EU ENERGY POLICY IN THE TREATY OF LISBON: BETWEEN FUNDAMENTAL BREAKTHROUGHS AND THE CHALLENGES AHEAD

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Abstract: *Energy policy is a vital area of the European Union, but its legal position in previous EU primary law was unclear. The latest revision of basic treaty (the Treaty of Lisbon signed in 2007) changed this situation significantly by including in its text sound energy-related stipulations. Two different readings are possible in these new stipulations: they could be interpreted as fundamental breakthroughs, since a detailed legal basis and a new set of competence rule are established, but they may also be seen as inconsistent with other legal bases, since various interfaces can directly be read from the Treaty provisions. These interfaces may become a predicament when choosing proper legal basis for secondary legislations in this area, at a later stage. After the analysis of these readings, the author finds that the contribution of the Treaty of Lisbon is between fundamental breakthroughs and the challenges ahead. It all still depends on the actors of this area, such as the European Commission or the European Court of Justice (ECJ) to further make use of the breakthroughs of the Treaty and overcome the challenges.*

I. Introduction

In the last several decades, energy-related issues have had a continuous and profound impact in the European Union (EU)[1]. In the 1950s, the pooling of

1 There is a terminology issue regarding the "European Union" (EU) and the "European Community" (EC). Since the Treaty of Lisbon clarifies that the Union shall replaced and succeed the Community, I will use "EU" in most occasions of this thesis. I will use "EC" when necessary, for example in special contexts like describing the historical progress of energy policy.

vital resources of France and Germany marked the beginning of the European integration. The integration of nuclear sector was still on the top of political agenda in the 1960s. Europe went through the Oil Crisis in the 1970s and enhanced its energy relations with former Soviet Union countries later in the 1990s. In the new century, the continent faced continuous energy supply crises as well as an urgent need to combat climate changes by improving energy efficiency and promoting renewable energy.

However, having in account these extensive issues, the energy policy of EU was considered weak for a long time. Most energy matters were treated as domestic issues of the Member States and even the European Commission admitted in 1996 that its "energy policy objectives are far from being shared by all the Member States"[2]. This situation was mainly due to the economic realities and political concerns of the Member States. To the former aspect, the energy mixes of the Member States were sharply different and diverse. For example, after the 1960s France started relying more on nuclear energy but other countries like Germany focused on its coal industry[3]. In what regards the latter aspect, due to the special strategic weight of energy resources, the Member States were reluctant to transfer their sovereignties to the European level. As Stephen Padgett would later explain, "the strategic economic importance of the energy sector meant that policy autonomy was guarded jealously by national governments"[4].

In this context, the legal position of the energy policy was also unclear. Specifically, the role of energy policy within EU primary law faced with a "historical paradox"[5]. That is, two of the three founding treaties[6] covered vital energy resources while the most important Treaty establishing the European Economic Community (1957)[7], did not even mention the word "energy". In addition, this issue was again not addressed in the following treaty revisions.

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2 European Commission, "Report on Civil Protection, Tourism and Energy", Brussels, 14 April 1996, SEC (96) 496 final.

3 Jacques de Jong and Coby van der Linde, "EU Energy Policy in a Supply-constrained World," *European Policy Analysis*, Vol.11 (2008), p. 3.

4 Stephen Padgett, "The Single European Market: the Politics of Realization," *Journal of Common Market Studies*, Vol.13, No.1 (1992), p. 53.

5 See, for example, Janne Halland Matlary, *Energy Policy in the European Union* (New York: St. Martin's Press, 1997), p. 15; Andrei Belyi, "EU External Energy Policies: A Paradox of Integration", in Jan Orbie (ed.), *Europe's Global Role: External Policies of the European Union* (Hampshire: Ashgate Publishing Limited, 2008), p. 207.

6 Treaty establishing the European Coal and Steel Community (ECSC Treaty), 16 April 1951 and Treaty establishing the European Atomic Energy Community (EURATOM Treaty), 25 March 1957.

7 Treaty establishing the European Economic Community, 25 March 1957.

For example, the 1992 Treaty on the European Union (TEU) only mentioned that "the Union shall have activity in the sphere of energy" without any further stipulations[8]. Although the 2004 Constitutional Treaty created a legal basis for the energy policy[9], this progress became seemingly useless because the Constitution failed to pass the ratification process later in 2005.

Eventually, the legal position of energy policy was dramatically clarified in the latest treaty revision: the Treaty of Lisbon[10]. The title of previous Treaty establishing the European Community (TEC) was replaced by "Treaty on the Functioning of European Union" (TFEU)[11] and it also provides a new version of EU Treaty. In what regards the energy-related parts within the Treaty, in general terms two contrasting sides can be found. On the positive side, the text can be viewed as a fundamental breakthrough because a detailed legal basis and a new competence definition were formally established. However, on the negative side, the Treaty also contains ambiguities with regard to the relation between energy policy and other policy areas. These may become challenges for the development of energy policy in the post-Lisbon phase.

Therefore, the objective of present paper is to consider the issues surrounding the energy-related content of the Treaty on the basis of these two conflicting angles. To this end, a comprehensive assessment is necessary. The discussion will begin by analyzing major contributions of the Treaty in this area: the new legal basis clause and the new competence delimitation rules. Then, the focus will shift to the whole treaty and discuss some unsolved ambiguities between the new legal basis of energy policy and other general legal bases. The last section will present a personal outlook from these two different readings brought by the Treaty.

