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Division of Competences and Security of Energy Supply

3.1. BRIEF REMARK

BEFORE ANALYSING THE law of competences, it is important to mention one noteworthy characteristic of the energy market as far as consumer–producer relations are concerned. As previously emphasised, we should firstly highlight the distinction between oil and gas markets in our analysis. The oil market, unlike the gas market, is a flexible and global market which indicates that the origin and the destination of oil may not play an important role in formulating an oil security framework for the purposes of our discussion on competences. In the oil market, supply is not addressed to a particular region or country but to a 'great pool' that constitutes the 'world' oil market.[1] The oil can be easily re-directed to other destinations. The gas market, however, does not yet possess this characteristic. It is regional and rigid. It is therefore important to create a physical link (eg a pipeline) between producer and consumer and a privileged relationship between the two would thus guarantee a more efficient energy security system. For this reason, the following discussion on the creation of an external energy policy, by either the Community or the Member States, would be definitely relevant for energy in the form of gas. What about oil? Would the fact that the oil market is a global market lead to the conclusion that establishing a privileged relation with particular oil-producing countries is worthless and would not prevent an oil crisis? Would this characteristic lead us to have a global approach in dealing with oil security matters rather than a 'regional' approach, or, for the purposes of our study, a 'Community' approach? The answer is no.

[1] See in particular, P Noël, 'Approvisionnement énergétique de l'Europe et politique étrangère commune: une problématique', at 3, available at <http://www.upmf-grenoble.fr/iepe/textes/PNeurope.PDF> [hereinafter 'Approvisionnement énergétique']. See also P Noël and P Criqui, 'Marchés énergétiques et géopolitique pétrolière, 1990–2030', (1998) <http://www.upmf-grenoble.fr/iepe/textes/pnpc98.pdf> [hereinafter 'Marchés énergétiques et géopolitique'].

Firstly, the development of world oil reserves is an important factor in securing oil supply.[2] Most oil-rich countries do not possess the necessary infrastructure to develop their reserves efficiently: therefore, the development of these reserves by foreign assistance becomes crucial. Another question to be answered immediately here is why, in that case, it is necessary to formulate an external energy policy for the European Community (EC) when the main task of developing a given reserve in a third country is mostly accomplished by private oil companies, such as Shell or Total? The answer is that the history of international investment in the field of energy suggests that when political relations between two countries or two regions are not at their best, foreign oil companies hesitate to invest in that country or that region. Hence the external policy of the Community in general, and in particular the policy specifically touching upon the way in which an energy-producing country is dealt with, affects the activities of a given European oil company. For that reason, the formulation of an external energy policy to secure oil supply also becomes relevant. Moreover, the development of a third country's oil reserves by private companies does not imply that other institutions or bodies cannot carry out this activity. The European Community's membership of the Energy Charter Treaty (which aims at investment in the development of energy fields), and the Community's INOGATE programme[3] (which seeks to promote interstate projects to attract large-scale investment to energy-producing and transit countries), illustrate the fact that creating an environment where investment in the energy sector can be facilitated and protected is also a task of public authorities, including the EC, and not just of oil companies.

Secondly, an external policy could assist in stabilising regions in which oil is found.[4] Those regions, such as the Middle East, North Africa or the Caspian are tainted by political instability that would indirectly affect the flow of oil to consuming countries or increase its price. Stabilisation, although a difficult task, could be achieved through the direct involvement of the Community. A stable Middle East would enable a secure environment for the activities of energy operators in the region. This would be in turn beneficial for both consuming and producing countries. For this reason too, the discussion of the relationship between the consuming and the oil-producing countries becomes significant.[5]

This issue clearly touches upon the importance of both an economic and a foreign policy approach to the discussion of energy security. For this reason, a

[2] See Noël, 'Approvisionnement énergétique', *ibid*, at 4.

[3] For an explanation of the INOGATE Program see <http://www.inogate.org>.

[4] See Noël, 'Approvisionnement énergétique', above n 1, at 4.

[5] Some commentators add a third reason for the necessity of a Community foreign energy policy that is elaborated in the context of a military presence, which is found necessary to re-establish the normal oil supply condition where it has been halted for one reason or another. This study will not discuss this option as it necessitates a detailed discussion of the likelihood of the existence of a European military force, and also as it is believed that the first two reasons should suffice to enable the design of a policy which eradicates the need to have recourse to a military option. See Noël, 'Approvisionnement énergétique', above n 1, at 4.

separate chapter is later dedicated to foreign policy in this study. Now that it is clear that there is a role for the Community in guaranteeing energy security as a whole, including oil and gas, we turn to analysing the division of competences between the Community and its Member States regarding the security of energy supply and discuss its adequacy and shortcomings.

3. 2. INTRODUCTION

The design of an external energy policy for the European Union, ie a policy towards the energy-producing countries, is inextricable from broader economic and foreign policy challenges. As explained in the preceding chapter, the crucial role that energy plays in the economy of a given country or a region, on the one hand, and the inevitability of dealing with the overall relations between the two sets of consuming and producing countries on the other, necessitates the analysis of both these broader dimensions in designing an external energy policy. European efforts to establish a common foreign and security policy and the dependence of Europe on energy-producing countries to guarantee energy security, plead for an analysis of how best this security can be guaranteed at the EU level, and how the mutual interaction between the European Union and the Member States should be designed. It should seek to determine whether the formulation of an external energy policy should be placed outside the scope of EU activities that are concerned with economic and foreign policy, and whether the individual member countries should be allowed to design such a policy independently from each other (as they have done in the past), or whether, on the contrary, there should be a stronger role for the Community.

Some energy experts argue in favour of providing the Community with the task of formulating an energy security policy, while others emphasise the role of national governments. The former argue that in a liberalised market, where energy exchange between Member States should be guaranteed at any time (eg stock exchange and solidarity obligations at a time of crisis), when the interdependence of Member States in energy matters is increasing, and when a failure to adopt adequate measures in one Member State can have serious consequences for the operation of the internal market throughout the European Union and beyond,[6] it seems odd if broader necessary measures, such as creating a stable relationship between importing and exporting countries, are undertaken at the Member State level alone. They argue that a degree of cooperation should be created and a Community framework of action should be adopted. On the contrary, the latter group of experts argue that national governments can better guarantee the security of energy supply independently from the Community, due

[6] See the Memo of the Directorate General of Energy and Transport of the European Commission, *The internal energy Market: Improving the Security of Energy Supplies*, 2002. http://europa.eu.int/comm/energy/oil/internal_market/doc/memo2002_en.pdf.

to their familiarity with their own specific market.[7] These divergent views will play a role in discussing how the division of competences in the European Community should be approached. This issue is analysed at the end of this chapter.

By examining the ways through which the competences[8] of the Community and the Member States were divided, one can only agree that there is a direct link between the sensitivity of a specific sector and the debate on the division of competences. The closer a matter is related to the basic principles of the Community, the more likely it is that the Community will be allowed to deal with it. The best example of this link is the formulation of the common commercial policy, which was placed in the hands of the Community and the Community alone, since it was said to be directly linked to one of the most important principles of the Community, ie the establishment of a common market.[9] It was found vital to pursue one of the Community's central objectives (free trade) by action taken externally, since otherwise the position of the Community would have been weakened in its relations with other external entities. It is thus correct to say that the more an activity comes into contact with the most basic principles of the Community, the more probable it is that competence for its formulation and regulation falls to the Community, either as an exclusive power or one shared with the Member States. The expansion of these basic principles results in the gradual extension of Community competences.

Regarding our discussion on Europe's security of energy supply, it should be determined whether the already described principles and rules adopted internally to guarantee energy security (eg the attempt to create a European energy market) necessitate the Commission's involvement at the external level and eventually the formulation of an external energy policy by the Community institutions to guarantee that security. In other words, it should be ascertained whether energy

[7] The idea that national governments can best deal with energy security issues is rejected by some. John Mitchell believes that for European countries, the concept of energy security on a national basis is losing its meaning. He explains that the challenge for Europe is 'to focus on energy policies in a European projection rather than to play games with old labels'. See JV Mitchell, 'Energy Supply Security: Changes in Concepts', the text of the presentation to the 'Seminaire Européenne sur la Securité d'Approvisionnement Énergetique', Ministry of Economy, Finance and Industry, Paris, November 2000 [hereinafter 'Energy Supply Security'] at 15–18.

[8] The terms 'competence' and 'power' are used interchangeably in this chapter of the study.

[9] See, eg, Case 1/75, where the ECJ states that Art 113 (now 133) covers a policy,

> which is conceived in the context of the operation of the common market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other.

The Court went on to say that

> this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.

This would distort the institutional framework, call into question the mutual trust between the Community and the Member States, and prevent the Community from fulfilling its task in the defence of the common interest. See Case 1/75, *Local Cost Standard* [1975] ECR 1355, para 1364.

security is adequately guaranteed through the establishment of a European energy market or whether some active intervention by the Community at the external level is also necessary. This discussion is also directly linked to a more general discussion on the necessity to provide the Union with adequate competence to act efficiently in the international sphere and to allow the Union to speak with one voice. As one writer correctly suggests, 'the evolution of the Union as an effective international actor will depend on the balance between introspective concentration on necessary internal development and reform and a 'realistic confidence' in its external relations'.[10] As far as energy security is concerned, the balance is between internal developments within the Union to guarantee energy security, such as the creation of a common energy market and regulating security stock management, and external measures to guarantee such security and to create an efficient legal and political framework to regulate relations with the energy-producing and transit countries which the Union depends upon. This study argues that a balance does not yet exist and it seems that internal developments in creating a common energy market occur without efficient external relations to accompany them. Although some may argue that success at the internal level will automatically bring success at the external level, and the creation of an efficient internal market will render externalities obsolete, this study aims to reveal the flaws in such approach. This study also goes one step further by claiming that efficient internal development ceases to exist when such a balance is absent and where the necessary security measures to guarantee external energy flow are not in place.

One surprising aspect, hinted at briefly above, is the link between the increase in the external activities of the Community and the ECJ's involvement in analysing the division of competences between the Member States and the Community. For example, due to the increase in the Community's external commercial relations in the 1970's, the ECJ has become more involved in analysing of the relations of the Community and the Member States with third countries. In contrast, by the 1980's, the Community was so much involved in internal activities that there is 'an absence of discussion on the implications for the Community's external trading relations of the internal market program'.[11] Although it may seem that the absence of adequate discussion of the effects of internal development on external relations was due to the mind of the Community being occupied in dealing with internal issues, some commentators point out that this same reason has sometimes acted as an excuse not to expand the benefits of the internal market to third parties. Eeckhout, in answer to this lack of linkage, suggests that the unwillingness was due to the existence of a basic policy question, which was posed to the Community as 'to what extent should the

[10] M Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) at 138 [hereinafter 'External Relations and External Competence'].

