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EXECUTIVE SUMMARY

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

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- Recent declarations of European leaders, like J. Buzek President of the Parliament, remind the necessity to accelerate the Europeanization of energy policy. They demonstrate a renewed interest for the potentialities and limitations of the current decision-making mechanisms in this area. The establishment of a new European Energy Community, the revamping of the old EURATOM Treaty or an 'enhanced cooperation' mechanism are propositions to provide a way out and are increasingly structuring the energy policy debate.
- Several Member States are actually able to reach certain common positions in energy policy. They need more flexible forms of integration to commit on a regional or functional basis. The development of Regional Initiatives in gas or electricity also proves that some cooperation at the sub-European level is possible. The scope of such initiatives is however inherently limited and differentiation on a more ambitious scale will require legally-binding frameworks.
- Differentiation within the Lisbon Treaty provisions for enhanced cooperation has few advantages but remains a very rigid solution. A natural alternative is then offered by partial agreements between some Member States inspired by the Schengen regime. In this regime, Member States exercise their Treaty-making powers to establish mutual relationships. Acting here 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.
- As a general rule, the EU Member States are free to enter into such kind of agreements as long as they are in compliance with existing EU law. The legal limits to the Member States' ability to conclude Schengen-like agreements derive from the principle of supremacy of EU law which establishes the absolute superiority of EU law over national law.
- The legal feasibility of Schengen-like agreements can be assessed following five key implementing principles to be found in the jurisprudence of the European Court of Justice:
 1. Does the agreement legislate in an area of exclusive EU competence?
 2. Does the agreement conflict substantively with the existing rules or the objectives of EU law in the relevant field?
 3. Does the agreement interfere with the proper functioning of the EU institutional machinery?
 4. Does the agreement respect the general principles of EU law, e.g. non-discrimination against other Member States on grounds of nationality?

5. Where action at EU level is only marginally less appropriate than an agreement between Member States, EU action should be preferred.

- Obviously, such assessment can be made only on a case-by-case basis. Thus, this paper looks more closely at two energy areas where increased cooperation at the sub-European level is often called for: nuclear policy and gas security of supply. We find very different results: while the scope for Schengen-like agreements seems very limited for gas security of supply, it could constitute an improved cooperation device in certain domains of nuclear policy.
- The nuclear industry has a general need for long term stability and for reduction of investment risks linked to certain regulatory and market uncertainty. However, a Schengen-like agreement cannot give exclusive market advantages favoring nuclear mainly because competition policy is an exclusive EU competence. Instead, a Schengen-like agreement would be possible on common facility design certification, management of radio-active waste and spent nuclear fuel, or the setting-up of regional repositories.
- When it comes to gas security of supply inside the EU there is already an exhaustive regulatory coverage by EU legislation (incl. the Third Package and coming gas security of supply Regulation). Of course it would be beneficial to establish transparency, emergency or solidarity mechanisms at a regional level. However, the comprehensiveness of regulations at EU level pre-empts the Member States from concluding partial agreements in this area. With regard to security of supply outside the EU (i.e. third countries), a partial agreement cannot exclude the EU as a party as it cannot be excluded that it would touch upon EU exclusive competences such as on external trade policy. As a consequence, we consider a so-called 'mixed agreement' involving Member States and the EU as a legally feasible option.
- As a result it can be stated that short-run differentiation of EU energy policy inspired by the Schengen regime might not be legally feasible in every area. The decisive criterion is the respective development of EU legislation in the particular field. This sets the limits and also the opportunities for such agreements. Nevertheless, in certain targeted areas, Schengen-like agreements seem to be the right sort of legal framework for legally binding cooperation at the sub-European level. They could in fact be used as an interim step towards EU-wide harmonization.