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LEGAL FEASIBILITY OF SCHENGEN-LIKE AGREEMENTS
IN EUROPEAN ENERGY POLICY:
THE CASES OF NUCLEAR COOPERATION
AND GAS SECURITY OF SUPPLY

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Abstract

European energy policy is characterized by a complex allocation of authority between the European Union and its Member States which results in an intricate interplay of regulatory competence. Knowing the difficulties European countries face in coordinating and proposing common solutions in the area of energy, there is the urgent need to question the legal foundations underlying the decision-making process. Institutional paralysis, low reactivity to events and changes as well as systematic political horse-trading across all questions call for an alternative framework allowing some pioneering Member States to promote ad hoc common policies escaping the formal and procedural requirements of EU law. Our paper assesses the legal feasibility of short-run differentiation by means of partial international agreements inspired by the Schengen regime, namely entirely outside the EU framework. The key challenge from a legal point of view is to assess the substantive compatibility of such agreements in energy with the existing rules of the Union. Short run differentiation in energy cannot indeed be assessed at a high level of generalities. We therefore take two areas where legally-binding coordination at the sub-Union level is often called for: nuclear policy and gas security of supply. The possible substantive content of such cooperation is derived from the economic and political literature before legal feasibility is assessed. Our findings suggest that the scope for such agreements is limited for security of gas supply whereas it could be an improved cooperation device in certain areas of nuclear policy.

Keywords

EU energy policy, Schengen agreement, flexible integration, nuclear cooperation, gas security of supply

I. Introduction

The recent declarations of some prominent European leaders about the necessity to accelerate the Europeanization of energy policy have not only demonstrated a new political impetus but also a renewed interest for the potentialities and limitations of the current legal basis for decision-making in the Union.¹ Using the ‘enhanced cooperation mechanism’ (Art 20 TEU), establishing a new European Energy Community Treaty or revamping the old EURATOM Treaty, are only some of the propositions which compose the energy policy debate today. Focusing on the substantive content of policies is indeed no longer sufficient to achieve the three objectives of competition, sustainability and security of supply. There is now a need to address in parallel the institutional and political impediments precluding the Union from going forward.

The risk of institutional paralysis in an increasingly diversified Union with 27 Member States is not a particularity of the energy sector. Defence, migration, taxation or foreign policy are all fields where the complex allocation of competence between the Union and its Member States and the remaining need for unanimity in some parts of EU decision-making continue to limit the Union’s ability to implement common solutions. The risk of paralysis in an enlarged Union has been powerfully recalled by the French and Irish ‘no’ to the referendum for the adoption of the European Constitution which has been paradigmatic of Member States’ reluctance to relinquish part of their sovereignty. Even in fields of shared competence where qualified majority voting does apply, low reactivity to events and changes as well as systematic political horse-trading across all questions continue to undermine the ability of the Union to respond timely and efficiently to the globalization of today’s challenges.

As demonstrated by the Sector Inquiry of 2007,² the completion of a truly integrated single energy market remains at best a work-in-progress. For a variety of reasons, Member States have had very different views on the advantages of the new market organization. The ten-year negotiation process which led to the enactment of the first liberalization directives³ has already evidenced the difficulties of reaching a consensus⁴ and many of the problems which would impair the reform process in the next period, in particular the lack of a clear legal basis for energy in the EC Treaty. This has changed with the Lisbon Treaty and the new Art 194 TFEU. Art 194 TFEU codifies the existing objectives and instruments of European energy policy and links them explicitly. Art 194(1) TFEU indeed states that “*Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.*” This new provision could however arguably weaken the existing foundations of EU energy policy. It is indeed not unthinkable that a decision of the Commission under the competition rules be challenged on the basis of Art 194 TFEU for not taking into account security of supply or environmental concerns. In addition, Art 194(2) TFEU restates the right of Member States “*to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply*” and unanimity

¹ See e.g. the new Commissioner for Energy Günther Oettinger during his confirmation hearing (<http://www.euractiv.com/en/priorities/oettinger-defends-european-vision-energy/article-188911>) or the President of the European Parliament Jerzy Buzek advocating the creation of a new European Energy Community following the report of Jacques Delors’ Think Tank, Notre Europe (speech accessible at <http://www.ep-president.eu/president/view/en/press/speeches/sp-2010/sp-2010-February/speeches-2010-February-4.html>).

² DG Competition, Report on Energy Sector Inquiry, SEC(2006) 1724 final of 10.1.2007.

³ Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, O.J. 30.1.1997, L 27/20; Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas, O.J. 21.7.1998, L 204/1.

⁴ Hancher, “Slow and Not So Sure: Europe’s Long March to Electricity Liberalization”, 10(9) *Electricity Journal* (1997), 92-101.

over fiscal matters (Art 194(3) TFEU), two areas where EU energy policy has indeed achieved very little despite obvious possibilities.

A logical conclusion from the last ten years of liberalization experience is that the time may have come to consider more flexible forms of integration allowing Member States to reach common positions in energy to commit on a regional or functional basis. Short-run differentiation at the sub-Union level has always been a reality of the European integration process and certain well-known successes like the Schengen agreement have allowed progress without shaking the constitutional order of the Union. History has shown that short-run differentiation can take different forms, both within and outside the framework of the Treaties. Within the EU legal order, the European Monetary Union has for instance shown that a system of opt-out clauses (in this case granted to the UK, Denmark and Sweden) may allow for differentiation even though it requires amendments at the primary law level. After the *grand* adventure of the adoption of the Lisbon Treaty and the resulting constitutional *fatigue*, it might not be a reasonable path in energy. The Amsterdam and the subsequent Lisbon Treaty have nevertheless provided for differentiated integration through ‘closer’ and/or ‘enhanced cooperation’ which could be triggered by as few as eight and/or nine Member States. However, the complexity of this mechanism has so far prevented its use in practice. It therefore is legitimate to wonder whether differentiation outside the framework of the Treaties is not the right sort of low key legal framework⁵ in a field like energy. Legal conditions for taking this path indeed appear less onerous than the conditions set for intra-EU closer cooperation and, by acting under international law Member States preserve complete control over the negotiations process and almost complete control over implementation and enforcement of the obligations they accept.

The objective of this paper is to explore the legal feasibility of establishing a new institutional framework *a la* Schengen allowing some pioneering Member States to commit and promote *ad hoc* common policies in energy escaping the formal and procedural requirements of EU law. We will use the term *inter se* agreement to refer to agreements concluded between two or more Member States of the Union following the Schengen model as this is the term traditionally used in international law for agreements concluded between some, but not all, parties in an earlier agreement.⁶ The paper aims at providing the reader with a sense of the key issues and themes that will emerge if EU energy policy finds its legal foundation not inside but outside the framework of the Treaties. We will see that the key challenge from a legal point of view is to assess the substantive compatibility of such agreements with the existing rules of the Union and that short-run differentiation *a la* Schengen cannot therefore be assessed at a high level of generalities. We will thus take two areas where legally-binding cooperation at the sub-Union level is often called for: nuclear policy and security of gas supply. The possible substantive content of such cooperation will be derived from the economic and political literature before the legal feasibility is assessed.

Section II will explore the different options for short-run differentiation within and outside the framework of the Treaties before proposing three criteria against which the legal feasibility of these Schengen-like agreements must be assessed. Section III will then apply these criteria to a projected *inter se* agreement on nuclear policy and section IV will proceed similarly for an agreement concerning security of gas supply. Concluding remarks will follow.

⁵ In the words of Shaw, Flexibility in a ‘Reorganized’ and ‘Simplified’ Treaty, 40(2) Common Market Law Review (2003), 279-311.

⁶ See generally B. de Witte, “Old-Fashioned Flexibility: International Agreements between Member States of the European Union”, in Burca and Scott, Constitutional Change in the EU from Uniformity to Flexibility? (Oxford, Hart Publishing: 2000).

II. Short Run Differentiation in EU Energy Policy: Options and Legal Criteria

In energy, a natural tendency towards more or less formal regional cooperation for the regulation of cross-border trade has emerged over time. Under the umbrella of the European Regulators' Group for Electricity and Gas (ERGEG), certain Member States have signed non-binding Memoranda of Understanding outlining the objectives and milestones of regional market integration. In 2004, the European Commission acknowledged this voluntary process of micro-harmonisation of the energy markets as an important interim step in the constitution of a truly integrated single market. The setting up of these so-called *Regional Initiatives* was primarily intended to facilitate an incremental harmonization of information exchanges, capacity calculations and optimisation of allocation.⁷ The Regional Initiatives are proof that cooperation at the sub-Union level is not only needed, but also possible. Their scope is however inherently limited and differentiation on a more ambitious scale will require legal frameworks adapt to their obligations as members of the Union.

We note that differentiation between Member States is not foreign to the EU legal order. Flexibility, as a method of policy making, has become a permanent attribute of European integration.⁸ There are plenty of instances where certain Member States found ways to proceed faster on a given policy area when others were unwilling or unable to do so. Examples can be drawn from the Social Chapter of the TEU,⁹ the example of the Schengen Agreement or the introduction of the common currency in 1999.¹⁰ These developments led eventually to the constitutionalization of differentiation by introducing 'enhanced cooperation' as a tool within the Amsterdam Treaty.¹¹ In fact, the strategic objective to avoid cooperation agreements outside the EU framework led some Member States to push for a new intra-EU flexibility mechanism during the 1996-97 Inter-Governmental Conference (IGC).¹² Notwithstanding the 'enhanced cooperation' mechanism, partial agreements between Member States under international law have remained so far the dominant legal tool for differentiated integration.¹³ This section first compares the two options existing to implement short-run differentiation without amending primary Union law. It then proposes three criteria to assess the legal feasibility of Schengen-like agreements.

1. Enhanced Cooperation (Art 20 TEU) – A Treaty-Based Flexibility Instrument

At first sight, the most obvious tool for enabling a group of Member States to go ahead in specific areas of energy policy might be the establishment of an enhanced cooperation, as provided for in Art 20 TEU and Art 326 – 334 TFEU. The enhanced cooperation regime is the institutionalized form of differentiated integration, accommodating the willingness of certain Member States to pursue

⁷ For instance, the Regional Initiatives driven by ERGEG have worked on coordinated capacity allocation across borders in the North West European gas markets, coordinated demand analysis and investment planning in the Iberian and South East European gas markets, regulatory coordination towards harmonized regulatory decision-making across borders and improved transparency (second Commission benchmarking report). On the Regional Initiatives, see generally De Jong, "The Regional Approach", in Clingendael International Energy Programme, *Establishing the Internal EU Electricity Market* (2004).

⁸ D. Curtin, "The Shaping of a European Constitution and the 1996 IGC: "Flexibility" as a Key Paradigm?", 50 *Aussenwirtschaft* (1995), p. 237; T. Konstadinides, "Division of Powers in European Union Law. The Delimitation of Internal Competence between the EU and the Member States" (New York: Kluwer Law International, 2009), at 250.

⁹ C. Bernard, *EC Employment Law*, 3rd Ed (Oxford: Oxford University press, 2006), Ch. 1.

¹⁰ Although the latter represents a substantially different case of flexibility involving amendments at the primary law level.

¹¹ T. Konstadinides, *supra* note 7, at 252.

¹² B. de Witte, *supra* note 6, with reference to the Commissions opinion on the IGC of 2000, *Adapting the institutions to make success of enlargement*, Bulletin of the European Union, Supplement 2/2000, at 25.

¹³ B. de Witte, *ibid.*

integration at a faster pace than others using the common EU institutions.¹⁴ Remarkably, once introduced by the Amsterdam Treaty, there has not been a single instance so far where this mechanism has been used in practice. This does not imply that it has never been considered, let alone used as a threat in negotiations. In fact, it has been reduced rather frequently to a bargaining chip on issues where unanimity was required.¹⁵ If applied rigorously and literally, the procedural requirements of the Art 20 TFEU procedure appear very restrictive. This is probably why this instrument has never been used. Reformed already by the Nice Treaty, the rules governing enhanced cooperation underwent some simplifying changes again with the Lisbon Treaty. However, the conditions for triggering enhanced cooperation remain arguably very restrictive.

