

# POLICY *brief*

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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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### Highlights

- The recent declarations of some European leaders demonstrated a new political impetus towards the Europeanisation of energy policy. Nevertheless, the complex allocation of regulatory competences between the EU and its Member States works against coordination and harmonisation
- A possible solution could entail some Member States to promote ad hoc common policies through Schengen-like agreements, i.e., binding international law agreements outside the EU legal framework and thus escaping its formal and procedural requirements
- Schengen-like agreements must however comply with the principle of supremacy of Union Law in order to be legally feasible
- The compliance with the supremacy principle can be assessed on the grounds of three operational criteria: pre-emption, primacy of EU law and subsidiarity
- The legal feasibility assessment conducted in the two areas of nuclear policy and security of gas supply shows that in the former area several of the most important licensing issues could be fruitfully integrated in a Schengen-like agreement



Florence School of Regulation

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## Background

The recent declarations of some European leaders demonstrated a new political impetus towards the **Europeanisation of energy policy**. Nevertheless, the complex allocation of authority and regulatory competences between the EU and its Member States works against coordination and harmonisation. Institutional paralysis, low reactivity to events as well as political horse-trading are calling for an alternative legal framework for cooperation.

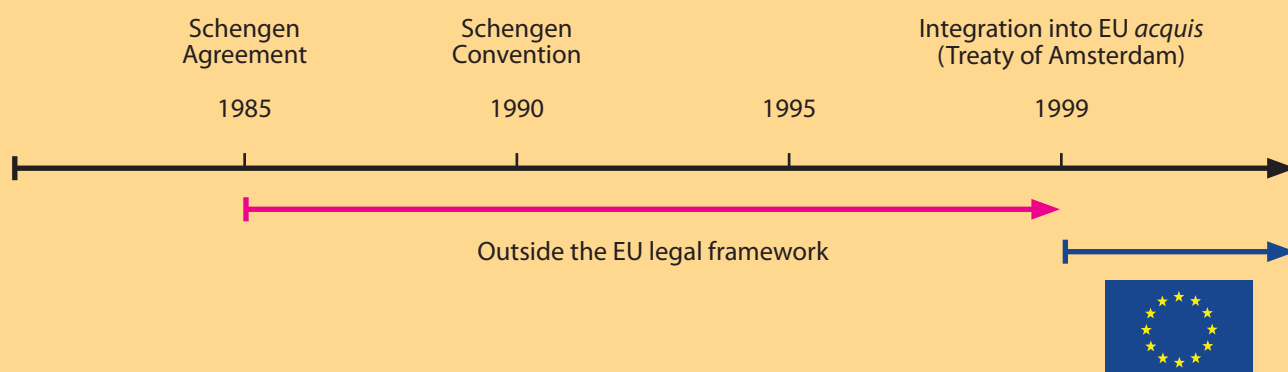
## Differentiated integration in energy policy

A possible solution to enhance harmonisation in the area of energy could entail some pioneering Member States to promote ad hoc common policies escaping the formal and pro-

cedural requirements of EU law. In this case, **some** Member States could reach common positions and proceed faster on a specific energy policy area whilst others are unwilling or unable to do so. Such **differentiation allows for** a more flexible form of integration.

Differentiation has always been a reality of the European integration process. Certain well-known successes like the Schengen Agreement have allowed progress without shaking the constitutional order of the Union. Box 1 illustrates the development of the Schengen Agreement, established initially by 5 EU Countries (Belgium, Germany, France, Luxembourg and the Netherlands) in 1985, when a more general consensus on abolishing the passport controls at the intra-Community borders could not be reached.

### Box 1 - The Schengen Agreement



*Today* the provisions of the Schengen *acquis* are fully applied by 22 EU countries (**Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden**), plus **Norway, Iceland and Switzerland**.

Even though the Schengen regulation was integrated into the EU *acquis* in 1999, the agreement represents the archetype of closer cooperation between a number of Member States that started entirely outside the EU framework.

