

May 2014

## Enforcement Activism of the EU's Renewable Energy Directive During the Global Financial Crisis

Jon Truby

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [International Law Commons](#), and the [Natural Resources Law Commons](#)

---

### Repository Citation

Jon Truby, *Enforcement Activism of the EU's Renewable Energy Directive During the Global Financial Crisis*, 38 Wm. & Mary Env'tl. L. & Pol'y Rev. 695 (2014),  
<https://scholarship.law.wm.edu/wmelpr/vol38/iss3/4>

# ENFORCEMENT ACTIVISM OF THE EU'S RENEWABLE ENERGY DIRECTIVE DURING THE GLOBAL FINANCIAL CRISIS

JON TRUBY\*

## INTRODUCTION

The American “shale revolution”<sup>1</sup> has been an economic blessing in a troubled time,<sup>2</sup> a blessing the EU (“European Union”) has largely not enjoyed.<sup>3</sup> It may prove, however, to have been a double-edged sword. If the focus on expanding shale exploration alleviated energy independence concerns<sup>4</sup> to the extent that renewable energy goals were deferred and consequently GhG (greenhouse gas) emissions could not be reduced, then the long-term outcome of the economic blessing may be an environmental curse.<sup>5</sup> Meanwhile, foregoing the economic benefits of a non-renewable energy revolution and suffering from the economic downturn maintained

---

\* Jon Truby, Ph.D., is an Assistant Professor of Law and Policy at the College of Law, Qatar University.

<sup>1</sup> For the commercial exploitation of shale gas and oil, see *Shale Oil and Shale Gas Resources Are Globally Abundant*, U.S. ENERGY INFO. ADMIN. (June 10, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=11611>. With the exploitation of shale gas and energy, the International Energy Agency predicts the United States will become energy independent and the world's biggest oil producer by 2020, and a net energy exporter by 2035, a major shift from it currently having to import twenty percent of its oil. *World Energy Outlook 2012*, INT'L ENERGY AGENCY 1–2 (2012), [http://www.worldenergyoutlook.org/media/weowebiste/2012/WEO2012\\_Renewables.pdf](http://www.worldenergyoutlook.org/media/weowebiste/2012/WEO2012_Renewables.pdf); see also *Technically Recoverable Shale Oil and Shale Gas Resources: An Assessment of 137 Shale Formations in 41 Countries Outside the United States*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/analysis/studies/worldshalegas/> (last updated June 13, 2013).

<sup>2</sup> *Global Economic Prospects*, WORLD BANK, <http://go.worldbank.org/PF6VWYXS10> (last visited Mar. 27, 2014); *The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST (Sept. 7, 2013), available at <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>.

<sup>3</sup> Public opinion and political uncertainty has limited the EU's shale production and exploration. See John Aglionby, *Europe Split on Benefits of Drilling for Shale Gas*, FIN. TIMES (June 27, 2013), <http://www.ft.com/intl/cms/s/0/3319fd84-df1d-11e2-881f-00144feab7de.html#axzz2uG8KrfeZ>.

<sup>4</sup> Clifford Krauss & Eric Lipton, *U.S. Inches Toward Goal of Energy Independence*, N.Y. TIMES (Mar. 22, 2012), [http://www.relooney.info/0\\_New\\_13164.pdf](http://www.relooney.info/0_New_13164.pdf).

<sup>5</sup> Letter from Martin A. Apple, Council of Scientific Society Presidents, to President of the United States Barack Obama (May 4, 2010).

pressure on the EU to reduce net energy imports and GhG emissions has ensured it has been unnerving in its renewable energy drive.<sup>6</sup>

Only three days after a €10 billion bailout of the Government of Cyprus in March 2013 by EU Member States,<sup>7</sup> the European Commission asked the European Court Justice for a daily penalty on Cyprus of €11,404.80<sup>8</sup> for “failing to transpose” EU renewable energy legislation.<sup>9</sup> Reporting non-compliance and seeking severe state fines in the European Courts at a time of government bailouts, the forcefulness of the European Commission in preventing and punishing infringements of renewable energy agreements has ascended its status to be an environmental champion in a time of European turmoil and lack of unity.<sup>10</sup> This Article evaluates the European Commission’s enforcement measures of EU renewable energy law throughout the global financial crisis and considers the methods it has used. It considers that the financial crisis has only amplified the EU’s push for energy independence, which has empowered the Commission to go unrestricted in seeking compliance of its renewable energy legislation—with the threat of stringent penalties for even those member states in severe economic or political crises.

## I. BACKGROUND

Reducing over-dependence on imported energy to save expensive national costs whilst minimizing GhGs were priorities<sup>11</sup> for both the EU and the United States prior to the 2008 global downturn, but the harsh budgetary cut-backs demanded by these two unions suffering limited

---

<sup>6</sup> Stephen Castle, *Europe, Facing Economic Pain, May Ease Climate Rules*, N.Y. TIMES (Jan. 22, 2014), <http://www.nytimes.com/2014/01/23/business/international/european-union-lowers-ambitions-on-renewable-energy.html>.

<sup>7</sup> Government of Cyprus Ministry of Finance Announcement, Agreement for a Financial Assistance to the Republic of Cyprus (Mar. 18, 2013), [http://www.mof.gov.cy/mof/mof.nsf/All/BB670607715A44D6C2257B3200368FE9/\\$file/agreemenfinancialassistance.pdf](http://www.mof.gov.cy/mof/mof.nsf/All/BB670607715A44D6C2257B3200368FE9/$file/agreemenfinancialassistance.pdf).