[11] See Cremona, 'External Relations and External Competence', *ibid*, at 142.

Community extend the benefits of internal market integration to non-member country suppliers of goods and services?'.[12] As he suggests, the lack of a clear linkage between internal and external activities is about limiting the expansion of the 'benefits' of the Community to those third states. However, this basic policy question does not arise in the same terms for all sectors of Community activity. The policy question does not squarely fit into the discussion of internal–external energy relations, because the question here is not whether the Community is willing to share the benefits of the internal energy market with third countries. Rather, the question is to what extent the objectives embodied in the internal sphere would not be attained if this linkage is not established? For that reason, the relevance of the Community's activity at the external level becomes especially significant. Hence, it should be determined whether developing the activities of the internal market in general and the creation of the common energy market in particular would not be hampered if sufficient attention were not paid to the matter of external energy security.

Some may argue that when the initial legislative phase for the internal energy market comes to an end, attention will be turned to the necessary external aspects of that policy. The initial phase of activities to establish a common energy market (since the creation of the gas and electricity directives) is not yet complete. However, if one argues that the internal energy market's function, ie guaranteeing the free exchange of affordable energy between Member States, is primarily dependent on either the import of energy or external factors affecting the energy price, or on both, a parallel concern for the external aspects of that policy is required, which is absent from the ambit of developments in the internal energy market. This absence can only be justified if an abundant use of other sources of energy, such as nuclear and renewable energy, renders the issue of dependence on oil and gas obsolete. As explained above, projections show that Europe's dependence on oil and gas will continue to grow in the decades to come, and the use of non-conventional sources will not substitute for conventional ones in the near future. Therefore, external concerns should also shape and define the content of an internal policy, which specifically deals with issues of energy security.

This being said, one needs to assess whether competence is or could be provided for the Community to take this aspect of energy security into account. After all, the Community can only be blamed for not putting efficient energy security measures in place if it actually possesses the power to do so. The 'story' of how energy was dealt with by the Community and the Member States, since the

[12] See P Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (Oxford, Oxford University Press, 1994) at 342 [hereinafter *European Internal Market*]. For a broad overview of the external relations of the European Community and its case law see P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, Oxford University Press, 2004). See also JV Louis, 'Les Relations extérieures de l'Union économique et monétaire' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (The Hague, Kluwer Law International, 2002) at 77.

inception of the European Community in the 1950s, was discussed generally in chapter 2. Here, those aspects that are important for our discussion on the law of competences are mentioned.

There are various determinants to decide upon the division of competences from purely legal issues to politically sensitive ones. The influence of the case law of the European Court of Justice (ECJ) on the development of the law on external competences of the Community is rightly said to be a distinctive characteristic of Community law and one of the most absorbing aspects of studying the European Community.[13] The controversy over the issue of competences, simply stated, is rooted in a crucial balance between the extent to which Europe should ever increasingly speak with one voice, on the one hand, and due respect for the principles of subsidiarity, proportionality and the existing competences of the Member States on the other. The discussion of the competences of the Community to deal with matters related to energy security should include a study of the case law of the ECJ, and an analysis of how this balance has been reached or tipped in different situations.

The powers of the Communities are derived from the treaties. The types of possible measures that may be adopted, and the procedures through which those powers can be exercised are determined by the treaties. Article 5 of the EC Treaty expressly states that 'the Community shall act within the limits of the powers conferred upon it by this treaty and of the objectives assigned to it therein', [the doctrine of attribution of powers]. The important consequence of this attribution of power to the Community is that Member States can no longer retain that power. As the Court commented in *Costa v ENEL*,

> the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a *permanent limitation* of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[14]

The principle of primacy, as outlined in this case, limits the competences of the Member States in dealing with those sectors for which the Community has been granted competences in the treaty.

Generally, the scope of competences of the Community has greatly expanded over the years. This expansion has been either due to changes in the provisions of the treaties and the addition of a specific sector to the overall competences of the Community, or has been established because it has been proved that such action is necessary to attain one of the objectives of the treaty. This evolution suggests that, in any case, a Community activity should be justified on a legal basis, which is found either expressly in the treaty provisions (explicit power) or is *implied*

[13] E Stein, 'External Relations of the European Community: Structure and Process' in *Collected Courses of the Academy of European Law*, vol 1, bk 1, (Dordrecht, M Nijhoff, 1991) at 128.

[14] See Case 6/64, *Costa v ENEL* [1964] ECR 585 at 593 and 594. See I McLeod, ID Hendry and S Hyett (eds), *The External Relations of the European Communities: A Manual of Law and Practice* (Oxford, Clarendon Press, 1996) at 31 [hereinafter *A Manual of Law and Practice*] at 40.

from those provisions or from secondary internal legislation based on those provisions (implicit power). Interestingly, the implicit power has been extensively used at times when the Community has been faced with new undertakings and challenges. One prominent example of the use of the implicit power is Article 308 of the EC Treaty, which provides

> If action by the Community should prove *necessary* to attain, in the course of the operation of the common market, one of the objectives of the Community, and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

This article can be used to extend Community legislation into new areas and to provide harmonisation measures for matters that do not have a specific legal basis (eg the energy sector). As this article is a 'residuary' power to be used 'only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question',[15] it has been expansively used in the field of energy.[16] A statistical survey of acts adopted on the basis of Article 308 in the energy field shows the frequent use of this article to set up framework programmes, technological action programmes, research programmes, international cooperation measures[17] and to conclude international agreements in the field of energy, such as the Energy Charter Treaty. The reason for such a wide use of this article, or say rather, the permission to use this article as a legal basis to adopt measures in the field of energy, was due to the fact that 'the Community already possessed an energy policy with relation to coal and nuclear (as mentioned earlier); and other sources of energy such as oil, gas and electricity were said to be covered by the general provisions of the EC Treaty, such as the internal market, competition, commercial policy, development cooperation, environmental policy, and the trans-European networks'.[18] This means that the use of Article 308, as long as future treaty amendments do not limit its application, can create a Community competence in the field of energy where 'necessary'.[19] Nonetheless, it

[15] See Case 45/86 *Commission v Council* (Generalised Tariff Preferences Case) [1987] ECR 1493 at 1520 and Case 242/87 *Commission v Council* [1989] ECR 1425. See also S Weatherill and P Beaumont, *EU Law* (London, Penguin Books, 1999) at 157.

[16] See also the Presidency Note of the 2000 Conference of the Representatives of the Governments of the Member States (IGC), CONFER 4711/00, Brussels, 22 Feb 2000.

[17] See Council Decision 1999/23/EC of 14 December 1998 Adopting a Multi-Annual Programme to Promote International Cooperation in the Energy Sector (1998–2002), [1999] OJ L/7/23. See also Council Reg (EC) No 2598/97 of 18 December 1997 Extending the Programme to Promote International Cooperation in the Energy Sector 'Synergy Programme', [1997] OJ L/351/16 and Council Reg (EC) No 701/97 of 14 April 1997, [1997] OJ L/104/1.

[18] See also the Presidency Note of the 2000, above n 16.

[19] The Treaty Establishing a Constitution for Europe limits the application of this article. Paragraph (1) of the flexibility clause (Art 18–1) of the Constitution provides that:

> if action by the Union should prove necessary, within the framework of the policies defined in part III, to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously, on a proposal from the European Commission, and after obtaining the consent of the European Parliament shall take the appropriate measures. This article is less flexible than Art 308 of the Nice Treaty (ex Art 235). Art 308 allows such action in 'the course of the operation of the common market' whereas the Constitution limits this action to the framework of the policies defined in Part III of the Constitution. Therefore, this 'flexibility' is applicable in so far as the action falls within the sectors already prescribed in the Constitution. See also S Weatherill, 'Competences' in B de Witte, (ed), *Ten Reflections on the Constitutional Treaty for Europe* (Florence, RCSAS, 2003) at 59 [hereinafter *Ten Reflections*]. The inclusion of a chapter on energy in the constitution should also be welcomed due to the fact that if energy was not given a separate legal basis, future Community measures, necessary in the field of energy, would not be adopted as 'easily' as before. A real constraint would thus be imposed on the Community in this field. This issue should be of great concern if the Constitution is not ratified and a new set of negotiations to reform the Constitution takes place in the future which keeps the flexibility clause, as found in the last version of the Constitution, and takes out the chapter on energy. A strong lobby from the energy sector may place this sector outside the ambit of the Constitution while the flexibility clause remains unchanged. In this case, the role of the Union in guaranteeing energy security will be extensively limited. Another feature of Art 17 is the role of the Parliament which (unlike Art 308 of the TEC that requires a consultation with the Parliament) necessitates 'the consent' of this organ. See also M Dougan, 'The Convention's Draft Constitutional Treaty: "A Tidying-Up Exercise" that Needs Some Tidying-Up of Its Own', Federal Trust Constitutional Online Essay, no 27/03, <http://www.fedtrust.co.uk> at 4.

[20] See also JHH Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2403 at 2416.

[21] See also R Holdgaard, 'The European Community's Implied External Competence after the Open Skies Cases' (2003) 8 *European Foreign Affairs Review* 365 at 368.

is still questionable whether the repeated use of this article might not warrant the creation of a specific legal basis in the EC Treaty. This opportunity was exploited in negotiations on the Treaty Establishing a Constitution for Europe, as explained later in this chapter.

Moreover, secondary legislation that is established in the field of energy through the implicit power based on various provisions of the treaty, such as Articles 308, 95, or 100, plays an important role in expanding the Community's competence in the field of energy. The denser the secondary legislation in the form of directives or regulations is, the more limited the competence of the Member States will gradually become. Internal legislation specifically dealing with the issue of energy security is elaborated on in chapter 4.

