR. Cependant, ce cadre réglementaire se borne à reprendre les éléments principaux de la directive 2009/28/CE, à cet égard. La ZEVI charge, en outre, le Ministre de l'économie, de l'énergie et du tourisme d'un certain nombre de fonctions, en la matière, principalement celles de notification à la Commission des projets de schémas communs de subvention et de la présentation des demandes relatives à la prise en compte, aux fins du respect de l'objectif national contraignant, de l'énergie SR produite est consommée dans un pays tiers.

Le plan d'action de la Bulgarie, au sens de l'article 4, paragraphe 1, de la directive 2009/28/CE²³, cite comme instrument principal la coopération avec des pays de la région et d'autres États membres. Ce plan prévoit comme moyen de renforcer cette coopération la traduction du cadre réglementaire bulgare en plusieurs langues officielles de l'Union européenne. En outre, la Bulgarie exprime un souhait d'ouvrir un dialogue avec des États membres qui seraient intéressés d'assurer une quantité additionnelle d'énergie SR aux fins du respect de leurs objectifs contraignants. Le plan d'action cite, à ce titre, l'Italie le Danemark, la Belgique et le Luxembourg. Dans le cadre du document prévisionnel, produit par la Bulgarie conformément à l'article 4, paragraphe 3, de la directive 2009/28/CE²⁴, l'accent a été mis sur la coopération entre la Bulgarie et la Roumanie en ce qui concerne le développement du potentiel hydro-électrique du fleuve Danube et la construction de deux centrales avec une capacité commune de 800 MW. Le plan d'action ne contient pas d'informations plus concrètes et un progrès sur ce projet n'a pas été décelé.

Ledit plan d'action spécifique que la Bulgarie dispose d'une capacité réduite de participer dans des projets communs dans d'autres États membres, en raison de la complexité du procès de coordination. Il ressort également de ce document que la connaissance de la part des autorités bulgares du potentiel de projets communs dans d'autres États membres est assez réduite également.

C. Changement climatique

Question num. 10 et 11

Il nous apparaît opportun d'adresser les deux questions ensemble.

La directive 2003/87/CE établissant un système d'échange de quotas d'émission de gaz à effet de serre dans la l'Union²⁵ fournit des indications quant à l'articulation entre le système d'échange de quotas pour les émissions de gaz à effet de serre et des mesures alternatives visant à réduire ces émissions. En effet, son considérant 23 ment en exergue la nécessité d'un ensemble global et cohérent de politiques et mesures mise en oeuvre au plan national et de celui de l'Union, dans lequel le marché de quotas s'intègre. Il ressort des considérants 24 et 25 de cette directive que des mesures nationales fiscales visant à limiter lesdites émissions sont, en principe admises, et que de telles mesures doivent concerner tous les secteurs de l'économie. Une attention particulière est prêtée à la compatibilité de telles mesures avec les dispositions du droit de l'Union relatives aux aides d'État (considérant 23). Il peut en être déduit que des mesures telles qu'une taxation des émissions de gaz à effet de serre présentent un caractère complémentaire par rapport au système d'échange de quotas pour ces émissions. Il convient de mentionner, en outre, l'existence d'initiatives au niveau de l'Union relatives à l'incorporation d'un élément environnemental dans la taxation des produits énergétiques, la dernière étant proposée par le commissaire Algirdas Šemeta mais n'ayant pas reçu une suite.

La directive 2003/87/CE a été transposée dans l'ordre juridique bulgare, notamment, par la loi relative à la protection de l'environnement, telle que modifiée²⁶. Cette loi ne prévoit pas des mesures fiscales comme celles décrites ci-dessus. Il n'existe pas non plus dans d'autres réglementations bulgares des disposition fiscales frappant spécifiquement les émissions de gaz à effet de serre. Des différences de points de vues sur l'articulation entre le système d'échange de quotas pour les émissions de gaz à effet de serre et des mesures alternatives visant à réduire ses émissions ne sont pas apparentes dans la législation bulgare.

²³ http://ec.europa.eu/energy/renewables/transparency_platform/doc/resubmitted_nrap_bulgaria_en.pdf

²⁴ http://ec.europa.eu/energy/renewables/transparency_platform/doc/bulgaria_forecast_english.pdf

²⁵ Directive 2003/87/CE du Parlement européen et du Conseil du 13 octobre 2003 établissant un système d'échange de quotas d'émission de gaz à effet de serre dans la Communauté et modifiant la directive 96/61/CE du Conseil, JOUE L 275, p. 32.

²⁶ *Държавен вестник*, n° 30, du 11/04/2006.

D. Security

Question 12

Electricity

By tradition the country is a net exporter of electricity in the region. In 2010 the share of electricity sold on the regional market amounted to 8.44 TWh, over 19 % of total net national output. The forecast for future development of electricity capacities focuses on further guarantee of the system security and electricity supply, including regional aspects, and is based on the National electricity strategy of the Republic of Bulgaria until 2020 adopted by the Parliament and on a ten-year "Plan for the development of transmission network in Bulgaria for the period 2010 -2020" prepared by ESO and NEK. The strategy contains a forecast of gross national consumption – "variant maximum" and "variant minimum" – for the next 10 years. Variants show possible forecast reduction of electricity consumption intensity by about 1.4 % in the period 2012 – 2014, having in mind the start of emissions trading and certain decline in electricity consumption after 2017 with "minimum scenario" due to the implementation of energy efficiency measures. New electricity capacities that are currently constructed and planned for operation in the next 10 years are mostly based on primary energy sources, nuclear energy, wind and water energy, photovoltaic and partly – local coal.