<sup>8</sup> Press Release, European Comm’n, Renewable Energy: Commission Refers Poland and Cyprus to Court for Failing to Transpose EU Rules (Mar. 21, 2013), <http://www.ecb.europa.eu/ecb/html/crisis.en.html> [hereinafter Renewable Energy].

<sup>9</sup> *Id.*

<sup>10</sup> See generally *Key Dates of the Financial Crisis*, EUROPEAN CENTRAL BANK, <http://www.ecb.europa.eu/ecb/html/crisis.en.html> (last visited Mar. 27, 2014); Niamh Moloney, *EU Financial Market Regulation After the Global Financial Crisis: “More Europe” or More Risks?* (2010), 1317, 1330 (2010).

<sup>11</sup> See John Edwards, *Achieving Energy Independence & Stopping Global Warming Through a New Energy Economy* (2007), 8 SUSTAINABLE DEV. L. & POL’Y 1, 4 (2007).

growth ensured that both parties remained focused on achieving energy independence.<sup>12</sup> The constant attention during 2007–2013 towards resolving economic crises<sup>13</sup> across Europe and America may have reduced policy priorities of achieving environmental goals,<sup>14</sup> and even made the case for commercial shale exploration, which had previously been limited due to these environmental goals.<sup>15</sup> With the EU opting not<sup>16</sup> to follow the United States' economically successful<sup>17</sup> lead on shale,<sup>18</sup> EU enforcement policy could have permitted a lax approach towards Member States failing to fully comply with renewable energy objectives at a time of severe financial difficulty, when governments and major banks were being rescued across Europe.<sup>19</sup>

---

<sup>12</sup> A study by IHS Consulting predicts that unconventional oil and gas production will reduce the United States' trade deficit one third by 2020. *America's New Energy Future: The Unconventional Oil & Gas Revolution and the US Economy*, IHS (Oct. 2012) <http://www.ihs.com/info/ecc/a/americas-new-energy-future-report-vol-3.aspx>.

<sup>13</sup> Daniel W. Drezner & Kathleen R. McNamara, *International Political Economy, Global Financial Orders and the 2008 Financial Crisis*, 11 PERSPECTIVES ON POLITICS 155 (2013); Stijn Claessens, Giovanni Dell'Ariccia, Deniz Igan, & Luc Laeve, *Cross-Country Experiences and Policy Implications from the Global Financial Crisis*, 25 ECON POL'Y 62, 267–93 (2010).

<sup>14</sup> Sonia van Gilder Cooke, *Will Austerity Derail Europe's Clean Energy Movement?*, TIME (Feb. 10, 2012), <http://content.time.com/time/world/article/0,8599,2106390,00.html>; see also Benjamin K. Sovacool, *Energy Policy and Climate Change*, in THE HANDBOOK OF GLOBAL CLIMATE AND ENERGY POLICY 450–51 (Robert Falkner ed., 2013).

<sup>15</sup> Elmar Altvater & Margot Geiger, *Exiting the Multiple Crises Through 'Green' Growth?*, in MULTIPLE CRISES IN LAND AND RESOURCE USE (Andreas Exner et al. eds., 2013); Marek Strzelecki & Brian Swint, *Europe Nears First Commercial Shale Gas Production in Poland*, BLOOMBERG NEWS (Jan. 23, 2014, 12:12 PM), <http://www.bloomberg.com/news/2014-01-23/europe-nears-first-commercial-shale-gas-production-in-poland-1-.html>.

<sup>16</sup> Fiona Harvey, *Sir David King Warns Against Fracking*, THE GUARDIAN (Sept. 16, 2013), <http://www.theguardian.com/environment/2013/sep/16/david-king-fracking-shale-gas>.

<sup>17</sup> The United States shale boom has helped the United States in its economic recovery through job creation, investment, revenues, and by providing an inexpensive source of energy that has helped keep United States' manufacturing costs low. See *Shale Gas: A Renaissance in US Manufacturing?*, PWC (Dec. 4, 2011), [http://www.pwc.com/en\\_US/us/industrial-products/assets/pwc-shale-gas-us-manufacturing-renaissance.pdf](http://www.pwc.com/en_US/us/industrial-products/assets/pwc-shale-gas-us-manufacturing-renaissance.pdf).

<sup>18</sup> Production costs were found to be much higher outside of North America. A study by IHS Consulting predicts that unconventional oil and gas production will reduce the United States' trade deficit one third by 2020. *America's New Energy Future: The Unconventional Oil & Gas Revolution and the US Economy*, IHS, <http://www.ihs.com/info/ecc/a/americas-new-energy-future-report-vol-3.aspx> (last visited Mar. 27, 2014).

<sup>19</sup> Alex Cukierman, *Monetary Policy and Institutions Before, During, and After the Global Financial Crisis*, 9 J. FIN. STABILITY 373, 374 (2013).