First of all, the minimum number of Member States required to initiate an enhanced cooperation agreement has gone from eight to nine. Second, regarding the authorization process, the initial authorizing decision shall be enacted by qualified majority without further qualifications (except in CFSP).¹⁶ The final authorisation decision to launch the projected enhanced cooperation shall then be adopted only when the ‘*Council has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole*’, a requirement which will not be met easily.¹⁷ Thirdly, the initiation is lying mainly in the hands of the Commission: the Member States have to submit a request to the Commission, not to the Council, specifying the scope and objectives of the projected cooperation. The Commission then submits it to the Council and thus preserves a supranational review. The Commission remains the only gateway for launching a concrete legal text.¹⁸ Regarding the content of possible cooperation agreements, there are two limitations: nothing can be done in enhanced cooperation that the Union would not be entitled to do itself, nor can anything be done in a different way from that which the Union could itself do. This is due to the fact that enhanced cooperation is governed by the same legal bases as those governing the Union, i.e. the same powers, the same instruments of action, and the same procedures.¹⁹ Another limitation of this instrument is that the cooperation must remain ‘*within the framework of the Union's non-exclusive competences*’, thus enhanced cooperation would for instance not be possible in decisive areas of EU energy policy such as such as commercial policy or competition.

Against this background, it remains to be seen whether and how Member States will be able to overcome the procedural constraints of the enhanced cooperation mechanism. Despite the few advantages of the Treaty-based mechanism, such as the possibility to use the Union institutions or increased democracy and transparency, strong disadvantages continue to exist, particularly the rigidity of the procedural requirements even with the reformed Treaty. Other forms of flexibility might therefore be more adequate to enhance EU energy policy.

2. Reinforced Cooperation Outside the Institutional Framework of the EU: The Schengen Model

An alternative to the intra-Union closer cooperation framework is offered by partial agreements, i.e. Treaties prepared and concluded outside the institutional framework of the EU between some Member States under international law. This means that Member States decide to leave the narrow framework

¹⁴ D. Thym, “The Political Character of Supranational Differentiation”, 31 *European Law Review* (2006), 781.

¹⁵ One example is the negotiation on the framework decision introducing the European Arrest Warrant. It has been blocked for a long-time by Italy. The other Member States used the threat of the introduction of the mechanism of enhanced cooperation to get Italy to agree to this piece of legislation.

¹⁶ Art. 329 TFEU.

¹⁷ Art. 20 (2) TEU.

¹⁸ F. Tekin, W. Wessels, “Flexibility within the Lisbon Treaty: Trademark or Empty Promise?”, EIPASCOPE 2008, at 1. Available at: http://www.eipa.eu/files/repository/eipascope/20080509184449_SCOPE2008-1-5_TekinandWessels.pdf

¹⁹ CEPS, Egmont, EPC (2007), *The Treaty of Lisbon: Implementing the Institutional Innovations*, Joint Study, November 2007, available at: <http://www.ceps.eu/node/1385>.

of EU law and conclude agreements among themselves. Hence, they exercise the Treaty-making powers they have preserved not only in relation to third-party countries but also in their mutual relationships.²⁰ When acting under international law the Member States preserve complete control over the negotiations process and almost complete control over implementation and enforcement of the obligations they accept.

The archetype of cooperation that started outside the treaty framework is the Schengen Agreement. It was established when a consensus on abolishing the passport controls at the intra-Community borders could not be reached. It led to the initial decision of Germany, France and the Benelux countries to cooperate and create between them a territory without internal border in 1985.²¹ The Schengen regime is also the first institutionalized example of reinforced cooperation occurring between a number of Member States that is operating – after its incorporation into the Union *acquis* - under the legal framework of the EU to attain a treaty objective. The most recent example of cooperation through partial agreement is the Treaty of Prüm on extended data exchange and intensified cooperation which was signed in May 2005 by only seven Member States.²² The legal conditions for taking the route outside the common institutional framework are less onerous than the conditions set for intra-EU closer cooperation. Nevertheless, they are also subject to important legal limits which will be examined in the following section.

3. Legal Criteria for Assessing the Feasibility of Schengen-Like Agreements

As a general rule, the Member States are free to enter agreements *inter se*. However, this must be in full compliance with Union law. The legal limits to the Member States' ability to conclude Schengen-like agreements originate from the principle of supremacy of Union law. This principle is absolute in the sense that it encompasses national law as a whole, including constitutional law.²³ Clearly stated for the first time in the *Costa Enel* case it implies that once Union law exists, conflicting national norms are inapplicable.²⁴ For the treaty-making competence of the Member States this means that an *inter se* agreement cannot not be concluded where Union law exists.

But how much Union law must exist, and is an actual conflict needed between the existing Union law and the provisions of the envisaged agreement to render it illegal? This is only one question raised by the intricate relationship between the supremacy principle and projected Schengen-like agreements. Thus there is a need to operationalize the supremacy principle in order to conduct a feasibility assessment. Criteria need to be identified in order to determine whether a conflict between the provisions of a projected *inter se* agreement and Union law would arise in a specific situation.²⁵ Following the jurisdiction of the European Court of Justice and legal doctrine the relevant criteria are pre-emption, primacy of Union law and subsidiarity.

²⁰ B. de Witte, *supra* note 6.

²¹ A. Wiener, "Forging Flexibility – The British "No" to Schengen", (2000) 00/1 Arena Working Paper, Oslo.

²² G. Amato, J. Ziller, R. Lizasoain, "The European Constitution" (Cheltenham: Edward Elgar Publishing 2007), at 36.

²³ Kovar, "The Relationship between Community Law and National Law", in EC Commission (ed.), *Thirty Years of Community Law* (1981), at 112.

²⁴ Case 6/64, *Costa v. Enel*, [1964] ECR 585 at 593-4: "The integration into the laws of each Member States of provisions which derive from the Community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty." This has been confirmed e.g. in Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125. For a general commentary see Kovar, *ibid*, at 112.

²⁵ Cross, "Pre-emption of Member State Law in the European Economic Community: A Framework of Analysis", 29 *Common Market Law Review* (1992), 447-472.

a. The Criterion of Pre-emption

Pre-emption is the main criterion for assessment in the field of energy policy. It is still a loosely defined concept ranging from straightforward contradictions with Union law to subtle and hypothetical friction to be assessed on a case-by-case basis.²⁶ However, certain key implementing principles can be found in the case law which actually leave substantial space for *inter se* agreements.

The doctrine of Union pre-emption has so far yielded only little commentary.²⁷ The first important statement was made in the *Simenthal* case (1978) where the Court stated that Union law “render[s] automatically inapplicable any conflicting provisions of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude[s] the valid adoption of new national legislative measures to the extent to which it would be incompatible with Community provisions”.²⁸ The objective of the pre-emption criterion is thus to establish a conflict rule.²⁹ To define whether a projected *inter se* agreement would conflict with the relevant Treaty articles and secondary legislation, a four-tier analysis is suggested.

1. Does the projected *inter se* agreement legislate in an area of exclusive Union competence?

Typical fields of Union exclusive competence are e.g. the common commercial policy or competition law. In these areas, *inter se* agreements are illegal even if Union law has not yet occupied the field.³⁰ *Inter se* agreements are thus only possible in fields of exclusive competence of the Member States or in areas of shared competence.³¹ Shared powers can be either concurring or parallel competences. Parallel competences (the Union and the Member States can take action independently from each other) are the exception and are extremely rare. The vast majority of shared powers are concurring powers (as in energy), i.e. that Member States theoretically have competences to take measures and thus can sign *inter se* agreements until the Union issues its Directives or Regulations. In other words, as soon as the Union exercises its shared competence, Member States are pre-empted from taking further legal action (Art 2(2) TFEU).³² As a first approximation this seems to mean that Member States may conclude an *inter se* agreement only until and insofar as the Union has not exercised its competence. In reality however, the exercise of competence by the Union in case of concurring competences and the impact it may have on the Member State’s treaty-making powers involves a complex assessment of the true extensiveness of what is called ‘occupation of the field’ by Union law, and what is the scope of ‘the field’ itself.³³

²⁶ Schuetze, 2006, supra note 4.

²⁷ From early attempts, e.g. Waelbroeck, “The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation”, in Sandalow and Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol 2 (1982), 548-580 and Weiler, “The Community System: The Dual Character of Supranationalism”, 1981 *Yearbook of European Law*, 267-277, to recently Schuetze, “Supremacy without Pre-emption? The Very Slow Emergent Doctrine of Community Preemption”, 43 *Common Market Law Review* (2006), 1034 - 1048.

²⁸ Case 106/77, *Simenthal*, [1978] ECR 629, para 643-44.

²⁹ Cross, (1992), supra note 3.

³⁰ Jacobs and Karst, “The ‘Federal’ Legal Order, the USA and Europe Compared: A Juridical Perspective”, Vol 1, book 3 (1986), at 237 and Weiler (1981), supra note 4.

³¹ We note that when the Union fails to act in case of exclusive competence, Member States cannot step in and sign an *inter se* agreement but must bring proceedings before the Court of Justice against the defaulting institution.

³² Art 2(2) TFEU reads: “When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

³³ As pointed out by Waelbroeck (1982), supra note 4: “the essential problem here is to define the scope of the Community competence”. Emphasis added.

2. *Occupation of the field by Union law - does the projected inter se agreement “affect a matter with which [Union law] has dealt extensively”?*³⁴

For *inter se* agreements in areas of shared competence to be illegal, pre-emption requires either extensive ‘occupation of the field’ by means of Union legal acts (field pre-emption).³⁵ Extensive occupation of the field can be implied or potential, which means that even though there is no Union legislation, the Union may still have a duty to fill this gap. The very existence of this duty prevents Member States from acting. This happens for instance when secondary legislation expressly gives a duty to the Union to legislate on a specific issue of shared competence, which amounts to a *quasi*-exclusive competence (in the sense of Art 3 TFEU). In rare cases, secondary legislation also expressly forbids action by Member States.³⁶ However, pre-emption is most often implied which also precludes *inter se* agreements even when they do not conflict substantively with Union law.³⁷ Implied pre-emption arises when the field is covered so “*exhaustively*”³⁸ that there is no room for further Member States action.³⁹ This has been stated by the Court in *Prantl*: “*Once rules of the common organization of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise*”.⁴⁰ This reasoning was for instance used by the Court in *Criminal proceedings against Tullio Ratti* in 1979⁴¹ or in *Commission v. Germany* in 1986.⁴² This means that secondary legislation, e.g. a Directive or Regulation, pre-empts any agreement falling within its scopes. Member States are precluded from concluding agreements containing conditions that are more restrictive, detailed or simply different than those laid down in the secondary legislation in question. In this case again, implied pre-emption of a specified field has similar effects as an exclusive competence as defined in Art 3 TFEU.⁴³

Given the proliferation of secondary Union law in many fields of shared competence (energy included), the combination of actual and potential ‘occupation of the field’ very restrictive of Member States’ treaty-making powers. In reality, this is a situation which has to be assessed case-by-case and “*should not be assumed too lightly*”.⁴⁴ Assessing ‘exhaustion’ indeed requires a thorough understanding of a particular market and subtle judgment of the extent of Union legislation coverage. We note that the ‘exhaustion’ argument has almost only been raised by the Court in the case of

³⁴ Case 218/85, 3532, *supra* note 8, para 13. Emphasis added.

³⁵ Of course Member States may still conclude so-called implementing agreements in the case of the European legislator specifically authorises them to do so.

³⁶ See e.g. in Case 130/85, *Groothandel in Im- en Export van Eiern en Eiproducten Wulro BV* against a disciplinary decision of the Tuchtgerecht of the Stichting Scharreleiern-Control, [1986] ECR 2035.

³⁷ See Case 469/98, *Commission v. Finland*, [2002] ECR I – 9627, para 102.

³⁸ Case 255/86, *Commission v. Belgium*, [1988] ECR 693.

³⁹ Case 148/78, *Criminal proceedings against Tullio Ratti*, [1979] ECR 1629. See also Schuetze (2006), *supra* note 4, at 1034 and Cross (1992), *supra* note 3, at 459.

⁴⁰ Case 16/83, *Prantl*, [1984] ECR 1299, para 6.