II. The new legal basis and competence rules as fundamental breakthrough

There are two provisions in the Treaty directly related to energy policy. First, it creates an independent title XXI in the TFEU entitled "energy". The

8 Art. 3 (t), Treaty on the European Union (O.J. C 191, 1992).

9 Art. III-256, Treaty establishing a Constitution for Europe (O.J. C 310, 16 December 2004).

10 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (O.J. C 306, 12 December 2007).

11 See Art.1, LTEU. The number of provision is cited from the consolidated version of Treaty. See Consolidated version on the Treaty on European Union and Treaty on the functioning of the European Union (O.J. C/115 2008).

sole provision of this title is Art.194[12], the new legal basis clause which stipulates the basic legal framework of the policy area. Second, Art. 4 TFEU defines the energy policy under the category of the shared competence of EU. These two provisions can be considered as major breakthroughs brought by the Treaty. This section attempts to assess them.

A.The new legal basis: legal framework and innovations

In general, the new Art.194 sets up the basic legal framework of this policy area.In the first paragraph, it stipulates four comprehensive energy objectives. Then it specifies the general legislative procedure: the ordinary legislative procedure is now applied to thefour objectives under the further consultation of the Committee of the Regions (COR) and the European Economic and Social Committee (EESC). In the third paragraph and as derogation to the general legislative procedure, a special legislative procedure is applied with regard to measures "primarily of a fiscal nature".

EU energy policy will benefit from this new legal framework, established in the EU primary law. The main contributions of this provision are specifically summarized in following three points.

1) *A detailed legal basis.* Before introducing the legal framework established by this provision, the importance of a legal basis itself cannot be neglected. For the first time, a detailed legal basis for energy policy was incorporated in the basic treaty level and formally entered into force. This provision constitutes a crucial point for EU to formally exercise its legislative competence in this area, since in theory, the legal basis is a precondition to any secondary legislation of the Union[13] and it reflects compliance with the principle of conferred.[14] After the creation of this legal basis, legislative measures of EU in this field do not need to rely on other non-energy-specific legal bases anymore,

12 The full text of this provision is in the appendix of this paper. The article number of Treaty of Lisbon is cited from the consolidated version Treaty on European Union and Treaty on the functioning of the European Union (O.J. C 115, 9 May 2008).

13 According to the rules of procedure of the Council, each legislative measure shall clarify what treaty provision is the legal basis for this measure. A typical form is that the first recital of measure shall state that "having regard to the Treaty…and in particular, Article…thereof". See Kieran Bradley, "The European Court and the Legal Basis of Community Legislation", *European Law Review*, Vol.19 (1988), p. 379. Therefore, the clarification of legal basis is the procedure requirement of each legislative measure and thus a precondition for them.

14 According to Art.5 (2) TEU, "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."

like for example the legal basis of environmental policy or internal market. Therefore, the legislative competence of EU in this area will be further enhanced. In my opinion, the establishment of this new legal basis can be considered as an important step for EU to achieve a common and independent energy policy.

2) *The key objectives.* In general, the stipulation on objectives in a given policy is "one of determining factors of the legal base".[15] Before the Treaty of Lisbon, the developments of EU energy policy were essentially on the basis of the "three pillars", which focused on the competiveness (energy market), sustainability (environmental concern) and security (energy supply). In this sense, Art.194 rightly incorporates the current policy framework into the Treaty, as it stipulated the functioning of the energy market, the security of energy supply and the promotion of energy saving and energy efficiency in the provision (objective a-c in the first paragraph). By this stipulation, the basic scope of energy policy is clarified.

3) *The legislative procedure.* According to this provision, most sections of the energy policy are covered by the ordinary legislative procedure.[16] Its main feature is that the Commission submits the proposal at first and the Council and the European Parliament co-decide and jointly adopt the measure. Meanwhile, the main voting rule of the ordinary legislative procedure is the Qualified Majority Voting (QMV). The precise institutional balance under this procedure remains to be seen. Suffice it to say that in the present stage, the main voting procedure for energy-related measures has a significant merit, since the decision-making process will be facilitated and no veto from individual Member State can block them.

Apart from the legal framework established by this provision, another striking feature deserves further study. That is, the Lisbon version legal basis of energy policy, adds two innovations into its text when compared with its previous version.[17] Both theoretical importance and their practical impacts are concisely reviewed as follows.

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15 Ludwing Krämer (ed.), "*EC Environmental Law* (sixth edition)" (London: Sweet & Maxwell, 2007), p. 14.

16 Before the Treaty of Lisbon, the name of this procedure was the co-decision procedure. The Treaty of Lisbon expands the scope of this procedure to about 40 new areas and changed its name to ordinary legislative procedure. The new name is a reflection on the enhanced role of this procedure in the EU decision-making process.

17 See Art. III-256, Treaty establishing a Constitution for Europe (O.J. C 310, 16 December 2004).

1) *The solidarity requirement.* The Treaty of Lisbon inserts the phrase "in a spirit of solidarity between Member States" in the text of the new legal basis. When compared with other TFEU solidarity contents, the scope of solidarity requirement in Art.194 is broader. Under a literal understanding, the solidarity requirement is not specified to some special events, such as terrorist attacks[18] or supply difficulties[19], but a more general requirement is used for the whole field of energy policy. This broad scope shows the importance of solidarity between the Member States on energy-related issues. Although some criticized that "without any definition of the principle of solidarity…it remains not clear whether it will receive any application in practice…"[20], the application of this principle already can be found in the secondary legislations after the Treaty[21].