The other important aspect of the division of competences between the Community and the Member States is the expansion of the implied powers of the Community from internal to external matters. In the early years of the Community, when it began to perform the tasks entrusted to it by the text of the treaty, the importance of the Community's treaty-making power came to the fore, and the inevitable link between the internal and external activities of the Community became transparent. It was found that the full realisation of many EC internal policies clearly depended on the ability of the Community to negotiate and conclude international treaties with third parties.[20] These external abilities and powers are either expressly conferred on the Community by the treaty, or implicitly arise, according to the Court, from the treaties or from secondary legislation adopted pursuant to the treaty (implied external power).[21] When competence is established, either through the former or latter possibility, the Court sometimes deals—although inconsistently—with the peculiar question of

whether this competence is one that is 'shared' between the Member States and the Community, or is 'exclusive'. The consequence of fitting into one or other of these categories of competences will be dealt with in the course of examining the case law (section 3.5.). The ways through which energy activities were dealt with in the treaties should firstly be briefly explained.

3.3. FROM THE TREATY ESTABLISHING THE ECSC TO THE NICE TREATY

In negotiating a Treaty on Coal and Steel, the coal and steel resources in France and Germany were considered as the 'commanding heights of the economy'. They were found to be critically important for economic development, and the pooling of these resources indicated a new age of cooperation. The result of these negotiations, the Treaty Establishing the European Coal and Steel Community of 1951, focused on the achievement of peace through expanding production and raising standards of living. In that treaty, the institutions of the Community were 'responsible to ensure the maintenance of conditions, which would encourage undertakings to expand and improve their production potential and to promote a policy of using natural resources rationally and avoiding their unconsidered exhaustion' (Art 3). This task had to be undertaken 'within the limits of the respective powers of the Community Institutions'.[22]

It should be kept in mind that this treaty dates from the 1950s, when Europe had adequate energy, especially in the form of coal and gas, and its dependence on third country producers of energy was only marginal. The latter only gradually became a concern due to the exhaustion of energy reserves and the abandonment of the use of coal in many countries because of its negative environmental effects. It could thus be said that the treaty's failure to refer to the issue of 'external security of energy supply' is to some extent justifiable. It is said 'to some extent' since one could expect the Treaty to be forward-looking: the 'exhaustion of energy reserves' had been commonly known for quite some time and energy projections heralded the increase in energy dependence in the decades to come.

In the ECSC Treaty, the power to use natural resources rationally, which can be considered as a means to guarantee energy security, was placed in the hands of the Community institutions. Moreover, Article 95 of the ECSC established that if the treaty has not provided the necessary powers in some areas, and it becomes apparent that a decision or a recommendation is necessary to attain, a decision can be taken with the unanimous assent of the Council and after consultation with the Consultative Assembly. A similar clause was later inserted into the EEC

[22] See Art 3 of the ECSC Treaty. The Community institutions were the High Authority, assisted by a Consultative Committee, Common Assembly, Special Council of Ministers, and the Court of Justice. See Art 7 of the ECSC Treaty.

Treaty and has become one of the most important legal bases to adopt measures in the field of energy (see Article 308 of the TEC).[23]

The Treaty on the European Economic Community and the EURATOM Treaty came into existence in 1957. The pooling of resources was again mentioned in the Treaty on the European Economic Community as a means to guarantee peace. No reference was made to the rational use of natural resources as an obligation of the Community institutions, but Article 232 of that treaty left the powers that were already granted to the Community institutions in the ECSC Treaty untouched. Article 103 of the EEC Treaty provided the possibility for the Council to act by qualified majority, upon a proposal of the Commission, to issue a directive to circumvent a difficulty that may arise in the supply of certain products. This provision can also be construed as allowing the Community institutions to be involved in adopting measures to guarantee energy security when there is shortage of energy supply. As later illustrated in the chapter on internal security measures, this provision has been the legal basis for establishing regulations on stock management.

The EURATOM Treaty, on the other hand, can be considered as one of the main obstacles to the development of an efficient security policy with respect to conventional energy sources in Europe for some time. This is because Europe was determined that the use of nuclear energy should render concern for the security of other sources obsolete, so far as dependence on third countries was concerned. The aim of the treaty was to create the conditions necessary to develop a powerful nuclear industry, which would provide extensive energy resources and would lead to the 'prosperity' of the people.[24] As embodied in Article 1 of that treaty, relations with other countries should have been concentrated on creating the conditions necessary for the speedy establishment and growth of nuclear industries. Interestingly, Article 52 of that treaty's chapter on 'Supplies' acknowledges the need to secure the supply of nuclear materials and establishes that this supply is 'exclusively' in the hands of an agency which can conclude supply contracts coming from inside the Community or 'outside'. This agency is an institution of the Commission and under its direct supervision. Article 64 of this treaty, on making available the source materials coming from outside the Community, provides that

> The Agency, acting where appropriate within the framework of the agreements concluded between the Community and a third state or an international organisation, shall, subject to the exceptions provided for in this treaty, have the *exclusive right* to

[23] Although the ECSC Treaty ceased to exist on 23 July 2002, the content of many of its provisions, such as Art 95, was taken up by the TEC See also the IGC 2000, Possible Extension of Qualified Majority Voting: Consideration of Some Areas Already Covered by Community Powers, Exercise of Which Has in the Past, in the Absence of Any Specific Procedure, Given Rise to Frequent Use of the Procedure Laid Own in Art 308 of the TEC, CONFER 4711/00, 22 February 2000.

[24] See the Preamble of the EURATOM Treaty.

> enter into agreements or contracts whose principle aim is the supply of ores, source materials or special fissile materials coming from outside the Community. (emphasis added)[25]

Hence, the mere task of securing necessary materials to guarantee nuclear supply was placed in the hands of the Community institutions.

The treaty also suggests that users of source materials are allowed to conclude contracts with third countries to supply them only if the agency is not in a position to deliver within a specific period of time or if so, only at excessively high prices. In that case, users of source materials can directly enter into contracts after communicating the proposed contract to the Commission (Art 66). Surprisingly, no such provision ever existed to provide the Community institutions with the task of supplying oil and gas from third countries. This fact clearly shows the preference attributed to nuclear energy, the dominant use of which was encouraged in Europe, and was also deemed to play an important role in guaranteeing Europe's security of supply. Nevertheless, the emphasis on this type of energy gradually changed due to the appearance of potential dangers in its production and use and the negative effects that any accident could have, especially on the environment.[26] Although the energy outlook changed, the supply of other sources of energy, such as oil and gas, remained in the hands of the Member States due to their constant insistence on keeping their advantageous relationship with energy-producing countries untouched. This latter point has been extensively dealt with in the first chapter.

The Single European Act of 1986, the Maastricht, Amsterdam and Nice Treaties, all failed to provide new ways through which energy supply should be guaranteed within the Community. The only change was the inclusion of a reference to energy in Article 3 EC Treaty by the Maastricht Treaty. Article 3 states the objective of promoting, throughout the Community, a harmonious, balanced and sustainable development of economic activities, and lists measures in the sphere of energy as one means of attaining this objective (Art 3(t)). However, it is problematic in that the ways through which this activity should have been undertaken were not elaborated on in other provisions of the Treaty. Declaration number 1, annexed to the Maastricht Treaty, provides that the fields enumerated in Article 3(t) will only be examined by the procedure embodied in Article N(2), (now Article 48 TEU),[27] that is, through treaty revision. It can therefore be

[25] Based on Chapter X of that treaty, Arts 101–106, the possibility exists of including the Member States in the Agreements between the Community and third countries. The Member States may also enter into contracts with third countries or international organisations independently. Although these articles do not determine the areas where the Member States can enter into international agreements, the agreements cannot be concluded for supplying the source materials for nuclear energy because that task was 'exclusively' placed in the hands of the agency. These agreements can possibly be related to cooperation with third countries in other aspects of nuclear cooperation.

[26] See section 2.4 of this study on the change of approach to the importance of the nuclear energy.

[27] See also V Michel, '2004: le défi de la répartition des compétences' (2003) 39 *Cahier de Droit Européen* 17 at 27.

submitted that those fields enumerated in Article 3(t) (ie energy, civil protection and tourism) remain ineffective until a treaty amendment determines the ways through which such activities should be put in place. Mere reference to some activities without mentioning the specific policy objectives does not provide a competence for the Community to adopt measures in those fields.

Later treaties, such as Amsterdam and Nice, included the same provision, but yet again, no detailed implementing rules were incorporated (see the current Article 3(u)). The Treaty on the European Union does not refer to energy in its text, but some measures adopted under Title V, such as joint actions or common positions include energy as one field of action. The reference to these provisions is made in the last chapter of this study on the activities under the title of Common Foreign and Security Policy (CFSP).

Other areas of the EC Treaty cover the field of energy, but they are mentioned for purposes other than the issue of security of supply. For example, the Community is asked in Title XV to contribute to the establishment of trans-European networks in the area of energy (Art 154); Title XIX on Environment permits the Council to adopt measures that would significantly affect a Member State's choice between different energy sources and the general structure of energy supply (Art 175). This Article, although limited to the sphere of environment, may have strong repercussions for the ways in which individual Member States choose the energy sources for their consumption, because it is likely to tie their hands in importing energy from third countries if that energy does not conform to the requirements imposed by the Council. Nonetheless, this article cannot be named as a provision in line with the energy security concerns referred to in this study. One aspect of energy security is controlling access to diversified energy sources, and this diversification is likely to be limited, and not expanded by a Council decision based on Article 175.

3.4. ENERGY COMPETENCES IN THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

Recent attempts to reach agreement on a post-Nice revision of the treaties, led to the establishment of a convention to examine some important issues with respect to the future development of the EU. These attempts resulted in the adoption of a Constitution in June 2004, which was signed in October of the same year. For the first time, this document introduces a legal basis for the activities of the EU within the energy sector.[28] Various working groups were established within the Convention to deal with various fields of action under the treaty. Working Group V on 'complementary competencies' dealt with Article 308, which was previously used as a legal basis for activities in the energy field. Its final report provided that:

[28] For the text of the Constitution, see Treaty Establishing a Constitution for Europe, [2004] OJ C/310/1.