⁴¹ Case 148/78, *Criminal proceedings against Tullio Ratti*, [1979] ECR 1629, para 26-27: “a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different”.

⁴² Case 48/85, *Commission v. Germany*, [1986] ECR 2549, at 12-13: “it is one of the fundamental characteristics of a common organization of the market that in the sectors concerned the Member States can no longer take action through national provisions adopted unilaterally”.

⁴³ For R. Schuetze (2006), *supra* note 4, “the reason for total exclusion lies in the perceived fear that any supplementary national action may endanger or interfere with the strict uniformity of the Community regime”.

⁴⁴ See B. De Witte, *supra* note 6. See also Case 218/85 *CERAFEL v. Le Campion*, *supra* note 8 and Case 255/86, *Commission v. Belgium (Bulk Fruit)*, [1988] ECR 693.

agricultural markets and that most markets in Europe are not covered as extensively.⁴⁵ The ‘field’ itself is not a clearly defined concept as the Court has sometimes used the argument of field pre-emption to assess the allocation of competence on an area covered by only one article of a Directive.⁴⁶

3. Does the projected inter se agreement conflict substantively with the rules or the objectives of Union law in the relevant field?

In case of shared competences and non-exhaustive occupation of the field the area covered by the projected *inter se* agreement as compared to the existing rules of Union law needs to be defined. This is why the legal feasibility of Schengen-like agreements cannot be assessed at a high level of generalities. The problem then becomes to assess the substantive compatibility of the projected *inter se* agreement with the existing rules and objectives in this precise area of Union law. In the case of direct conflict, the *inter se* agreement would be illegal, which is the essence of the supremacy principle.⁴⁷ This could happen for instance when certain provisions of the *inter se* agreement are intended to limit the impact of existing secondary law.⁴⁸ Once a conflict is found to exist, there is a qualitative assessment to be done on the intensity of this conflict *vis a vis* the rules or the objectives of secondary Union law.⁴⁹ In the case of an absence of relevant rules, compliance of the *inter se* agreement with the stated objectives of Union law is critical.⁵⁰ Here the *Gallaher* case is very illustrative. The case was about possible stricter regulations adopted at national level, which were contested. As Article 3 (3) of the Directive 89/622 concerning the labelling of tobacco products required that health warnings should cover “at least 4 % of the corresponding surface”, the British government tightened the obligations of manufacturers by stipulating that the specific warning ought to cover 6% of the surfaces on which they were printed. The Court allowed the stricter measure based on a broad interpretation of the wording of Art 3.

In practice, a sliding scale must be used as some minor, hypothetical or temporary conflict could for instance be accepted. Such an approach is indeed necessary as there are grey areas in practice between the extreme case where Member States can legislate freely as long as there is no direct conflict with existing Union law and when they are fully pre-empted due to exhaustive occupation of the field.⁵¹

4. Obstacle pre-emption - does the projected inter se agreement “interfere with the proper functioning” of the Union system?

In the case of absence of conflict, the last step of the pre-emption analysis requires assessing the impact of the projected *inter se* agreement on the proper functioning of the Union system and the

⁴⁵ See De Witte, *ibid*, p. 31, who actually agrees with Bernard (1996) who writes: “one has to conclude that pre-emption has a fairly narrow field of application and concerns primarily the common organizations of agricultural markets. Even there, pre-emption analysis must be handled with caution and the limits of the field being occupied must be defined with care” in Bernard, “The future of European Economic Law in the Light of the Principle of Subsidiarity”, *Common Market Law Review* (1996), at 663.

⁴⁶ Case 52/92, *Commission v. Portuguese Republic*, [1993] ECR 2961, para 19.

⁴⁷ Tamplin Lang, “The ERTA Judgment and the Court’s Case Law on Competence and Conflict”, 1986 *Yearbook of European Law*, 183.

⁴⁸ See e.g. Case 158/88, *Commission v. Ireland*, [1990] ECR I-2367 and Case 60/86, *Commission v. United Kingdom (Dim-Dip Car Lights)*, [1988] ECR 3921.

⁴⁹ See e.g. Case 223/78, *Grosoli*, [1979] ECR 2621, at 2631-2.

⁵⁰ See Waelbroeck (1982), *supra* note 4 and Case 50-76, *Amsterdam Bulb BV v. Produktschap voor Siergewassen*, [1977] ECR, para 9: “The compatibility with the community regulations of the provisions referred to by national court must be considered in the light not only of the express provisions of the Regulation but also of their aims and objectives.”

⁵¹ On this line see e.g. Weiler “the External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle” in Weiler, *The Constitution of Europe (CUP, 1999)*, 130-187, at 173, in his commentary of the ERTA judgment.

current dynamics of integration. The question to be solved here was best expressed by the Court in *Irish Creamery Milk Suppliers Association v. Ireland* and could be phrased as follows: does the Member States' law have effects "which obstructs the working of the machinery established by the common organization of the market"?⁵² This is particularly important in sectors where the EU builds both competitive markets and the institutions to support it.⁵³ One illustrative example was the *Bussone* case where the Court held that the adoption of a national rule was precluded as it might hinder directly or indirectly, actually or potentially the effectiveness of the Union system.⁵⁴ The *inter se* agreement should not endanger the integrity of the Union legal order.⁵⁵

b. Primacy of Union Law

The second criterion to be assessed is the substantive compatibility between the future *inter se* agreement and general rules of Union law. Even if the *inter se* agreement does not affect the legal rights of other Member States, it cannot conflict in substance with Union law. This safeguard is intended to guarantee stability and uniform application of Union law. It directly derives from the Member States' *duty of sincere cooperation* (former Art 10 EC, now Art 4(3) TEU).⁵⁶ As a result, inter-governmental cooperation established by a Treaty cannot be used as an argument to impede the development of policy at the Union level.⁵⁷

In practice, a typical incompatibility which may arise with general principles of Union law is related to discrimination on grounds of nationality. Such discrimination seems almost inherent to the existence of *inter se* agreements to which only some Member States participate. It does not mean that benefits cannot be enjoyed exclusively by the Member States signing the agreement but that undertakings of other Member States should not arbitrarily be excluded. In our case, state aid and competition rules will also have to be taken into account in addition to non-discrimination as an *inter se* agreement should not distort competition in the internal energy market.

Where possible conflicts are foreseen, it is suggested to insert a conflict rule in the projected *inter se* agreements, such as it has been done e.g. in Art 134 of the Schengen Convention (1990): "*the provisions of this Convention shall apply only in so far as they are compatible with Community law*". Such a clause would contribute to show good faith on the part of Member States vis-à-vis their duty of sincere cooperation. We note that the *inter se* agreement would have more chance to be seen as lawful if it is expressly presented as an *interim* agreement, preparing the field for further integration at the Union level, thus not a separate and rival cooperation regime, which would run counter to the Member States duty of sincere cooperation.⁵⁸

⁵² Case 36/80, *Irish Creamery Milk Suppliers Association v. Ireland*, [1981] ECR 735 at 751, para 19.

⁵³ Schuetze, *supra* note 4.

⁵⁴ Case 31/78, *Francesco Bussone v. Italian Ministry of Agriculture*, [1978] ECR 2429.

⁵⁵ Case 2/88, *Imm. Zwartveld*, [1990] ECR I-3365, para 17; Case 275/02, *First & Franex*, [2002] ECR I-10943, para 49; Case 339/00, *Ireland v. Commission*, [2003] ECR I-1175, para 71; Case 344/01, *Germany v. Commission*, [2004] ECR I-2081, para 79; Case 459/03, *Commission v. Ireland*, [2006] ECR, I-4635, para 174 and *Delvaux and Guimaraes-Purokoski*, "Vertical Division of Competence between the European Community and its Member States in the Energy Field – Some Remarks on the Evolution of Community Energy Law and Policy", in *Delvaux, Hunt and Talus* (eds.), *EU Energy Law and Policy Issues* (Euroconfidential, 2008).

⁵⁶ Art 4(3) TEU reads: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

⁵⁷ Art 4(3) TEU also reads: "The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

⁵⁸ De Witte, *supra* note 24.

c. Principle of Subsidiarity

The principle of subsidiarity applies in fields of shared competence. Legal doctrine on the principle of subsidiarity is nearly exclusively focused on the question of whether the Union or the Member States should act.⁵⁹

Given the special qualities of Union law (e.g. higher transparency in decision-making⁶⁰ or a more effective compliance system), *inter se* agreements should generally be considered less effective and therefore Union law should be preferred “*in the name of subsidiarity*.”⁶¹ This means in practice that, where action at Union level is in view of the scale of the problem *marginally* less appropriate than an *inter se* agreement between Member States, Union action should be preferred to the conclusion of an *inter se* agreement. This is in a way mirroring the former Amsterdam Protocol on subsidiarity which stated that “*action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States*.” Indeed, the application of the principle of subsidiarity to *inter se* agreements means that Member States’ actions through *inter se* agreements should produce clear benefits compared with action at the level of the Union to be legal.

The ‘value-added’ test of *inter se* agreement compared to Union action is inextricably linked to the political feasibility of action at Union level. Thus, the determination of the ability of the Union to act relies on the *ex ante* ability to reach unanimity or success through Qualified Majority Voting (QMV). *Inter se* agreements should thus be particularly suitable in the case where e.g. an agreement involving a few neighbouring Member States on a highly localized issue and *a contrario* is not be suitable when strong externalities on other (non-contracting) Member States exist.⁶²

III. Towards Short-Run Differentiation Outside the Framework of the Treaties in Nuclear: An Early Assessment

There are two main drivers for renewed support for nuclear power in several Member States: the need for secure electricity supply and the need to reduce greenhouse gas (GHG thereafter) emissions.⁶³ The potential impact of nuclear on security of supply and GHG emissions has been quoted on several instances by the Commission, for instance in its Second Strategic Energy Review (2008).⁶⁴ Today several countries (such as the UK, Italy and Romania) are thus implementing or considering a long-term net growth in nuclear capacity but several others (including i.e. Ireland and Austria) remain resolutely opposed. It is then unlikely that Europe will be able to “speak with one voice” on matters of electricity generation mix and nuclear power, an exclusive competence of the Member States (Art 194(2) TFEU). While there is a widespread sense that handling key aspects of nuclear policy at the European level could have real merit, the political realities strongly militate against such an approach. The very slow process towards the enactment of the Council Directive 2009/71/EURATOM

⁵⁹ See generally on the principle of subsidiarity Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 1982); Toth, “The Principle of Subsidiarity in the Maastricht Treaty”, 29 *Common Market Law Review* (1992), 1079-1105; Davies, “Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time”, 43 *Common Market Law Review* (2006), 63-84.

⁶⁰ See e.g. Art 5 to 7 of the Protocol No 2 on the application of the Principles of Subsidiarity and Proportionality in the Lisbon Treaty.

⁶¹ De Witte, 2000, *supra* note 24, at 54.

⁶² This was in a way recognized in the Amsterdam protocol on subsidiarity: “the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States”.

⁶³ ENEF, (European Nuclear Energy Forum, Subgroup “Nuclear Legal Road Map of WG “Opportunities”) *The Importance of New Approaches in Licensing* (2008); Nuttal and Newbery, “Prospects for a European Supply of Security and Nuclear Power”, CESSA Policy Briefs (2008).

⁶⁴ DG TREN, *Second Strategic Energy Review, An EU Security and Solidarity Action Plan*, COM(2008) 781 final of 13.11.2008.

establishing a Community framework for the safety of nuclear installations showed again how reluctant many Member States are to pool any national control over the opening and operation of their nuclear industries in the interests of a Europe-wide regulation. This is why the possibilities for legally-binding agreements at the sub-Union level and outside the framework of the Treaties need to be investigated for nuclear energy.