An alternative, Treaty-based means of differentiation is the “enhanced cooperation” - described in Box 2 -, which however, has not proved very successful so far.

**Box 2 - Three case studies**

The enhanced cooperation regime is a form of differentiated integration introduced by the Treaty of Amsterdam. Remarkably, there has not been a single instance so far

where this mechanism has been used in practice, mainly due to the rigidity of the procedural requirements. Strict conditions apply, from the number of Member States required (nine) to the qualified majority needed to enact the initial authorisation.

Conversely, Schengen-like agreements can be concluded by some Member States under international law, so-called “*inter se* agreements”. In practical terms, such agreements imply that the Member States abandon the narrow framework of EU Law and act under the broader framework of international law, where they preserve treaty-making powers.

The legal conditions for Schengen-like agreements are less onerous than the conditions set for the enhanced cooperation mechanism. Nevertheless, they are also subject to important legal limits and in particular, they must fully comply with the principle of **supremacy of Union Law**. Broadly speaking, the principle of supremacy of Union law means that an *inter se*

agreement cannot be concluded where there is a risk of (actual or potential) interference with Union law. However, this principle is complicated to apply in practice.

**3. Legal feasibility assessment**

The assessment of the compliance of an agreement with the supremacy principle is a very complex matter and requires a case-by-case analysis on the grounds of more operational criteria, namely pre-emption, primacy of EU law and subsidiarity, which all need to be fulfilled. Box 3 illustrates the three assessment criteria.

**Box 3 – The assessment criteria***1st criterion: Pre-emption*

Areas of exclusive Union competence: *inter se* agreements are illegal even if the Union law has not occupied the field yet.

Areas of shared competence and extensive occupation by Union law: *inter se* agreements are illegal in both cases where Union legislation exists (actual occupation) and where no legislation exists but the Union has a duty to fill the gap (potential occupation).

Areas of shared competence and non-extensive occupation by Union law: *inter se* agreements are illegal if a case-by-case assessment on the substantive compatibility reveals a direct, non-minor and non-temporary conflict; *inter se* agreements are illegal also in absence of conflict if they interfere with the proper functioning of the Union system, the integrity of the Union legal order and the common organisation of the markets.

*2nd criterion: Primacy of EU law*

According to Member States' duty of sincere cooperation, the principle of primacy of EU law requires *inter se* agreements not to conflict in substance with general principles of Union law, e.g., non-discrimination on grounds of nationality. To fulfil this 2nd criterion, a safeguard clause in the Schengen Agreement was introduced. It clearly stated that “*The provisions of this convention shall apply only in so far they are compatible with Community law*”.

*3rd criterion: Subsidiarity*

Given the special qualities of Union law (certainty, enforcement, etc.), in fields of shared competence Union law should generally be preferred to *inter se* agreements as long as they do not create clear benefits compared with action at the Union level.

#### 4. Two potential areas of application

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. In what follows a feasibility assessment for Schengen-like agreements is conducted in two areas: nuclear policy and security of gas supply.

##### A. Nuclear policy

*While some Member States (such as the UK, Italy and Romania) are today implementing or considering a long-term growth in nuclear capacity, several others (such as Ireland and Austria) remain resolutely opposed. It is unlikely that Europe will ever speak with one voice on matters of electricity generation mix and nuclear power, which is an exclusive competence of Member States. Moreover, Member States are subject to EU law and must comply with the Directives and Regulations made under the EURATOM Treaty. **The feasibility assessment on 3 possible areas of cooperation shows that inter se agreements could fruitfully integrate several important licensing issues concerning reactor design certification and the disposal of radioactive waste and spent nuclear fuel.***

##### MARKET RULES

Why cooperate? An *inter se* agreement could clarify market rules for nuclear investors and operators on the design and use of long-term contracts and on the creation of joint ventures, open seasons and investment in merchant lines.