An overview of recent legal enforcement action demonstrates that the Commission's legal pursuit has been unfaltering.<sup>20</sup> The Commission has sought enforcement including punishments upon even those Member States in severe financial crises, representing a broader policy to achieve energy sustainability in the long term through self-sufficiency of renewable energy, reduced consumption, and reduced imports.<sup>21</sup>

## II. EU RENEWABLE ENERGY POLICY

Importing twice as much energy as the United States,<sup>22</sup> the EU's dependence on foreign energy consumption is expected to rise from 50% to 70% by 2025.<sup>23</sup> The EU has long been keen to reduce dependence on foreign energy,<sup>24</sup> but the 2008 financial crisis and subsequent austerity<sup>25</sup> measures made cost-saving imperative.<sup>26</sup> A switch to renewable energy is therefore an attractive option for the EU.<sup>27</sup> Besides cost-saving, there are further significant advantages to this option too, importantly that switching to renewable energy causes fewer GhG emissions than in the production of non-renewable energy, enabling it to achieve its global GhG targets.<sup>28</sup> The process of the transition also creates significant technical job opportunities and investment, and in developing a renewable energy industry

<sup>20</sup> Legal Enforcement: Complaints, Petitions and Other Sources of Infringement Information, EUROPEAN COMM'N, <http://ec.europa.eu/environment/legal/law/complaints.htm> (last updated Jan. 24, 2014).

<sup>21</sup> Press Release, European Comm'n, Environment: Six Member State Face Court for Failing to Put EU Laws on Their Statute Books (June 3, 2010), [http://europa.eu/rapid/press-release\\_IP-10-686\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-686_en.htm?locale=en).

<sup>22</sup> *Id.*

<sup>23</sup> Christophe-Alexandre Paillard, *Rethinking Russia: Russia and Europe's Mutual Energy Dependence*, 63 J. INT'L AFF. 65 (2010); see also European Commission, *Annex to the Green Paper, A European Strategy for Sustainable, Competitive and Secure Energy, What Is at Stake—Background Document*, at 17, COM (2006) 105 final (2006) [hereinafter *Annex to the Green Paper*].

<sup>24</sup> Gawdat Bahgat, *Europe's Energy Security: Challenges and Opportunities*, 82 INT'L AFF. 961, 963–64 (2006); Debra Johnson, *EU-Russian Energy Links: A Marriage of Convenience?*, 40 GOV'T & OPPOSITION 256, 262–66 (2005).

<sup>25</sup> See David Lodge & Marta Rodriguez-Vives, *How Long Can Austerity Persist? The Factors That Sustain Fiscal Consolidations*, 2 EUR. J. GOV'T & ECON. 5, 6 (2013).

<sup>26</sup> JEREMY RIFKIN, *THE THIRD INDUSTRIAL REVOLUTION: HOW LATERAL POWER IS TRANSFORMING ENERGY, THE ECONOMY, AND THE WORLD* 37–39, 43 (2013).

<sup>27</sup> European Commission Green Paper, *A European Strategy for Sustainable, Competitive and Secure Energy*, at 11–12, SEC (2006) 317, COM (2006) 105 final (Mar. 8, 2006).

<sup>28</sup> *Life Cycle Assessment Harmonization Results and Findings*, NATIONAL RENEWABLE ENERGY LABORATORY, [http://www.nrel.gov/analysis/sustain\\_lca\\_results.html](http://www.nrel.gov/analysis/sustain_lca_results.html) (last updated Oct. 17, 2013).

it can enable the EU to export its expertise and manufactured equipment to other countries.<sup>29</sup> In this rapidly growing industry, the EU has the chance to become a global player.<sup>30</sup> Embracing renewables to produce energy more efficiently, the EU Energy Commissioner emphasized these advantages, announcing that “[r]enewables are a solution to global climate change, European economic growth, and security of supply issues.”<sup>31</sup>

### III. ENFORCEMENT ACTIVISM AND THE RENEWABLE ENERGY DIRECTIVE

The Renewable Energy Directive<sup>32</sup> placed obligations, including regulatory changes and national targets, on EU Member States to help the EU source twenty percent of its energy from renewable sources<sup>33</sup> by 2020.<sup>34</sup> Member States also needed to cut GhG emissions by twenty percent as compared to 1990 levels by 2020.<sup>35</sup> It had been long in the planning and finally enacted in 2009 at a time when Member States may have been inclined to reduce regulatory burdens in an effort to aid business during the peak of the economic downturn.<sup>36</sup> Adding such pressure and compliance costs on Member States could have been regarded as a contentious act during the recession,<sup>37</sup> but the Commission focused on its

---

<sup>29</sup> EUROPEAN RENEWABLE ENERGY COUNCIL, EUROPEAN RENEWABLE ENERGY EXPORT STRATEGY 2, 4, *available at* [http://www.erec.org/fileadmin/erec\\_docs/Projcet\\_Documents/EUREES/DEFINITIF\\_EXPORT.pdf](http://www.erec.org/fileadmin/erec_docs/Projcet_Documents/EUREES/DEFINITIF_EXPORT.pdf).

<sup>30</sup> ECOTEC, RENEWABLE ENERGY SECTOR IN THE EU: ITS EMPLOYMENT AND EXPORT POTENTIAL: A FINAL REPORT TO DG ENVIRONMENT 17, *available at* [http://ec.europa.eu/environment/enveco/eco\\_industry/pdf/ecotec\\_renewable\\_energy.pdf](http://ec.europa.eu/environment/enveco/eco_industry/pdf/ecotec_renewable_energy.pdf).

<sup>31</sup> Renewable Energy, *supra* note 8.

<sup>32</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. (L 140) 16.