Stronger cooperation among pro-nuclear countries would aim at ensuring increased cooperation in the fuel cycle, including progress towards implementation of disposal of high-level radioactive waste and spent nuclear fuel. Increased cooperation between national regulators is also needed so that the new designs of reactors are available for construction under an effective and efficient regulatory system.⁶⁵ Some areas for cooperation have for instance been defined in the Conclusions of the 4th plenary meeting of the European Nuclear Energy Forum (Prague, 28-29 May 2009).⁶⁶

Member States' capability to further such collaboration remains however bound by a number of specific obligations on how they act with respect to their nuclear industry. Most importantly, as members of the EU, these Member States are subject to EU law and must comply with the Directives and Regulations made under the EURATOM Treaty.⁶⁷ The Treaty has survived recent attempts to have it incorporated into the main treaty during the debate on a new constitution for the EU, and remains an important source of rule-making for all Member States on this issue.⁶⁸

This section explores whether a legally-binding international law agreement *a la* Schengen among a few Member States would be a plus and indeed feasible from a legal point of view, as a preparatory step for improvement at the Union level. It will for this purpose study the legal feasibility (against the criteria defined in Part II, namely the pre-emption of Treaty competence, the primacy of EU law and the principle of subsidiarity) of three possible areas of cooperation at the sub-Union level:

- Clarifying Market Rules for Nuclear Investors and Operators
- Disposal of Radioactive Waste and Spent Nuclear Fuel
- Common Framework for Reactor Design Assessment

⁶⁵ International Energy Agency, "The European Union", IEA Energy Policies Review (2008)

⁶⁶ In the spirit of the Florence and Madrid Forums, the Commission proposed in 2007 to organise a broad discussion among all relevant stakeholders on the opportunities and risks of nuclear energy. This was endorsed by the leaders of the 27 EU Member States in March 2007. Since then, the European Nuclear Energy Forum (ENEF) gathers all relevant stakeholders in the nuclear field: governments of the 27 EU Member States, European Institutions including the European Parliament and the European Economic and Social Committee, nuclear industry, electricity consumers and the civil society.

⁶⁷ Even though not extensively addressed in this section, they are also constrained by the various international environmental treaties to which they are a party even if they do not directly impact upon the nuclear industry, but do so or may do so indirectly. An example of this is the Aarhus Convention, which promotes public participation in decision-making. This Convention gives further rights to the citizens in environmental matters. The Aarhus Convention was transposed into Community law through the Directives 2003/4/EC (information) and 2003/35/EC (participation). Directive 2003/624/EC (access to justice) is still under discussion. Both adopted Directives already contain some provisions on access to justice. The accession to the Aarhus Convention led to the revision of the environmental legislation of the EU, as appropriate, part of which covers nuclear issues (e.g. the 85/337/EEC Environmental Impact Assessment Directive has been amended by the 2003/35/EC Directive). In the specific field of nuclear energy, some legal uncertainties appear due to the fact that the Aarhus Convention was signed under the EC Treaty and not under the EURATOM Treaty (DG TREN website). We note however that fields covered by the Aarhus convention do not a priori require more cooperation among Member States (except maybe on sharing of best practices) but better cooperation at the local level.

⁶⁸ The Lisbon Treaty does however bring some substantial changes to the functioning of the EURATOM Treaty but concern mainly procedural and institutional provisions which do not concern us here.

1. Clarifying Market Rules for Nuclear Investors and Operators: Rationale and Legal Feasibility

a. Content of the Proposition

An inter se agreement could clarify market rules for nuclear investors and operators on two core pieces.

First, a transparent and user friendly ‘non-binding competition policy handbook’ on the design and use of long-term electricity contracts could be agreed on. In the new European competitive energy paradigm, large and stable spot markets should be liquid enough to enable firms to sink high fixed-cost investments based on reliable investment signals. Yet, European spot markets remain under-developed.⁶⁹ In the present situation, long-term contracts help mitigate some market risks by providing an insurance device which will also help secure funds with investment banks under project financing structures.⁷⁰ This is particularly consequential for high fixed-cost technology such as nuclear because the greater the fixed costs are, the greater price and quantity risks are in volatile energy markets.⁷¹ However, long-term electricity contracts create severe risks of anti-competitive effects (e.g. foreclosure) and have become a focus of scrutiny for European and competition authorities.⁷² As a result, market operators are left uncertain on how they can structure (e.g. on duration, exclusivity or use restrictions) long-term contracts, which increases market risk and creates a severe impediment to the nuclear renaissance.

Second, an inter se agreement could define robust legal and regulatory regime guiding nuclear investors on:

- the creation of joint ventures with other suppliers;
- the use of “open season” mechanisms to booking their generating capacity to suppliers or to selling long-term energy contracts to industrial consumers;
- investment in merchant lines.

In the face of the different market risks investors face (e.g. volume and price risks, misalignment of contract incentives with potential buyers, under-development of European spot and forward markets)⁷³ some innovative contract structures such as consortium, joint ventures and collective buying schemes are increasingly considered and implemented (e.g. in Finland and France).⁷⁴ What is acceptable from a competition point of view remains much of a black hole which is detrimental for legal certainty.⁷⁵ The use of “open season” faces the same problem whereas it is a way to mitigate competition problems and

⁶⁹ DG COMP, 2007. Report on Energy Sector Inquiry, SEC(2006) 1724, 232-244 and 283-294.

⁷⁰ Finon, D., Roques, F., 2008. Financing Arrangements and Industrial Organization for New Nuclear Build in Electricity Markets. *Competition and Regulation in Network Industries* 9(3), 247-281; Lacy, B., 2006. Nuclear Investment: Performance and Opportunity. Communication to the World Nuclear Association Annual Symposium 2006.

⁷¹ Finon and Roques, 2008, *ibid*; Roques, F., Newbery, D., Nuttal, W., 2005. Investment Incentives and Electricity Market Design: the British Experience. *Review of Network Economics* 4(2), 93-128.

⁷² Hauteclocque and Glachant, “Long-term Energy Supply Contracts in European Competition Policy: Fuzzy not Crazy”, 37(12) *Energy Policy* (2009), 5399-5407.

⁷³ For a full overview see Hauteclocque and Glachant, “Long-term Energy Supply Contracts in European Competition Policy: Fuzzy not Crazy”, 37(12) *Energy Policy* (2009), 5399-5407.

⁷⁴ These contracting schemes for instance include risk-sharing generated between industrial consumers and electricity operators (EPR, Zandvliet, Roselectra, TVO), partnership between consumers and generators valuing a secondary fuel (DK6) or consumers cooperative purchasing electricity (Exeltium).

⁷⁵ Hauteclocque, “Legal Uncertainty and Competition Policy in European Deregulated Electricity Markets: the Case of Long-term Exclusive Supply Contracts”, 32(1) *World Competition* (2009), 91-112.

market test demand.⁷⁶ Merchant lines are investments in interconnection undertaken by private parties fully or partially exempted from the rules on Third Party Access (thereafter TPA) and/or the rules on the use of the congestion rent. From the point of view of nuclear investors (and buyers involved in some of the hybrid contractual structures described above), investing in merchant lines in parallel to investing in nuclear capacities can have the advantage to secure sales abroad when regulated interconnectors are highly congested.⁷⁷

Overall, a robust market frame could provide a clearer view on what is presumably pro- and anti-competitive with long-term contracting, joint venture and possible exemptions of TPA in this area and therefore reduce the uncertainty surrounding investors, operators and business consumers interested in nuclear energy.

b. Legal Assessment

Competition policy (Art 101 - 102 TFEU) is an exclusive competence of the Union (Art 3(1) TFEU) and EU competition rules do not exclude or exempt nuclear energy.⁷⁸ Therefore, EU competition rules apply to activities in the field of nuclear energy to the extent that they do not derogate from the provisions of the EURATOM Treaty.⁷⁹ The provisions of the EURATOM Treaty more closely linked to ‘market frame’ issues are Art 92 – 100 EURATOM (Chapter 9 on “The Nuclear Common Market”). In Case 1/78 of the ECJ *Draft IAEA Convention on Physical Protection of Nuclear Materials, Facilities and Transports*, the Court expressly clarified that the Commission has powers (shared competence) for the creation of a nuclear common market and stated that Chapter 9 of the EURATOM Treaty needs to be interpreted as an application of the general common market in the specialized field of nuclear energy: “*In the field of supply and movement of nuclear materials the Commission is endowed with a number of prerogatives which are defined in detail by Articles 52 to 76⁸⁰ on the one hand and articles 92 to 100 on the other (..)*” (para. 12). However, these provisions concern only “*the goods and products specified in the lists forming Annex IV to this Treaty*” (Art 92 EURATOM), i.e. primary fuel (uranium and its derivatives), whereas we need a more robust market frame regarding sales and transport of *the energy* produced from primary fuels (i.e. electricity).

As a result, most market frame issues (long-term energy contracts and joint venture) are under the jurisdiction of competition rules where the Commission enjoys exclusive competence. Several major cases have indeed been engaged by the Commission on energy long-term contracts in the last 5-10 years, e.g. *Synergen*,⁸¹ *Gas Natural/Endesa*,⁸² *Repsol*,⁸³ *Distrigaz*,⁸⁴ or *EDF*⁸⁵ or *Electrabel*.⁸⁶ On the

⁷⁶ DG TREN, 2004. Note of interpretation on Directives 2003/54-55 and Regulation 1228/03 in the electricity and gas internal market: Exemptions from certain provisions of the third party access regime; DG TREN, 2009. Commission Staff Working Document on Article 22 of directive 2003/55/EC concerning common rules for the internal energy market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – New infrastructure exemptions. SEC(2009) 642 final; ERGEG, 2007. Treatment of new infrastructure: European regulators’ experience with Art. 22 exemptions of Directive 2003/55/EC. Ref: E07-TNI-01-04; ERGEG, 2007. Guidelines for good practices on open season procedures. Ref: C06-GWG-29-05c.

⁷⁷ Also, their capacities are allocated with a maximum duration of one year in the best case, see ETSO, 2006. An overview of current cross-border congestion management methods in Europe.

⁷⁸ See e.g. in antitrust cases COMP/37.363 Svenska Atomförsäkringspoolen, COMP/34.985 Pool Italiano Rischi Atomici and COMP/34.558 Aseguradores Riesgos Nucleares; in merger control: Case IV/M.773 Westinghouse/Equipos Nucleares of 18.12.1996 or Case COMP/M.4153 Toshiba/Westinghouse (19.9.2006).

⁷⁹ Cases 188/80 France, Italy and United Kingdom v. Commission (1982) ECR 2545 [1982] 3 CMLR 144, p. 32

⁸⁰ Art 52 to 76 EURATOM covers the supply of ores, source materials and special fissile materials through the European Supply Agency.

⁸¹ Synergen: Report on Competition Policy 2002; IP/02/792 of 31.5.2002.

⁸² Gas Natural/Endesa: Report on Competition Policy 2000; IP/00/297 of 27.03.2000.

problem of long-term contracts across Member States and long term priority access rights to the network, the court came close to a ban in *VEMW* (2005).⁸⁷ The treatment of nuclear joint venture is also covered by competition rules (and EURATOM in specific cases such as ITER) and the test for merchant lines by the Regulation 714/2009 in three decisions recently (*BritNed*, *Estlink* and *East West Cable*).

The Commission has made clear that its single energy market initiative will apply to nuclear energy in the same way as to any other and that a rigorous application of the relevant state aid⁸⁸ and competition rules implies a level playing field for all energy sources. To the extent that nuclear energy competes on an equal footing with other energy sources, free competition should not only be the rule between nuclear operators throughout the EU, but also between nuclear operators and other energy providers. Only the case of merchant lines deserves further legal analysis as it belongs to internal market rules (Art 26 and 114 TFEU), an area of shared competence (Art 4 TFEU).⁸⁹

The regulation of merchant lines is closely regulated by the Regulation 714/2009 which specifies 6 criteria for the granting of exemptions on TPA and the use of the congestion rent (Art 7(1))⁹⁰ by national regulators and the new Association for the Cooperation of Energy Regulators (ACER). In essence, this test is the effects test of EU competition law (Art 101(3) TFEU) carried out *ex ante* to provide more legal certainty for investors.⁹¹ Further clarifying rules for nuclear investors would indeed not conflict with this objective. However, Art 7(1) is meant to be an ‘exception test’, namely that “*the level of the risk is such that the investment would not take place unless the exemption is granted*” and

(Contd.) _____

⁸³ Repsol: COMP/B-1/38.348, O.J. 20.10.2004, C 258/7 and summary of commitments decision in the same case, O.J. 30.06.2006, L 176/104.