> [t]o avoid the current repeated recourse to Article 308 in certain areas, *e.g.* ... energy ..., the working group agreed on the need to recommend new specific legal bases in the Treaty for such policy areas if the Union wished to pursue policies in these fields. As regards tourism, which is mentioned in TEC Article 3(u) along with energy and civil protection, there was wide agreement in the group that no separate Treaty article was desirable. *The group felt that it was an anomaly to have subject matters mentioned in TEC Article 3 without having any corresponding Treaty article setting out the policy objectives and the competence.* (emphasis added)

This working group thus identified the problem with Article 3(u) TEC, as mentioned above, and found it necessary to provide a legal basis for the Community's energy activities. The consequences of inserting such a provision will be analysed while discussing the law of division of competences as developed in the case law and explained below. However, some aspects of the new provision should be referred to briefly here.[29] Although the fate of the Constitution is unclear at the moment, the innovative inclusion of energy in the treaty for the first time, and its consequences for the analysis of the division of competences in the field of energy, necessitates its analysis here.

Energy appears in the third part of the Constitution in the chapter on 'the policies and functioning of the Union'. Three articles refer to energy. Two of these correspond to the current treaty articles mentioned above (ie Article III-233 on environment and Article III-246 on the trans-European networks). The third provision provides the legal basis for activities, which are directly related to the issue of energy security. Previously, article III-157, as it appeared in the July 2003 Draft Treaty Establishing a Constitution for Europe, provided the opportunity for the Union to undertake activities in the field of energy. Based on this provision, a European energy policy should ensure the efficient functioning of the energy market, ensure security of energy supply in the Union, and promote energy efficiency, energy saving, and the development of new and renewable forms of energy.[30] Article III-157(2) stated that these necessary measures will be enacted in European laws and framework laws (ie the new classification for legal measures available to the Union)[31] and they shall not affect a Member State's choice between different energy sources, and the general structure of their energy supply. This latter part suggests that Member States are free to choose the energy source that they find fit for consumption by their nationals, such as oil, gas,

[29] For a general discussion of the Draft Treaty Establishing a Constitution for Europe, see <http://european-convention.eu.int>.

[30] See 'Draft Treaty Establishing A Constitution for Europe', CONV 850/03, 18 July 2003.

[31] The number of acts in the Constitution are categorised as (1) legislative acts which are European laws and framework laws (replacing regulations and directives respectively with the same legal consequence upon their adoption as before, ie binding with general application and binding as to the result to be achieved on the Member States addressed; (2) non-legislative acts which are European regulations and European decisions. Regulations are binding in their entirety or binding as regards the results to be achieved, but they are implementing measures, and not legislative. Decisions are binding in their entirety on those addressed. 3) non-binding Acts which are recommendations and opinions are legal acts of the Union but have no binding force.

electricity or energy from renewable sources, or a combination of the above. This part, however, shall not apply if there is a unanimous decision by the Council of Ministers, which, based on Article 130(2)(C) of the Constitution (under the environment title), allows for the adoption of measures that could 'significantly affect a Member State's choice of energy sources and its general structure of energy supply'.[32] Therefore, the broad discretion of the Member States to choose their source of energy consumption can be limited due to environmental considerations.

This Article was amended and was renumbered Article III-256 in the final version of the Treaty Establishing a Constitution for Europe as it appears in the official journal of December 2004.[33] This provision corresponds broadly to the Convention draft article discussed above, but inserts a clause which precludes the Union from taking action if these actions affect the right of the Member States to 'determine the conditions for exploiting their energy resources'. The full text of the new Article reads as follows:

> 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union, and (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy.
>
> 2. Without prejudice to the application of other provisions of the Constitution, the objectives in paragraph 1 shall be achieved by measures enacted in European laws or framework laws. Such laws or framework laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. Such European laws or framework laws shall not affect a Member State's right to determine *the conditions for exploiting its energy resources*, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article III-234(2)(c) (emphasis added).

[32] Based on this provision each Member State can keep its separate structure for energy consumption. For example, France's total energy consumption, based on the 2005 figures, was 158.3 million tonnes of oil equivalent (mtoe) of which 73.1 mtoe is oil consumption and 10 mtoe consumption of energy from renewable sources. This figure shows that oil contributes to 46.1% of France's overall energy consumption compared to the 6.3% contribution of energy from renewable sources. Other energy sources, such as natural gas, electricity, solid fuels, and derived heat contribute to the remaining energy consumption. Other member countries have different energy consumption structures: Belgium's oil consumption is 45.9% compared to 1.3% of renewable sources, Italy's oil consumption is 44.7% compared to 1.3% of renewable sources, and the UK's oil consumption is 40.77% compared to 0.39% of renewable sources. See the Commission Report, *European Union Energy and Transport in Figures 2005*, at <http://europa.eu.int/comm/dgs/energy_transport/figures/pocketbook/doc/etif_2005.pdf>. Based on the new provision in the Constitution, a change in the structure of energy consumption will take place only if the Council decides unanimously that the use of renewable sources in some countries should increase, which is clearly linked to environmental considerations.

[33] See 'Treaty Establishing a Constitution for Europe', above n 30.

> 3. By way of derogation from paragraph 2, a European law or framework law of the Council shall establish the measures referred to therein when they are primarily of a fiscal nature. The Council shall act unanimously after consulting the European Parliament.

The insertion of this additional limit in paragraph 2 was most likely the result of pressure on the part of countries possessing energy reserves, such as the Netherlands, Denmark and Great Britain, which sought to reserve the right to regulate the methods of exploiting their reserves.

With respect to Article III-256, one of the Declarations Concerning Provisions of the Constitution provides that '[the] Conference believes that Article III-256 does not affect the right of the Member States to take the necessary measures *to ensure their energy supply* under the conditions provided for in Article III-131' (emphasis added).[34] This declaration suggests that, based on Article III-131 (which is similar to the current Art. 297), 'in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations for the purpose of maintaining peace and international security, Member States shall consult each other and take necessary steps to circumvent the situation with the objective of preserving the proper functioning of the internal market'. It was thus deemed appropriate to allow individual Member States to maintain law and order through independent measures to guarantee energy supply. If these conditions occur, the Union's measures should not limit the powers of the Member States to address internal problems or disturbances as they deem best. Nonetheless, as the case law demonstrates, the situations envisaged by Article 297 are 'clearly defined and do not lend themselves to any wide interpretation'.[35] These situations should be ones of actual crisis, entailing a 'grave danger to vital interests, if not its very existence, of a Member State'. Hence, it was declared 'impossible to infer from [Article 297] that there is inherent in the Treaty a general proviso covering all measures taken for reasons of public safety and security'.[36]

Article III-256 of the Constitution places the issue of 'energy security' in its broader context. It is 'broader' because the Union is not limited and can undertake activities to secure energy flow at any time. Therefore, these activities are no longer limited to times of crisis.[37] The Union is no longer required, firstly, to 'define the circumstances' according to which some measures to guarantee

[34] See the 'Treaty Establishing a Constitution for Europe', above n 30.

[35] See Case 13/68, *SPA Salgoil v Italian Ministry of Foreign Trade*, [1968] ECR 453, at 463.

[36] See Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 26. See also the opinion of Advocate General La Pergola in Case 273/97, *Angela Maria Sirdar v the Army Board and Secretary of State for Defence*, [1999] I-7403, para 21.

[37] See the amendment proposal by GM de Vries and TJAM de Bruijn, where they argue in favor of restricting the activities of the Union to times of crisis. For the proposed amendments to the energy section, see
<http://european-convention.eu.int/amendments.asp?content=845&lang=EN>.

energy security are adopted, and secondly, to enumerate conditions due to which measures can be taken during the time of crisis. As shown later in discussing the proposal in September 2002 for a new directive on stocks management in the Union,[38] the definition of a crisis became controversial as some considered the 'lack of actual physical availability of energy' as the necessary trigger event to adopt measures to overcome the crisis, as opposed to 'an imminent risk', or a 'general perception of disruption', which embodies a broader discretion to adopt necessary measures. Based on the Constitution, the adoption of measures no longer necessitates defining the triggering event.

The lack of reference to a 'crisis' in this provision is justifiable because Article III-180 (similar to the current Article 100 TEC) already generally contemplates crisis situations by allowing the Council to adopt a European decision laying down measures 'if severe difficulties arise in the supply of certain products'. This existing power has been extensively used, as elaborated in section 4.3, to adopt measures for the management of security stocks in the Community. It would not have made much sense to provide a new legal basis for the Union's energy activities in the Constitution, which would limit its use to times of crisis, whilst the legal basis for undertaking activities where energy supply is disrupted existed elsewhere in the Treaty. The Constitution had to either limit this activity to times of crisis, ie not providing a new basis for energy activities, or establish a broader provision to manage the Union's security of energy supply beyond mere internal measures to combat a physical lack of energy supply, as found in Article III-256.

Furthermore, the categorisation of the Union's policy in the field of energy is designed to allow the Union to embark on activities at the external level because nothing in the provision limits the competence of the Union in this respect. The proposed new legal basis for energy contrasts with the provisions introduced in the Maastricht Treaty on culture (Art III-280(3)), public health (Art III-278(3)), research and technological development (Art III-249(b)), education, youth, sport and vocational training (Art III-282(2)) and development cooperation (Art III-317(2)). In each of these fields there is express reference to fostering cooperation with third countries and international organisations. For example, the provision on development cooperation lays added emphasis on the necessity of the Union and the Member States acting 'within their respective spheres of competence' while cooperating with third countries. The new legal basis for energy in the Constitution neither refers to such cooperation with third countries nor does it emphasise the necessity for the Union and the Member States to act 'within their respective spheres of competence'. However, the absence of a reference to 'cooperation with third countries' in the new provision on energy does not mean that the Union is barred from undertaking external activities if the energy security of the Union so demands. Indeed, in the absence of an express

[38] For a detailed analysis of the regulations on stock management within the Community, see section 4.3.

reference to external competence in a given domain, such competences can still be implied by the text, as will be shown by the analysis below of the case law on this point. Moreover, the need to include the wording 'within the spheres of their competence' only shows that the EC and member States' competences are concurrent.[39] If one remembers the doctrine of attribution of powers and the fact that these powers, beyond those highlighted in the text of the Treaty, may also result from principles developed through the case-law of the ECJ, as demonstrated below, the reference to the Union's activity in 'its sphere of competence' could also have the value of reiterating the importance of the already established doctrines of division of competences and the existence of concurrent powers for the sake of clarification.