<sup>33</sup> Specifically wind, solar, hydro-electric and tidal power, and geothermal energy and biomass. *Renewable Energy: What Do We Want to Achieve?*, EUROPEAN COMM’N, [http://ec.europa.eu/energy/renewables/index\\_en.htm](http://ec.europa.eu/energy/renewables/index_en.htm) (last visited Mar. 27, 2014).

<sup>34</sup> LEONARDO MASSAI, EUROPEAN CLIMATE AND CLEAN ENERGY LAW AND POLICY 110 (2012).

<sup>35</sup> *Id.* at 184.

<sup>36</sup> Damian Carrington, *Environmental Regulations Set to Be Slashed*, THE GUARDIAN (Mar. 16, 2012), <http://www.theguardian.com/environment/2012/mar/16/environmental-regulations-slashed-red-tape>; Cristina Arellano, Juan Carlos Conesa, & Timothy J. Kehoe, *Chronic Sovereign Debt Crises in the Eurozone, 2010–2012*, FEDERAL RESERVE BANK OF MINNEAPOLIS (May 2012), <http://pareto.uab.es/jconesa/research/ArellanoConesaKehoeMplsFedEpp.pdf>.

<sup>37</sup> Fabio Serrichio et al., *Euroscepticism and the Global Financial Crisis*, 51 J. COMMON MARKET STUD. 51, 52 (2013).

long-term strategy.<sup>38</sup> Its policy was a determined effort to reduce net imports of energy and switch to renewable sources, to save import costs, and reduce GhG emissions, amongst other benefits.<sup>39</sup> Since then, the Commission indiscriminately enforced this legislation through the European Court of Justice (having failed to fully reach targets under previous renewable energy legislation),<sup>40</sup> ensuring that Member States remained focused on achieving their targets and were not distracted by other events.<sup>41</sup> This, alongside with the ability of the European Court of Justice to issue punishments, demonstrates the vital importance placed upon the endgame of a twenty percent renewable energy achievement, over many other major EU objectives.<sup>42</sup> Energy sustainability, it seems, is paramount to the success of the EU,<sup>43</sup> and not even a near-bankruptcy of a Member State has been a permissible excuse for the European Commission to lose sight of that goal.

The Commission's persistence is evident in their repeated use of "reasoned opinions" to oblige Member States to comply.<sup>44</sup> Reasoned opinions are the penultimate stage in the EU's infringement procedures before court action,<sup>45</sup> commonly giving Member States two months to comply or be issued with proceedings at the European Court of Justice.<sup>46</sup> France and the Czech Republic were both sent reasoned opinions in 2011 for failing to inform the Commission of activities that are required to comply with two key areas of Directive.<sup>47</sup> They were overdue in their

---

<sup>38</sup> European Commission, *Green Paper, Towards a European Strategy for the Security of Energy Supply*, at 2, COM (2000) 769 final (Nov. 29, 2000).

<sup>39</sup> *Annex to the Green Paper*, *supra* note 23, at 3.

<sup>40</sup> See Stuart Hohnen, *The 2009 EU Renewables Directive—How Binding Is 'Binding'?*, ENERGY POLICY BLOG (Sept. 13, 2010), <http://www.energypolicyblog.com/2010/09/13/the-2009-eu-renewables-directive-%E2%80%93-how-binding-is-%E2%80%98binding%E2%80%99/>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See generally Angus Johnston & Guy Block, EU ENERGY LAW (2012); MASSAI, *supra* note 34, at 1–3. Further EU strategies are discussed in Jon Truby, *Maritime Emissions Taxation: An Alternative to the EU Emissions Trading Scheme?*, 31 PACE ENVTL. L. REV. 310 (2014).

<sup>44</sup> *Enforcing EU Energy Law: Infringement Decisions*, EUROPEAN COMM'N, [http://ec.europa.eu/energy/infringements/index\\_en.htm](http://ec.europa.eu/energy/infringements/index_en.htm) (last visited Mar. 27, 2014).

<sup>45</sup> The Treaty on the Functioning of the European Union, Oct. 26, 2012, art. 258, O.J. (C 326).

<sup>46</sup> *Infringement Cases*, EUROPEAN COMM'N, [http://ec.europa.eu/environment/legal/law/press\\_en.htm](http://ec.europa.eu/environment/legal/law/press_en.htm) (last updated Jan. 24, 2014).

<sup>47</sup> Press Release, European Comm'n, Renewable Energy: French and Czech Legislation Still Not in Line with EU Rules (Nov. 24, 2011), [http://europa.eu/rapid/press-release\\_IP-11-1446\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-11-1446_en.htm?locale=en).

communication, which they were required to do by December 5, 2010 (pursuant to Article 27(1)).<sup>48</sup> Article 16 (access to and operation of the grids) of the Renewable Energy Directive required Member States to open up access to their national electricity grid to both competition and more varied (specifically renewable) energy sources through legislative, administrative, and infrastructure modifications.<sup>49</sup> The Commission also required an explanation of their Article 17 (sustainability criteria for bio-fuels and bioliquids) compliance activities, requiring Member States to produce biofuels in a sustainable fashion.<sup>50</sup> Given that member states are bound by Article 27(2) to communicate the legislative reforms adopted pursuant to the Renewable Energy Directive, the lack of notification of compliance activities could only lead the Commission to assume that the required reforms had not been carried out.<sup>51</sup> Ensuring France met its target was a particularly important objective of the Commission, given both the size of France's national grid and the fact that its target of having twenty-three percent of its energy consumption produced from renewable energy by 2020 (compared to 2005 levels) would make a considerable contribution to the overall target, even exceeding the EU's overall target of twenty percent.<sup>52</sup>

The use of reasoned opinions as a final step before court action has been commonplace for the Commission on the issue of enforcing the Renewable Energy Directive. Hungary, Luxembourg<sup>53</sup> Finland, Poland, Greece,<sup>54</sup> Cyprus, Ireland, Malta, Slovenia,<sup>55</sup> Austria, Bulgaria,<sup>56</sup> Belgium, and Estonia<sup>57</sup> have also been issued reasoned opinions for failing

---

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> National targets are contained in ANNEX I, A of the Directive. *See* ANNEX I, A, Directive 2009/28, of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC (L 140).