⁸⁴ Distrigaz: COMP/37.966, O.J. 5.4.2007, C 77/48; IP/07/1487 and MEMO/07/407 of 11.10.2007.

⁸⁵ EDF: COMP/37.386, MEMO/07/313 of 26.7.2007.

⁸⁶ Electrabel: COMP/37.387, MEMO/07/313 of 26.7.2007.

⁸⁷ *VEMW*: C-17/03, [2005] ECR I-4983, ECJ. See on *VEMW*: DG Comp, 2006. Commission staff working paper on decision C-17/03 of June 7, 2005 of the Court of Justice of the European Communities, SEC (2006) 547; Talus, “First Experience under the Exemption Regime of EC Regulation 1228/2003 on Conditions for Access to the Network on Cross-border Exchanges in Electricity”, 25(3) *Journal of Energy and Natural Resources Law* (2005), 266-281 and Talus, “First Interpretation of Energy Market Directives by European Court of Justice – Case C-17/03, *Vereniging vooe Energie*”, 24(39), *Journal of Energy and Natural Resources Law* (2006), 39-52. We note that these contracts are not clearly addressed in the Regulation 714/2009 on cross-border exchanges in electricity (Regulation 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 1228/2003, O.J. 14.8.2009, L. 211/15).

⁸⁸ See e.g. Approval by the Commission of a package of aid granted to the Scottish nuclear industry, XXth Report on Competition Policy (1990).

⁸⁹ Even though EU competition rules still apply after the investment is sunk in the case of abuse of a dominant position or unlawful concerted practices between the joint owners. We note that competition rules have so far never been used on a merchant line exempted under the Art 7 procedure of Regulation 714/2009. We also note that when the national regulators or ACER reach a positive decision, the Commission may still request them to amend or withdraw it and the notifying entities are required to comply. The Commission is however still not granted the power to overrule Member States and NRAs in case they cannot agree, even after ACER mediation. For a precise analysis of the allocation of regulatory powers on merchant lines, see Hancher and Hauteclocque, “Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice”, EUI Working Papers RSCAS 2010/01.

⁹⁰ Art 7(1) reads: “(a) the merchant inter-connector should enhance competition in electricity supply; (b) the level of the risk is such that the investment would not take place unless the exemption is granted; (c) the inter-connector must be owned by a person legally separate from the TSOs; (d) charges must be levied on users of the inter-connector; (e) since the start of the European electricity liberalization, no part of the capital or operating costs of the inter-connector has been recovered from any component of the network tariffs; (f) the exemption is not to the detriment of competition or the effective functioning of the internal electricity market or the efficient functioning of the regulated systems to which the inter-connector is linked.”

⁹¹ T. Van der Vijver, “Exemptions to Third Party Access for New Infrastructures in the European Community Gas Sector - the Exception that Defies the Rule?”, 29(4) *European Competition Law Review* (2008), 229-237.

this is clearly something that has to be assessed case-by-case. In addition, Art 7(1) is a competition test and nuclear investors should not take advantage of clarified guidelines over other competitors. Last, without presuming on the extent of the ‘occupation of the field’ by means of Union law for the whole internal energy market, it seems clear that field pre-emption would exist at least on the precise scope covered the Art 7 of Regulation 714/2009.

Overall, we believe that the possible improvements of the market frame we proposed could not be included in an *inter se* agreement.

2. Disposal of High-level Radioactive Waste & Spent Nuclear Fuel: Rationale and Legal Feasibility

a. Content of the Proposition

The Commission stressed in its Communication on *An Energy Policy for Europe* of 10 January 2007⁹² that nuclear power raises important issues regarding waste. In its conclusions of 8 May 2007, the Council set out that each EU Member State should be urged “*to establish and keep updated a national programme for the safe management of radioactive waste and spent fuel that includes all radioactive waste under its jurisdiction and covers all stages of management*”. European countries indeed currently adopt different approaches to the fuel cycle.⁹³

High level waste and spent fuel subject to direct disposal, which are the most hazardous radioactive waste, require long-term isolation and containment. It is internationally accepted that geological disposal represents the safest and most sustainable option for long-term management.⁹⁴ Progress on the implementation of such disposal projects is noted only in a few Member States, namely Finland, Sweden and France, and it is likely that these countries will have operational disposal facilities by 2025.⁹⁵ The remaining countries are less advanced. Many of them have not made such progress because of the political sensitivity of the issue or insufficient scientific, technical and financial resources.⁹⁶ Finland demonstrates that even small nuclear programs can afford their own national repository but in this case, the cooperation with the Swedish nuclear program has helped to reduce costs.

In order to reach economies of scale on the cost side, there are more and more multi-national initiatives in support of national solutions through joint work, programs and knowledge transfer, as well as reflections on regional solutions. An *inter se* agreement could include provisions on disposal of high-level radio-active waste and spent nuclear fuel as well as the setting-up of regional centres for disposal.

b. Legal Assessment

Contrary to general safety standards, the specific legal basis on disposal of high-level radio-active waste and spent nuclear fuel is currently very thin. General safety standards apply nevertheless. The existing safety standards have first been defined in the Council Directive 96/29/EURATOM which lays down basic safety standards for the protection of the health of workers and the general public

⁹² Communication, *An Energy Policy for Europe*, COM(2007) 1 final of 10.1.2007.

⁹³ Bredimas and Nuttall, “An International Comparison of Regulatory Organizations and Licensing Procedures for new Nuclear Power Plants”, 36(4) *Energy Policy* (2008), 1344-1354.

⁹⁴ ENEF (ENEF Working Group “Risk” Sub Working Group “Waste Management”), *Roadmap to Successful Implementation of Geological Disposal in the EU* (2008).

⁹⁵ *Ibid.*

⁹⁶ For a complete overview of the situation in the different MS, see the Commission’s Report on Radioactive Waste and Spent Fuel Management in the European Union (2008), COM(2008)542 final and ENEF, 2008, *ibid.*

against the dangers arising from ionising radiation. The Council Directive 2006/117/EURATOM⁹⁷ on the supervision and control of shipments of waste and spent fuel later complemented it. It provides for a compulsory and common system of notification and a standard control document for shipments of radioactive waste or spent fuel which have a point of departure, transit or destination in an EU Member State if the quantities or concentration are over certain limits fixed by Article 3(2)(a) and (b) of Directive 96/29/EURATOM. These Directives have recently been complemented by a more general Council Directive 2009/71/EURATOM establishing a Community framework to define basic obligations on the safety of nuclear installations whilst strengthening the role of national regulatory bodies.

The management of spent fuel and radioactive waste has thus been addressed at the Union level through a variety of legislative instruments, but only for general radiation protection and environmental matters. The Court of Justice in its case law had indeed recognized that the Union shares competence with the Member States in matter of nuclear safety.⁹⁸ At present, waste management remains however a national responsibility with Community legislation only covering a small range of the issues involved, such as supervision and control of shipments of radioactive waste and spent fuel. ‘Occupation of the field’ can thus be considered almost non-existent. As stated in Recital 7 of the Directive 2006/117: “*Each Member State should remain fully responsible for the choice of its own policy on the management of the nuclear waste and spent fuel within its jurisdiction, some choosing reprocessing of spent fuel, others aiming at final disposal of spent fuel with no other use foreseen.*” Cooperation on the disposal of high-level radio-active waste and spent nuclear fuel as well as the setting-up of regional centres for disposal can thus be considered close to being exclusive competence of Member States. There is thus no problem of pre-emption of Treaty-making competence.⁹⁹ We also note that such cooperation would also concur to the realization of EURATOM objectives, especially the “*establishment of the basic installations necessary for the development of nuclear energy in the Community*” (Art 2(c) EURATOM). However, the safety standards set in Union law should be complied with in all cases to avoid conflict pre-emption. We note here that were the Commission to table effectively new legislative proposals on the treatment of nuclear waste by the end of 2010, as announced by president José Manuel Barroso in March 2010 at the OECD-hosted conference on civil nuclear power in Paris, an inter se agreement signed in between could be interpreted as creating obstacle pre-emption. The full legality test would then have to be run once the new (final) text is known.

In terms of discrimination on grounds of nationality, as long as foreign undertakings operating in one of the contracting Member States would not be precluded to use the new regional centre for disposal, primacy of Union law would be respected. In terms of distortion of competition within the internal market, the use of such regional repository can hardly be considered as ‘hidden subsidy’ to the nuclear industry, especially since the cost efficiencies would a priori be enjoyed by the Member States themselves and not by the undertakings. Lastly, the principle of subsidiarity does not appear to be a

⁹⁷ Council Directive 2006/117/EURATOM of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel, O.J. 5.12.2006, L 337/21. This Directive does not apply to shipments of radioactive materials recovered, through reprocessing, for further use (Art 1(4)).

⁹⁸ C-187/87 (1988 ECR, p.5013), C-376/90 (1992 ECR I-6153) and C-29/99 (2002 ECR I-11221).

⁹⁹ As long as Member States comply with their obligations under Article 37 EURATOM, which require them to provide ‘general data’ to the Commission on the site and surroundings of a planned facility in the course of national authorisation procedures for the operation of nuclear power plants, reprocessing facilities and storage facilities. We note that the Court in Cattenom interpreted Art 37 EURATOM as meaning that the Commission has to be provided with general data before a disposal of radioactive waste is authorized by the competent Member State and that the Commission’s opinion must be brought to the attention of that State before the issue of any such authorization. The Commission thus assesses whether the planned installations are liable to lead to an exposure, significant from the point of view of health, of the members of the population of another Member State or to significant contamination of the water, soil or airspace of another Member State. On the basis of these notifications, the Commission has already drawn up a number of opinions, which pay special attention to the features of the site of the planned installations.

major problem, especially with regard to the fact that the Commission itself believes that regional cooperation could accelerate decision-making on definitive disposal solutions and that regional solutions are appealing in terms of economies of scale. Recital 15 of the Directive 2006/117 also recalls that “*Member States should promote agreements between themselves in order to facilitate the safe and efficient management of radioactive waste or spent fuel from Member States that produced it in small quantities and where the establishment of appropriate facilities would not be justified from a radiological point of view.*” For the moment, these issues are addressed only by means of extensive consultations at the EU level, and especially in the European High Level Group on Nuclear Safety and Waste Management (ENSREG) and at the European Nuclear Energy Forum (ENEF). An *inter se* agreement involving waste disposal could thus be presented as an interim step to a Union-wide legislation. The Commission’s Report *on Radioactive Waste and Spent Fuel Management in the European Union* even argued that increased cooperation could “*facilitate a restart of the discussion in the Council and in the European Parliament on a European Union legislation*”, thereby showing the level of maturity of the subject at European level.

A regional agreement on the management of high-level radio-active waste and spent nuclear fuel, including regional centres for disposal, appears as particularly suited for the approach we propose. The different directives on nuclear safety should of course be complied with, in particular the Member States’ requirements to report periodically to the Commission.

3. A Common Framework for Reactor Design Assessment: Rationale and Legal Feasibility

a. Content of the Proposition

In the framework of reactor design assessment, cooperation among the regulators of the Member States could be promoted in an *inter se* agreement. Although there is movement in Europe towards harmonised requirements for licensing, reactor design certification is done nationally.¹⁰⁰ If a design has been assessed and certified by one national regulatory authority, replication of efforts does not optimise the licensing process.¹⁰¹ As the national safety requirements tend to converge, it is natural for the different authorities to mutually converge in their assessment as well. The resulting standardization of reactor designs would greatly contribute to reinforcing the licensing process and making it more effective.

