Review of ECT Implementation in Selected Areas:

Analysis on Issues Related to Competition under the Energy Charter Treaty

By Uğur Erman Özgür for the
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Foreword

The network energy industry has been subject to some fundamental changes since the inception of the Energy Charter Treaty (ECT) in 1994: vertically integrated enterprises have been unbundled, and gas and electricity markets have been liberalised in order to establish competition for an investment friendly environment in many countries. Within the ECT constituency, some Contracting Parties have taken measures to liberalise their industries, instituting free market economy principles in upstream and downstream network energy markets. In the emerging energy markets, the ECT represents a unique instrument for the creation of level playing field for energy investments in resource development and infrastructure. In addition to binding provisions for the promotion and protection of foreign investments, it provides a legal framework for cooperation on trade, transit of energy materials and products, energy efficiency policies and issues related to competition within the ECT constituency.

In addressing the political and regulatory risks for foreign investors, in terms of the Risk Reduction Dialogue commenced by the Energy Charter in 2004, this paper examines – from a legal perspective – cooperation options under the competition and free-market economy principles embodied within the ECT. In 2003, the Energy Charter Secretariat published its Best Practices Guidelines on Restructuring (Including Privatisation) in the energy sector with the aim of exchanging experience and stimulating discussion on possible approaches to restructuring in the energy sector. This paper aims to widen the exchange of experiences and stimulate cooperation in relation to issues of competition, particularly where barriers to network access in electricity and gas markets are concerned.

This paper was prepared by Mr. Uğur Erman Özgür during his internship at the Secretariat under the supervision of Dr. Dario Chello, Director for Energy Efficiency and Investment, and Senior Experts, Dr. Sedat Çal and Mr. Zafar Samadov.

The object of this paper is to show that some Contracting Parties to the ECT have developed bilateral, multinational and regional cooperation arrangements that comply with their commitment to work to alleviate market distortions and barriers to competition in the Economic Activity in the energy sector under Article 6 of the ECT. The conclusion of the paper points out the further actions that may be taken under the ECT in order to stimulate cooperation on competition issues within the ECT constituency.

"Analysis on Issues Related to Competition under the Energy Charter Treaty" is published under my authority as Secretary General and is without prejudice to the positions of Contracting Parties/Signatories or to their rights or obligations under the ECT or international investment agreements.

Urban Rusnák
Secretary General

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CHAPTER 1: Summary

Following the introduction of competition in network energy industries[1] of some Contracting Parties to the Energy Charter Treaty (ECT), in addition to investment protection challenges, foreign investors may today face barriers to competition arising out of uncommon norms and standards, exemptions and arbitrary public procurement policy decisions. In order to overcome such barriers to competition in network energy industries, the energy sector should be persuaded to adopt continuous and consistent levels of international cooperation on issues of competition. The ECT provides the legal framework for such cooperation. Article 6 of the ECT paves the way for technical assistance and cooperation on the development and implementation, and in the enforcement of competition rules among the Contracting Parties within the ECT constituency.

Concerning free market economy and competition principles embodied within the ECT, this paper reviews the legislation of the selected Contracting Parties (the EU, Denmark and Georgia), and their bilateral, multilateral and regional endeavours to cooperate in establishing open and competitive network energy markets.

This paper concludes with the methods and cooperation options that Contracting Parties have successfully developed in order to stimulate competition in their network energy industries. Recommendations are provided to facilitate and further improve cooperation on issues of competition within the ECT constituency. Many initiatives are outlined and discussed, such as non-case-specific recommendations and best practices, facilitation of direct contact between competent authorities in the ECT constituency and the option to undertake specialised/customised workshops within the Energy Charter Process.

1 Within the context of this paper the term 'network energy industries' means electricity, natural gas and district heating transmission and/or distribution systems exhibiting natural monopoly character.

CHAPTER 2: Introduction

2.1. Overview

To respond to the growing energy security challenges, the energy sector will require an investment of USD 48 billion annually until 2030, according to a recent report by the International Energy Agency (IEA).[2] However, the low level of foreign direct investment (FDI) in transition and emerging economies means that constraints remain in achieving such a goal.[3] In addition to investor promotion and protection mechanisms, international cooperation should be considered in removing barriers to network energy industries as a way to overcome obstacles to private sector participation in resource development and infrastructure.

In searching for alternative financing options, states have been making their energy markets accessible for private sector participation through concessions or by the creation of market conditions through liberalisation. Since the ECT came into force in 1998, the retreat from state to private finance has progressed substantially. Some states entered into long-term individual concessional agreements with investors to boost private sector participation, whereas others restructured and liberalised their state monopolies to introduce competition. However, in some Contracting Parties of the ECT constituency states retain monopolistic structures in the energy sector. By contrast, in Contracting Parties that adopted restructuring and liberalisation programmes, states appear as the guarantor of the market economy and have an equal chance of success in altering the pattern of programmes.[4]

The emergence of energy markets reveals market power abuses, market manipulations as well as regulatory failures.[5] Because of different market models and the increasing need for investment friendly energy markets, a continuous and consistent level of international cooperation is crucial to the energy sector. In this context, cooperation and competition principles embodied within the ECT can provide a supra-national forum where countries can exchange their experiences and best-practices, and cooperate on issues relating to competition in order to achieve the desired level of FDI flow. The ECT endeavours to establish 'a legal framework in order to promote long-term cooperation in the energy field […] with the objectives and principles of the [Energy] Charter'.[6] Considering that the fundamental objective of the ECT is to ensure the creation of a 'level playing field' for energy sector investments, cooperation in issues related to competition should further be encouraged among Contracting Parties. This, however, is a rigorous task given that countries have different market models throughout the ECT constituency.

2 International Energy Agency (IEA), World Energy Outlook 2011, p. 45.
3 World Bank and PPIAF, PPI Project Database, Energy Note 2011, available at ppi.worldbank.org /features/December-2011/2011-Energy-note.pdf, date of access: 18 June 2012.
4 Cameron P. D., *Competition in Energy Markets: Law and Regulation in the European Union*, (Oxford: OUP 2007), para. 1.04.
5 Joskow P. L., Lessons Learned From Electricity Market Liberalisation, *The Energy Journal, Special Issue, The Future of Electricity: Papers in Honour of David Newberry* 2008, pp. 22–23.
6 ECT Article 2.

Within the framework of the risk reduction dialogue, this paper has been prepared in an attempt to facilitate the exchange of information on issues relating to competition; it also aims to share experiences of the Contracting Parties in the context of competition principles embodied within the ECT – principles that include but are not limited to Article 6 on Competition. The scope of this paper will be limited to competition-related issues providing analysis of existing legislations, as well as bilateral, multilateral and regional initiatives for joint operations on cooperation in network energy industries of selected Contracting Parties that have undertaken initiatives in creating competitive energy markets. This paper endeavours to explore the practical application of competition principles embodied within the ECT. In addition, the report puts forward suggestions as to how to further stimulate cooperation between Contacting Parties within the activities of the Investment Group of the Energy Charter. The paper is structured with the understanding that, although the ECT provides a political commitment to develop open and competitive markets, Contracting Parties are not under any obligation to implement liberalisation in their energy markets.

2.2. Background

As opposed to many bilateral investment treaties, the ECT does not only provide standards of protection for foreign investments. The Treaty is a unique multilateral treaty in that it extends Contracting Parties' obligations to facilitate trade and transit of energy materials and products, and it promotes energy efficiency policies through the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA). The ECT is also unique as it establishes a common forum for cooperation 'to promote access to international markets on commercial terms, […] develop[ing] an open and competitive market, for energy materials and products'[7] and 'to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector'.[8]

As per Article 6(2), each Contracting Party to the ECT undertook a commitment to 'ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector'. Unilateral and anti-competitive conducts may also include exploitative abuses as provided in the understandings of the ECT with respect to Article 6.

Article 6 further encourages cooperation between Contracting Parties in implementing and enforcing their competition rules, and in resolving antitrust and competition disputes between Contracting Parties in the energy sector. According to Article 6(3), (4) and (5):

> (3) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available resources, technical assistance on the development and implementation of competition rules to other Contracting Parties.

7 ECT Article 3.
8 ECT Article 6(1).

> (4) Contracting Parties may cooperate in the enforcement of their competition rules by consulting and exchanging information.
>
> (5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other Contracting Party and may request that its competition authorities initiate appropriate enforcement action. The notifying Contracting Party shall include in such notification sufficient information to permit the notified Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and cooperation as the notifying Contracting Party is able to provide. The notified Contracting Party or, as the case may be, the relevant competition authorities [that] may consult with the competition authorities of the notifying Contracting Party and shall accord full consideration to the request of the notifying Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development.

Compared to the above-cited text of Article 6, consultations regarding antitrust and competition principles under the ECT reveal that earlier texts of articles on competition were produced in the form of more descriptive propositions. As reflected in the *travaux preparatoires*,[9] in the earlier versions of articles relating to competition, delegations considered drafting Article 7 on Energy Markets,[10] Article 5 on Liberalisation and Non-Discrimination, Article 9 on Monopolies and Article 10 on State Aid.[11]

A review of the ECT's *travaux preparatoires* shows that a common characteristic of the draft articles was the detailed approach to describing anti-competitive conducts as well as obliging Contracting Parties to achieve liberalisation and redesign their energy markets so as 'to minimise the scope and powers of monopolies and/or dominant enterprises'.[12] For instance, under Draft Article 7, Contracting Parties would be encouraged to 'undertake to prohibit agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition […]'.[13] Under Draft Article 10, the Contracting Parties would be obliged to avoid 'State aid[s] […] with the object of distorting competition in trade […]'.[14] However, creating a supra-national forum

9 *Travaux preparatoires* of Article 6 on Competition is available at the Energy Charter Secretariat. References 10 to 15 below reflect the views of the Signatories to the European Energy Charter, the Energy Charter Secretariat and the Secretariat's Legal Sub-Group during the drafting process of Article 6.