<sup>53</sup> Press Release, European Comm'n, November Infringements Package: Main Decisions, ¶ 11 (Nov. 21, 2012), [http://europa.eu/rapid/press-release\\_MEMO-12-876\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-876_en.htm).

<sup>54</sup> Press Release, European Comm'n, Renewable Energy: Finnish, Greek and Polish Legislation Still Not in Line with EU Rules (Mar. 22, 2012), [http://europa.eu/rapid/press-release\\_IP-12-278\\_en.htm?locale=fr](http://europa.eu/rapid/press-release_IP-12-278_en.htm?locale=fr) [hereinafter Finnish, Greek and Polish Legislation].

<sup>55</sup> Press Release, European Comm'n, Renewable Energy: National Legislation in 4 Member States Still Not in Line with EU Rules (June 21, 2012), [http://europa.eu/rapid/press-release\\_IP-12-640\\_en.htm?locale=fr](http://europa.eu/rapid/press-release_IP-12-640_en.htm?locale=fr) [hereinafter Renewable Energy].

<sup>56</sup> November Infringement, *supra* note 53.

<sup>57</sup> Press Release, European Comm'n, May Infringements Package: Main Decisions, (May 30, 2013), [http://europa.eu/rapid/press-release\\_MEMO-13-470\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-470_en.htm).



to communicate to the Commission how they would apply the Directive into national law.<sup>58</sup> Following repeated offenses from such a large proportion of member states, the Commission warned that “unnecessary delays in implementing it may jeopardize the achievement of the EU renewable energy objective”<sup>59</sup>—something it sees as paramount for a more sustainable and competitive Europe.<sup>60</sup>

#### A. *Penalties*

The threat of being referred to the European Court of Justice for enforcement may often be enough to stimulate compliance, and the public may never hear more about the proceedings (or indeed view the contents of the reasoned opinion).<sup>61</sup> However, the Commission has shown a willingness to punish non-compliance following the expiry of their warning deadline.<sup>62</sup> The Commission first refers the case to the European Court of Justice which makes a judgement determining whether EU legislation has been breached.<sup>63</sup> If so, the court orders the infringing Member State to comply, and if the Member State does not comply with the judgement, the Commission returns to seek a second judgment and financial penalty.<sup>64</sup>

The penalties which the Commission can pursue through the Court can be significant.<sup>65</sup> Since the Renewable Energy Directive itself does not provide for specific penalties, the Commission instead seeks penalties through the Treaty on the Functioning of the European Union<sup>66</sup> for infringement of the Court of Justice’s judgement on EU law generally.<sup>67</sup> Indeed, the Commission is itself responsible for specifying the quantity

---

<sup>58</sup> See November Infringements Package, *supra* note 53; Finnish, Greek and Polish Legislation, *supra* note 54; Renewable Energy, *supra* note 55; May Infringements Package, *supra* note 57.

<sup>59</sup> See Renewable Energy, *supra* note 55.

<sup>60</sup> See *id.*

<sup>61</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, O.J. (L 145) (2001).

<sup>62</sup> See generally 20:20 KEEP ON TRACK, <http://www.keepontrack.eu> (last visited Mar. 27, 2014).

<sup>63</sup> For guidance on enforcement procedures, see *id.*

<sup>64</sup> Treaty on the Functioning of the European Union, art. 260(2), Oct. 26, 2012, 2012 O.J. (C 326).

<sup>65</sup> See generally *id.*

<sup>66</sup> See generally *id.*

<sup>67</sup> *Id.*

of any penalty it believes the Court should issue, though ultimately the decision on the extent of the penalty is that of the court.<sup>68</sup> The Commission has a formula it uses to calculate the requested penalty payment<sup>69</sup> based on the severity and duration<sup>70</sup> of the infringement.<sup>71</sup> It is further guided by the infringing Member State's influence in decision-making (based on its voting rights in the Council of Europe<sup>72</sup>) as well as its "capacity to pay."<sup>73</sup> The objective of this method is to ensure that the economic reality of a Member State is taken into account, so that it is capable of paying a fine which punishes the Member State but does not go as far as to over burden it.<sup>74</sup>

In the case of Cyprus, the formula utilized to determine Cyprus' capacity to pay a fine may have resulted in an unnecessarily harsh penalty proposal by the Commission. The formula used was as follows<sup>75</sup>:

$$\sqrt{\frac{GDP \text{ of Cyprus}}{GDP \text{ of Luxembourg}} \times \frac{Votes \text{ of Cyprus}}{Votes \text{ of Luxembourg}}}$$

The issue arises in exactly which GDP figures for Cyprus were utilized in the formula; indeed there is no indication in any of the Commission Communications referenced as to which GDP figures the Commission ought to use to calculate the appropriate penalty for Cyprus.<sup>76</sup> If this calculation is based on quarterly GDP figures, the actual GDP of Cyprus at the time of the penalty proposal may have been considerably lower than the figures used. The banking crisis in Cyprus led to a steep decline in its net worth, potentially worsened by the bailout only days before, which severely damaged Cypriot banking, one of its most valuable

---

<sup>68</sup> *Id.*

<sup>69</sup> Communication from the Commission: Updating of Data Used to Calculate Lump Sum and Penalty Payments to be Proposed by the Commission to the Court of Justice in Infringement Proceedings, European Comm'n, at 3, SEC (2012) 6106.