Harmonizing licensing issues is a good way of ensuring that industry can evolve in a stable legal and regulatory framework. Fleets of standardized nuclear power plants offer, in general, the potential for increased safety through operational excellence, higher availability and capacity factors and improved maintenance efficiency.¹⁰² A greater convergence and harmonization of national standards on reactor design assessment would also allow for increased international cooperation among regulators, for example by sharing methods and data arising from safety evaluation. As to reactor design and technology, utilities are already choosing among fairly standardized designs offered by a small number of vendors. These vendors operate worldwide and, in line with the concept of

¹⁰⁰ NIP (2008), Updated Nuclear Illustrative Programme, presented under Article 40 of the EURATOM Treaty for the Opinion of the European Economic and Social Committee, Communication from the Commission to the Council and the European Parliament, COM(2006)844 final, 12 July 2007. The European Utilities Requirements (EUR) document is a nuclear power plant specification written by a group of potential investors in electricity generation in Europe, mostly utilities and other industrial institutions, originally designed to facilitate the licensing of EPR reactors. Although used as a basis for the bid specification of the new nuclear constructions in Finland (EPR at Olkiluoto 3) and Bulgaria (AES-92 at Belene), it is not yet a regulatory type of design safety standard at Union level.

¹⁰¹ ENEF, 2008, states: “The emergence of multinational operators leads to the question of whether the mandatory technical competence of the licensee needs to be fully localized, namely present in the country where the plant will be built, or whether a licensee can take credit for its competence in technical headquarters in another country.”

¹⁰² Ibid.

standardization and its obvious advantages, should prefer to get design changes shared by a larger set of users.¹⁰³ Overall, common reactor design assessment for new builds (and mutual recognition) could be promoted through *inter se* agreement.

b. Legal Feasibility

As for the management of nuclear waste and spent fuel, the assessment of reactor designs is only subject to the common safety requirements of the Directive 2009/71/EURATOM (on the basis of Art 2(b) and 30 EURATOM). Union legislation does not go further with harmonization and does not include any reciprocity mechanism for design approval. The problem of pre-emption is also largely the same as in the previous section. Competences are shared on safety requirements but Member States retain exclusive competence (and responsibility) over reactor design assessment, in line with established principles of international law. However, to be legal a common licensing scheme with a mutual recognition mechanism should not conflict with the safety objectives of the EURATOM Treaty. We note also that a predictable and harmonized licensing framework overseen by an independent regulatory authority is the keystone for the achievement of nuclear safety. An *inter se* agreement would therefore not raise a problem of pre-emption.

The problem of primacy of Union law might at first appear more complicated to solve. However, giving different answers in different countries does not only lead to a lack of predictability but also to a distortion of competition. Free competition in this part of the supply chain is a stated objective of the EURATOM Treaty as Art 2(g) states that the Union should “*ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialized materials and equipment*”. To achieve the necessary confidence and a level-playing field, the licensing framework must ensure that regulatory decisions are aligned across Europe. As a result, harmonization among a few Member States on the licensing processes, it is submitted, is a natural obstacle to discrimination on ground of nationality. However, it could be considered that undertakings already operating in Member States parties to the *inter se* agreement would benefit from an undue advantage compared to ‘outsiders’, even though it would still be an improvement compared to the current situation. As it is purely a problem of harmonization and that discrimination might occur, it might be argued that Union law should be favoured in the name of subsidiarity. However, in view of the very long and contentious process leading to the Nuclear Safety Directive, it is submitted that Union law could better be used to *consolidate* the future *acquis* of an *inter se* agreement and not initiate harmonization of reactor design assessment itself.

4. Conclusion

The nuclear industry currently has a general need for planning stability and reduction of investment risks coming from regulatory and market uncertainty. As for the latter, it appears that an *inter se* agreement would not be legal as market issues in the new competitive paradigm are already heavily regulated, not the least by EU competition law. However, this section has shown that common approaches at the sub-Union level are possible concerning in particular the licensing process. Harmonization and simplification of licensing procedures are critical in order to provide legal robustness and certainty. In particular, we have shown that common approaches would be possible on the management of radio-active waste and spent nuclear fuel, the setting-up of regional repositories and common design certification. We have seen that despite the many areas of exclusive competence of Member States, there is a strong rationale for continuous action at the Union level, in particular on safety under EURATOM and on competition and state aid under the Lisbon Treaty. There is also a natural role for the Commission to enhance public awareness on e.g. factual accounts of the operating history of nuclear facilities, enact a roadmap for European nuclear energy and spread good practices.

¹⁰³ Ibid.

European solidarity for the fulfilment of closure commitment in Central and Eastern European countries will also continue. The Commission holds a limited power of regulatory oversight but it exists nevertheless. Any international law agreement between Member States should thus recognize the continuous rights of the Commission. However, in view of the tensions raised by the debate on the future of EURATOM in the context of the discussions on the Lisbon Treaty, it seems that an *inter se* agreement on nuclear cooperation could be a way to go forward in the targeted areas described above.

IV. Towards Short-Run Differentiation in Gas Security of Supply Governance

High energy prices, the occurrence of regional supply shortfalls and first of all, the increasing reliance on imports from third countries is reason for unsettling concern. In fact, it is anticipated that by 2030, up to 70 % of the EU's natural gas consumption would have to be imported.¹⁰⁴ Notwithstanding such anticipation and the likely or unlikely associated consequences, European regulation addressing gas security of supply is not abundant. Security of gas supply policy basically happens at the national level. The different domestic preferences are embodied in the gas contracts and political preferences which are the prerogative of the Member States.¹⁰⁵ The actually existing EU energy policy in this area is comprised of a visible internal market policy and, at this stage, a vocal but inconsistent common supply security policy.¹⁰⁶ The main challenges to such a policy at European level are political, both internally and externally. The reluctance of Member States to accept the idea of pooling their gas markets has been so strong that efforts to obtain their consent was doomed to fail for many years. The first success only occurred in 1998 with the creation of the directive on common rules for the internal market in natural gas.¹⁰⁷ This pooling together being a new phenomenon, attention was however exclusively centred on securing an efficient and well-functioning internal energy market in the expectation that such a market would eventually lead to a secure framework for energy supply.¹⁰⁸ It was the initial Loyola de Palacio's push for a security of supply directive, adopted in April 2004¹⁰⁹ that finally brought the change. The British U-turn at the Hampton Court European Summit in October 2005, after the governments had so far resisted all initiatives to co-ordinate energy policy at European level, as well as the first Russia-Ukraine¹¹⁰ gas dispute, also played a role.¹¹¹ The most recent trigger for the renewed interest has of course been the Russian-Ukrainian gas crisis of 2009 that revealed several shortcomings of the existing legislation. The new Treaty provision on energy Article 194 para 1 lit (b) introduced by the Lisbon Treaty continues along the same lines of the institutional fine-tuning. Down to the present day the issue of (gas) security of supply went through a gradual legislation of EU energy policy: from a collection of general *per definitionem* "non-energy" provisions, such as those on the internal market (ex-Article 95 EC), on competition (ex-Article 81-88 EC) or on trans-European

¹⁰⁴ "Towards a European strategy for the security of energy supply", Green Paper by the European Commission, 2000, at http://ec.europa.eu/energy/green-paper-energy-supply/doc/green_paper_energy_supply_en.pdf

¹⁰⁵ See European Parliament criticism as regards the proposal for the gas SoS Directive, PE 321.993/REV, p. 21. Available at: <http://www.europarl.europa.eu/meetdocs/committees/itre/20030319/491341EN.pdf>

¹⁰⁶ J. DE JONG, C. VAN DER LINDE, "EU Energy Policy in a Supply-constrained World", 11 European Policy Analysis, 2008, SIEPS, p. 2.

¹⁰⁷ Adopted 22 June 1998, two years for transposition into national regimes. Similar development for the 1996 internal market electricity Directive.

¹⁰⁸ J. DE JONG, C. VAN DER LINDE, see note xx above, p.1.

¹⁰⁹ Council Directive 2004 /67 /EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, OJ L 127 of 29 April 2004, p. 92;

¹¹⁰ A. RILEY, "The Coming of the Russian Gas deficit: Consequences and Solutions", CEPS Policy Brief, No. 116, October 2006. Available at: www.ceps.be.

¹¹¹ Although there were differences in approaching the topic for instance between DG-TREN and DG-COMP, see K. TALUS, "Security of Supply – An Increasingly Political Notion", in B. Delvaux, M. Hunt, K. Talus (ed), EU Energy Law and Policy Issues, (Rixensart:Euroconfidentiel 2007, p. 126.

networks (ex-Art 154 EC) to a finally explicit provision for the energy sector including security of supply which invites the EU explicitly to establish those measures necessary to achieve security of supply.

Due to the heterogeneous energy situations of the Member States and the fact that each Member State government refers to security of supply considerations when taking decisions on the national fuel mix, it is unlikely that the EU will be able to develop a coherent common policy on obtaining secure energy supplies in the near future.¹¹² In order to meet the multitude of interests, differences in energy dependence and energy mix and to overcome the complexity of decision-making in this area, a new decision-making framework could be established by means of differentiation that would allow progress to be made by those Member States that are able to agree on common actions with regard to natural gas supply. Such an approach should be particularly considered for the gas sector as it is, due to the nature of the product and the method of its transportation, essentially a regional market. Concrete examples for illustrating the legal feasibility of an *inter se* agreement in the field of natural gas supply may be drawn from the following areas.¹¹³

- Mutual transparency commitments as regards actual use of existing gas pipes and storage
- Common concept of emergency (emergency plans/ solidarity mechanism)
- A common supply framework agreement/ speaking with one voice.

1. Mutual Transparency Commitments

a. Content of the Proposition

In order to permit regulators and all market participants to behave rationally a minimum of transparency of the industry operation is needed. It has to cover the actual use of the existing gas pipes as compared to their commercial booking as well as the actual level and actual use (net change) of storages. A partial agreement could contain requirements for aggregating this data at the regional level which should help releasing of information, enhancing the relevance of the released information and therefore would be influential with regulators and market participants.

This area of supply security policy is afflicted with problems of disharmonized and uncoordinated transposition due to the significant discretion (also temporal) of the Member States with regard to translating the respective provisions into national law.¹¹⁴ In 2009 the Commission had already to launch infringement proceedings against 21 Member States for failing to comply with the 2003 legislation on the internal market for natural gas. Key violations identified were *inter alia* a lack of transparency, insufficient coordination, and the absence of regional cooperation. The average time

¹¹² J. Roberts, “Energy and the Transformation of International relations”, in A. Wenger, R. Ortung, J. Perovic (Ed.), Oxford 2009: Oxford Institute for Energy Studies, 2009, p.

¹¹³ Two other interesting areas for an *inter se* agreement could be 1) Organizing the grid architecture (changing the structure of the set of grids, compression stations, storages, LNG terminals) and the grid development planning to enhance security of supply and to remedy to failures already revealed by past crisis, national emergency plans or attempts to harmonize rules or to converge on a single market design. 2) Harmonizing the grid access, market access and the cross-border trading rules (among TSOs, hubs, LNG and storage facilities) at the regional level to enlarge market participants areas of operation, to facilitate their reaction at time of emergency and to ease the mobilization of resources and their reallocation at the regional level. It can start from sharing common secondary capacity markets, balancing mechanisms, LNG or storage facilities or go up to organizing fully functional regional ‘trade hubs (physical and virtual with entry / exit access rules coordinating all TSOs and Hubs of the region)..

¹¹⁴ See European Commission, “Report on progress in creating the internal gas and electricity market”, Brussels, 11.3.2010, COM(2010)84 final.

taken to process such cases can be 28 to 35 months leading to serious leads and lags.¹¹⁵ The Lisbon Treaty will not change much as the future legal instruments for the implementation of energy policy goals are to be enacted through the ordinary legislative procedure (Art. 289(1), 294 TFEU), hence regulation by means of directives will continue to prevail.¹¹⁶

b. Legal Assessment

Transparency understood in the above mentioned sense falls under the competence in Art 194. Being a shared competence, it first needs to be assessed whether there is an occupation of the field by Union legislation.

The existing transparency requirements in national markets are already very broad, e.g. Art 19 (and the Annex) of the 2003 Internal Market Gas Directive (even though Art 16 and 27 are restrictive somehow). The related powers of the regulators are also very broad, see Art 41 Gas Internal Market Directive. The respective powers of ACER as introduced by the “rd package are also comprehensive. In addition, Art 44 of the Directive contributes indirectly to transparency. There is furthermore Art 8(6) of the Gas Regulation which gives power to ACER to get network codes exactly on these issues (or even new Guidelines under Art 23 of the Gas Regulation). As a result, it does not appear very legitimate to agree on a preliminary agreement on transparency because it will be in place sooner or later provided by ACER. Moreover, the Commission is currently examining a possible legislative initiative in this area in 2010 and has launched the procedure to adopt a decision amending the transparency guidelines annexed to Regulation (EC) No 1775/2005. Proliferation of the field does not stop even here.