10 Basic Agreement for the European Energy Charter, Draft of 5 November 1991, Draft Article 7.

11 Note by the Secretariat on 5 March 1992.

12 Basic Agreement for the European Energy Charter, Draft of 20 January 1992, Draft Articles 5, 7, 9 and 10.

13 Basic Agreement for the European Energy Charter, Draft of 5 November 1991, Draft Article 7.

14 Basic Agreement for the European Energy Charter, Draft of 5 November 1991, Draft Article 10.

to minimise public sector involvement in energy markets has proven a demanding task. Particularly for Draft Articles 9 and 10 on Monopolies and State Aid, delegations reserved their rights and/or materially objected to the wording of the draft articles. As a result, Draft Articles 9 and 10 were deleted. Nevertheless, the consensus to develop open and competitive energy markets was retained and reflected within the scope of Article 8 on Competition (subsequently Article 7 as provided in the Draft Treaty of 15 March 1993, and currently Article 6).

Article 6 directs the broad goal of alleviating 'market distortions and barriers' on a political basis and does not entail a strict legal commitment for the Contracting Parties. Article 6(1) provides a soft commitment and sets the ground for the somewhat firmer commitments to unilateral and cooperative actions that follow in the subsequent subparagraphs.[15] In Article 6(2), despite the more concrete text compared to Article 6(1) (i.e. '[…] shall ensure that […] they have and enforce […]'), the ECT does not give effect to a firm commitment to implement laws that address 'unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector'. This reflects the Contracting Parties' recognition of state sovereignty and sovereign rights over energy resources.[16] Furthermore, in order to fully benefit from the ECT by means of creating the 'level playing field' for energy sector investments within the ECT constituency, it is fundamental that the Contracting Parties introduce liberalisation and competition in energy markets. The ECT creates an international forum to achieve competitive energy markets, giving regard to 'progressive liberalisation […]' and 'competition rules concerning mergers, monopolies, anti-competitive practices and abuse of dominant position'.[17] Thus, free market economy principles embodied within the ECT provide the grounds to boost competition within the ECT constituency.

In consideration of the above findings, it can be concluded that the Energy Charter Process encourages liberalisation and competition in energy markets in order to facilitate cross-border investment within the ECT constituency. This goal is expressed in the *travaux preparatoires* and is well demonstrated in Article 3, Article 6 and the preamble of the ECT. Nevertheless, the practicality of the ECT's competition provisions should be analysed, given that Article 6 does not entail a binding enforceability option. As set forth in Article 6(7), diplomatic negotiations are the exclusive means in resolving disputes between Contracting Parties under Articles 6(5) and 27(1).

In the context of the above discussions, the scope of this paper will be confined to the content analysis of competition legislation in network energy industries of selected Contracting Parties, which have undertaken steps towards developing competitive energy markets, in consideration of the rather complex structure and the delicate balance between regulation and competition. However, before commencing the review of selected jurisdictions, it may be relevant and useful to elaborate on some competition issues that Contracting Parties might face in network energy industries.

15 Interpretation of and Advice on Article 8(1) *[currently Article 6(1)]* by the Energy Charter's Legal Sub-Group, 28 January 1993, p. 2.
16 ECT Article 18.
17 ECT Preamble.

CHAPTER 3: Private Sector Participation and Competition in Network Energy Industries

3.1. Private Sector Participation

Historically, network energy industries have been vertically integrated under state-owned monopolies or privately owned regulated companies that can vary according to that country's politics and culture.[18] With the rise of neo-liberal policies, some countries have aimed at reduced state interference and regulation. As a result of growing energy security challenges, private sector participation has become essential due to governments' searches for alternative financing options and efficiency models to reduce the heavy burden of infrastructure projects on the public budget.[19] Two models have been dominantly employed in instituting private sector participation in infrastructure projects: *Independent Power Producer (IPP) Projects* and *Liberalisation*.

IPP Projects have opted to be an important model for private sector participation, given that they ensure market prices and profitability in the long term and can represent reduced risks where investors are concerned. These models have provided private sector long-term incentives through operating rights in the production segment. Under IPP Projects, private investors sell their output directly to governments under take-or-pay or Power Purchase Agreements (PPAs). Particularly in developing countries, governments prefer IPP Projects, because they allow public control of infrastructure assets, while simultaneously encouraging private investment in the generation segment.[20] Build-Operate-Transfer (BOT) and Build-Operate-Own (BOO) models provide *ad hoc* solutions for governments that are reluctant to open their network energy industries to competition. Under the IPP models, the private sector builds, finances, manages and at the end of the contracting term either transfers (i.e. BOT) or owns (i.e. BOO) the infrastructure assets.[21]

As a second model, new economic wisdom introduced markets that are competitive and that could deliver innovation, efficiency and low prices.[22] Restructuring and liberalisation have become the prevailing model in countries that aim to institute competition in their network energy industries. The liberalisation of energy networks has introduced the concept of 'competition where possible and regulation only where unavoidable',[23] aiming to promote and optimise private sector participation by implementing market-based instruments as well as regulation in the energy sector. This model introduces competition in network

18 Cameron P. D., *Competition in Energy Markets: Law and Regulation in the European Union*, (Oxford: OUP 2007), paras. 1.10–11.

19 Jamasb T., Mota R., Newberry D. & Pollitt M, Electricity Sector Reform in Developing Countries: A Survey of Empirical Evidence on Determinants and Performance, *The Cambridge – MIT Institute Working Paper Series*, Working Paper 47 (2004) (hereinafter Jamasb et al. 2004), p. 4.

20 Pritchard R., The IPP Experiment, *International Energy Law and Taxation Review* (2001), pp. 29–30.

21 *Ibid*.

22 Jones A. & Sufrin B., *EC Competition Law: Text, Cases and Materials*, (Oxford: OUP, 2007 Third Edition), pp. 1–4.

23 Newbery D., Privatisation, Restructuring and Regulation of Network Utilities, (USA: MIT Press, 2002), p. 134.

energy industries through the unbundling of vertically integrated monopolies and privatisation of generation and supply segments. In transmission and distribution segments where monopolistic characteristics are prominent, regulation is retained to act as a 'surrogate for competition'.[24][25]

3.2. Issues of Competition and Cooperation

The overall aim of competition policies is to increase the efficiency of markets by preventing anti-competitive behaviours. However, in liberalised network energy industries competition issues are not limited to anti-competitive behaviours, such as prevention, restriction or distortion of competition, through horizontal or vertical agreements and concerted practices. Regulation intervenes in markets in order to compensate for market failures.[26] Hence, bureaucratic obstacles and market-distorting government intervention may create regulatory barriers at network entry levels. Such barriers may include administrative constraints that arise out of state authorities' exclusive rights to issue 'certificates, licences and other permits for starting business operations' in network energy industries.[27] Thus, competition issues may arise as a result of barriers to *network access*. In its work to develop the interface between regulation and competition, the United Nations Conference on Trade and Development (UNCTAD) outlined the main regulatory barriers to competition that exist in network energy industries as:

- 'Restraints on competition, i.e. by introducing uncommon norms and standards amounting to barriers to market entry or by preventing foreign firms from competing in national markets;
- Elimination or exclusion from competition through exemption of certain activities from the scope and coverage of competition laws;
- Creation of distortions to competition, such as artificial executive interventions changing the competitive positions of certain firms (through arbitrary public procurement policy decisions, for instance).'[28]

24 Cameron, *Competition in Energy Markets: Law and Regulation in the European Union*, para. 1.76.

25 The scope of this paper does not include a discussion on best practice experiences in liberalising network energy industries. Further information is elaborated in the Best Practices Guideline on Restructuring (Including Privatisation) in the Energy Sector, *the Energy Charter Secretariat Publications*, June 2003 available at www.encharter.org/fileadmin/user_upload/Publications/Best_Practice_Guidelines_2003_ENG.pdf; for further information see also Joskow P. L., Lessons Learned From Electricity Market Liberalisation, pp. 11–13; Newberry D., Issues and Options for Restructuring Electricity Supply Industries, *The Cambridge – MIT Institute Working Paper Series*, Working Paper 01 (2002); Bacon R. W., A Scorecard for Energy Reform in Developing Countries, *World Bank Group Finance, Private Sector and Infrastructure Network Publications, Public Policy for the Private Sector* 175 (1999); Pritchard R., Eight Guidelines for Electricity Industry Reform, *Center for Energy Petroleum Mineral Law and Policy (CEPMLP) Internet Journal* 12:7 (2002), available at www.dundee.ac.uk /cepmlp/journal/html/vol12/article12–7.html, date of access: 18 June 2012.

26 UNCTAD Doc. TD/RBP/CONF.7/L.7, Model Law on Competition (2010) – Chapter VII, pp. 4–5; UNCTAD documents referred to within this paper are available at unctad.org, date of access: 18 June 2012.

27 UNCTAD Doc. TD/B/COM.2/CLP/23 including Corr.1, Model Law: The Relationships Between a Competition Authority and Regulatory Bodies, Including Sectoral Regulators, p. 3.

28 *Ibid*. at p. 8.