<sup>70</sup> The duration to be taken into account begins with the period from the date of the first judgment. See C-304/02, *Commission v. France*, E.C.R. I-6263 (2005), ¶¶ 81, 102, 108.

<sup>71</sup> Communication from the Commission, *supra* note 69; European Comm'n Communication, Implementation of Article 260(3) TFEU, SEC (2010) 1371.

<sup>72</sup> See Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community art. 205(2), Dec. 12, 2006, 2006 O.J. (C 321).

<sup>73</sup> Application of Article 228 of the EC Treaty, at ¶ 18.1, SEC (2005) 1658.

<sup>74</sup> *Id.* ¶ 18.

<sup>75</sup> The full formula can be seen at European Commission Communication, *id.* ¶ 18, n.18.

<sup>76</sup> *Id.* ¶ 18.1.

sectors.<sup>77</sup> In February 2013, the Commission itself reported an expected downturn in the Cypriot GDP of -3.5% in 2013.<sup>78</sup> However, by May 2013 it had revised its expectations to a -8.7% downturn in GDP in 2013, a much higher figure representing the scale of the economic loss in Cyprus.<sup>79</sup> Nevertheless, since the penalty proposal was issued in March 2013,<sup>80</sup> the latter figures could not have been used. This means that for the purposes of the penalty calculation, the GDP of Cyprus may have been deemed to be much larger than later realized and not proportionate to its “capacity to pay,” resulting in a significantly higher fine than if updated (and more accurate) GDP figures had been used. The Commission was obliged in such circumstances to request a daily penalty on Cyprus of €11,404, only days after the national financial rescue by the EU and the International Monetary Fund (“IMF”).<sup>81</sup> Though the point was not to make an example of Cyprus per se, what it demonstrated in reality was that in the pursuit of the achievement of the Renewable Energy Directive, the Commission could allow no leeway for Member States to avoid, delay or mitigate penalties, even if their nation was crippled with economic disasters.<sup>82</sup>

March 2013 also saw the Commission propose a much higher fine on the Polish Government. After repeated warnings,<sup>83</sup> Poland was also referred to the court for punishment with a daily penalty of €133,228.80 for its infringements.<sup>84</sup> The development of Poland’s national strategic plan to achieve their renewable energy targets had been delayed following political contention.<sup>85</sup> Having traditionally relied upon coal for ninety percent of its energy supply<sup>86</sup> and now having to comply with several EU regulations

---

<sup>77</sup> See CENT. BANK OF CYPRUS, ECONOMIC BULLETIN 9 (June 2013), available at [http://www.centralbank.gov.cy/media/pdf/ENG\\_EB\\_JUN13\\_V2.pdf](http://www.centralbank.gov.cy/media/pdf/ENG_EB_JUN13_V2.pdf).

<sup>78</sup> EUROPEAN ECONOMIC FORECAST: WINTER 2013, EUROPEAN COMM’N 56–57 (2013), available at [http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2013/pdf/ee1\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee1_en.pdf).

<sup>79</sup> EUROPEAN ECONOMIC FORECAST: SPRING 2013, EUROPEAN COMM’N, 64–65 (2013), available at [http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2013/pdf/ee2\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee2_en.pdf).

<sup>80</sup> See Renewable Energy, *supra* note 8.

<sup>81</sup> *EU Approves Multibillion-Euro Cyprus Rescue Package*, REUTERS (Apr. 12, 2013), <http://rt.com/business/eurozone-cyprus-bailout-terms-754/>.

<sup>82</sup> *Application of Article 228 of the EC Treaty*, *supra* note 73, ¶ 18.

<sup>83</sup> Finnish, Greek and Polish Legislation, *supra* note 54.

<sup>84</sup> Renewable Energy, *supra* note 8.

<sup>85</sup> *Poland on Collision Course with Brussels over ‘Illegal’ Coal Plant*, EURACTIV (Aug. 22, 2013), <http://www.euractiv.com/energy/poland-collision-course-brussels-news-529895>.