2) *The new objective of energy network.* Apart from the three central objectives of energy policy, the Treaty of Lisbon also adds a new objective: "promote the interconnection of energy networks". In fact, this objective is not a "new" one, since the energy sector is essentially a network-based industry and prior to the Treaty of Lisbon, the Commission had already addressed this issue in various policy papers.[22] However, it had not been treated as important as other three key objectives. The Treaty of Lisbon changed this situation and further enhanced the role of energy network in the legal framework of energy policy. This innovation provided new direction for practical development. After the Treaty, the

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18 See Art.222 TFEU.

19 See paragraph 1 of the Art.122 TFEU.

20 Sami Andoura, Leigh Hancher and Marc Woude, *Towards a European Energy Community: a Policy Proposal* (Paris: Notre Europe, 2010), p. 98.

21 See, for example, two secondary legislations were adopted in terms of the common rules for internal market on electricity and nature gas transmission networks in 13 July 2009. (Directive 2009/73 concerning common rules for the internal market in natural gas, O.J. L 211/94, 2009 and Regulation 715/2009 on conditions for access to the natural gas transmission networks, O.J. L 211/36, 2009.) According to these legislations, a general consideration on "regional solidarity" and the regime on "regional cooperation of transmission system operators" were created respectively. (See, Art.6 of the Directive 2009/73/EC and Art.12 of the Regulation (EC) No.715/2009).

22 See, for example, European Commission, "White Paper: an Energy Policy for the European Union", Brussels, 13 December 1995, COM (1995) 682 final. This White Paper stated that "the liberalization of the markets for electricity and gas will start a process of structural change." Then, one of the structural changes the Commission intended to achieve was to "establish under Commission auspices cooperation on interconnected systems between national regulatory authorities. This system could be later extended to pan-European networks as they are developed.".

development of an interconnected energy network became a significant component under the framework of internal energy market.[23] Both new financial programs[24] and new energy technologies[25] were also applied in this subarea.

B. Competence delimitation in energy policy: general and specific stipulations

In terms of the competence delimitation between the Union and the Member States in the area of energy policy, the Treaty of Lisbon also made a breakthrough as this policy area was declared a shared competence of the Union. This subsection intends to introduce and analyze relevant general and specific rules of the Treaty with regard to the competence allocation between the EU and the Member States.

In general, the area of energy policy is described as a shared competence of the Union[26]. According to the definition of shared competence presented by the Treaty[27], its literal meaning is close to an "automatic pre-emption of Member

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23 In this sense, the European Network of Transmission System Operators (ENTSO) were established for the electricity and the nature gas sectors. These organs were significant components of the third internal energy market package. See Regulation 715/2009 on conditions for access to the natural gas transmission networks, O.J. L 211/36, 2009. 715/2009 and Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity, O.J. L 211/15 2009.

24 From 2009 to 2010, a new financial program was established for the construction of energy infrastructures: the European Energy Program for Recovery (EEPR). See Regulation (EC) No 663/2009 establishing a program to aid economic recovery by granting Community financial assistance to projects in the field of energy, O.J. L 200/31 2009 and Regulation (EU) No 1233/2010 amending Regulation (EC) No 663/2009 establishing a program to aid economic recovery by granting Community financial assistance to projects in the field of energy, O.J. L 346/5 2010. Under the framework of Regulation, the Commission granted € 2.3 billion to 31 gas and 12 electricity projects in the sphere of interconnected infrastructures. See, Official Press Release, "Economic Recovery: Second Batch of 4-billion-euro Package goes to 43 Pipeline and Electricity Projects", Brussels, IP/10/231.

25 For example, on 12 April 2011, the Commission issued a new Communication about the "smart grids". By promoting smart grids in the network, it could "improve the efficiency and help consumers to better manage their appliances". See European Commission, "Communication on Smart Girds: from Innovation to Deployment", Brussels, 12 April 2011, COM (2011) 202 final. See also Official Press Release, "EU Sustainable Energy Week: Commission will Announce Action on Smart Meters for More Savings", Brussels, 8 April 2011, IP/11/442.

26 Art. 4 TFEU.

27 Art. 2 TFEU states that "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their

State action where the European Union has exercised its power".[28] In other words, when the Union decides to exercise its power in an area of shared competence, the powers of the Member States have to be "pre-empted" accordingly. Under this new shared competence regime, a boundary with regard to the allocation of competence between the Member States and the Union in the field of energy policy becomes apparent. In the areas where EU already exercised its competence, for example in the liberalization regimes on electricity and nature gas market, the Member States should not exercise their corresponding competences.

But this general definition cannot fully explain the complicated competence issue in a specific area like energy policy. According to the second paragraph of Art.194, three restrictive conditions are set for the competence of EU. It states that measures of energy policy "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)". Hence, apart from the general concept of shared competence, three specific "forbidden zones" are also established.

In general, these restrictive conditions were added under the pressure of some energy producers Member States during the negotiation period of the Treaty.[29] This stipulation shows that there are many sensitive subareas between the EU and the Member States. In other words, the Member States were not willing to transfer their sovereignties in these more sensitive matters. Therefore, this stipulation became controversial and received various criticisms.[30] Some even thought that it was a "permanent legal shortcoming".[31] Regarding this issue, I stand on the optimistic side and argue that despite the restrictive conditions inserted, the Treaty of Lisbon defining energy policy as a shared competence still can be viewed as a breakthrough for three main reasons as explained in the later paragraphs.