2. Common Concept of Emergency (Emergency Plans/ Solidarity Mechanism)

a. Content of the Proposition

A common European concept of emergency does not exist. The Commission’s 2009 Assessment Report of the Directive states the different ways and definitions to ensure a Member State’s self-defined levels of supply security.¹¹⁷ The particular look at the relevant 2004 Directive on gas security of supply discloses many shortcomings, as it is long on generalities and policies but short on effective detailed regulation.¹¹⁸ In addition, contrary to the internal market Directives, in this case even no infringement proceedings were opened for its non-implementations.¹¹⁹ The 2004 gas security of supply directive tried to establish a crisis management mechanism.¹²⁰ However, under the fierce and heavy pressure of Member States the idea was reduced to Member States having the prerogative to define their respective energy policy and to choose their respective mix of energy sources while being aware of the risk of gas supply, plus to mitigate such risks in the context of their national energy policies. It

¹¹⁵ As the past shows: 1999-2002. See 24th annual Report from the Commission on monitoring the application of community law (2006) [SEC(2007) 975] [SEC(2007) 976] COM/2007/0398 final.

¹¹⁶ U. Ehrlicke, D. Hackländer, “European Energy Policy on the Basis of the New Provisions in the Treaty of Lisbon”, in A. Bausch, B. Schwenker, (Ed.) Handbook Utility Management, Berlin Heidelberg, Springer 2009, p. 741

¹¹⁷ Assessment Report of Directive 2004/67/EC on Security of supply, SEC (2009) 978 = COM (2009) 363, p. 8 et seq.

¹¹⁸ Commission, proposal for a regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC, COM (2009), 363/4; Commission, Assessment Report of Directive 2004/67/EC on Security of supply, SEC (2009) 978 = COM (2009) 363, p. 8 et seq.

¹¹⁹ K. TALUS, see note xx above, p. 149.

¹²⁰ See the Security Package, Communication from the Commission to the European Parliament and the Council, The Internal Market in Energy: Coordinated Measures on the security of Energy Supply. Proposal for a Directive of the European Parliament and the Council concerning Measures to Safeguard Security of Supply, COM (2002) 488 final.

ended with Member States having countless unchecked and non-cooperative options.¹²¹ The organization of an emergency frame by those Member States participating in the envisaged agreement in the form of defining national emergency plans, checked by the regulatory authorities for their consistency at the regional level is considerable. It would be checked if market operation rules permitted markets to play their role of “first line crisis mechanism” which requires a minimum level of operation transparency and a minimum level of harmonisation among countries, regulators, hubs and TSOs. The definition of a solidarity mechanism could be used at the regional level among the participating Member States alongside with common regulations on how it will be financed *ex ante* and paid on use.¹²²

b. Legal Feasibility

The projected establishment of emergency plans by means of an inter se agreement meets the same obstacle like the projected transparency mechanism: there is a broad occupation of the field by EU law. Subject to an area of shared competence, field occupation leads to a limitation of the Member States’ treaty-making competence with regard to *emergency plans*. The still valid 2004/67 Gas Security of Supply Directive already contained in its Art. 8 the obligation for the Member States to prepare in advance and publish national emergency measures, it provided for the adoption and publication of national emergency provisions. Even though the established mechanism has proven to be insufficient in the event of a supply crisis in 2009 this does not change the extent of field occupation. The inefficient results were caused by non- or uncoordinated harmonization across the 27 Member States. Despite this, the new Regulation repealing the 2004 Gas Security Directive which is expected by mid 2010¹²³ provides for a detailed content of the emergency plans of the Member States and the Commission will be equipped with broad powers. The content of the plan is detailed in the proposal and includes *inter alia* a definition of the role of each of the relevant parties, the procedures to be followed in the event of a crisis and inter-State cooperation mechanisms. According to Art. 9 (1) and (2) of the proposed regulation, three crisis levels are established: “early warning”, “alert” and “emergency”.

The emergency level for EU action is reached “when an exceptionally high demand occurs or when there is a disruption of the supply through or from the largest infrastructure or source and there is a credible risk that the supply standard to protect customers can no longer be met with market based instruments alone”. The Commission can verify “*whether the declaration of an Emergency is justified and whether it does not impose an undue burden on the natural gas undertakings and on the functioning of the internal market*”. It can ask the competent authority to modify or even lift the measure in the event that it imposes an undue burden or is unjustified, Art 9(6). Moreover, the Commission may even declare a Community emergency at the request of one competent authority, specifying the geographical scope of the measure. Its primary task is to coordinate the actions of the competent authorities, in which it is to be assisted by the Gas Coordination Group Art. 10 (1).

The same applies with regard to the establishment of a common solidarity mechanism at regional level. The current 2004 Directive already dealt with Member States cooperation¹²⁴ and the expected 2010 Regulation explicitly provides for a specification of Member States solidarity in applying this principle in times of crisis. Supply crisis is defined as a situation where the necessary volumes cannot be obtained in the internal market. Thus, Member States’ solidarity is not only required in the event of

¹²¹ A. R. Boerner, “A critical evaluation of the new proposal for an EC gas supply security regulation”, 7 OGEL 2009, p. 2.

¹²² J. M. GLACHANT, P. RANCI, F. LEVEQUE, CESSA, Sept. 2008.

¹²³ European Commission, Report on progress in creating the internal gas and electricity market, Brussels, 11.3.2010 COM(2010)84 final

¹²⁴ The establishment of genuine solidarity between Member States in major emergency supply situations is essential, even more so as Member States become increasingly interdependent regarding security of supply.

a supply crisis understood as a short-term transportation failure but also understood as a market failure. It cannot even be excluded that solidarity also encompasses cases of failed negotiations with exporters (see Art. 3 No. 2 of the proposed Regulation “the Member States shall cooperate with each other to prevent supply disruptions and to limit dangers in case it occurs”).¹²⁵ Based on solidarity the Member States or the EU will take a part of the burden caused by a supply crisis either directly by purchase of volumes or transportation capacity, or indirectly by aid to needy Member States or compensation of third parties.

All efforts to enhance security of supply policy at European level need to bear in mind that the EU has no responsibility for the availability of goods on the market, thus not for adequate gas supplies.¹²⁶ This lies only with the Member States according to their constitutions. Even with the new energy provision, security of supply is only an *aim* for the internal market rules and not a responsibility of the Union. Article 122 TFEU (ex Article 100 EC) on undertaking activities at the time of the shortage of supply, only provides for regulations that can come into play only when the internal market has collapsed or is about to collapse.¹²⁷

Thus, the existing and nascent legislation pre-empts any agreement falling within their scopes. The Member States are precluded from concluding agreements containing conditions that are more restrictive than those laid down there, or which are even more detailed or in any event different. Moreover, pre-emption occurs here because the envisaged regulations purporting to implement EU regulations would even introduce additional conditions (obstacle pre-emption).

3. A Common Supply Framework Agreement

a. Content of the Proposition

The external dimension of gas security of supply has been only recently touched upon by the Union institutions.¹²⁸ It is characterized by a disparate hierarchy of objectives in various hard law and soft law measures. Some of the most important proposals are in the soft law measures what basically hint at the creation of an efficient external policy. The competence to deal with the externalities of gas security remains largely with the Member States. A main point of concern with regard to the external dimension of gas security of supply is that it is imbued with the prevalence of bilateral energy deals between Member States and third party countries. Such practice presents some serious drawbacks for the EU as a whole. It leads, first of all, to the inability of the EU to “speak with one voice”, thereby weakening the negotiating position of the Union versus key producer countries.¹²⁹ Moreover such agreements may be counter-productive in terms of competition distortion, trade deflection as well as for improving the overall EU’s security of supply policy.¹³⁰ Particularly with regard to the external dimension of securing gas supply the persisting internal market approach as *sole policy* tool proved to be insufficient. It is no coincidence, that recently increasing clamour of failure put in question the idea of competitive markets. Meanwhile, security and reliability of energy supply concerns seem to

¹²⁵ A. R. Börner, “A critical evaluation of the new proposal for an EC gas supply security regulation”, 7 OGEL 2009, p. 23.

¹²⁶ Börner, above note 7, p. 29.

¹²⁷ Which in our case of market areas fully integrated by infrastructure would be a total collapse, see R. Börner, above note 7, p. 26.

¹²⁸ Only in 2007, see the energy package of the European Commission and the Communication “An Energy Policy for Europe”, COM (2007) 1 Final.

¹²⁹ Similar argument in Open Skies, Opinion of the AG, paragraph 64.

¹³⁰ H. SCHMITT VON SYDOW, Wilton Park Conference on “A Smart EU Energy Policy”, Dec. 2009. Nabucco depends on a number of factors coming together all along the line (upstream supplies, downstream markets, licensing, financing agreement etc). Deals proposed by Gazprom to Austria’s OMV, Hungary’s MOL, and Italy’s Eni, could each have the effect of disturbing the necessary choreography.

supersede the desired effects of market efficiency.¹³¹ In fact, reconsideration of the gas market liberalisation policy, insofar as it works against security of supply, is demanded.¹³² It is not an accident that possibilities of setting up buying consortia and/or a “gas purchasing group”¹³³ made their way onto the European agenda. One example is the “CDC” approach of the Commission as suggested in the Second Strategic energy review. This is an approach which might run counter the EU competition rules, Art. 101, 102 TFEU.

Negotiations with the gas producing countries mainly take place on a bilateral basis, in an uncoordinated manner fully focused on the national interest. Transparency in this area is lacking almost completely. The Member States make bilateral deals with major energy suppliers without informing the Commission or the other Member States, thereby putting the cohesiveness and the credibility of the EU energy external policy into question.¹³⁴ This lack of transparency inside the EU is also used by third party countries against the EU, in particular with respect to the pricing of gas in different EU Member States. Unlike with the signing of particular bilateral deals with the USA on air transportation access (*‘open skies’*), the EU has not mounted any legal challenge against the Member States and has not yet asked the European Court of Justice to step in, which however remains a possible way forward for the Commission.¹³⁵ In order to secure gas supply the establishment of a coherent approach among Member States towards major supplier countries is needed a “common voice” i.e. a coordination and information mechanism for bilateral actions, arrangements and contracts based on a high level of transparency.

b. Legal Feasibility

With regard to the external dimension, the situation is difficult for a Schengen-like approach understood as an agreement among Member States as we touch upon exclusive competences of the Union. Generally those cases where the Union can act externally derive either explicitly from the treaty, are implied from those provisions or derive from secondary internal legislation based on those provisions.¹³⁶ If we look at the usual bilateral energy agreements concluded between Member States and third countries at least some of the aspects covered are the exclusive competence of the EU. In fact, the Union (and pre-Lisbon: the Community) possesses the external competence to “speaking with one voice” which covers the conclusion of agreements with third countries.¹³⁷ Relevant policy on the matter is on the one hand the Common Commercial Policy (CCP) of Article 207 TFEU (ex 133 EC Treaty).¹³⁸ It provides for a coherent external trade regulation at EU level. The CCP does not only

¹³¹ A. Sastri, Comment on “A French rethink of the Gas Market” 10. March 2010. Available at: <http://www.europeanenergyreview.eu/index.php?id=1772>.

¹³² Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European

¹³³ See the recent proposals by the French Government, C. Stoffaers.

¹³⁴ H. SCHMITT VON SYDOW, Wilton Park Conference on “A Smart EU Energy Policy”, Dec. 2009.