<sup>86</sup> *North American Firms Quit Shale Gas Fracking in Poland*, BBC (May 8, 2013), <http://www.bbc.co.uk/news/business-22459629> (Poland’s confidence in a US-style shale revolution

including the Renewable Energy Directive and the Carbon Capture and Storage Directive,<sup>87</sup> Poland has found the switch to renewable energy production difficult to adhere to and to justify to its electorate.<sup>88</sup> The Court of Justice was called upon by a journalist at the International Bar Association to make a “robust ruling . . . [to] help redress the balance in favour of renewables [in Poland].”<sup>89</sup> This view suggests that a stringent punishment by the Court of Justice may be required to push Poland to comply with its obligations under the Directive. To avoid such delays in reporting about national transpositions to meet the Renewable Energy Directive, and therefore avoid having to enforce the matter in court, in March 2013 the Commission began its obligation<sup>90</sup> to produce progress reports which would be published every two years to keep track of Member States’ efforts.<sup>91</sup>

The Commission has also been forceful and persistent in taking action against Member States breaching directives *related to* the Renewable Energy Directive that would hinder the achievement of its objectives.<sup>92</sup> Poland was again referred<sup>93</sup> to the Court of Justice with heavy proposed financial penalties—a daily fine of €88,819.20—for infringing the EU Gas Directive.<sup>94</sup> They are further being pressed by the Commission

---

diminished following disappointing exploratory results); *Poland on Collision Course with Brussels over ‘Illegal’ Coal Plant*, *supra* note 85 (Poland’s Prime Minister remained determined to rely on coal, using newer, more efficient technology to source its energy, and planned to build new coal power plants which risked infringing the CCS Directive).

<sup>87</sup> Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC, and Regulation (EC) No 1013/2006, June 5, 2009, art. 1, 2, 2009 O.J. (L 140).

<sup>88</sup> *Poland on Collision Course with Brussels over ‘Illegal’ Coal Plant*, *supra* note 85.

<sup>89</sup> Polly Botsford, *Will Poland’s Revised Energy Law Pass the EU Test?*, INT’L BAR ASS’N, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4f12dd4d-229b-4e27-b906-9e6c266891a1> (last visited Mar. 27, 2014).

<sup>90</sup> Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market, Oct. 27, 2001, art. 3(4), 2001 O.J. (L 283) 33–40.

<sup>91</sup> *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2013) 175 final (Mar. 27, 2013).

<sup>92</sup> Press Release, European Comm’n, Internal Gas Market: The Commission Takes Poland to Court over Regulated Gas Prices for Business Consumers (June 20, 2013), [http://europa.eu/rapid/press-release\\_IP-13-580\\_en.htm](http://europa.eu/rapid/press-release_IP-13-580_en.htm).

<sup>93</sup> *Id.*

<sup>94</sup> 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

to comply with other EU laws related to the achievement of the reduction in GhG emissions and the switch to renewable energy, such as compliance with fluorinated GhGs<sup>95</sup> regulations.<sup>96</sup>

Other Member States have also been pursued by the Commission<sup>97</sup> with proposed punishments, such as Finland which the Commission proposed both €32,140.80 and €28,569.60 daily fines for infringements of the EU Electricity Directive<sup>98</sup> and EU Gas Directive respectively.<sup>99</sup> Finland subsequently made considerable amendments to its legislation, showing that strict enforcement methods can have the desired impact on Member States.<sup>100</sup> It is both the duty of the Commission to ensure Member States comply with EU legislation, and in applying the rules promptly and efficiently their efforts are designed to force compliance to achieve some degree of energy self-sufficiency in Europe.

#### IV. UNITED STATES

Any comparison with the United States' experiences towards achieving the same target could determine that its push towards shale has enabled policymakers to take the eye off the ball in achieving renewable energy targets.<sup>101</sup> Arguably the EU has more directly focused on

---

2003/55/EC, Aug. 14, 2009, 2009 O.J. (L 211).

<sup>95</sup> Memo/12/876, Climate Change: Commission Calls for Poland to Comply with EU Legislation on Fluorinated Greenhouse Gases, European Comm'n (Nov. 21, 2012), [http://europa.eu/rapid/press-release\\_MEMO-12-876\\_en.htm?local=EN](http://europa.eu/rapid/press-release_MEMO-12-876_en.htm?local=EN).

<sup>96</sup> Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on Certain Fluorinated Greenhouse Gases (as amended), June 14, 2006, 2006 O.J. (L 161).

<sup>97</sup> Finnish, Greek and Polish Legislation, *supra* note 54.

<sup>98</sup> 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, Aug. 14, 2009, 2009 O.J. (L 112) 55–56.

<sup>99</sup> Press Release, European Comm'n, Internal Energy Market: Commission Refers Poland and Finland to Court for Failing to Fully Transpose EU Rules (Nov. 21, 2012), [http://europa.eu/rapid/press-release\\_IP-12-1236\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1236_en.htm).

<sup>100</sup> To comply with the various directives, Finland introduced the Electricity Market Act (sähkömarkkinalaki 588/2013), the Act to amend the Natural Gas Market Act (laki maakaasumarkkinalain muuttamisesta 589/2013), the new Electricity and Gas Market Supervision Act (laki sähkö—ja maakaasumarkkinoiden valvonnasta 590/2013) and the Act on the Energy Market Authority (laki energiamarkkinavirastosta 591/2013). *See Finland to Fully Transpose the Electricity Market Directive—Ensuring Effective Competition in the Electricity Market*, MERILAMPI (Sept. 1, 2013), <http://www.merilampi.com/newsletter-articles?article=33805046>.