First, this new competence definition reflects the historical progress of this area. The treaty of Lisbon created three categories of competence, namely

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competence to the extent that the Union has decided to cease exercising its competence."

28 Paul Craig, "Competence: Clarity, Conferral, Containment and Consideration", *European Law Review*, Vol. 29, No.3 (2004), p. 331.

29 Sanam Haghighi, "Energy Security and the Division of Competences between the European Community and its Member States", *European Law Journal*, Vol.14, No. 4 (2008), p. 470.

30 For example, it was described as "a carefully crafted compromise between national sovereignty over natural resources and energy taxation issues and shared Union competence over the rest". See Sami Andoura, Leigh Hancher and Marc Woude, *supra* note 18, p. 98.

31 Jan Frederik Braun, "EU Energy Policy under the Treaty of Lisbon Rules between a New Policy and Business as Usual", *EPIN Working Paper*, No. 31, 2011, p. 3. Available at www.epin.org/_JF_20110231_epin.html, latest achieved 20 March 2012.

exclusive competence, shared competence and competence to support, coordinate or supplement the actions of the Member States.[32] If we travel back to the 1960s or 1970s, the most frequent-used instruments of EC were various policy guidelines[33] or communication[34], but the legislative activity was rare. If this situation is to remain unchanged, then, establishing a competence for the Union to support actions of Member States would seem more appropriate.[35] But at present, the energy policy is clearly defined as a shared competence of the Union rather than a support or supplement competence. This stipulation clearly reveals that recently the importance of the supranational activity in this area has increased significantly and a mere supplementary role for the Union was no longer appropriate. Thus, the Treaty correctly stipulated energy policy as an area of shared competence which allowed the Union to further enhance its impact by means of exercising its competence.

Second, the development of energy policy benefited from the shared competence regime established by the Treaty. This means that the activities of EU would become "pre-emptive" as mentioned above. At the same time, it could be forecasted that the legislative activity of the Union will be further developed. As Sanam Haghighi predicted,"the more secondary legislation becomes 'dense', the greater the chances that the Member States are limited in their competence to act in that field".[36]

Third, with regard to the three restriction conditions, it is more accurate to state that the new shared competence rule removed the legal uncertainty on the competence delimitation of EU energy policy rather than retain room for the Member States' action. According to the principle of conferral, the competence of the Union is bestowed upon the Member States.[37] In what regards the sensitive subareas like energy exploitation or the general structure of energy supply, a consensus of the Member States on whether to abdicate their powers to the Union cannot be achieved. Consequently, the three restrictive conditions inserted into the new legal basis as

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32 See, Art.2 TFEU.

33 See, for example, European Commission, "First Guidelines for a Community Energy Policy, Memorandum Presented to the Council", Brussels, 18 December 1968, COM (68) 1040.

34 See, for example, European Commission, "Communication on Necessary Progresses in Community Energy Policy", Brussels, 4 October 1972, COM (72) 1200.

35 It is noteworthy that in about 10 years ago, the Commission admitted that "the Commission`s energy policy objectives are far from being shared by all the Member States". See, SEC (96) 496 final, *supra* note 66, p. 2.

36 Sanam Haghighi, *"Energy Security: the External Legal Relations of the European Union with Major Oil and Gas Supplying Countries"* (Portland: Hart Publishing, 2007), p. 83.

37 Article 5(2),TEU, *supra* note 13.

the EU energy policy cannot affect Member States' power thereof.

In this regard, I think the restrictive conditions of EU competence led to the removal of the legal uncertainty and to the reduction of the resistance of the Member States in terms of transferring their power to the EU. As mentioned in the Introduction, due to the political and strategic sensitivity of energy resources of each of the Member States, the political will to develop a common energy policy was always absent. The new competence rules make it clear that the competence of EU in this area is not an exclusive one, but shared among the Member States. There are certain aspects retained by the Member States clearly stipulated in the Treaty. In this context, Member States can rest assured that the competence of EU will not affect their control on domestic resources. Therefore this stipulation is helpful for the EU and the Member States to reach some type of consensus

Thus, it is necessary to have a positive attitude to the current rules on the competence delimitation within energy policy presented by the Treaty. In this regard, the comment from the EESC is noteworthy[38]. It stated that "it is clear that the European Union will have to make full use of the new competences in the energy sphere conferred upon it by the Treaty of Lisbon and encourage the Member States to enter into a broad form of cooperation and collaboration over a range of questions that legally fall within the remit of national or shared competences"[39].

In summary, the new shared competence delimitation is also a breakthrough for the development of energy policy. This set of rules clarifies the competence delimitation between the Union and the Member States in this vital area and confers the EU two tasks in the future: utilizing its competence to develop the key objectives as defined in the new legal basis, on one hand, and fully cooperating with the Member States in the sensitive areas where the EU has no competence, on the other. The three restrictive conditions are by no means "permanent legal shortcomings". After this policy area is clarified as a shared competence of EU, I believe that they can be overcome by constant corporations in future practice.

III. The interface between energy policy and other policy areas: challenges remain.

The current study on the new legal basis of energy policy and competence rules show that the Treaty of Lisbon made significant breakthrough in terms of the legal position, framework and competence delimitation of this area. However, it is also important to understand whether this provision fits into the current

38 EESC, "The EU's New Energy Policy: Application, Effectiveness and Solidarity", Brussels, 16 September 2010, TEU/422.

39 *Ibid*, p. 3.