¹³⁵ It is visibly a matter for political judgment by the Commission whether to take action in such cases. However, in recent times it has done so in other areas See C-266/03 Commission v Luxembourg [2005] ECR I-4805; C-433/03 Commission v Germany [2005] ECR I-6985 (Inland Waterways Agreements); C-246/07 Commission v Sweden, pending (AG Maduro opinion 1 October 2009); C-13/07 Commission v Council (WTO –Vietnam accession), opinion of AG Kokott, 26 March 2009. Demonstrates the complexity of interpreting the effects of pre-Lisbon Art 133. The following cases are all on Art 307 EC, AG Maduro relied also on Art 10 but the ECJ did not: C-205/06 Commission v Austria (BITS), 3 March 2009; see also C-249/06 Commission v Sweden (BITS), 3 March 2009; C-118/07 Commission v Finland (BITS), 19 November 2009.

¹³⁶ S. Haghighi, “Energy Security and the Division of Competences between the European Community and its Member States”, European Journal, 2008, p. 464.

¹³⁷ H. SCHMITT VON SYDOW, Wilton Park Conference on “A Smart EU Energy Policy”, Dec. 2009.

¹³⁸ This provisions covers trade in products that are and/or were subject to the European Coal and Steel Community and the European Atomic Energy Community regimes.

stand for the coordination of national policies or an obligation to cooperate with the Member States, but as a task of the Union. However Member States rarely hesitate to foster an autonomous commercial policy despite the competence of the Union. Pre-Lisbon, this Union exclusive competence was limited to trading in goods. In other areas such as investments, the provision of services or when non-trade matters were involved, the competence was shared and thus both the Community and the Member States were allowed to conclude agreements.¹³⁹ One illustrative example is the amendment of the trade-related aspects of the Energy Charter Treaty in 2001.¹⁴⁰

In practice most energy-related agreements have been mixed with the consequence that they had to be concluded by the EC and the Member States since they naturally contained elements which encompassed shared competence, including services, establishment and investment/capital (examples include the Energy Charter Treaty and the Energy Community Treaty).¹⁴¹ The difficulty was distinguishing trade in goods (imports of oil, natural gas and coal being then already covered) from services (gas services).¹⁴² The Lisbon Treaty now indicates explicitly that the area of CCP in its entirety is exclusive. It is a major simplification compared to the complexity of the former provision and has important consequences for the Member States as they are excluded from adopting international treaty in this area, a clear case of pre-emption.¹⁴³ In addition, the EU even possesses (and already possessed pre-Lisbon) an implied external power relevant for the regulation of the EU external energy relations, which is now, after having been progressively developed by the ECJ, codified in Article 3 TFEU.¹⁴⁴ The reform Treaty codified the “implied external powers”, i.e. if there is an internal

¹³⁹ Definition of services see S. ZARILLI, “Energy Services in International Trade: development Implications”(2001) 8 Dundee University Online Journal, Article 15: Services in the energy sector appear in two categories: the traditional services related to oil and gas exploration, drilling services, derrick erection, re-gasification services, refinery services as well as and pipeline buildings. Those services arising from the break-up of integrated energy systems and the introduction of competition and privatization in this sector, e.g. operations to the power pools, the provision of continuous information on energy prices, energy trading, and brokering, energy management, reduction in greenhouse gas emissions, and trading of emission rights are referred to as the emerging services. Apart from exploration and production, services of transmission and distribution through pipeline or LNG also exist in the natural gas sector. Except of coal mining which includes services, coal is basically treated as a good as most aspects of its trade relate to trade in goods. For electricity one finds its generation, transmission, distribution and supply which are services.

¹⁴⁰ It was done simply by Council decision based on Article 133 EC Treaty with a reference to the Community's exclusive competence in the preamble (see Dec 2001/595/EC).

¹⁴¹ Although the post-Nice version of Article 133 EC Treaty referred to services, this competence was not exclusive.

¹⁴² In Opinion 1/94 the ECJ had indicated that the competence of the Community to conclude agreements with regard to trade in services only fell in the field of CCP as far as cross-border provisions of services were at stake without any movement of natural or legal persons since this was similar to cross-border trade in goods and thus the external competence in CCP only covered what is called under the WTO agreements ‘Mode 1’ of service provisions. Mode 2: consumption abroad of services by a consumer of another country; Mode 3: commercial presence of foreign service providers in a country; Mode 4: movement of natural persons providing services were not covered. The Nice Treaty extended the scope of the CCP, with respect to the negotiation and conclusion inter alia to trade in services, ex Article 133 (5) EC Treaty. See J. WOUTERS, D. COPPENS, B. DE MEESTER, “The European Union’s External Relations after the Lisbon Treaty”, in S. Griller, J. Ziller, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008), p. 142 (170).

¹⁴³ Agreements as regards “changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and service, the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. They will only be enabled to act “if so empowered”. Nevertheless, similar to the EC Treaty, the Lisbon Treaty also does not explicitly define the scope of trade in services, thus it is unclear whether it includes the broad meaning given by the GATS or instead, the narrow in the EC treaty which excludes commercial presence.

¹⁴⁴ The reform Treaty codified the formerly progressively by the ECJ developed “implied external powers”, see Article 3 (2) TFEU (such competence may be either exclusive or shared) which is 1) as a result of the ‘AETR’ case law - in cases where internal rules were already adopted in a particular field (which makes it necessary to compare the already existing Community rules with that of the energy deal at issue in order to determine the extent of the coverage); 2) Whenever the Community has included provisions in its internal legislative acts relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive

competence there is also an external competence of the Union. These implied powers are also exclusive, thus exclude the Member States from acting, when the conclusion of the projected agreement is provided for in a legislative act of the Union, Art. 3 (2) TFEU. Having an area where a possible agreement would not solely involve issues that fall within shared competence but also within the exclusive competence of the EU, the Member States are prevented from concluding a Schengen-like agreement even if the Union has not exercised its powers to set up a common policy in the area.¹⁴⁵

How to determine what exactly belongs to the Union's power if we look at the conclusion of energy agreements with third countries? And what is still left to the Member States?¹⁴⁶ The *open skies cases* are good examples for proving that the limits of competences are anything but clear-cut. The bilateral agreements at issue were fairly complex agreements, dealing with a variety of issues, ranging from aviation security to adoption of a computerized reservations system, from licensing to fares.¹⁴⁷ The situation is similar for the energy deals. Most of them are supported in some way by an intergovernmental agreement or understanding, and thus are not purely commercial. Moreover, due to the gradual expansion of Union competences with regard to the externalities it seems impossible to find scope for a Member States's *inter se* agreement. What might look like a shared power may turn out to instead rest with the Union.

4. Conclusion

Looking at the jurisprudential groundwork undertaken, the establishment of a new institutional framework alongside EU law in order to enhance cooperation in gas supply security with regard to transparency and a common solidarity and/or emergency mechanism is legally not feasible due to pre-emption of the field by Union law. Since the external side of gas supply security involves matters that are in the scope of the Union as well as the Member States an alternative could be a mixed-agreement, i.e. an agreement entered into both by the EU and the Member States.¹⁴⁸ It could create a partnership between the Union and at first a number of willing Member States seeking cooperation to exercise powers in the field of gas security of supply. Incentive for such an agreement could be *inter alia* to avoid a further expansion of the Unions competence as it has happened based on the implied external competences doctrine by the ECJ and might now go on under the Lisbon Treaty. Although until now the competences to deal with the non-market aspects of energy security have remained still largely within the hands of the Member States, the observable expansion of the internal regulatory power of the Commission is able to gradually spur the involvement of the Union at the external level.¹⁴⁹ Another alternative is given to create a new gas Treaty based on the same model like EURATOM which is an example of an instrument where the competencies have been clearly identified and defined. It explicitly recognizes the competence of the Community to establish with other countries

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external competence in the spheres covered by those acts; 3) if it is necessary to conclude an agreement with at least one third party country in order to achieve the objective related to internal measures.

¹⁴⁵ In the very classic Kramer decision, the Court held that the Member States would be free to keep on exercising their own residual powers until the Union started to exercise its powers. In case the Community had an exclusive power to set up a common fisheries policy, including external action. That implies that the Member States may seem free to act, but are not, in that their actions including the conclusion of agreements with third parties can only take place by the acquiescence of the Union; they act on borrowed time. Joined Cases 3, 4 and 6/76, Kramer [1976] ECR 1305. Available at: <http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&lng1=en,de&lng2=da,de,en,fi,fr,it,nl,sv,&val=53705:cs&page=1&hwords=Kramer%7E>.

¹⁴⁶ J. KLABBERS, "Treaty Conflict and the European Union", (Cambridge: 2009), p. 117.

¹⁴⁷ Therefore, throughout the open skies saga, at least four legal bases for the exercise of an exclusive power of the Community were invoked, which already suggests that the situation is far from clear. Two regular treaty provisions, Article 133 TEC and Article 84 TEC, the 1/76 doctrine and the ERTA doctrine.

¹⁴⁸ J. KLABBERS, "Treaty Conflict and the European Union", (Cambridge: Cambridge University Press, 2009), p. 188.

¹⁴⁹ S. S. HAGHIGHI, see note 88 above, p. 421.

relations which aim at fostering progress in the peaceful use of nuclear energy.¹⁵⁰ On this basis the Community is entering into a growing number of international agreements with third countries and is strengthening cooperation with international organizations. In addition, the EURATOM Treaty provides that the common supply policy for uranium should, where appropriate, be ensured within the framework of agreements concluded between the Community and third countries.¹⁵¹ However, such a solution is subject to several uncertainties. Even though it appears very promising to create a new supranational body such as e.g. the EURATOM Agency, it does not seem politically realistic, particularly in view of the remaining reluctance of the Member States to transfer any more powers related to energy regulation to the EU institutions and looking at the recent experience with ratifying the Lisbon Treaty.

V. General Conclusion

This article has presented a preliminary assessment of the legal feasibility of Schengen-like agreements for EU energy policy. We have found no general answer and diverging results according to the area analyzed.

In the area of nuclear policy, several of the most important licensing issues could be fruitfully integrated in an *inter se* agreement. The licensing process concerns a wide range of issues such as reactor design certification, early site permit, construction permit, operating licenses or combined licenses, and of course security and safety standard. A deeper cooperation of nuclear regulators in new licensing issues is possible in the short-term. Some initiatives of these regulators already exist, as the Multinational Design Evaluation Program, which shows the relevance and timeliness of the issue. Common changes and harmonization of the regulatory and licensing legal framework could occur quickly if a few Member States could agree on an *inter se* agreement. A number of EU countries considering new build have already taken steps to adapt their framework, for instance Italy and the UK. Such steps should be coordinated and best practice examples should be followed. More efficient, more predictable and more harmonized licensing regimes are vital for investment decisions. Given the very particular and contentious nature of the nuclear technology, a legally-binding cooperation device could be useful.

The internal dimension of gas security of supply is an area which is exhaustively covered by EU legislation. Even though it would be beneficial to establish transparency, emergency or solidarity mechanisms at a regional level, the comprehensive regulation at EU level pre-empt the Member States from concluding *inter se* agreements in this area. Of course deeper regional cooperation is possible in the loose frame of regional initiatives. With regard to the external dimension a Schengen-like agreement excluding the EU will not be possible as the objectives to be regulated touch upon areas of exclusive Union competence. As a consequence only a so-called mixed agreement appears to be the best possible solution. Such a solution outside the EU institutional framework would in addition give the Member States a possibility to limit a further expansion of the EU's external competences (as developed gradually by the ECJ and now constitutionalized with the Lisbon Treaty).

As a general result, Schengen-like agreements are not legally feasible in every area of EU energy policy. The actual legal feasibility depends on the development of Union law which in turn often depends on the willingness of Member States to transfer competences at the Union level. This sets the limits and also the opportunities for such agreements. Overall, such *inter se* agreements seem to be the right sort of legal framework in certain targeted areas of energy policy where we would like to see a more European policy to go forward.

¹⁵⁰ See Articles 2 (h) and 101 of the Euratom Treaty.

¹⁵¹ See Articles 52 and 64 of the Euratom Treaty.

Finally, even if the primacy of EU law might be an insurmountable obstacle in some areas of energy policy where the legislation is already comprehensive, the current political realities might act as a facilitator for the implementation of inter se agreements. The unification of energy law is indeed an inherently political subject and any attempt by the Commission to prevent the Member States from concluding international law agreements or to fight their legality under EU law might be seen as an intolerable intrusion within their real (or perceived) exclusive prerogatives.

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