It is also interesting to highlight here that this provision does not define what constitutes energy. Therefore, the logical result would be to include all types of energy, from nuclear to oil, coal, gas and renewable sources of energy. Doubt remains, however, with respect to the status of the EURATOM Treaty. As agreed in July 2003, and reflected in the Protocol attached to the Draft Constitutional Treaty, the provisions of the Treaty Establishing the European Atomic Energy Community continue to have legal effect with only some minor and non-substantive changes. Nowhere in this Protocol is a reference made to the provision on energy as embodied in Article III-157 (later III-256). As some commentators have rightly suggested, a sub-paragraph to the energy provision of the Constitution could have announced the expiry of the EURATOM Treaty upon the entry into force of the Constitution.[40] Otherwise, the provision should have defined what sources of energy are covered by the Constitution, and subsequently place the atomic energy outside its remit. The Constitution, as signed in October 2004, does not embody these concerns, and it remains to be seen how overlapping legal bases will be dealt with in the future.

The significance of including a distinct legal basis for the activities of the Union in the sphere of energy will be explained below (section 3.5),[41] along with the analysis of the case law on the division of competences. The reason for discussing this matter at that point is due to the role that the ECJ has played in

[39] For another opinion on this issue see, B de Witte and G de Búrca, 'The Delimitation of Powers between the EU and its Member States' in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press, 2002) at 218 [hereinafter 'The Delimitation'].

[40] See the proposed amendment by H Farnleitner at <http://european-convention.eu.int/amendments.asp?content=845&lang=EN>. He suggests that three new sub-provisions should be added to Art III-157 and an expiry reference made for the EURATOM Treaty. He believes that safety standards to protect the health of workers and the general public be added and emphasises that nuclear materials should not be diverted to purposes other than those for which they are intended, in particular with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. As is clear from his suggestions, he seeks a detailed elaboration on the use of nuclear energy in order to prevent the possibility of a broad interpretation of this provision, which could go beyond purely peaceful purposes.

[41] For the consequences of the inclusion of the Flexibility Clause in the Constitution, see above n 19.

identifying the conditions for the division of competences between the Community and the Member States. The only palpable result of including such a provision in the Constitution, however, is that the Union is expressly provided with powers to engage in energy activities. Reference to Article 308 for dealing with energy matters will therefore no longer be necessary if the Constitution enters into force. However, in order to verify the possibility of acquiring competences a study of the case law becomes necessary. A detailed analysis of the case law, determining the limits of this type of implied competence, will be provided below: it suffices to state here that although Article I-14 of the Constitution includes the energy sector in the list of shared competences,[42] this shared competence might gradually limit the competences of Member States even more, both externally and internally. The more secondary legislation becomes 'dense', the greater the chance that the Member States are limited in their competence to act in that field. This dynamic element in the evolution of Community competences is a cause of concern for Member States, and may help to explain their reluctance to provide the Union with such competence for quite some time. The issue of the division of competences and its implications for security of supply is discussed in detail below.

3.5. EXTERNAL COMPETENCES: THE EVOLUTION IN THE CASE LAW OF THE ECJ

The delimitation of competences between the Community and the Member States has been subject to extensive judicial review (with the exception of Title V of the TEU[43] on the Union's common foreign and security policy, because of limitations imposed on the jurisdiction of the ECJ by Article 46 TEU).[44] The

[42] What is, however, extremely absurd in placing 'energy' in the category of shared competences is the link between this provision and Art III-315 on common commercial policy where services and foreign direct investment, as well as trade, are placed within the ambit of this policy. External relations in the field of energy are concentrated on trade in energy goods, energy services and investment in the energy sector. Therefore, it is not clear and it has not been clarified which activities in the energy sector fall outside the ambit of the exclusive competence and are to be considered as shared competences. This is even more surprising considering that the only other possibility is the relation between the Member States and third country suppliers of energy, which would be limited to political relations, which is again distinct in the Constitution under the rubric of the CFSP It would have been more reasonable to enumerate the activities in the energy sector that are shared between the Member States and the Community.

[43] Art 7 of the Treaty Establishing the European Community limits the powers of the Community institutions, including the ECJ, as conferred by that treaty, and Art 5 limits the exercise of the powers of the ECJ based on the provisions of the TEU.

[44] Art 46 TEU provides:

The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this treaty: (a) provisions amending the Treaty establishing the European Economic Community with a view to establishing

Court itself has announced that 'its opinion may be sought on the questions concerning the division of competences between the Community and the Member States'[45] and is therefore 'both willing and able to assert itself as the highest court in a constitutional order adjudicating on competences'.[46] As the case law below highlights, the ECJ, having the main task of elaborating this issue, has gone through a potholed road, and its deliberations have given rise to many criticisms as reflected in the scholarly writings.

While the Member States were once considered as the best authorities to guarantee their internal security of energy supply, and they were permitted to adopt measures that could potentially distort trade to meet that end, their competence was gradually weakened, especially after the adoption of various measures in the path of creating a European energy market. Hence, with respect to internal security of energy supply, the approach of the ECJ has changed accordingly. The necessity of guaranteeing an adequate supply of energy gradually became a Community concern through the ECJ's interpretation. As the case law below explains, the possibility exists that such a shift in competences could be expanded to cover externalities of security of energy supply, giving way to the creation of an implied external power of the Community to deal with such matters. In other words, it can be argued that if the ECJ had found it necessary to disallow a Member State from undertaking activities at the domestic level to rectify energy supply problems, it is not far-fetched to suppose a strong potential for an analysis of the 'necessity' in those situations, expand them, and limit the activities of the Member States at the external level. This possibility and the basis to render such competence exclusive will be analysed below after explaining the approach of the ECJ towards the issue of internal security of energy supply.

the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community; (b) provisions of Title VI, under the conditions provided for by Article 35; (c) provisions of Title VII, under the conditions provided for by Articles 11 and 11a of the Treaty establishing the European Community and Article 40 of this treaty; (d) Article 6(2) with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this treaty; (e) the purely procedural stipulations in Article 7, with the Court acting at the request of the Member State concerned within one month from the date of the determination by the Council provided for in that Article; (f) Articles 46 to 53.

[45] See Case 1/94, on the Competence of the Community to Conclude International Agreements concerning Services and the Protection of Intellectual Property, [1994]ECR I-5267, para.9, and Case 2/94, Accession of the Community to the European Convention for the Protection of Human Rights (ECHR) [1996] ECR I-1759, para 10. In the latter case, the Court expressly provides that

> where a question of competence has to be decided, it is in the interests of the Community institutions and of the states concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated.

[46] See A von Bogdandy and J Bast, 'The European Union's Vertical Order of Competences: the Current Law and Proposals for its Reform' (2002) 39 CML Rev 227 at 238 [hereinafter 'Vertical Order of Competences'].

In the 1983 *Campus Oil* case,[47] the Irish government defended a regulation according to which importers of petroleum products had to purchase a percentage of their requirements through a national oil refiner based on the idea that this purchase would guarantee the continued activity of the refiners and ensure the minimum supply of petroleum products at all times. The question was posed to the Court whether this activity constitutes a restriction on imports and therefore, a breach of Article 28 EC (then Art 30).[48] The Commission argued that the Community, in accordance with its responsibility in this area, had adopted the *necessary rules* to ensure supplies of petroleum products in the event of a crisis (emphasis added).[49] These 'necessary measures' were claimed to be measures at the level of the 'international energy agency', the Directive on Management of Stocks, and the Directive on Reduction of Consumption in the Event of Difficulties in Supply. However, the Court acknowledged that

> Even though those precautions against a shortage of petroleum products reduce the risk of Member States being left without essential supplies, there would nonetheless still be real danger in the event of a crisis.[50]

Hence, the Court was of the view that although the Community measures seek to guarantee the delivery of energy from other countries to the country that is totally dependent on imports, 'this did not mean that the Member State concerned had *an unconditional assurance* that supplies will in any event be maintained at least at a level sufficient to meet its minimum needs'. The Court also described security of energy supply as an objective covered by the concept of 'public security' and therefore within the ambit of Article 30 (then Art 36), ie the exception clause for the free movement of goods. Consequently, the Court accepted that a Member State's appropriate complementary measures at national level cannot be excluded, even where Community rules on the matter exist.[51]

The reason for this approach by the ECJ was that exceptional importance was given to petroleum products by stating that 'these products are an energy source in the modern economy and are fundamental for a country's existence.[52] The Court, therefore, found it necessary for the Member States to be permitted to adopt measures at national level. Nonetheless, it should be borne in mind that

[47] See Case 72/83, *Campus Oil Limited and others v Minister for Industry and Energy and others*, [1984] ECR 2727.

[48] Art 30 provides:

> The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

[49] See the *Campus Oil* case, above n 47, at para 25.

[50] See the *Campus Oil* case, above n 47, at para 30.

[51] See the *Campus Oil* case, above n 47, at para 31.

[52] See the *Campus Oil* case, above n 47, at para 34.

this case was decided in the 1980s when no real attempt to create an internal energy market for oil and gas existed and the dependence of one individual Member State on energy imports justified independent national measures. As the structure of the energy market has changed due to the creation of the internal energy market in the second half of the 1990s (although it is not yet completed), the test of 'total dependence on import', as mentioned by the Court, no longer constitutes justification for national measures, and the growing interdependence of the Member States would justify a different approach by the Court.[53]

The approach taken by the ECJ in the *Campus Oil* case slightly changed in later cases and it has become difficult to judge whether the Court would continue to bestow such great importance upon security of energy supply in the analysis of a 'necessity', permitting derogation from basic treaty obligations. Of course, the gravity of the lack of an adequate energy supply for a particular Member State has to be considered on a case-by-case basis. A generalisation of the ECJ's approach to the issue of energy security is therefore not advisable, but there are clues in the following cases as to the possible approach of the Court in analysing the issue of 'necessity' and implying the competence of either the Member State or the Community to combat a supply threat.

In the 1990 case of *Commission v Hellenic Republic*, the ECJ rejected the claim of the Greek government in defending a state monopoly in the import and marketing of refined petroleum products on the grounds of public security. The Court stated that the Greek government had failed to produce any evidence that import bans, aimed at the increased use of the product of national refineries, were necessary to secure energy supply.[54] It is interesting to compare the claim of the Greek government in that case with the claim of the Irish government in the *Campus Oil* case. In *Campus Oil*, the Irish government claimed that 'there is a need to guarantee the provision of petroleum products, in view of the fact that if a refinery is closed, all suppliers of refined products on the Irish market would have been obliged to obtain their supplies from abroad',[55] which was found to further threaten the country's security. Therefore, the specific case of Ireland and its total dependence on the import of petroleum products was taken into account by the Court. However, in *Commission v Hellenic Republic*, the Greek government's claim as to the special geopolitical situation of Greece and the necessity of guaranteeing a regular supply of crude oil through maintaining public sector refineries in operation, was not found to be an adequate claim to allow derogation from Community obligations, although Greece, like Ireland, was fully dependent on the import of petrochemical products.