Treaty. In other words, its relation with other relevant legal bases deserves and requires further study. As illustrated below, there are many parts of the Treaty that also address energy issues and any vague stipulations in this regard may become challenging to the legislative process of energy-related measures in the post-Lisbon period.

A.General Review: Interfaces with other general legal bases in the TFEU

After the creation of a new legal basis in the treaty of Lisbon, one may suppose that the Art.194 is the only provision dealing with energy matters. However, it should be noted that the word "energy" is in fact widely used in the consolidated version of the TFEU[40]. More specifically, it was not only used in the new energy policy legal basis of the competence clause, but it was also used in numerous non-energy-specific provisions. For example the legal basis of Trans-European Network (Art. 170, TFEU) states that: "...the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and *energy infrastructures"* (emphasis added).

If we consider the energy resource as a part of "nature resources" and note the fact that in Europe about 80% of carbon dioxide emissions come from the energy sector[41], then it is self-evident that the EU environmental policy also has deep association with the energy policy. Within the TFEU, the legal basis of environmental policy (Art. 191 TFEU) also stipulates "prudent and rational utilization of natural resources" and "combat climate change" as its objectives. In addition, the environmental concern is also expressly stressed in the context ("preserve and improve the environment") and objective (objective c) of the new legal basis of energy policy (see the table 1 below).

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40 In the whole text of Treaty of Lisbon, the word "energy" is mentioned more than 15 times. But most of them are related to the term European Atomic "Energy" Community Treaty (EURATOM) in the protocols and declarations. Within the TFEU and other than the new legal basis (Art.194) or the shared competence category (Article 4), three provisions explicitly mention the word "energy". They are Art.122 on internal energy security, Article 170 on Trans-European network in energy infrastructures and Art.192 on environmental policy.

41 European Commission, "Communication: An Energy Policy for Europe", Brussels, 10 January 2007, COM (2007) 1 final, p. 1.

Article 191 (1) TFEU	Article 194 (1) 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 utilization of natural resources, – promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.	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: ... (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy;

Table 1: The comparison between the texts of Art.191 (1) and Art.194

Moreover, the same term "functioning of the internal market" is used in both the new legal basis of energy policy and the legal basis of internal market (Art.114 TFEU). This is mainly because from 1986 onwards, EU aimed at establishing an internal energy market to promote the free movement of energy resources and fair competition in this sector. Therefore, there were three packages of secondary legislation[42] adopted for this purpose. But before the Treaty of Lisbon, no detailed legal basis of energy policy was established in the basic treaty level. These measures needed to rely on the legal basis of internal market.

42 See the first wave directives: Directive 96/92/EC on the common rules for the internal market in electricity, O.J. L27/20, 1997 and Directive 98/30/EC on the common rules for the internal market in natural gas, O.J. L 204/1 1998. The second wave of secondary legislations: Directive 2003/54/EC on common rules for the internal market in electricity, O.J. L 176/37, 2003 and Directive 2003/55/EC on common rules for the internal markets in natural gas, O.J. L 176/57, 2003. Regulation (EC) No.1228/2003 on conditions for access to the network for cross-border exchanges in electricity, O.J. L 176, 2003 and Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks, O.J. L 289, 2005. The third package: Directive 2009/72 on common rules for the internal market in electricity, O.J. L 211/55; Directive 2009/73 on common rules for the internal market in natural gas, O.J. L 211/94, 2009; Regulation 715/2009 on conditions for access to the natural gas transmission networks, O.J. L 211/36, 2009; Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity, O.J. L 211/15 2009.

Art.194 TFEU	Art. 114 (ex Article 95, EC) TFEU
1. In the context of the establishment and functioning of the internal market.... Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market;	1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. ... 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.

Table 2: the comparison of text between Art.194 TFEU and Art.114 TFEU

The aforementioned phenomenon in the TEFU shows that various legal base of other policy areas also consider energy matters, such as energy infrastructures, as their subject topics. Especially in some cases, similar texts are used between relevant provisions and the new Art.194. This phenomenon can be called as the "interface" between energy policy and other policy areas. The main reason for this extensive interface came from the treaty revision process of EU of the last decade of the 20th century. After the 1986 Single European Act[43], a new legal base such as internal market and environmental policy was formally established within the primary EU law.[44]Although no detailed legal basis was directly established for energy policy, "the reforms did create a new dynamic where actors in other policy areas became more active in redefining traditional energy policy issues..."[45]. Consequently, the number of energy-related legislation that relied on these new legal bases soared after the relevant treaty revisions[46].

43 Single European Act, O.J. L169, 1987.

44 See Art.18 and Art.25 of the Single European Act.

45 Svein Anderson, "EU Energy Policy: Interest Interaction and Supranational Authority", *ARENA Working Paper* (Center for European Studies, University of Oslo), 2000/05, available at http://www.arena.uio.no/publications/working-papers2000/papers/wp00_5.htm (latest achieved June 2011).