In order to boost competition in liberalised network energy industries, states have established an Independent Regulatory Authority (IRA) and a National Competition Authority (NCA) to remove these anti-competitive effects of regulation to competition.[29] IRAs and NCAs should be distinguished because independent regulators intervene in the network energy industry on an *ex-ante* basis with the objective being to prevent anti-competitive behaviours and to ensure security of supply. By contrast, competition authorities mostly intervene on an *ex-post* basis to redress distortions of competition as a result of concerted practices or abuses of dominant positions. In an ideal liberalised network energy industry, IRAs ensure non-discriminatory network access by providing transparent tariffs and non-discriminatory network entry, whereas NCAs take measures against anti-competitive behaviours such as horizontal or vertical agreements, mergers or cartels that may 'fix prices', 'restrict outputs' and 'rig bids'.[30][31] Despite their divergent tasks, independent regulators and competition authorities share the objective to ensure and stimulate competition in network energy industries. As illustrated in *GDF Suez* v *Commission*,[32] Contracting Parties can cooperate with IRAs while enforcing rules on competition in the ECT constituency.[33] As a result, cooperation between NCAs and IRAs is crucial in order to implement and enforce competition principles in network energy industries.

3.3. Cooperation for Effective Competition

As businesses have become more global, the importance of cross-border issues of competition and cooperation has increased drastically. According to Whish:[34]

> Principles of public international law do not provide an adequate answer to the problems that arise when true conflicts occur between competition authorities, and yet the scope for such conflicts is likely to increase as more states adopt their own codes of competition law and as business increasingly becomes international. […] [C]ompetition authorities have become increasingly aware that, as national systems of competition law are not always adequate to deal with cartels, anti-competitive practices and mergers that transcend national boundaries, international cooperation between them may increase the chances of achieving a successful solution.

Internationalisation of competition law shapes cooperation principally among NCAs. However, given the structure of network energy industries and the important function of IRAs in introducing competition, information exchange and joint investigations

29 *See* e.g. Joskow, Lessons Learned From Electricity Market Liberalisation at *supra* note 5.

30 Jones & Sufrin, *EC Competition Law: Text, Cases and Materials*, pp. 783–84.

31 Leduc E., A Note on Recent Developments on Scopes of Intervention for Competition Authorities and Energy Regulators, European Commission DG Competition, Antitrust - Energy, Environment, pp. 1–2, available at www.cne.es/cgi-bin/BRSCGI.exe?CMD=VEROBJ&MLKOB=502984683232, date of access: 18 June 2012.

32 Case COMP 39.316, GDF Suez foreclosure [2009] OJ C156/14, Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.316—Gaz de France (gas market foreclosure)'.

33 '[…] [T]he Commission had the opportunity to assess the relevance of the commitments brought by GDF Suez with the help of the French energy regulator (CRE) […]': Leduc, A Note on Recent Developments on Scopes of Intervention for Competition Authorities and Energy Regulators, p. 4.

34 Whish R., *Competition Law*, (Oxford: OUP, 2012, Seventh Edition), p. 506.

should be facilitated among NCAs and IRAs, while preventing anti-competitive effects of regulation. On a non-case-specific basis, states may exchange information in establishing and/or developing national legislation to remove barriers to competition in network energy industries and in adopting recommendations of international organisations related to enforcement of the rules of competition.[35]

Tools of cooperation in issues of competition are diverse. They can consist of bilateral, regional or multilateral agreements and of non-binding best practices and recommendations. For instance, UNCTAD and the Organisation for Economic Cooperation and Development (OECD) endeavour to increase interaction and cooperation between their member countries through their model legislations, guidelines and recommendations on competition in network energy industries. In this context, UNCTAD's most significant work, the Model Law on Competition, includes a chapter solely devoted to the interface between NCAs and IRAs.[36] In addition, the OECD has published extensively on the issue of the relationship between NCAs and IRAs in network energy industries.[37] Furthermore, both organisations endeavour to increase cooperation among their member countries; they do this through their general recommendations on competition law such as 'the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices',[38] 'the Revised Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade'[39] and 'Recommendation of the Council Concerning Effective Action against Hard Core Cartels'.[40] Other organisations such as the International Competition Network (ICN) and the European Competition Network (ECN) establish multinational forums in order to facilitate cooperation between competition authorities and to promote 'procedural and substantive harmony of competition laws' among its members.[41]

Furthermore, cooperation among IRAs is mostly available through bilateral agreements and regional multinational initiatives such as the Agency for the Cooperation of Energy Regulators (ACER), the Forum of Nordic Energy Regulators (NordREG), the Nordic Energy Cooperation (NORDEN), the Baltic Sea Region Energy Cooperation (BASREC) and the Energy Regulators Regional Association (ERRA). The cited options for cooperation will be explored in more detail under the review of competition and cooperation legislation in selected Contracting Parties in the next section.

35 Jenny F., International Cooperation on Competition: Myth, Reality and Perspective, *The Antitrust Bulletin*/winter *2003*, p. 974.

36 UNCTAD Doc. TD/RBP/CONF.7/L.7, Review of Application and Implementation of the Set Model Law on Competition (2010) – Chapter VII, Geneva 8–12 November 2010.

37 *See* OECD Doc. DAFFE/CLP(99)8, Relationship Between Regulators and Competition Authorities, Policy Roundtables (1998), OECD documents referred to within this paper are available at www.oecd.org, date of access: 18 June 2012.

38 *See* UNCTAD Doc. TD/RBP/CONF/10/Rev.2, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

39 *See* OECD Doc. C(95)130/FINAL, Revised Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade.

40 *See* OECD Doc. C(98)35/FINAL, Recommendation of the Council Concerning Effective Action against Hard Core Cartels.

41 Whish, *Competition Law*, p. 448; for a full list of Members of the ICN *see* www.internationalcompetitionnetwork.org /members/member-directory.aspx, date of access: 18 June 2012.

CHAPTER 4: Review of National Competition Legislation in Selected ECT Contracting Parties

4.1. Scope of the Review

Considering the above discussions on private sector participation and cooperation in competition issues in network energy industries, the following section provides a review of national legislation in the EU, the Kingdom of Denmark (Denmark) and Georgia in the appraisal of initiatives for commencing competition and facilitating cooperation between NCAs and IRAs in their respective jurisdictions. These jurisdictions are selected in an attempt to finely balance the analysis and impartially represent divergent industry structures within the ECT constituency. The scope of the analysis is limited to the implementation of competition principles and cooperation initiatives in the network energy industries of EU, Denmark and Georgia, taking into account that the EU represents a model for supra-national legislation and mechanisms; Denmark exhibits a developed competition legislation and market structure, while Georgia is in a transition period towards an open and competitive network energy industry. When the ECT's entry was enforced in each jurisdiction, the following analysis questioned whether the Contracting Parties:

i. have been working to adopt liberalisation programmes and appropriate laws that address unilateral and anti-competitive concerted practices in order to alleviate market distortions and barriers (under Article 6(1) and (2));

ii. have taken initiatives to facilitate technical assistance on the development and implementation of competition rules (under Article 6(3));

iii. have taken initiatives to facilitate cooperation in the enforcement of competition rules by consultations and exchanges of information (under Article 6(4)).

In this context, it is necessary to analyse non-case-specific cooperation tools in order to develop and implement competition rules in the ECT constituency. In addition, case-specific competition tools should be analysed in order to explore options for exchange of information between the competent authorities of the selected Contracting Parties. Considering the interface between NCAs and IRAs, the IRA's important duty is to remove the regulatory barriers to competition that are specific to network energy industries. This requirement is crucial to the analysis of cooperation between IRAs (in addition to cooperation between NCAs) within the ECT constituency for their *ex-ante* role in implementing and enforcing competition principles.

4.2. Review of the Legislation on Competition and Cooperation in Network Energy Industries of the EU, Denmark and Georgia

4.2.1. European Union

4.2.1.1. EU Network Energy Industry: Third Energy Package

The European Communities became signatories to the ECT on 15 December 1994 with the Council Decision 94/998/EC[42] and subsequently approved the ECT and PEEREA on 23 September 1997 with the Council and Commission Decision 98/181/EC, ECSC, Euratom.[43] Since the ECT came into force in 1998, the EU has taken comprehensive steps to establish the Internal Energy Market (IEM), which is also in compliance with its endeavours to enact laws that are necessary and appropriate to address unilateral and concerted anti-competitive conduct related to energy networks under the *acquis communautaire* on competition.[44] At the intra-EU level, the EU enacted directives and regulations in order to liberalise its network energy industries.

The first EU Liberalisation Directives on Electricity[45] and Gas[46] were enacted in 1996 and 1998, respectively; these aimed to implement a harmonised regulatory reform and liberalisation scheme in each Member State. The 2003 Liberalisation Package[47] subsequently repealed the First Package modifying its provisions on market opening, on the administration of access to networks, and the regulation of the market.[48] The 2003 recast aimed to enhance competition in the EU network energy industry by improving provisions with regard to 'free network access, free competition among suppliers and free consumer choice'.[49] The 2003 Package, however, exhibited 'disappointing conclusions' according to the 2007 Sector Inquiry.[50] The 2007 Sector

42 OJ 1994 L 380/1–2, 94/998/EC: Council Decision of 15 December 1994 on the provisional application of the Energy Charter Treaty by the European Community, EU documents referred to within this paper are available at eur-lex.europa.eu, date of access: 18 June 2012.

43 OJ 1998 L 69/1–3, 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects.

44 TFEU Articles 101 and 102.

45 Directive 96/92/EC of the European Parliament and the Council of 19 December 1996, concerning Common Rules for the Internal Market for Electricity.

46 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998, concerning Common Rules for the Internal Market in Natural Gas.

47 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/92/EC, OJ L176/37, as amended; Regulation 1228/2003/EC of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (2003) OJ L176/1, as amended; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC; Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks.

48 Roggenkamp M., Redgwell C., Rønne A. & Guayo I., *Energy Law in Europe: National, EU and International Regulation*, (Oxford: OUP 2007), paras. 5.268–5.271.