Although it may be true that the Greek government did not show that there is a link between the import ban and the non-operation of its refineries, the Irish

[53] See also PD Cameron, *Competition in Energy Markets: Law and Regulation in the European Union* (Oxford, Oxford University Press, 2002) at 239 [hereinafter *Competition in Energy Markets*].

[54] See Case 347/88, *Commission v Hellenic Government*, [1990] ECR I-4747.

[55] See the *Campus Oil* case, above n 47 para 5.

government's mere reference to 'total dependence on import' was found sufficient to allow independent national measures, without the need for further evidence to support this claim. This comparison not only shows the very exceptional circumstance in which the *Campus Oil* decision was rendered, but also the slight change in the attitude of the ECJ in approaching the condition of 'necessity' and allowing for Member States' derogations.[56]

This attitude was reinforced with different reasoning in a later case[57] where the ECJ took the role of analysing the 'necessity' issue. The Court accepted that although the continuity of supply flow constitutes a public security objective, the arguments of the defendant country (Greece again) should go *beyond purely economic reasoning* in order to justify derogation from the Community rules. The Court later explained that the objective of public security can be achieved by 'less restrictive measures' than the ones taken by the Greek government which were in direct opposition to the rules of the Treaty on free movement of goods.[58] Although the Court does not explicitly state what constitutes a 'non-economic' objective or 'less restrictive measures' to justify one's action, the Court restricted the 'security' argument and extensively limited the application of its previous reasoning in the *Campus Oil* case.

This application becomes even more limited in the Opinion of the Advocate General in the *PreussenElektra* case,[59] in which he doubted whether recourse to the provisions on public security was still possible 'given the fact that the Directive (here the Electricity Directive) provides those types of measures necessary to ensure security of supply'.[60] Interestingly, the Court allowed the Member States to have recourse to some type of measures in the field of energy which could be considered compatible with the objectives of Article 30 EC (now Article 28). In that case, the Court linked Article 30 to the obligation imposed by Germany on public electricity supply undertakings to purchase electricity generated exclusively from renewable sources of energy, but this time not on the ground of 'public security' but on the ground of 'protection of environment'.[61] It is doubtful that the Court would have accepted such a restriction as compatible with Article 30 purely based on 'security of supply' grounds, similar to the

[56] The Court emphasised this issue four years later, in the *Almelo* case, by calling for compliance with the Community rules on competition and referring the analysis of 'necessity' to the national courts. The Court suggested that the question of whether a restriction of competition is necessary in order to enable an undertaking to perform its task of general interest, ie supply of electricity, should be examined by national courts and not by the ECJ See Case 393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*, [1994] ECR I-1477, para 51(c)

[57] See the Case 398/98, *Commission v Hellenic Government* [2001] ECR I-7915.

[58] See *Commission v Hellenic Government*, *ibid.* para 31. See also the Opinion of the Advocate General, paras 47–48. In order to secure energy supply, the Greek government made the transfer of the storage obligation to refineries established in Greece conditional upon the obligation to obtain supplies of petroleum products from those refineries.

[59] See Opinion 379/98, *PreussenElektra AG and Schleswag AG*, [2001] ECR I-2099.

[60] See the Opinion of Advocate General Jacobs in *PreussenElektra* case, para 209.

[61] See *PreussenElektra*, above n 59, at paras 68–81.

approach of the ECJ in previous cases mentioned above. Therefore, one can submit that the newly established rules on energy, such as the gas and electricity directives, are considered as the best guarantees of security so that recourse to purely national measures will no longer be justified, which will in turn diminish the competence of the Member States in that field. As secondary legislation in the field of energy security develops further, the Member States have less ability to invoke energy security within the ambit of Article 30.

How would the approach of the ECJ be shaped with respect to externalities of energy security? To what extent does the case law of the ECJ limit or expand the competences of the Member States in guaranteeing their security of energy supply by establishing agreements with third country suppliers of energy?

The international legal capacity of the Community, ie its capacity to be represented on the international plane and to enter into international treaties with third parties, can be transferred from the Member States to the Community. This transfer of power is either explicitly referred to in the treaty or takes place through a progressive development which originates in the *ERTA* judgment, where the important principle of 'implied external power' was established and was later taken up by the ECJ to ascertain conditions on the eventual creation of an exclusive competence.[62] The settled idea with respect to competences before the *ERTA* judgment was that the Community only possesses a treaty-making power in those cases 'expressly' provided for in the Treaty.[63] The Treaty provided no basis for a Community competence to negotiate and conclude treaties in the field of road transport, the subject of that case. It was for the Court to decide whether a transfer of power to the Community had actually existed in the field of transport, as no express power in the treaty could be found. The Court stated:

> In the absence of specific provisions in the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy . . . one must turn to *the general system of Community Law relating to agreements with non-member State.*[64] (emphasis added)

The Court sought to elaborate on this issue by stating that regard should be had to the '*whole scheme of the Treaty* no less than to its specific provisions'.[65] In the following paragraphs, the Court reveals the ambiguity of terms such as the 'general system of Community law' or 'the whole scheme' by stating:

> Such authority may arise not only from an explicit grant by the Treaty . . . but may flow from *other provisions of the Treaty* and *from steps taken within the framework of these provisions by the Community institutions.*[66] (emphasis added)

[62] See Case 22/70, *Commission v Council* (ERTA) [1971] ECR 263.

[63] See JA Winter, 'Annotation on ERTA' (1971) 8 CML Rev 550 at 553. See also P Pescatore, 'Les relations extérieures des communautés européennes', (1961) *Receuil des Cours de l'Académie de Droit International,* 103.

[64] See *ERTA* case, above n 62, at para 12.

[65] See *ERTA* case, above n 62, at para 15.

[66] See *ERTA* case, above n 62, at para 16.

The phrase 'the steps taken by Community institutions within the framework of these provisions' is interpreted as 'the laying down of *common rules* with a view to implementing a common policy envisaged by the Treaty'.[67] In the *ERTA* case, the 'common rule' is Regulation no 543/69. This Regulation vests power with the Community to enter into any agreement with *third countries* relating to the subject matter governed by that regulation, which is the harmonisation of certain social legislation relating to road transport. The existence of this common rule, which dealt with an externality, rendered possible the establishment of a Community competence to act externally in this field. This case therefore acknowledges that implied external power exists when internal rules were already adopted in that particular field, which further suggests that, firstly, a power to adopt internal rules existed, and secondly, it has been exercised.[68] The practical consequence of the application of this doctrine is that the Member States cannot, outside the framework of the Community institutions, assume obligations which might *affect* those rules or alter their scope.[69] It is submitted that although the reasoning through which a Community competence is established is of great importance, the consequence of possessing this competence is also of great significance for the Member State as the limits of Member States' activities should be determined.

The analysis of the existence of the Community's implied powers is unnecessary if a legal basis to take activities in a specific policy sector is provided for in the Treaty and the competence of the Community to deal with the external dimension of that sector is highlighted.[70] For example, the Treaty Establishing the European Community (TEC) added a few new areas of action where this competence can be established. Article 151(3) on culture explicitly provides that

[67] See *ERTA* case, above n 62, at para 17. The phrase 'the steps taken by Community institutions within the framework of these provisions' is explained to mean 'the laying down of common rules with a view to implementing a common policy envisaged by the Treaty'. What are these common rules? Opinions differ on this particular issue. McGoldrick believes that in a 'formal sense' common rules are directives, regulations, measures to be taken for the approximation of laws (Art 95), administrative provisions and measures to be taken in certain circumstances (Art 308). However, he adds that this 'formal sense' is not the one referred to in *ERTA*. The case refers to those rules whose existence will result in pre-emption. In other words, when EC internal measures exhaustively cover a particular field, Member States will be prevented from taking any action in that field. Therefore, the common rules, in the *ERTA* sense, will be those rules which completely cover a field. This pre-emption is then paralleled at the external level. See D McGoldrick, *International Relations Law of the European Union* (Harlow, Longman, 1997). Other commentators believe that common rules are those which include 'obligations of a detailed character', whether a regulation or a directive. See JA Winter, 'Annotation on ERTA', above n 63, at 554. This opinion, if read strictly, means that, it is not important whether the rule results in pre-emption. The rule is a 'common' rule as long as it is detailed. The Court also hints at this latter interpretation, emphasising that the content of a specific measure should be examined.

[68] This last condition was later modified in the *Kramer* judgment where it was suggested that the power to take any measure should be at the disposal of the Community no matter whether it was exercised. See the Joined Cases 3, 4, and 6/76, *Cornelis Kramer and Others* [1976] ECR 1279, paras 30–33.

[69] See the *ERTA* judgment, above n 62, at para 22.

[70] See Cremona, 'External Relations and External Competence', above n 10, at 147.

'the Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture' (similar provisions can be found in relation to education, vocational training and youth, development cooperation, public health, research and technological development).[71] As no such reference is made to the field of energy in the treaty, the analysis of implied powers becomes more relevant to determining the Community's competence.

On the other hand, as the main rationale for limiting the activities of the Member States at the external level is to prevent the existing internal Community rules from being affected by the independent action of the Member States, one is obliged to compare the already existing Community rules with that of the relevant international agreement in order to determine the extent of its coverage. In other words, it should be verified whether the Member State has become active in a field for which the Community has already established internal rules. For that matter the Court speaks of a 'large coverage' of the international agreement by Community rules.[72] Although 'largely' is not defined so as to assist one in determining the competences of the Member States and the Community, it could mean that the more the field of an international agreement is covered by Community measures, the less chance there is for the Member States to exercise their competence in those fields, and competence will be handed to the Community.[73] Moreover, the ECJ also allows for the possibility of adding some provisions to such an international agreement for which the Community has gained competence, which do not constitute the principal objective of the international agreement and do not impose extensive obligations, but are declaratory in nature and are not explained in concrete terms.[74] In other words, the Community can enter into international agreements with third states and add a section to those agreements without a need for a separate legal basis. In this case, the Community can claim competence for the whole agreement. For instance, if the energy sector is not a specific field of cooperation between the Community and a third state, such as Russia, the Community has the competence to add a section related to energy cooperation, if the inclusion of such a provision is justified by an express provision of the treaty or through the analysis of an implied power (eg large coverage of energy issues in secondary legislation). In this case, energy cooperation is only an 'ancillary provision' for which no separate legal basis is necessary.