46 A concise summary on relevant legislations is presented as follows:

1) From 1986 to 2007, legislative measures in terms of environmental concerns within energy sector were mainly based on Art. 175 TEC (current Art. 192 TFEU) and mainly focused on the development of energy efficiency and renewable energy. The first measure concerning energy efficiency was Directive 93/76 on minimizing CO_2 emissions by improving energy efficiency (SAVE program, 1993 O.J.L 237/28). Subsequently, there were numerous

On the other hand, as stated before, the Treaty of Lisbon created a new legal basis of energy policy while other relevant provisions still clearly mentioned energy issue in their text. This situation may become a challenge for the legislative process of this area in the post-Lisbon period. More specifically, choosing a proper legal basis for a specific energy from between two or three similar and overlapping provisions will grow to be a controversial task. This situation is more problematic for an ill-defined interface within the Treaty as explained in the following paragraphs.

B . Theoretical challenge:an ill-defined interface in the current Treaty

As the European Court of Justice (ECJ) pointed out, in its opinion, the choice of a proper legal basis has "constitutional significance"[47]. Since, it determines the division of powers among EU institutions and between EU and its Member States. However, as shown in this section, after the revision of the Treaty of Lisbon, some of the content of the two energy-related provisions (Art.194 TFEU and Art.122 TFEU) was overlapped, namely in what regards to security of energy supply and on different legislative procedure (ordinary legislative procedure and special procedure). Therefore, this ill-defined interface will in all probability be base for legal basis litigation in the future.

In terms of the content of these two provisions, the most ambiguous section appears to be at the amendment of the Treaty of Lisbon to the content of Art.122 TFEU. Previously, this provision (Art.100 of EC Treaty) had been used as a

financial measures adopted in order to promote energy efficiency. The legislation related to renewable energy mainly refers to resources other than conventional ones, such as solar and photovoltaic energy, wind power, biomass and bio-fuels. The first legislation on renewable energy was Directive 2001/77/EC, which focused on the promotion of electricity produced from renewable energy resources in the internal electricity market, O.J. L 283/33, 2001. Two years later, a similar Directive (Directive 2003/30 on the promotion of the use of bio-fuels or other renewable fuels for transport, O.J. L 123/42, 2003). These measures were repealed by the 2009 Renewable Directive (Directive 2009/28/EC on the promotion of the use of energy from renewable sources, O.J. L 140/16, 2009).

2) There were three decisions related to development of trans-European Network in the field of energy infrastructure from 1996 to 2009: Decision 96/391/EC laying down a series of measures aimed at creating a more favorable context for the development of trans-European networks in the energy sector, O.J. L16,1996; Decision No.1229/2003/EC laying down a series of guidelines for trans-European network, O.J. L176, 2003 and Decision No.1364/2006/EC laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, O.J. L 262/1, 2006.

3) For the secondary legislations on the construction of internal energy market in electricity and nature gas sector, see *supra* note 42.

47 Opinion 2/00 Cartagena Protocol on Bio-safety,[2001] E.C.R. I-9713, para 5.

legal basis for EC to legislate in the field of internal energy security and crisis response since it stipulated that the Community could take measures "if severe difficulties areas in the supply of certain products" arise. Case in point, after the 1970s Oil Crisis, the Council adopted a decision to create a target for reducing the consumption of primary sources of energy during times of difficulty in what regards the supply of crude oil and petroleum products[48]. Due to the influence of the 2006 nature gas supply crisis, the Treaty of Lisbon also made amendments to this provision. The text now emphasizes the energy issue ("notably in the area of energy") and also stipulates the solidarity requirements ("in a spirit of solidarity between Member States") therein. A comparison between the previous and current text of this provision is presented in the following table.

Art. 100 EC Treaty	**Art.122 TEFU**
1. Without prejudice to any other procedures provided for in this Treaty, the Council, acting by a qualified majority on a proposal from the Commission, may decide upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.	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.

Table 3: the comparison between previous Art.100 EC Treaty and current Art.122 TFEU

Accordingly, the content of Art 122 TFEU is largely overlapped with Art.194 TFEU with regards to the security of energy supply. It is necessary to recall that the new legal basis of energy policy (Art.194 TFEU) also contains a solidarity requirement. In addition, one of Art.194 TFEU's objectives is to "ensure security and energy supply in the Union". This objective was created due to "severe difficulties arise in the supply of certain products". When comparing the texts of these two provisions, one finds that many sections are similar and the relation between them is unclear (see the table 4 below).

48 Decision 77/706/EEC on the setting of a community target for a reduction in the consumption of primary sources of energy in the event of difficulties in the supply of crude oil, O.J. L 292/9, 1977.

Art. 194 TFEU	Art.122 TEFU
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: ... (b) ensure security of energy supply in the Union;	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.

Table 4: the comparison between Art.194 TFEU and Art.122 TFEU

These two provisions open the following question: what is exactly the boundary between the solidarity requirements used? In the context of the Treaty of Lisbon, the answer is that there is none. As seen in the table 3, both of them contain the phrase "in a spirit of solidarity between the Member States". More importantly, as the legal basis of the energy policy mentions the objective of energy security, it is indeed unnecessary to add the emphasis on "energy products" in Art.122 TFEU. Since, "ensuring energy supply" is also an objective under the legal basis of energy policy, which logically contains the several difficulties raised during the energy supply process. Due to the reasons stated above, these new amendments constitute a large inconsistence between Art.194 TFEU and Art.122 TFEU[49].

Apart from the confusion made by the similar content of these two provisions, it should be noted that the future possibility of litigation based on the legal basis is also unexpectedly high due to the different legislative procedures stipulated therein.