49 Albers M., The New EU Directives on Energy Liberalisation from a Competition Point of View, *Cameron P. D. et al., Legal Aspects of EU Energy Regulation: Implementing the New Directives on Electricity and Gas Across Europe*, (Oxford: OUP 2005), paras. 3.03–3.06.

50 Neelie Kroes speech in European Commissioner for Competition Policy on Final Report of Energy Sector Competition Inquiry Press Conference, Brussels 10.01.2007, available at europa.eu, date of access: 11 June 2012.

Inquiry Report noted the five shortcomings as a 'high level of concentration and distortion of market power, vertical foreclosure, lack of market integration, lack of transparency and high prices' in energy markets.[51] Thereafter, the Third Energy Package was enacted in 2009 and came into force on 3 March 2011.[52] Its aims were to implement effective unbundling of vertically integrated monopolies, 'remov[e] the regulatory gaps (in particular for cross-border issues), address[] market concentration and barriers to entry, and increas[e] transparency in market operations'.[53] The Third Energy Package has improved the former EU directives on energy in accordance with the best practices in regulatory reforms.

The 2009 Directives have promoted ownership unbundling and the concepts of 'independent system operator' (ISO) and 'independent transmission operator' (ITO).[54] They have prohibited vertical integration in the network energy industries of Member States,[55] and they underline the importance of financial, legal and human resource autonomy for IRAs.[56] With respect to Third-Party Access (TPA), the 2009 Directives retain regulated TPA (rTPA) 'based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users'.[57] Also, the 2009 Directives entail close cooperation of IRAs with the ACER[58] and the 'Council of European Energy Regulators' (CEER).[59] With the Directives, the EU endeavours to reduce vertical integration, improve cross-border trade, strengthen regulatory enforcement and increase cooperation between transmission system operators (TSOs) in Member States. Until 2014, the EU aims to increase competition and security of supplies by fully integrating national energy markets through implementation of the *acquis communautaire* on energy.[60]

4.2.1.2. Cooperation for Competition among NCAs

At the intra-EU level, the basis of the EU Competition Policy is concentrated within Title VII Chapter I of the Treaty on the Functioning of the European Union (TFEU). Article 101 prohibits '[…] all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market […]'. Article 102 restricts '[a]ny abuse by one or more undertakings of a dominant position within the

51 SEC, DG Competition Report on Energy Sector Inquiry, SEC (2006) 1724, 10 January 2007, Part II, para. 392.

52 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (hereinafter 2009 Electricity Directive); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (hereinafter 2009 Gas Directive).

53 *See* COM(2007) 528 final, Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC Concerning Common Rules for the Internal Market in Electricity, p. 9.

54 *See* Articles 9 and 13 of the 2009 Electricity Directive; Articles 9 and 14 of the 2009 Gas Directive.

55 Article 9(1)(a) of the 2009 Electricity and Gas Directives.

56 Article 35 of the 2009 Electricity Directive; Article 39 of the 2009 Gas Directive.

57 Articles 32(1) of the 2009 Electricity and Gas Directives.

58 Recital para. 59 of the 2009 Electricity Directive; Recital para. 57 of the 2009 Gas Directive.

59 *Memorandum of Understanding for Establishment of the Council of European Energy Regulators*, Brussels, 7 May 2000, available at www.ceer-eu.org/documents.htm, date of access:18 June 2012.

60 For further information *see* EC website at ec.europa.eu/energy/gas_electricity/codes/codes_en.htm, date of access: 11 June 2012.

internal market or in a substantial part of it […]'. To establish common competition principles, the European Council and the EC have also adopted regulations. Within the framework of the *acquis communautaire* on competition, cooperation between NCAs is enabled and facilitated through EU legislation on Cartel and Merger review.[61] In addition, the Council Regulation on the implementation of Articles 101 (formerly Article 81) and 102 (formerly Article 82) of the TFEU have enacted the legal framework upon which the EC, Member States, NCAs and national courts may work together towards a common purpose.[62]

Regulation 1/2003 gives authority to NCAs, national courts and the EC to ensure that EU Competition Law is complied with. In order to facilitate cooperation among NCAs, for national courts and the EC to achieve this task, Council Regulation 1/2003 and the established ECN enable the exchange of information, including confidential information, at the intra-EU level.[63]

At extra-EU level, there is cooperation on issues related to antitrust and competition among EU and non EU member countries through multilateral and bilateral arrangements. The EU cooperates with non-Member State countries on competition matters through the European Economic Area (EEA) Agreement and the WTO, and non-binding mechanisms such as the OECD and the ICN. The EU has also concluded bilateral arrangements to cooperate with non EU member countries in the ECT constituency, namely Albania,[64] Croatia,[65] Japan,[66] the Republic of Moldova,[67] Montenegro,[68] Ukraine,[69] the Swiss Confederation[70] and the Republic of Turkey.[71] The EU has further concluded bilateral cooperation arrangements with the Russian Federation.[72]

61 *See* e.g. Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (hereinafter 'the EC Merger Regulation').

62 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter 'the Regulation 1/2003').

63 *For further information see* Articles 11 and 12 of the Regulation 1/2003; see also Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03) for further information on allocation of authority between NCAs, national courts and the EC.

64 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part (2006).

65 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (2004).

66 Agreement between the European Community and the Japanese Government concerning cooperation on anticompetitive activities (2003).

67 Partnership and Cooperation Agreement Establishing a Partnership Between the European Communities and their Member States, of the One Part, and the Republic of Moldova, of the Other Part (1998).

68 Competition related extracts of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (2007).

69 Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and Ukraine, of the other part (1998).

70 Agreement between the European Community and the Swiss Confederation on Air Transport (2002).

71 Agreement between the European Coal and Steel Community and the Republic of Turkey on trade in Products covered by the Treaty Establishing the European Coal and Steel Community (1996).

72 Competition related extracts of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (1997); Memorandum of Understanding on Cooperation (2011).

As indicated in Annex I, European Economic Area (EEA) Agreement is currently applicable in three EFTA countries: Iceland, Norway and Liechtenstein. Cooperation between the EU, Icelandic, Norwegian and Liechtenstein Competition Authorities, and the EFTA surveillance authority is governed through Protocol 23 (Article 58) and with reference to the cooperation between surveillance authorities and Protocol 24 (on cooperation) in the field of control of concentrations. Articles 53 and 54 of the EEA Agreement mirror Articles 101 and 102 of the TFEU, and Protocols 23 and 24 entail general provisions on cooperation. The EU is also engaged in the activities of the ICN and OECD for cooperation on anti-competitive practices.

At the bilateral level, agreements with Albania, Croatia and Montenegro refer to the competition section of the TFEU (i.e. Articles 101 and 102) for enforcement of competition rules; these countries are obliged to make their future legislation compatible with the *acquis communautaire* on competition.[73] At the bilateral level, agreements concluded with Japan, the Russian Federation, the Republic of Moldova, Ukraine, the Swiss Confederation and the Republic of Turkey provide mutual obligations for cooperation between competent competition authorities and the EU under the *acquis communautaire* on competition and respective legislation of each country.

Among the bilateral arrangements concluded between the EU and the above-cited countries, the agreements with Albania, Croatia, Ukraine, and Russia merit further emphasis as these contracts contain provisions pertaining to cooperation in energy resource projects as well as in competition. For instance, Article 107 of the Albania Bilateral Agreement provides that Albania agrees to relate to the *acquis communautaire* on energy at national level and to 'reflect the principles of the market economy […] based on the […] [EnC] Treaty […]'. Furthermore, bilateral agreements with Croatia, Ukraine and Russia base energy cooperation on the principles of the market economy as well as the ECT. In particular, as provided in Article 65 of the Russian Federation Bilateral Agreement, cooperation between the EU and the Russian Federation 'shall take place within the principles of the market economy and the [] Energy Charter [Treaty], against a background of the progressive integration of the energy markets in Europe'.

4.2.1.3. Cooperation for Competition among IRAs

In addition to evaluations on cooperation between NCAs within the framework of the Third Energy Package, one should also analyse whether the EU legislation provides the legal basis for cooperation between IRAs of EU Member States and with other Contracting Parties within the ECT constituency.

ACER, created under the 2009 Agency Regulation, and CEER institutionalise cooperation between IRAs of Member States. Together with CEER, ACER replaces the 'European Regulators' Group for Electricity and Gas' (ERGEG), an independent advisory group that was established by the EC to facilitate cooperation between the European IRAs.[74] ACER and CEER endeavour to facilitate the creation of a law of competition on energy through the close cooperation of IRAs. These energy regulators appear as forums for

73 *See* Articles 71, 70 and 73 of the Albania, Croatia and Montenegro – EU Bilateral Agreements, respectively.

74 Proposals for Directives of the European Parliament and of the Council amending Directive 2003/55/EC concerning common rules for the internal market in Electricity and Natural Gas, p. 9.

cooperation, information exchange and technical assistance between the IRAs of EU Member States to develop and enforce competition principles in network energy industries. The EU obliges Member States to implement the legal framework in which ACER can enjoy the 'legal capacity accorded to legal persons under national law', particularly with respect to national property laws.[75]

At the intra-EU level, cooperation between Member States is promoted by the EC under Article 6(1) of the Directives. The 2009 Directives distinctly entail close cooperation of IRAs through the ACER.[76] ACER's tasks could be summarised as providing a framework for IRAs to cooperate, regulating cooperation between national TSOs and their activities, granting individual decisions particularly on exemption request(s) concerning infrastructure assets of EU interests, and providing opinions or recommendations to the Commission in order to secure binding rules.[77] In addition, the EC has to consult the European Network of Transmission System Operators for Gas (ENTSO-G) and Electricity (ENTSO-E) (together ENTSOs) as per the 2009 Regulations on conditions for access to the electricity and natural gas transmission networks[78] as well as other relevant stakeholders.[79]

At the extra-EU level, the legal system used for cooperation with non EU member countries through ACER, CEER and ENSTOs is not yet clearly established. The EC recently published a Commission Staff Working Paper which provides an analysis of the Possibility of Neighbouring Countries and their Transmission System Operators to participate in ACER and in the ENTSOs.[80] According to the EC, non EU member countries' IRAs can participate in ACER provided they meet the conditions set forth in Article 31 of the Agency Regulation. Article 31 reads:

> 1. The Agency shall be open to the participation of third countries which have concluded agreements with the Community whereby they have adopted and are applying Community law in the field of energy and, if relevant, in the fields of environment and competition.
>
> 2. Under the relevant provisions of those agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of those countries in the work of the Agency, including provisions relating to financial contributions and to staff.