<sup>101</sup> Amy Myers Jaffe, *Shale Gas Will Rock the World*, WALL ST. J., [http://altecheco.com/placed\\_images/pdf/How%20Shale%20Gas.pdf](http://altecheco.com/placed_images/pdf/How%20Shale%20Gas.pdf) (last updated May 10, 2013).

achieving a renewable energy solution to sustain energy needs than the United States, which has enjoyed the shale boom to minimize net energy import.<sup>102</sup>

Despite multiple attempts to pass similar renewable energy legislation, the United States appears to have been relatively unsuccessful in terms of its legislative outcomes. The American Clean Energy and Security Act of 2009<sup>103</sup> came close to mirroring some parts of the EU Renewable Energy Directive, requiring twenty percent of electricity to be produced from renewables by 2020.<sup>104</sup> It was defeated, and several other attempts to pass ambitious renewable energy legislation have not seen fruition, such as the Clean Energy Jobs and American Power Act,<sup>105</sup> the American Power Act,<sup>106</sup> and the Clean Energy Standard Act of 2012.<sup>107</sup> While related energy legislation and standards are in force in the United States,<sup>108</sup> there is no clear comparison in terms of determined and far-reaching legislation.<sup>109</sup> However, in promising United States energy independence by 2020, President Obama has made a vast policy commitment that America seems on track to complete and is within the United States' economic interests,<sup>110</sup> though not necessarily in an environmentally sustainable manner.<sup>111</sup>

---

<sup>102</sup> See Richard Youngs, *The EU's Global Climate and Energy Policies: Gathering or Losing Momentum?*, in THE HANDBOOK OF GLOBAL ENERGY POLICY chapter 13, 14 (Andreas Goldtha ed., 2013).

<sup>103</sup> The American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (1st Sess. 2009).

<sup>104</sup> *Id.* at Title I.

<sup>105</sup> Clean Energy Jobs and American Power Act of 2009, S.1733, 111th Cong. (1st Sess. 2009).

<sup>106</sup> The American Power Act of 2010, 111th Cong. (June 2010).

<sup>107</sup> Clean Energy Standard Act of 2012, S. 2146, 112th Cong. (2nd Sess. 2012).

<sup>108</sup> ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY REVIEW 2010 (Oct. 2011); Joshua Freed et al., *A Clean Energy Standard: Getting the United States Back into the Clean Energy Race*, THIRD WAY (Mar. 2011), [http://content.thirdway.org/publications/382/Third\\_Way\\_Policy\\_Memo\\_-\\_A\\_Clean\\_Energy\\_Standard-Getting\\_the\\_United\\_States\\_Back\\_into\\_the\\_Clean\\_Energy\\_Race.pdf](http://content.thirdway.org/publications/382/Third_Way_Policy_Memo_-_A_Clean_Energy_Standard-Getting_the_United_States_Back_into_the_Clean_Energy_Race.pdf).

<sup>109</sup> See Cary Coglianese & Jocelyn D'Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411, 1420–27 (2008).

<sup>110</sup> Mark E. Rosen, *Energy Independence and Climate Change: The Economic and National Security Consequences of Failing to Act*, 44 U. RICH. L. REV. 977 (2010).

<sup>111</sup> For a discussion of U.S. energy policy, see Joseph P. Tomain, *The Dominant Model of United States Energy Policy*, 61 U. COLO. L. REV. 335 (1990); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961 (2006); Lincoln L. Davies, *Tracing U.S. Renewable Energy Policy*, 43 ENVTL. REP. 10320–27 (2013).

## CONCLUSION: LONG-TERMISM

The European Commission has used every tool available to ensure that Member States amend their legislation, infrastructure, and administration to comply with the EU Renewable Energy Directive. This has required repeated warnings to Member States with the threat of legal action, name-and-shame publications for offenders, and policy guidance.<sup>112</sup> Finally and most importantly, the use of the European Court of Justice has been the last point of call to ensure that the accountability of Member States is upheld and that Member States are penalized for their breaches for non-compliance.

Member States have been referred to the court for significant punishments, despite what they may have regarded as legitimate excuses for compliance failures, such as the economic meltdown of their economy. The Commission neither had the grounds nor inclination to permit excuses. In carrying out its duty, even through the financial crises that have rocked the global and political economy, the achievement of the directive has been paramount. The forcefulness of the Commission has personified the seriousness of which governing policy in the EU treats renewable energy rule-breakers.

The EU's policy is evidence of choosing a long-term view, rather than relaxing environmental regulations in the short term to enable European businesses to cut costs and encourage a return to growth. It has ignored the short-term temptations of regulation relaxation and taken a long-term view, even at risk of economic pain. The EU has also resisted the temptation of joining the shale boom, demonstrating its commitment to a cleaner and environmentally conscious economic recovery. It is determined instead to switch to renewable energy, which could slash the EU's exorbitant energy import bill and help achieve its GhG emissions targets. It may be that the United States will achieve the former before the latter. Not only may the environment suffer as a consequence, but the United States may fall behind in the race to develop and produce technology and expertise in renewable technology—an industry that is set to grow rapidly as the world embraces renewables.<sup>113</sup>

---

<sup>112</sup> There has been criticism of the lack of guidance to achieve the Directive's Objectives. See Gerard Wynn, *EU Law Unclear on Integrating Renewable Power: Wynn*, REUTERS (Sept. 16, 2013), <http://www.reuters.com/article/2013/09/16/column-wynn-germany-solar-idUSL5N0HC13P20130916>.

<sup>113</sup> Chris Bryan, *RWE to Halve Dividend Amid Renewables Boom*, FIN. TIMES (Sept. 20, 2013), <http://www.ft.com/intl/cms/s/0/6276f72e-21be-11e3-bb64-00144feab7de.html#axzz2uPPSezFJ>.