*Inter se* agreement legally feasible? No.

Why? Pre-emption: Most market frame issues (such as long-term energy contracts and joint ventures) are under the jurisdiction of competition rules where the Commission enjoys exclusive competence. Generally, to the extent that nuclear energy competes on an equal footing with other energy sources in liberalized markets, an *inter se* agreement distorting competition among producers cannot fulfil the pre-emption criterion.

##### DISPOSAL OF RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL

Why cooperate? Nuclear power raises important issues regarding waste: 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 of disposal.

*Inter se* agreement legally feasible? Yes, provided compliance is ensured with Directives on nuclear safety.

Why? i) Pre-emption: The Court of Justice recognised a shared competence in matter of nuclear safety, but at present waste management remains a national responsibility with Community legislation mainly covering safety issues; ii) Primacy: 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, the non-discrimination principle would be respected; iii) Subsidiarity: EU law explicitly states that regional cooperation could constitute an interim step to a Union-wide legislation in this area.

##### REACTORS DESIGN

Why cooperate? The standardisation of reactor design would contribute to make the licensing process more effective, stabilise the regulatory framework as well as increase international cooperation.

*Inter se* agreement legally feasible? Yes.

Why? i) Pre-emption: Reactor design is only subject to the common safety requirements. Union legislation does not go further with harmonisation and does not include any reciprocity mechanism for design approval. There is movement towards harmonisation in licensing, but reactor design certification is done nationally; ii) Primacy: An agreement on common licensing requirements would contribute to create a level-playing field among nuclear operators of different nationality; iii) Subsidiarity: Union law could be better used to consolidate the future *acquis* of an *inter se* agreement rather than initiate the harmonization of reactor design assessment itself.

##### B. Security of gas supply

*High energy prices, the occurrence of regional supply shortfalls and above all, the increasing reliance on imports from third countries are reasons for unsettling concern for the security of gas supply. Nevertheless, security of gas supply policy basically happens at the national level and it is unlikely that the EU will be able to develop a coherent common policy on obtaining secure energy supplies in the short-term. The main challenges to a supply security policy at European level are political, both internally and externally. **The feasibility assessment on 3 possible areas of cooperation shows that Schengen-like agreements are not well-suited. Internally, the Member States are pre-empted by the comprehensive regulation at EU level, while externally, a Schengen-like agreement is not possible as the objectives to be regulated touch upon areas of exclusive Union competence.***

## TRANSPARENCY

Why cooperate? An *inter se* agreement could contain requirements for aggregating data at regional level, releasing information and enhancing the relevance of the released information for regulators and market participants.

*Inter se* agreement legally feasible? No.

Why? Pre-emption: Transparency understood in the above falls under shared competence but occupation of the field by Union law is already very broad. The powers of ACER (Agency for the Cooperation of Energy Regulators) introduced by the 3<sup>rd</sup> package include network codes on these issues: a preliminary agreement on transparency will be therefore provided by ACER soon or later. Finally, the Commission itself is considering a possible future legislative initiative in this area.

## EMERGENCY

Why cooperate? An *inter se* agreement would allow a minimum level of harmonisation among countries, regulators, hubs and Transmission System Operators with regard to the

different emergency plans defined by the Member States.

*Inter se* agreement legally feasible? No.

Why? Pre-emption: The issue falls under shared competence but there is a broad occupation of the field by EU law: Member States treaty-making competence is limited.

## EXTERNAL SUPPLY FRAMEWORK

Why cooperate? An *inter se* agreement would allow coordination and information mechanisms for bilateral actions, arrangements and contracts based on a high level of transparency.

*Inter se* agreement legally feasible? No.

Why? Pre-emption: At least some of the aspects covered by the usual bilateral energy agreements concluded between Member States and third countries are in the exclusive competence of the EU. In addition, the EU possesses an exclusive, implied external power relevant for the regulation of the EU external energy relations.