75 Regulation (EC) No 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, OJ L 211/1, 13.07.2009 (hereinafter 'the 2009 Agency Regulation'), Article 2(2).

76 Recital para. 59 of the 2009 Electricity Directive; Recital para. 57 of the 2009 Gas Directive.

77 Explanatory Memorandum, pp. 13 and 14, and Articles 5–11 of the 2009 Agency Regulation.

78 Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003.

79 *See* Florence Electricity Regulatory Forum at ec.europa.eu/energy/gas_electricity/forum_electricity_florence_en.htm and Madrid Gas Regulatory Forum at ec.europa.eu/energy/gas_electricity/forum_gas_madrid_en.htm for also the views of stakeholders on the Third Energy Package, date of access: 18 June 2012.

80 SEC(2011) 546 final/2, Commission Staff Working Paper on the Possibility of Neighbouring Countries and their Transmission System Operators to Participate in ACER and in the ENTSOs.

The EC stipulates that Contracting Parties to the EEA (including Iceland, Liechtenstein and Norway) comply with Article 31(1) when Annex IV to the EEA Agreement incorporates the 2009 Package. However, for the EEA countries to be closely involved in the work of the ACER, the EEA Agreement should also include provisions giving effect to Article 31(2) above.[81]

Furthermore, the EC evaluates the treaty establishing the Energy Community (EnC Treaty) within the context of Article 31 of the Agency Regulation. According to the EC, once a binding decision is adopted by the Energy Community Ministerial Council, the Contracting Parties to the EnC Treaty will be obligated to adopt the 2009 Package and thus the legal grounds for the Contracting Parties to cooperate through ACER and ENTSOs will be established.[82]

The EC further evaluates bilateral agreements and notes that non-EU member countries that concluded bilateral agreements with the EU, in terms of adopting the *acquis communautaire* in the field of energy, environment and competition, can now work together through the ACER and ENTSOs. In both cases (either under the EnC Treaty or bilateral agreements), arrangements should be made to meet the prerequisite sought under Article 31(2). The EC additionally requires non EU member countries' TSOs to fulfil the requirements of the 2009 Package that are involved in the functioning of ENTSOs.[83]

4.2.1.4. Remarks on ECT Implementation

The EU legislation entails a strong commitment to provide competition in the EU network energy industries. The Third Energy Package endeavours to develop open and competitive energy markets, which reflect the principles laid down in Articles 6(1) and (2) of the ECT. The *acquis communautaire* on competition and energy addresses rules that alleviate market distortions and barriers to competition; these regulations prevent unilateral and anti-competitive conduct in the energy sector. However, implementation of EU legislation on energy is a challenging process, given the public interest concerns and security of supply challenges in EU Member States at national level. As outlined in the EU 2009-2010 Report on progress in creating the internal gas and electricity market, and despite the obligation of the EU Member States to adopt the Third Energy Package before 3 March 2011, as yet only a few EU Member States have filed draft legislation to their parliaments, most of which are pending adoption.[84]

At the extra-EU level, as outlined in Annex I and II, the EU is involved in cooperation arrangements both at bilateral and multilateral level with non EU member countries within the ECT constituency. Through these cooperation channels the EU endeavours to cooperate with non-EU member countries in order to extend the constituency of the *acquis communautaire* on competition and energy. Hence, the EU also complies with Articles 6(3) and (4), facilitating technical assistance and cooperation with other

81 *Ibid* at p. 3.
82 *Ibid*.
83 *Ibid* at p. 4.
84 European Commission Staff Working Document, 2009–2010 Report on progress in creating the internal gas and electricity market, Brussels 9 June 2011, available at ec.europa.eu/energy/gas_electricity/legislation/doc/20100609_internal_market_report_2009_2010.pdf, date of access: 18 June 2012.

Contracting Parties to develop competition rules and enforce rules for case-specific competition infringements. However, the extra-EU instruments on cooperation do not usually entail sector-specific cooperation (the energy sector in the scope of this paper) in competition matters, but provide a general legal framework for cooperation in competition issues and implementation of the *acquis communautaire* on competition and energy in non EU member countries. In this context, the EU also endeavours to facilitate technical cooperation with non-EU member countries through ACER.

4.2.2. Denmark

4.2.2.1. Danish Network Energy Industry: Legislative Background

Denmark ratified the ECT and PEEREA on 22 August 1997, and the Trade Amendment on 13 July 2001. Since the ECT came into force on 16 April 1998, Denmark has taken steps towards an ambitious liberal energy sector reform, gradually introducing comprehensive legislation to remove barriers to competition in its network energy industries.

In 1999 and 2000, Denmark enacted Acts No 375 and 449 on Electricity and Gas Supply, and introduced further amendments on 1 January 2005 following the Energy Reform of 2004.[85] Under the current structure, transport and distribution remain public monopoly activities, whereas generation and trade segments are open to competition under market conditions. The legislative framework encourages free consumer choice and open access to networks, also addressing supply security, national economy, the environment and consumer protection.[86] According to Articles 6 and 7 of the Electricity and Gas Supply Acts, today there is no captive consumers' quota, meaning that consumers may freely choose their electricity and gas suppliers. In addition, the separation of potentially competitive activities from transport and distribution is clearly legislated, paving the way for fair and open access to networks.[87]

Among the Contracting Parties to the ECT that have adopted liberalisation initiatives, Danish reform should be emphasised as it has implemented a successful (ownership) unbundling regime in its network industry.[88] The Consolidated Act No 1097 on Energinet.dk, which came into force on 1 January 2005, reflects the 29 March 2004 agreements of the Danish Parliament to establish a single entity to own and operate Denmark's high voltage electricity transmission system and natural gas transport assets. The state-owned transmission company, Energinet.dk merged the former transmission entities, namely Elkraft (for eastern Denmark) and Eltra (for western Denmark) operating through ELFOR (the industry association) in the electricity industry, and Gastra for the gas industry.[89] Energinet.dk currently owns the main gas

85 Act No 375 on Electricity Supply (1999) (hereinafter 'Electricity Law') and Act No 449 on Natural Gas Supply No 449 (2000) (hereinafter Gas Law), the Danish legislation is available at the Danish Energy Agency website www.ens.dk/en-us/Sider/forside.aspx, date of access: 18 June 2012.

86 *See* Article 1 of Electricity and Gas Laws with 2005 amendments, respectively.

87 *See* Articles 24 and 18 of Electricity and Gas Laws, respectively.

88 Rønne A., Barton B., Lucas A. & Barrera-Hernandez L, eds. Energy Regulatory Reform in Denmark, *Regulating Energy and Natural Resources*,(Oxford Scholarship Online: Oxford, 2006 and 2010), p. 2.

89 Energy Policies of IEA Countries – Denmark Review (2006), IEA, p. 25.

transmission and the 400 kV electricity transmission grids. The company operates the electricity and gas transmission grids through its wholly owned subsidiaries, namely Energinet.dk Gas Storage Holding A/S, Energinet.dk Gaslager A/S, Regionale Net.dk A/S and Energinet.dk Associated Activities A/S.[90]

Today, Energinet.dk operates as the TSO in the network energy industry and, as provided in Sections 9 and 10 of the Act on Energinet.dk, produces resources of financial and human autonomy; these resources represent important entities for the non-discriminatory access to networks and thus for effective competition. Energinet.dk takes measures to maintain security of electricity and gas supply; it endeavours to establish open and fair access for all users, and shows transparency for competitive energy markets. It calculates the environmental impacts of the energy sector and supports environment friendly energy infrastructure and resource development projects in the network energy industry.

In addition to Energinet.dk, the Danish Energy Regulatory Authority (DERA) is involved in the supervision of the monopolistic behaviours in the Danish network energy industry. DERA was established in 2000 with the Danish Electricity Supply Act as the independent regulator. The principal tasks of DERA include securing and ensuring transparency and non-discriminatory access to the network. In this context, DERA regulates and controls tariffs, prices and terms of supply fixed by the public monopolies (i.e. Energinet.dk and its subsidiaries). Moreover, DERA hears and resolves complaints from consumers (household and business), enforcing competition principles in case-specific assessments. DERA is supervised by the Danish Competition Authority (DCA), which incorporates two energy regulatory units. In addition to its supervisory tasks, the DCA also conducts *ex-post* scrutiny for competition infringements in the energy sector.[91]

4.2.2.2. Cooperation for Competition among NCAs

The Danish Competition Act No 384 came into force in 1997 with the objective to align Denmark's Competition Law with the *acquis communautaire* on competition. After being modified and amended in 2005, 2007 and 2008, respectively the Consolidated Danish Competition Act No 1027 now provides an enhanced set of provisions with regard to unilateral and concerted anti-competitive practices, including anti-competitive agreements between undertakings, abuse of dominant position and merger control.