The doctrine of implied powers widely expanded the Community's competence in dealing with various fields in the 1970s, but became gradually limited in the 1980s and 1990s due to the ECJ's reluctance to extend this doctrine to some areas, especially where a substantial change with constitutional significance in the

[71] *Ibid.*

[72] Case 2/91 (ILO) on the Convention No.170 of the International Labor Organisation concerning Safety in the use of Chemicals at Work [1993] ECR-I-1061 at para 25.

[73] See also Case 2/92 (OECD) [1995] ECR I-525 at para 34.

[74] Case 268/94, *Portugal v Council*, ECR [1996] I-06177 at para 52.

Community's legal system was entailed.[75] Nevertheless, if such drastic change was not to occur, the principle of attribution of powers continued to enable the Community to act in those areas which were implied from its provisions in future cases. The Court, for instance, suggested that whenever Community law creates internal powers for the institutions of the Community for the purpose of attaining a specific objective, the Community has authority to enter into international commitments '*necessary*' for the attainment of that objective [the necessity doctrine].[76] Case 1/94 defines 'necessary' as when 'the attainment of the objectives of the Treaty is *inextricably linked* to that externality'.[77] Therefore, the power to take any measure should first be at the disposal of the Community, and should be subsequently expanded to cover external relations only where necessary. Clearly, the 'objectives' of the Community, 'necessary' expansion, or 'inextricably linked' should be defined in order to apply this judgment to individual cases. The ECJ has not adopted a uniform approach on this point and some questions remain: are the 'internal' and 'external' objectives divided for the purposes of division of competences? Can the internal objectives be fully achieved without external action? Which body decides the extent of the expansion of the Community competence to deal with externalities of energy supply? What would be the nature of this competence, shared or exclusive? These questions need to be answered in order to determine the possibility of expanding the Community's competence to encompass external relations in the field of energy.

[75] Case 2/94 on the accession of the European Communities to the European Human Rights Convention is a very good example of this perseverance and the limited application of this doctrine. The Court decided that because there was no 'general power to enact rules on fundamental rights' in the treaty, no legal basis for implied external Community action existed. The Court concluded that accession to this convention would entail a substantial change in the Community system, a change of constitutional significance, which would go beyond the ambit of Art 235 (now Art 308), through which the Community could take appropriate measures if no power was provided in the treaty. Mere respect for fundamental rights as a general principle of Community law was not adequate to create an implied external power. Although this case is referred to as an exception to the gradual expansion of Community competence in the jurisprudence of the ECJ, it fails to show where and how limitations can be imposed on the expansion of Community competence, as the channels through which the Court reached its conclusion are not determined, and the real rationales are not spelled out. See Case 2/94 (ECHR) [1996] ECR I-1763 at para 35. This case, along with the case on the legality of tobacco advertising (Case 376/98) found the use of Art 308 along with Art 95 ultra vires, as they allow a 'creeping expansion' of EC competences. See also B de Witte and G de Búrca, 'The Delimitation', above n 39, at 205. See also Cremona, 'External Relations and External Competence', above n 10, at 150.

[76] See Case 1/76 *Draft Agreement Establishing a European Laying up Fund for Inland Waterway Vessels*, [1977] ECR 741, para.4.

[77] See Case 1/94, above n 45, at para 86. The Court explained that one could attain freedom of establishment and freedom to provide services for nationals of the Community Member States without being obliged to extend that freedom to nationals of non-member countries. With regards to TRIPS, the Court defines the word 'inextricable' by stating that unification and harmonisation of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective. See para 100.

In order to clarify the relevance of the division of competences for energy security, the already existing doctrines should be compared to the Treaty provisions and the internal measures adopted in the field of energy. An important opinion of Advocate General (AG) Tizzano in the *Open Skies* case raised some new and interesting issues for the clarification of the ambiguities in this field, which will be mainly used here as a yardstick against which the external competences of the Community and the Member States in guaranteeing security of energy supply are analysed.

In the *Open Skies* cases,[78] the ECJ had to determine whether several Member States of the European Community were in breach of Community law by having concluded bilateral agreements concerning air transport with the USA. An analysis of the division of competences was found necessary to establish whether the Community had 'exclusive' competence to initially enter into such an agreement with a third country. Firstly, with respect to the air transport, the Council has adopted regulations on Community air carriers operating inside the Community and on the fares and rates for air services which contain provisions applicable to air carriers from third countries. Therefore, some 'externalities', in the form of applying the Regulation to third country carriers, already existed in the internal measures. Secondly, these externalities provided an ample opportunity for the Court to define and elaborate on the already existing doctrines of shared competence and exclusivity. However, only AG Tizzano provided a full analysis in his Opinion and that analysis was not adopted as such by the ECJ The Court adopted a classic approach and decided that external competence is created based on the 'effect' doctrine namely that when the international commitment falls within the area covered by the internal measure, 'effect' is established.[79] Moreover, the Court imposed a limitation on the way such link should be established by suggesting that the limited character of the provisions of the internal measures preclude inferring from them that there is an 'inextricable link' between the internal and external competence of the Community.[80] Nevertheless, the Court did not introduce new guidelines as to how exactly the implied external competence should be established.

The AG, on the other hand, first proposed an analysis of the 'necessity doctrine' by stating that 'despite the absence of any express provision, the necessity for an agreement in a given field may enable the Community to affirm its own external competences', but only the actual exercise of that competence

[78] See the *Open Sky* case, Case 467/98, *Commission v Denmark*, judgment of 5 November 2002; Case 468/98, *Commission v Sweden*, judgment of 5 November 2002; Case 469/98, *Commission v Finland*, judgment of 5 November 2002; Case 471/98, *Commission v Belgium*, judgment of 5 November 2002; Case 472/98, *Commission v Luxembourg*, judgment of 5 November 2002; Case 475/98, *Commission v Austria*, judgment of 5 November 2002; Case 476/98, *Commission v Germany*, judgment of 5 November 2002; 466/98, *Commission v Great Britain and Northern Ireland*, judgment of 5 November 2002.

[79] See the Open Sky Case 476/98, *ibid*, para 118.

[80] *Ibid.* para 87.

would render it exclusive.[81] Moreover, what the AG highlighted for the first time was the clarification of the dilemma of 'how and by whom the assessment should be carried out as to the necessity of an implied external power'.[82] The AG refused to accept that Member States, the Commission, the Council or the Court could carry out this assessment on their own account. The Court, he said, cannot carry out this assessment because 'it cannot substitute its own discretionary assessment for that which the competent legislative institutions did or did not carry out'.[83] No assessment can be done, he stated, unless through the establishment of competent institutions with clear procedures.[84] One can conclude that based on his proposed view, in order to determine whether an external activity is necessary on behalf of the Community to guarantee security of energy supply—eg entering into an agreement with an energy-producing country specifically designed for matters of energy security—only an institution established for analysing the peculiarities of energy security should determine this 'necessity', and the ECJ should respect that determination.

This proposed view is important for the purposes of Europe's security of energy supply. There are detailed technicalities involved in assessing whether this security is endangered, for which the expertise of the ECJ does not seem sufficient to extend or limit the Community's competence. As one commentator rightly suggests, at the time a crisis is perceived, a Member State may be willing to enter into long-term contracts with oil producers that offer better guarantees of supplies in the event of crisis.[85] In choosing that oil producer, they usually look at various issues, such as geographical and political proximity with that country, or the link between their demands and its immediate satisfaction by adopting some external measures, or the adoption of whatever else is 'necessary'. This analysis differs between Finland, with its proximity to the important energy- producing country of Russia, and Greece, which has no immediate border with any energy producing country. The involvement of the Community in guaranteeing security of energy supply, which is based on the belief that after the creation of the internal energy market the security concerns in one country expand and cover the whole internal market, suggests that security is no longer 'country-specific' but is rather a Community issue. Therefore, what is 'necessary' should apply to all the Member States with their differing energy demands, energy infrastructure, proximity to energy producing countries, differing political relations with these countries, etc. Nevertheless, the 'unity of security concerns' that is shared among all Member States, if created, does not lessen the importance of examining the

[81] See the AG Opinion, para 49. See also Case 1/76 *Draft Agreement Establishing a European Laying up Fund for Inland Waterway Vessels*, [1977] ECR 741.

[82] AG Opinion, paras 48–58.

[83] *Ibid.* para 51.

[84] *Ibid.* para 51. Some have also argued for the creation of a special European Constitutional Council for deciding all issues of division of powers. See JHH Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals' (1997) 22 EL Rev 150 at 155.

[85] PD Cameron, 'Competition in Energy Markets', above n 53.

technicalities of energy security at all times. This necessitates, for example, an analysis of the efficiency of the existing infrastructure in Greece or Finland as well as a broader global overview of the situation of energy supply. For that reason an abstract review of the case law on what is 'necessary' should not be undertaken by the ECJ.

Apart from the analysis of where and under what conditions it is 'necessary' for the Community to engage in externalities of energy security, AG Tizzano also referred to the 'effect doctrine' as established in the *ERTA* judgment. As explained above this doctrine holds that if competence is established through the implied power, the result is that Member States are precluded from acting in that field only to the extent that 'their act affects those common rules'. The issue to be resolved is to determine 'exactly what was meant by those last four words' (ie which may effect those rules).[86] The case law differs on this issue and there is disagreement as to whether 'benign' effect is also counted as 'effect'. The AG refers to the extent of the Community rules in that specific field in order to establish 'effect'. He argues that in matters covered by common rules (no matter to what extent), the Member States may not, under any circumstances, conclude international agreements, even if these are entirely consistent with the common rules, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community law.[87] Moreover, he states that if the texts of the agreements reproduce the common rules *verbatim*, or incorporate them by reference, the effect is established.[88] He finds this conclusion rigid and over formalistic.[89] However, he rightly bases his statement on the rationale that the reception of the common rules into the agreements would have the effect of

[86] F Burrows, 'The Effects of the Main Cases of the Court of Justice in the Field of the External Competences on the Conduct of Member States' in CWA Timmermans & ELM Volker (eds), *Division of Powers between the European Communities and their Member States in the Field of External Relations* (Deventer, Kluwer, 1981) at 111. See also D McGoldrick, above n 67, at 75. He argues that there are examples where the international commitments at issue do not affect or alter the scope of the common rules. One example would be where Member States purported to extend the territorial application of the EC rules, or if the international obligations assumed by them would affect the common rules in a beneficial way. For example, McGoldrick's argument can be accepted in cases where a Member State enters into a bilateral agreement with a third state, and the text of their agreement is identical to that of the common rules established by the Community. In this case 'effect' is hard to establish. For an argument to the contrary, see D O'Keeffe, 'Exclusive, Concurrent and Shared Competence' in A Dashwood, and C Hillion (eds), *The General Law of EC External Relations* (London, Sweet and Maxwell, 2000) [hereinafter *General Law of EC*] at 187. O'Keeffe argues that the territorial scope of Community law is itself a matter for Community law, and Member States cannot alter it unilaterally. Moreover, any effect on community rule, benign or not, seems to be outlawed by the Court in Case 2/91. See also U Fabio, 'Some Remarks on the Allocation of Competences between the European Union and its Member States' (2002) 39 CML Rev 1289.