As a result of the increase of the RES electricity capacities in the country, mainly wind power in north-east Bulgaria, some difficulties occur regarding the connection of new capacities to the transmission and distribution networks due to limited capacity. In this regard, in the Ministry of Economy, Energy and Tourism in cooperation with SEWRC, an Electricity Transmission Network Development Plan of Bulgaria for the period 2010 – 2020 is in process of approval. Under the current legislative framework SEWRC reviews and approves investments and schedules for the network expansion of electricity distribution companies.

Gas

In relation to the need of diversification of supplies the following projects have been identified as priority in the Energy Strategy until 2020 of Bulgaria adopted by the Parliament – Nabucco, connecting the Caspian region and the Middle East with Central and Western Europe, "South Stream" and also the construction of interconnections with the transmission systems of

Romania and Greece. There is also clear understanding that it is important to act for the construction a liquefied natural gas terminal on the Aegean Sea. As an immediate measures, Bulgartransgas EAD has signed agreements with DESFA – Greece, and BOTAS – Turkey for reverses transmission of natural gas in case of interruption of supplies through Ukraine. Future investments in output capacity and import capacity for the next three years consist in building an interconnection with the gas transportation system of Romania (with a capacity of up to 1.5 billion m³/ per year) and Greece with a capacity of up to 1.0 billion m³/per year.) In order to improve security and quality of the gas supply in the country, a number of investments were made in the gas transmission network and facilities. Under a contract for a grant with EBRD high pressure transmission pipelines are in a process of development. Under a consultancy services with EBRD, started a process of reconstruction to expand the working volume of the underground gas storage Chiren. A number of measures were taken aiming to connect the gas transmission systems of Bulgaria with Romania, Serbia and Greece. The gas extraction site Galata is expected to be transformed into the second gas storage in the country.

As presented above, until the moment actions undertaken by Bulgarian institutions are mostly based on regulations and non legislative rules and programs. It is expected that with the adoption of the new Energy Act all those initiative will find their legal grounds in conformity with EU legal framework on energy security.

Question 13

The Energy Act provides for the Minister of Economy, Energy and Tourism to monitor the security of supply. He publishes future and past measures and outcomes of monitoring in an annual bulletin on the condition and development of energy on the website of the Ministry. According the Additional Provisions of the Energy Act, "monitoring the security of supply" is the balance between supply and demand of electricity and natural gas on the national market, the level of expected future consumption, and planned additional capacity in process of planning and building, the quality and maintenance levels of networks, as well as measure for covering peak consumption and overcoming deficit of one or more providers, suppliers, or traders." The Act provides for that centralized operational management, coordination and control of the operating regime of the gas transmission system is carried out by the TSO, and the operational management of

each distribution system is carried out by the distribution system operator. Orders of the gas transmission system operator are binding for gas distribution system operators, consumers, extraction enterprises and gas storage area operators, connected to the transmission system, and for other companies.

E. The Treaty

Question 14

On 1.06.2011 the Bulgarian Parliament adopted the Energy Strategy until 2020 of Bulgaria (approved earlier by the Council of Ministers). The document sets as national objectives a 20 % reduction of greenhouse emission in relation to 1990, 20 % share of RES energy in the entire energy mix and 10 % share of RES energy in the transport sector, improvement of the energy efficiency by 20 %.

In this relation the five principle priorities for Bulgaria set in the Strategy are as follows:

- guaranteeing the security of supply – it is to be accomplished by developing the necessary infrastructure, diversification of supply, creation and maintenance of coordinated EU politics and solidarity on the issue;
- accomplishment of RES objectives (the absolute objective for Bulgaria is 16 % share of RES in the consumption of energy);
- improvement of energy efficiency;
- development of a competitive market, including by creating an electricity energy exchange in the country by the end of 2011 and optimization of the use of the interconnectors with neighboring countries;
- protection of consumers' interests.

The Strategy affirms the European perspective of the Bulgarian politics in the energy sector. The current European energy policy legal framework has been reflected into the Strategy. Bulgarian legislator and government will have as a main goal reducing the external energy dependence of the EU. This is not only a key instrument for further negotiations where Bulgaria will defend national and EU's interests in developing the internal energy market but it is also an important tool for interpretation when applying environmental, energy and competition rules to a particular situation. For instance, it is affirmed in the document that Bulgarian interests in developing nuclear energy (construction of NPP in Belene and prolongation of the utilization of

block 5 and 6 of NPP Kozloduy) in Bulgaria will be carried on in coordination with EU institutions. Noticeably, the document is drafted in the light of Art. 194 of the TFEU which, even though does not change its already binding nature, is a clear confirmation of the real will of Bulgaria to follow a consistent legislative and political path for the accomplishment of EU's objectives in the energy sector.