According to Section 9, Article 24 of the DCA, infringement cases under Articles 101 and 102 TFEU and/or the DCA are subject to the scrutiny of the Danish Competition and Consumer Authority (DCCA), provided that the infringement in question has ties to Denmark. The implementation of the EU Competition Law in Denmark is subject to Regulation 1/2003, which has been discussed above in more detail.[92] Overall, the

90 Energinet.dk Annual Report of 2010, p. 6, available at www.e-pages.dk/energinet/219/, date of access: 11 June 2012.

91 The Danish Competition Authority – Annual Report of 2001, available at www.kfst.dk/?id=23046, date of access: 11 June 2012.

92 *See* above the Regulation 1/2003 at *supra* note 74.

DCA has the authority to monitor infringements of competition in the upstream and downstream network operations, and to maintain fair access conditions in the network energy industry. Furthermore, DERA can also be involved in the *ex-ante* scrutiny of infringements of competition in network operations in order to enforce EU and Danish competition law.[93]

At the extra-EU level, Denmark is involved in multilateral arrangements; these processes mainly facilitate cooperation with NCAs and IRAs in the Nordic region. Despite their involvement in the EEA Agreement, Iceland and Norway are not members of the EU. Further cooperation, therefore, has been facilitated through bilateral and multilateral agreements. For instance, Denmark has undertaken cooperation between the Faroe Islands and Iceland through the Iceland, Denmark and Faroe Island Free Trade Agreement (FTA). Articles 14 and 15 of the cited FTA refer to the creation and aligning of rules on competition and the avoidance of discrimination as a result of public monopolies; these articles also provide the justification to alleviate barriers to competition in the Nordic network energy industry.[94] Furthermore, knowledge and information exchange (including confidential information) on the scrutiny of competition infringements among the NCAs of Denmark, Sweden, Iceland and Norway has been possible through the Agreement between Denmark, Iceland, Norway and Sweden of 2003,[95] on the subject of cooperation in matters of competition.[96] Also, under NORDEN, the Nordic NCAs and IRAs regularly cooperate on competition issues in the Nordic network markets. This cooperation is well reflected in a report from the Nordic NCAs, in which competition cases relating to upstream and downstream infringements of competition in the Nordic electricity markets are discussed.[97]

4.2.2.3. Cooperation for Competition among IRAs

As noted above, respective IRAs and TSOs of EU Member States are obligated to cooperate in accordance with Articles 6(1) of the EU Electricity and Gas Directives. As an EU Member State, Denmark is no exception to this regulation. The Danish Government has enacted the legislative background to improve the interface between DERA and Energinet.dk, and other EU Member State IRAs and TSOs.[98] At the intra-EU level, cooperation to develop and enforce competition principles could be achieved through ACER. In addition, as a member of ENTSO-E and ENTSO-G, Energinet.dk collaborates with the EU Member States in defining technical and market rules for cross-border energy transmission in the EU.[99]

93 OECD Doc. DAFFE/CLP99(8), Policy Roundtables – Relationship between Regulators and Competition Authorities, OECD Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy (1998), p. 126.

94 Free Trade Agreement Between the Denmark Government and the home Government of the Faroe Islands, of the one part, and the Government of Iceland, of the other part, on Free Trade between the Faroe Islands and Iceland.

95 The Agreement was originally signed on 16 March 2001, and took its latest form with the incorporation of Sweden to the agreement on 9 April 2003.

96 Agreement between Denmark, Iceland, Norway and Sweden Concerning Cooperation in Matters of Competition (2003).

97 *See* Capacity for Competition – Investing for an Efficient Nordic Electricity Market, Report from the Nordic Competition Authorities, 1/2007, available at www.kfst.dk/?id=27909, date of access: 11 June 2012.

98 *See* Electricity and Gas Laws with 2005 amendments.

99 Energinet.dk Annual Report of 2010, p. 31.

Denmark is involved in important regional and multilateral arrangements at the extra-EU level. Denmark may enjoy the rights vested in multilateral and bilateral Cooperation arrangements between the EU and developing countries (including the EEA agreement). In addition, Denmark may cooperate with Nordic countries through the Nordic Energy Cooperation (NORDEN). NORDEN is a regional initiative, commenced under the auspices of the Treaty of Cooperation between Denmark, Finland, Iceland, Norway and Sweden (the Helsinki Treaty),[100] which has established the grounds for the Nord Pool, the Nordic cross-border electricity exchange network. Denmark may also facilitate cooperation with the IRAs and TSOs of developing countries through multilateral and regional initiatives, such as the Forum of NordREG, the Nordic Organisation of Transmission System Operators (NORDEL), and the Baltic Sea Region Energy Cooperation (BASREC) (including Russia).

Denmark is also involved in cooperative initiatives, which include provisions that address collaboration and technical assistance in energy matters with countries in the ECT constituency. For instance, 'Charter for the Carbon Sequestration Leadership Forum (CLSF): A Carbon Capture and Storage Technology Initiative' includes soft-law provisions, enabling Denmark to cooperate with Australia and Norway (Signatories to the ECT) as well as Japan (Contracting Party to the ECT), on technical matters related to energy efficiency, technology transfer and transportation.[101] Furthermore, according to the Memorandum signed between Russia and Denmark, the two states may collaborate in the field of energy efficiency and inexhaustible energy sources; an arrangement that may also include cooperation in relation to state planning regulations.[102] However, the cited multilateral and bilateral initiatives do not include provisions particularly focused on the promotion of technical assistance and knowledge exchange in competition matters specific to network energy industries. These initiatives are case-specific technical cooperation arrangements and do not necessarily require open market conditions, as opposed to most of the bilateral and multilateral arrangements, which involve the EU on the one side and non-EU member countries on the other.[103]

4.2.2.4. Remarks on ECT Implementation

The Danish network energy industry is a good reflection of the free-market economy and competition principles laid down in the ECT. Denmark comprises a very developed energy sector reform compared to many countries in the ECT constituency. The implementation of the Danish legislation on electricity and gas allows for the selective creation of open, stable, transparent and competitive electricity and gas markets at both downstream and upstream levels. In this respect, the Danish legal framework is one step ahead of the EU liberalisation packages. As noted above, Denmark had

100 Treaty of Cooperation between Denmark, Finland, Iceland, Norway and Sweden (the Helsinki Treaty) (1962).

101 Charter for the Carbon Sequestration Leadership Forum (CLSF): A Carbon Capture and Storage Technology Initiative, Purpose of the CSLF, p. 1.

102 Memorandum between the Ministry of Energy of the Russian Federation and the Ministry of Climate and Energy of the Kingdom of Denmark on collaboration in the field of energy efficiency and inexhaustible energy sources, Article 2.

103 *See* e.g. Annex I, Bilateral Cooperation Agreement between the EU and Albania requiring Albania to liberalise its energy sector as per the Third Energy Package.

adopted ownership unbundling and established a TSO long before these were sought as prerequisites under the EU Third Energy Package. In this context, Denmark complies with Articles 6(1) and (2) of the ECT, providing the legal framework to alleviate market distortions and barriers to competition in the energy sector.

Denmark, which possesses a well-developed market structure in its network energy industries, has taken steps to cooperate with non EU member countries at regional level on competition issues relating to the energy sector. Denmark has facilitated cooperation with other Contracting Parties in the ECT constituency in compliance with Articles 6(3) and (4) of the ECT, providing the legal framework for technical assistance and cooperation in order to develop competition rules and ensure of their enforcement with the IRAs and NCAs of Northern Europe. However, as noted above, cooperation is dominantly conducted at the regional level (i.e. within the Nordic region).

4.2.3. Georgia

4.2.3.1. Georgian Network Energy Industry: Legislative Background

Georgia ratified the ECT on 22 February 1995, PEEREA on 9 December 2004 and the Trade Amendment on 12 October 2009. Following the ratification of the ECT, the Georgian Government has taken steps towards a liberal energy sector-enacting the post-soviet Law on Electricity and Natural Gas in 1997.[104] This law aims to introduce competition in its network energy industries. Under the auspices of the liberalisation agenda, the Georgian network energy industry has been restructured and unbundled into generation, transmission and distribution segments. As reported in a recent publication by the Secretariat, generation segment assets are still partially owned by the Georgian state, whereas privatisation deals take place in the pipelines.[105] The transmission segment remains a monopoly, whereby the distribution segment has been divided and allocated to regional joint stock companies that are run by municipal authorities.[106]

Under the terms of the Law on Electricity and Natural Gas, the Georgian Government established the Ministry of Energy and has vested its powers in the provision of the policy framework and legal background of the energy sector. The Georgian National Energy and Water Supply Regulatory Commission (GNEWRC), as defined under the Law on Independent National Regulatory Authorities, has also been established by this law.[107] As the IRA, GNEWRC has set the conditions for access to the network, such as regulating the tariffs and licensing rules for the generation, transmission, dispatch, import, export and distribution of electricity as well as for the supply, transportation

104 Law on Electricity and Natural Gas of Georgia (1997), available in English at www.esco.ge/files/05resolution33.pdf, date of access: 18 June 2012.

105 Energy Charter Secretariat, In-Depth Review of Energy Efficiency Policies and Programmes of Georgia, *the Energy Charter Secretariat Publications* (2012), p. 48.

106 Issues in Privatisation of Utilities in Georgia, available at www.erranet.org/index.php?name=0EeLibrary&file=download&id=1081&keret=N&showheader=N, date of access: 18 June 2012.