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49 The unclear relationship between these two articles was widely observed by scholars. Regarding these two provisions of Constitutional Treaty, Sanam Haghighi mentioned that "it would not have made much sense to provide a new legal basis for the Union's energy activities in the Constitution, which would limit its use to times of crisis, whilst the legal basis for undertaking activities where energy supply is disrupted existed elsewhere in the Treaty". Due to this, her suggestion was "the Constitution had ether limit this activity to times of crisis...or establish a border provision to manage the Union`s security of energy supply beyond mere internal measures to combat a physical lack of energy supply...". See, Sanam Haghighi, *supra* note 35, p. 81. This uncertainty was also indicated by the publication after the Treaty of Lisbon. See Sami Andoura, Leigh Hancher and Marc Woude, *supra* note 18, p. 99. I agree with their view and intend to point out that the new amendments of Treaty of Lisbon in Art.122 TFEU make the situation worse.

In here, it is again necessary to recall the significance of legal basis as it is a decisive factor for which decision-making procedure should be applied for a specific measure. Under different legislative procedures, the involvement of institutions and the voting procedure in the Council are dramatically different.[50] Therefore, it is widely accepted that the procedural divergence[51] is the trigger event for challenges with regard to the legal basis litigation[52]. In a way, the litigation of this nature becomes a political strategy for the Parliament or the Member States to "maximize power and influence over the legislative program of EU"[53].

The different stipulation on the legislative procedure between Art.194 TFEU and Art.122 TFEU may trigger legal basis litigation before the ECJ, brought by the European Parliament (EP). The main reason is that the first paragraph of Art.122 TFEU stipulates that the procedure requirement of this provision is the Council acting solely on the proposal from the Commission, with exclusion of the Parliament's involvement. This procedure is different from the ordinary legislative procedure provided in Art.194 (2) TFEU. As mentioned before, the content of these two provisions with regard to the security of energy supply is overlapped. Therefore, a specific measure choosing Art.122 TFEU as its legal

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50 This is particularly important to one institution: the European Parliament (EP), as its involvement and powers will be dramatically changed under different legislative procedure. For instance, according to Art.294 TFEU, under the ordinary legislative procedure, the EP has an active role. It can propose amendments or even reject a proposal through an absolute majority of its members. But under other procedures, the Parliament can merely be consulted, informed or even excluded. For example, Art.66 TFEU provides safeguard measures against third countries, and the Council can directly adopt this kind of measure on the proposal from the Commission. However,the EP may use the legal basis litigation as a "political strategy" to argue that the measure in question was based on an inappropriate legal basis and ought to be based on others.For this issue, see Holly Cullen and Andrew Charlesworth, "Diplomacy by Other Means: the Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States," *Common Market Law Review*, Vol.36, No.4 (1999), pp. 1243-1270.

51 The Treaty of Lisbon does not apply the ordinary legislative procedure to all policy areas and the special legislative procedure still exists. This procedural divergence could be considered as a trigger event for the legal basis challenges before the Court by either the EP or the Member States. See Marcus Klamert, "Conflict of Legal Basis: No Legality and No Basis but a Bright Future under the Treaty of Lisbon?", *European Law Review*, Vol. 35, No.4 (2010), pp. 499-450. See also, Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti and Adam Tomkins (eds.), *European Union Law Text and Materials* (New York: Cambridge University Press, 2006), p. 140.

52 It should be noted that before SEA introduced a new legislative procedure and strengthened the power of Parliament in the decision-making process, the challenges on proper legal basis for specific measures were not be considered as a significant issue and the amount of legal basis litigation was rare. After the SEA, the number of legal basis litigation soared. See Kieran St. C. Bradley, *supra* note 13, p. 379.

53 See Holly Cullen and Andrew Charlesworth, *supra* note 49, p. 1243.

basis may trigger legal basis litigation. In this context, the EP may bring an action to annul this measure before the Court, since the EP has strong argument that the proper legal basis for this kind of measure is the new energy policy legal basis: Art.194 TFEU. As stated, the measures based on the provision of Art.194 TFEU can sufficiently safeguard the prerogative of the EP as it mainly requires ordinary legislative procedure, however under Art.122 TFEU, the EP could not be involved in the law-making procedure.

C.Practical threat: the pending case C-490/10

The above-mentioned ill-defined interface is by no means a pure theoretical problem. Merely one year after the Treaty of Lisbon formally entered into force, a case with a similar background has already reached the light. This case can be treated as a warning bell for possible legal basis litigation between the new legal basis of energy policy and other relevant legal bases.

On 12 October 2010, the European Parliament brought an action[54] against the Council for annulling the Regulation 617/2010,[55] which had been adopted by the Council on the dual legal basis of Art.337 TFEU (which did not provide any involvement of the Parliament) and Art.187 EURATOM Treaty.[56] The Parliament, however, felt that the choice of legal basis of this measure was inappropriate, the proper option being the scope of Art.194 TFEU, which states that the measure should be in accordance with the ordinary legislative procedure. Meanwhile, the Parliament also thought that the Art.187 of EURATOM Treaty was unnecessary for the contested regulation to rely on[57].

To this case, it is indeed difficult to determine the proper legal basis for the measure in dispute. In the previous case law, the ECJ developed a standard to determine the proper legal basis by searching the "objective factors". It stated that "the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the

54 Case C-490/10, *European Parliament v the Council*, O.J. L 180, p. 7, 2010. This basic information of this pending case can be found at the website of EUR-LEX. See: http://eur -lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:013:001801.en.html, retrieved on 10 July 2011.