107 Law on Independent National Regulatory Authorities of Georgia, available in English at www.gnerc.org/uploads/law_of_georgian_on_independent_national_regulatory_authoritiesbest.pdf, date of access: 18 June 2012.

and distribution of natural gas.[108] Between 2006 and 2010, the Georgian Government introduced significant amendments to the law in order to enhance transparency and competitiveness in the functioning of the electricity wholesale market. Regarding third-party access, captive consumer thresholds have been reduced to a minimum of 8 GWH. In addition, small capacity power plants (up to 13 MW) have the access to network on a non-discriminatory basis.[109]

With the amendments of 2006, the Electric System Commercial Operator (ESCO) was also established, replacing the former Georgian Wholesale Electricity Market (GWEM). ESCO is a state-owned commercial entity. Its function is to balance 'electricity capacity, *inter alia*, through the form[ation] of medium- and long-term contracts on import and export.'[110] The Georgian network energy industry does not have a TSO. However, ESCO is given the authority to perform some of the traditional TSO functions such as 'balancing, and the import and export of surplus power'.[111]

In the Georgian network energy industry, market participants mainly consist of hydro power and thermal power-based producers, distribution companies, ESCO and transmission companies. There are three companies that provide electricity transmission services and one company that deals with the transmission of gas. Electricity transmission services are run by the state-owned Georgian State Electrosystem (GSE), Energotrans Ltd (owned by GSE) and SAKRUSENERGO (jointly owned by Georgia and Russia). In the gas network, the fully state-owned Georgian Oil and Gas Corporation (GOGC) operates the transmission activities together with its subsidiary, the Georgian Transportation Cooperation (GGTC). On the distribution side of the industry, three electricity distribution companies for household consumption and 30 companies as direct industrial consumers exist. Among these companies, partially state-owned JSC KazTranGas remains the biggest gas distributor.[112]

4.2.3.2. Cooperation for Competition among NCAs

The Georgian Competition Law dates back to 1992. The resolution on the demonopolisation of the Economic Activities in the Republic of Georgia was enacted on 17 March 1992. After more than a decade of practice, and particularly following the adoption of European Neighbourhood Policy (ENP) action plan,[113] Georgia committed itself to the harmonisation of its legislation with the *acquis communautaire* on competition and enacted the Law on Free Trade and Competition in 2005.[114] The current law refers to deregulation and anti-competitive actions of

108 Article 4(5) of the Law on Electricity and Natural Gas.

109 Energy Charter Secretariat, In-Depth Review of Energy Efficiency Policies and Programmes of Georgia, 2012, p. 49.

110 *See* ESCO's functions at www.esco.ge/index.php?article_id=13&clang=1, date of access: 18 June 2012.

111 European Bank for Reconstruction and Development (EBRD), Energy Community Report on Georgia, p. 2, available at www.ebrd.com/downloads/legal/irc/countries/georgia.pdf, date of access: 18 June 2012.

112 Energy Charter Secretariat, In-Depth Review of Energy Efficiency Policies and Programmes of Georgia, 2012, pp. 49–50.

113 EU/Georgia European Neighbourhood Policy (ENP) action plan (2016) available at ec.europa.eu/world/enp/pdf/action_plans/georgia_enp_ap_final_en.pdf, date of access: 18 June 2012; *see also* SWD(2012) 114 final, Joint Staff Working Document: Implementation of the European Neighbourhood Policy in Georgia Progress in 2011 and recommendations for action.

114 The Law on Free Trade and Competition of Georgia (2005), available in English at

governmental authorities with respect to state aid.[115] However, the law does not address competition issues, such as restrictive agreements and concerted practices, abuses of dominant positions, mergers and monopolies. Article 12 of the law establishes the Free Trade and Competition Agency (FTCA) as the NCA. FTCA has been granted the authority to issue non-binding recommendations and its powers are limited to investigative measures.[116]

Georgia has concluded bilateral and multilateral arrangements relating to cooperation on competition issues with countries that are also in the ECT constituency. For instance, the Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy[117] was signed by the Commonwealth of Independent States (CIS) including Georgia, as well as the Azerbaijan Republic, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Moldova, the Republic of Tajikistan, Turkmenistan, the Republic of Uzbekistan and Ukraine from the ECT constituency. The Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy creates the legal grounds for the prevention, limitation and elimination of monopolistic activities and unfair competition in the CIS region. In particular, the treaty makes mention of the close cooperation between NCAs in order to create favourable conditions for the development of competition in the CIS region and for the effective transaction of goods, markets and consumer rights protection; to elaborate common procedures for the investigation and evaluation of monopolistic activities of economic entities and executive/governing bodies; and to create mechanisms for cooperation. The treaty establishes common cooperation principles, referring to universally accepted general competition rules such as abuse of dominant positions, mergers, restrictive agreements and unfair competition.[118]

As mentioned above, legal grounds for cooperation among the EU, EU Member States and Georgia have been established under Articles 43 and 44 of the EU/Georgia PCA. Particularly, Article 44 facilitates technical cooperation on issues related to competition law. Article 44 provides:

> 1. Further to Article 43, the Community shall provide Georgia with technical assistance regarding the formulation and implementation of legislation in the field of competition, in particular as concerns:
>
> • agreements and associations between undertakings and concerted practices which may have the effect of preventing, restricting or distorting competition,

www.global competitionforum.org/regions/europe/Georgia/FTand%20C.pdf, date of access: 11 June 2012.

115 See Articles 7, 8 and 9 of the Law on Free Trade and Competition.

116 Georgian – European Policy Legal Advice Center (GEPLAC) Policy Paper on Competition, p. 5, available at www.geplac.ge/newfiles/EU-Georgia%20important%20Refferences/Policy%20Paper%20on%20Competition%20Lapachi.pdf, date of access: 18 June 2012.

117 The Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy in CIS Countries (1993).

118 Yacheistova N., *Competition Policy in Countries in Transition – Legal Basis and Practical Experience*, (UNCTAD Publications: New York & Geneva, 2000), pp. 3–4, available at r0.unctad.org/en/subsites/cpolicy/docs/cptransition.pdf, date of access: 18 June 2012.

- abuse by undertakings of a dominant position in the market,
- State aids which have the effect of distorting competition,
- State monopolies of a commercial character,
- public undertakings and undertakings with special or exclusive rights,
- review and supervision of the application of competition laws and means of ensuring compliance with them.

2. The Parties agree to examine ways to apply their respective competition laws on a concerted basis in such cases where trade between them is affected.

Georgia is also engaged in the activities of supra-national organisations such as WTO and UNCTAD as a member country. In this respect, UNCTAD recommendations and best practices are of significant importance in developing the competition legislation of Georgia.[119]

4.2.3.3. Cooperation for Competition among IRAs

Georgia is located in the Caucasus region. Until the collapse of USSR, Georgia was a part of the Unified Energy System of the Caucasus. It was interconnected with southern Russia, Azerbaijan, Armenia, and Turkey.[120] With its liberalised network energy Industry, Georgia might today exchange technical information and best practices on competition through GNEWRC with IRAs from other Contracting Parties at bilateral and multilateral levels, through agreements and regional initiatives.

Cooperation agreements concluded by Georgia in the energy sector have included the bilateral agreement with Russia on Scientific and Technical Cooperation of 1994, as well as multilateral agreements on Cooperation in the Sphere of Ecology and Environmental Protection mainly with Central European and Eurasian countries in 1992, and on Partnership and Cooperation with the European Communities and its Member States in 1999 (EU/Georgia PCA).[121] The 1999 Partnership was of particular importance as it engaged the Georgian network energy industry and the *acquis communautaire* on energy, facilitating cooperation on the basis of the ECT and PEEREA. Article 56 of the Agreement provides:

1. Cooperation shall take place within the principles of the market economy and the European Energy Charter and bearing in mind the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects, against a background of the progressive integration of the energy markets in Europe.

119 *See* e.g. UNCTAD Doc. TD/RBP/CONF.7/L.7, Review of Application and Implementation of the Set Model Law on Competition (2010) – Chapter VII; UNCTAD the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices *supra* note 38.

120 Energy Regulators Regional Association Report (ERRA), Issues in Privatisation of Utilities in Georgia (1999), p. 1, available at www.erranet.org, date of access: 18 June 2012.

121 *See* Annex I.

2. The cooperation shall include among others the following areas:

- formulation and development of energy policy, improvement in management and regulation of the energy sector in line with a market economy,
- improvement of energy supply, including security of supply, in an economic and environmentally sound manner,
- promotion of energy saving and energy efficiency and implementation of the Energy Charter Protocol on Energy Efficiency and related environmental aspects,
- modernisation of energy infrastructures,
- improvement of energy technologies in supply and end use across the range of energy types,
- management and technical training in the energy sector,
- transportation and transit of energy materials and products,
- introduction of the range of institutional, legal, fiscal and other conditions necessary to encourage increased energy trade and investment,
- development of hydroelectric and other renewable energy resources.

3. The Parties shall exchange relevant information relating to investment projects in the energy sector, in particular concerning the construction and refurbishing of oil and gas pipelines or other means of transporting energy products.

They shall cooperate with a view to implementing as efficaciously as possible the provisions of Title IV and of Article 49, in respect of investments in the energy sector (*emphasis added*).[122]

In addition, the Georgian Government is involved in regional and multilateral cooperation forums such as the ERRA. ERRA was established in 1999 as a voluntary organisation and its members include IRAs primarily from the Central European and Eurasian region as well as affiliates from Africa, Asia and the Middle East, and the USA. ERRA endeavours to improve energy regulation and cooperation among the IRAs of its member countries by increasing communication and the exchange of regulatory information, research and experience among member countries. Its tools include Technical Regulatory Exchange Programmes, Partnerships and Sub-regional Activities.[123] Furthermore, Georgia through its IRA and the GNEWRC, actively cooperates with the National Association of Regulatory Utility Commissioners (NARUC) and the United States Agency for International Development (USAID). Cooperation between NARUC and USAID, and GNEWRC is mostly based on non-binding arrangements such as the Memorandum of Understanding, concluded between NARUC and GNEWRC (June 2008).[124]

122 OJ L 205/3, Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part (1999).

123 *See* ERRA Website at www.erranet.org, date of access: 18 June 2012.

124 *See* GNEWRC Website at www.gnerc.org/index.php?m=638, date of access: 18 June 2012.

4.2.3.4. Remarks on ECT Implementation

As a country in the CIS region, Georgia is in a transition period to establish open and competitive network energy industries, and to adopt free-market economy and competition principles embodied within the ECT. Georgia has adopted several amendments to its principal legislation on electricity and gas, i.e. the Law on Electricity and Natural Gas, between 2006 and 2010, and it is still in the process of improving its network energy industry. However, the Georgian Competition Law limits its scope to remedies concerning state aids and excludes anti-competitive conduct resulting from restrictive agreements and concerted practices. Georgia has taken important steps to alleviate market distortions and barriers to competition in the energy sector as per Article 6(1) of the ECT. However, Georgia could take further steps to develop its rules on competition to address unilateral and concerted anti-competitive conduct under Article 6(2) of the ECT.

Georgia is involved in bilateral and multilateral regional agreements, such as the EU/Georgia PCA and the Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy with other CIS countries. These measures individually address cooperation in matters of competition or energy issues, but do not collectively entail cooperation in network energy industry-specific competition issues. These initiatives are positive steps towards cooperating on technical assistance and cooperation in order to develop and enforce competition rules as per Articles 6(3) and (4) of the ECT. In order to facilitate technical assistance and cooperation with other Contracting Parties in the ECT constituency, these initiatives should be combined with other measures to ensure further cooperation.

CHAPTER 5: Conclusion and Recommendations

This paper has endeavoured to monitor and assess the implementation of free-market economy and competition principles embodied within the ECT in network energy industries of certain Contracting Parties. As illustrated above, Contracting Parties may have different experiences in instituting competition in their network energy industries – based on their economic, social and political backgrounds. In order to create stable, equitable, transparent, non-discriminatory and thus investment friendly network energy industries, it is crucial to exchange information, while enforcing competition rules on case-specific arrangements and sharing technical information and best practices.

As described throughout the discussion, cooperation instruments to develop and enforce rules on competition in energy markets can take diverse forms. Under bilateral or multilateral agreements, states can establish regional forums to exchange information either for case-specific or for non-case-specific cooperation in competition issues. On the sector specific multilateral level, it is believed that the ECT provides the necessary legal grounds for such cooperation.

As listed in Annex I and II and outlined in the review, some Contracting Parties in the ECT constituency have developed instruments at bilateral, multilateral and regional level. With its energy sector-specific multilateral approach, the ECT can be considered to be a uniting instrument for providing the legal framework for cooperation in competition issues among 51 states in its constituency. The ECT is, therefore, unique in this respect, as it possesses the potential to extend cooperation in competition issues in the energy sector.

In this context, this paper has also endeavoured to trigger a discussion among the ECT Contracting Parties as well as observers on 'how to create an energy competition forum in order to exchange views, experiences and best practices, and to facilitate case-specific cooperation in enforcement of competition rules under the auspices of the ECT'. Given that the Energy Charter Process respects sovereign rights of states on the basis of the energy resources in their constituencies, it also commits them to certain binding provisions for investment promotion and protection as well as soft-law commitments in favour of establishing competition in energy markets. A competition forum created under the ECT can have a strategic and competitive edge in comparison with other regional and multinational information exchange arrangements.

Based on the conventional commitment under Article 6 of the ECT to alleviate market distortions and barriers to competition and to address unilateral and concerted anti-competitive conduct in the energy sector as per Articles 6(1) and (2) of the ECT, the following undertakings may be considered in order to further enhance cooperation on issues of competition within the Energy Charter Process:

- Non-case-specific recommendations and best practices could be adopted to facilitate cooperation and technical assistance on the development and

implementation of competition rules under Article 6(3) of the ECT within the activities of the Investment Group;

- Direct contact between the NCAs and IRAs within the ECT constituency could be facilitated and/or improved through specialised workshops in order to enhance knowledge and information exchange;
- Specialised workshops could be arranged in order to improve disputes under Article 6(5) of the ECT within the ECT constituency. Under this system, a more efficient dispute resolution option could be provided for the protection of energy sector investments against discriminatory measures; this option might be particularly useful in matters arising out of competition infringements at the network entry level in energy industries, as well as upstream and downstream energy markets in the ECT constituency.

Annex I: Multilateral Arrangements between the EU and Non-EU Member Countries within the ECT Constituency

Multilateral Arrangements	Non-EU Member Countries within the ECT Constituency	Competent Authorities	Cooperation Instruments
EEA Agreement	• Iceland	• Icelandic NCA	• *Protocol 23 (Article 58)* concerning the cooperation between surveillance authorities • *Protocol 24* on cooperation in the field of control of concentrations
	• Norway	• Norwegian NCA	
	• Liechtenstein	• Liechtenstein NCA	
		• EFTA Surveillance Authority	
ICN	• Albania	• Albanian CA	Non-rule making global forum that provides instruments such as: • Annual conferences • Workshops • Best practices • Recommendations
	• Australia	• Australian Competition and Consumer Commission	
	• Azerbaijan	• Antimonopoly State Service, Ministry of Economic Development	
	• Ukraine	• Antimonopoly Committee of Ukraine	
	• The Republic of Kazakhstan	• Agency of the Republic of Kazakhstan for Protection of Competition	
	• Montenegro	• Administration for Protection of Competition	
	• Japan	• Japan Fair Trade Commission	
	• Mongolia	• Mongolian Authority of Fair Competition and Consumer Protection	
	• Tajikistan	• State Agency for Antimonopoly and Support of Entrepreneurship	
	• The Republic of Kyrgyzstan	• State Agency on Antimonopoly	
	• The Republic of Uzbekistan	• State Committee on Demonopolisation, Support of Competition and Entrepreneurship	

Multilateral Arrangements	Non-EU Member Countries within the ECT Constituency	Competent Authorities	Cooperation Instruments
OECD	• Australia • Iceland • Japan • Norway	*Same as above*	Non-rule making body that publishes recommendations such as the *1995 OECD recommendation on cooperation between member countries on anti-competitive practices affecting international trade*
	• Turkey	• Turkish Competition Authority	
WTO	• Albania • Armenia • Australia • Japan • The Republic of Kyrgyzstan • Liechtenstein • Mongolia • Montenegro • Norway • The Swiss Confederation • Turkey		Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established to address issues such as; • core principles, including transparency, non-discrimination and procedural fairness • provisions on hardcore cartels; • modalities for voluntary cooperation; and • support for progressive reinforcement of competition institutions in developing countries through capacity building. The Working Group is currently inactive.
	• The Republic of Georgia • The Republic of Moldova		

Annex II: Bilateral Agreements on Cooperation between the EU and Non-EU Member Countries within the ECT Constituency

Contracting Parties Cooperating with the EU on a Multilateral/ Bilateral Level	Competition Agency	Agreements Containing Competitive Provisions
Albania	Competition Law Authority	Stabilisation and Association Agreement (2006)
Croatia	Croatian Competition Agency	Stabilisation and Association Agreement (2004)
Japan	Japan Fair Trade Commission(JFTC)	Agreement between the European Community and the Japanese Government concerning cooperation on anti-competitive activities (2003)
Russian Federation	Federal Antimonopoly Service	Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States and the Russian Federation (1997) and Memorandum of Understanding on Cooperation (2011)
The Republic of Iceland	Icelandic Competition Authority	EEA Agreement
The Principality of Liechtenstein	Liechtenstein Competition Authority	EEA Agreement
The Republic of Moldova	National Agency for the Protection of Competition	Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States and the Republic of Moldova (1998)
The Kingdom of Norway	Konkurransetilsynet (Norwegian Competition Authority)	EEA Agreement
Ukraine	Antimonopoly Committee	Partnership and Cooperation Agreement between the European Communities and their Member States and Ukraine (1998)
The Swiss Confederation	Swiss Competition Authority	Agreement between the European Economic Community and the Swiss Confederation (1972) Agreement between the European Community and the Swiss Confederation on Air Transport (2002)
The Republic of Turkey	Turkish Competition Authority (Rekabet Kurumu)	Association Agreement (1995) Agreement between the European Coal and Steel Community and the Republic of Turkey (1996)

Source: EC DG Competition

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Review of ECT Implementation in Selected Areas:
Analysis on Issues Related to Competition under the Energy Charter Treaty

Following the introduction of competition in network energy industries of some Contracting Parties to the Energy Charter Treaty (ECT), in addition to investment protection challenges, foreign investors may today face barriers to competition arising out of uncommon norms and standards, exemptions and arbitrary public procurement policy decisions. In order to overcome such barriers to competition in network energy industries, the energy sector should be persuaded to adopt continuous and consistent levels of international cooperation on issues of competition. The ECT provides the legal framework for such cooperation. Article 6 of the ECT paves the way for technical assistance and cooperation on the development and implementation, and in the enforcement of competition rules among the Contracting Parties within the ECT constituency.

Concerning free market economy and competition principles embodied within the ECT, this paper reviews the legislation of the selected Contracting Parties (the EU, Denmark and Georgia), and their bilateral, multilateral and regional endeavours to cooperate in establishing open and competitive network energy markets.

This paper concludes with the methods and cooperation options that Contracting Parties have successfully developed in order to stimulate competition in their network energy industries. Recommendations are provided to facilitate and further improve cooperation on issues of competition within the ECT constituency. Many initiatives are outlined and discussed, such as non-case-specific recommendations and best practices, facilitation of direct contact between competent authorities in the ECT constituency and the option to undertake specialised/customised workshops within the Energy Charter Process.

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