55 Regulation (EU, EURTATOM) No 617/2010 on the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) No 736/96, O.J. L32/2, 2010.

56 Art.337 TFEU states that the Commission may collect any information "in accordance with the provisions of the Treaties". Art.187 of EURATOM Treaty stipulates the same responsibilities for the Commission within the scope of EURATOM.

57 This information on the case is cited from the EUR-LEX website, *supra* note 51.

content of the measure".[58] However, it was not easy to determine objective factors of this measure, since the Regulation was concerning "a common framework for the notification to the Commission of data and information on investment projects in energy infrastructure".[59] This subject matter contained both the investment of energy infrastructure and the power of Commission to collect data and information. Therefore, it seems that the measure would fall within the scope of both Art.194 TFEU and Art.337 TFEU. Nevertheless, this Regulation could not be adopted on a dual legal basis, since the decision-making procedures of Art. 194 TFEU and Art.337 TFEU are different.[60] In addition, the situation became even more complicated when the Art.187 of EURATOM Treaty was taken into account.

On the other hand, although it is difficult to predict the result of the case, it provides two implications to the potential legal basis conflicts in this area. First, the scope of the energy-related measures is indeed far-reaching and its contents may have close relation with other policy areas. The ill-defined interface and the posterior selection of proper legal basis of relevant legislative initiatives, discussed above, are the only possible challenges after the Treaty.Various other challenges may also significantly affect this process especially with regard to the legal bases in dispute stipulate different procedural involvement rules for the EP, like for examplein this case of the dispute between Art.194 TFEU and Art.337 TFEU . Second, the scope of potential challenges may even go beyond the Treaty of Lisbon. As we know, currently the nuclear sector is still governed separately by the EURATOM Treaty while a legal basis for energy policy is currently established in the TFEU.Therefore, a measure related to the nuclear sector may also trigger the question on choosing a proper legal basis between provisions of EURATOM Treaty and the new legal basis of energy policy of TFEU. Just like in this case, whether the proper legal basis is Art.187 EURATOM or Art.194 TFEU is also in question. Hence, this case clearly revealed that the potential for a specific measure to trigger legal basis conflicts before the Court goes beyond the discussion in the current paper. It should be admitted that various challenges still exist for the future legislative process in this area.

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58 Case C-300/89 *Commission v Council* (titanium dioxide)[1991] ECR I-2901, paragraph 10; Case C-269/97 *Commission v Council* [2000] ECR I-2257, paragraph 43; Case C-338/01 *Commission v Council* (indirect taxes) [2004] ECR I-4829,paragraph 54.

59 Art.1 ofRegulation (EU, EURATOM) No 617/2010, *supra* note 257.

60 The Court stated in its case law that "no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other", see Case C-338/01 Commission v Council (indirect taxes) [2004] ECR I-4829, paragraph 57.

IV. Conclusion

The energy-related content of the Treaty could be viewed both as a breakthrough and as a challenge from different perspectives. If one only focuses on the content of the new legal basis or the new competence rules separately, they are without a doubt significant breakthrough presented by the Treaty. The legal basis created a transparent legal framework as well as sound innovations as it stresses new subareas of energy policy and the solidarity between the Member States. Despite the restrictive conditions also stipulated in the provision, the new shared competence regime is still a breakthrough since the competence delimitation between the Union and Member States in this policy area is greatly clarified by this regime.

On the other hand, however, when we put these new stipulations at the whole Treaty level, various challenges become apparent. The new legal basis of energy policy is not the only provision dealing with energy matters. A variety of other legal bases also expressly mention energy issues from the perspective of their policy areas, such as the construction of energy infrastructures as part of Trans-European network.In this context, when a specific secondary legislation contains any "mixed" issues, the choice of a proper legal basis becomes a problem. It becomes a challenge for the legislative process when different legislative procedures are stipulated in relevant provisions, such as the Art. 194 TFEU and Art.122 TFEU as mentioned above. But the ill-defined interface of TFEU is by no means the only potential challenge for the process of choosing a proper legal basis. The provisions of the EURATOM Treaty may also conflict with the new legal basis of energy policy in the TFEU, as illustrated in the pending Case-490/10. Therefore, it is clear that other than the new legal basis itself, the treaty drafters did not seriously consider whether this provision was consistent with other stipulations within the system of TFEU or other separate treaties. The potential legal basis conflict or legal basis litigation brought by certain institutions is therefore unavoidable in this context.

Thus, it is clear that the contribution of the Treaty of Lisbon in the area of energy policy is between fundamental breakthroughs and the challenges ahead. It is the task of relevant actors in this area, such as the European Commission, to push forward this policy area by making use of the new legal basis and shared competence presented by the treaty. It is also an important task to get over the challenges in the legislative practices. In this sense, the judgment of ECJ to the Case 490-10 is crucial. At the time of writing, this case is pending, but the judgment of ECJ on this case will undoubtedly establish a basic standard for the choice of proper legal basis for energy-related measures. Hopefully the judgment of ECJ will also aid in tackling the challenges ahead of this vital policy area of the EU after the Treaty of Lisbon.

Appendix - The new legal basis of energy policy

Art. 194 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty on the Functioning of the European Union, (OJ C 306, 12 December 2007).

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 Committee of the Regions and the Economic and Social Committee. 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.