[87] See the opinion of AG Tizzano in the *Open Sky* Case, above n 78.

[88] *Ibid.* para 71.

[89] *Ibid.* He is also of the opinion that Member States could not undertake international obligations in matters governed by common rules even in order to eliminate conflicts between those rules and agreements concluded by them, before the rules were adopted. Not even the requirement to ensure the full and correct application of Community law could justify unilateral action by Member States, since such action might also affect the common rules, compromising the unity of the common market and the uniform application of Community law.

distorting the nature and the legal regime of the common rules and entail a real and serious risk, which could not necessarily be reviewed by the Court. He further explains that there are 'considerable areas in between'[90] where the international obligations are neither in conflict with the common rules nor cover the same subject matter, but may fall within the scope of the 'effect doctrine' in so far as they are liable to effect the common rules. This effect may occur when agreements concern those aspects which are contiguous to those governed by the common rules, or where agreements relate to aspects not regulated by those rules.[91] On the other hand, in a later opinion the Court went one step further and provided that 'it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully'. The Court suggests that 'the assessment must be based not only on the scope of the rules in question but also on their nature and content and not only the current state of Community law in the area in question but also its future development should be taken into account insofar as that is foreseeable at the time of that analysis'.[92]

The two doctrines of 'necessity' and 'effect' suggest that either the presence of 'externalities' in the internal regulation or 'necessity' can justify the involvement of the Community or would render the regulation 'efficient' for the purposes of the 'effect' doctrine.[93] This conclusion could also be interpreted in line with the ECJ's approach to the issue of internal security of energy supply, as mentioned in the case law on internal security of energy supply above, and the fact that the creation of secondary measures regulating the internal energy market has limited the competence of the Member States to have recourse to independent security measures at domestic level because such measures were no longer found to be 'necessary'. This conclusion supports the statement made earlier in this chapter that the greater the number of energy-related secondary measures come to exist, the more the competences of the Member States are limited.

The other consequence of the gradual expansion of the Community's competence to deal with both internal and external matters of energy security is that such gradual expansion might lead to an 'exclusive' competence. The Court has

[90] See R Holdgaard, above n 21, at 379.

[91] See also Case 1/94, above n 45, at para 79. See also J Temple Lang, 'The Ozone Layer Convention: A New Solution to the Question of Community Participation in 'Mixed' International Agreements' (1986) 23 CMLR 156 at 161. He explains the problems of mixed agreements in general, and particularly in relation to the *ERTA* judgment. He states that this decision does not clarify the issue of exclusive Community competence in external relations because it can be understood in two different ways. One is that the Community has exclusive competence irrespective of the terms of the convention and second, that the Community has exclusive competence only if the proposed convention is likely to conflict or interfere with the operation of existing Community rules.

[92] See Opinion of the Court 1/03 of 7 February 2006 on the 'Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters'.

[93] See the Open Sky Cases, above n 78, at para 93. See also A Dashwood, 'The Limits of the European Union Powers' (1996) 21 EL Rev 113 at 126 [hereinafter 'The Limits of EU'].

provided various rulings on this issue and has been divided in allowing exclusivity due to the mere potential for Community action or the necessity for that action to be first exercised. Although one judgment of the Court rendered the competence exclusive without any prior exercise of internal powers,[94] that case has subsequently been considered as an exception.[95] Therefore, prior internal legislation will be a prerequisite for the exclusivity of implied powers.[96] The Court finds it 'undeniable' that, where harmonising powers have been exercised, the harmonisation measures thus adopted may limit, or even remove, the freedom of the Member States to negotiate with third countries. On the other hand, the internal power that has not been exercised in a specific field cannot confer exclusive competence in that field on the Community.[97] In a later opinion in 2006 the Court went as far as providing that in order to determine 'effect' and whether the Community has the competence to conclude an international agreement and whether that competence is exclusive, 'account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish'.[98]

In line with the opinion of the AG Tizzano in the *Open Skies* case, the main rationale for the exclusivity of the competence is the fact that if the Member States were allowed to reserve their concurrent power, and 'ensure their own interests' in establishing external relations to guarantee security of energy supply, adopting positions that may differ from the intended position of the Community, 'this would distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest'.[99] Nevertheless, the 'effect' of the external activity of the Member States on the internal market should be proved. In order to determine when that effect would occur, the already existing internal measures and the extent to which the issue is covered by Community measures are analysed. For the purposes of our study, we are concerned with those internal measures on energy that seek to guarantee internal security of energy supply and

[94] See Case 1/76 *Draft Agreement Establishing a European Laying up Fund for Inland Waterway Vessels*, [1977] ECR 741. See also Opinion 1/03 of 7 February 2006 where the Court confirms that Opinion 1/76 continues to exist as a separate basis for exclusive competence. See M Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International responsibility, and Effects on International Law', EUI Working Papers, 2006/22. See also T Baumé, 'Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006' (2006) 7 *German Law Journal* 681.

[95] See Case 1/94, above n 45, at para 34.

[96] See Cremona, 'External Relations and External Competence', above n 10, at 154.

[97] See Case 1/94, above n 45, at paras 88/89.

[98] See Opinion 1/03 of 7 February 2006, above n 94.

[99] See *Open Skies* Opinion of the AG (referring to the Case 1/75), para 64.

the functioning of the internal energy market. If the internal measures expressly refer to externalities of energy security, the Community will possess the competence to deal with those matters. In the absence of any express provision, which is the case with the majority of the internal measures on energy as explained below, exclusive competence is also established where the internal measures have achieved complete harmonisation.[100] In that case, the independent activity of Member States is perceived to effect those rules and States are therefore no longer able to retain freedom to negotiate with non-member countries.[101]

We must consider here the effect of such a limitation or expansion of Community and Member State competences on security of energy supply. For instance, the creeping exclusivity, (ie exclusive competence as a result of the exercise of an implied power based on the analysis of the case law) places the issue of energy security in the hands of the Community alone. In that case, it should be determined whether this security is in 'good hands'. In other words, can energy security be better guaranteed through exclusivity or should it be shared between the Community and the Member States?[102] history of the development of an energy policy within the European Community reveals that there is a strong reluctance on the part of the Member States to rely on the Community to enter into negotiations with third country producers of energy. Such reluctance is not only due to bad experience or the ineptitude of the Community to deal with this matter, but is also due to the eagerness of the Member States not to lose their advantageous relationship established in previous decades with individual energy-producing countries. Due to the fact that the existing internal measures in the field of energy play an important role in analysing the potential to expand the Community's competence, the relevant directives and regulations that could have direct or indirect broader security implications are identified and analysed in the next section.

Before analysing these measures, one other important aspect of the division of competences should be mentioned. The possibility of the Community establishing relations with third countries which supply energy cannot be analysed only within the context of the purely economic and commercial aspects of energy security, or the first pillar. The issues discussed in the sphere of the Common Foreign and Security Policy (CFSP) should also play a role in this evaluation, due

[100] The Court finds it 'undeniable' that, where harmonising powers have been exercised, the harmonisation measures thus adopted may limit, or even remove, the freedom of the Member States to negotiate with non-member countries. On the other hand, the internal power that has not been exercised in a specific field cannot confer exclusive competence in that field on the Community. See Case 1/94, above n 45, at paras 88/89. For a comprehensive study of the case law on the division of competences, see A Dashwood, and C Hillion (eds), 'General Law of EC'], above n 86. See also D McGoldrick, *International Relations Law of the European Union* (Essex, Longman, 1997) and McLeod *et al*, *A Manual of Law and Practice*, above n 14.

[101] See also Case 2/91 (ILO), above n 72, and Case 1/94, above n 45.

[102] What is interesting is the approach of the working groups of a Constitution for Europe, which placed all matters related to energy in the category of shared competences. See Art 13 of the Draft Constitution of July 2003 or Art I-14 of the adopted text in August 2004; CIG 87/04.

to the existence of various instruments at the Union's disposal in that framework which could be adopted to form such relations. It is the focus of this study to demonstrate the importance of approaching Europe's security of energy supply not only from an economic perspective, but also from a political perspective as energy relations have never been established on a purely economic basis. Although this characteristic can be found in many other fields of external relations, its importance is greater in the energy sector where most issues of energy security were politically driven (eg Suez Canal crisis). For this reason the ways in which CFSP measures can be adopted and added to the economic measures should be analysed. Although a detailed analysis of this issue is provided in section 7.2., a brief remark on the division of competences as found in this sphere of policy is provided here.

3.6. DIVISION OF COMPETENCES AND THE CFSP

The ways in which the competences of the 'Union' and the Member States are divided in the framework of the Common Foreign and Security Policy is not clear. Although, as the previous discussion revealed, this lack of clarity also exists within the sphere of economic policy (the first pillar): the particular lack of precision in the sphere of CFSP can be attributed to the special features of this policy framework. Firstly, the Union is given the competence to enter into international agreements. Article 24 of the Treaty on European Union stipulates that the Council, acting unanimously, can open negotiations to conclude an agreement with one or more states or international organisations. There are arguments as to whether these agreements are concluded on behalf of the Member States or the Union[103] and whether, because of this Article, the Union is provided with an international legal personality.[104] Nevertheless, it is clear that the competences of the Council on the basis of Article 24 are limited to measures within the framework of the CFSP and Police and Judicial Cooperation in Criminal Matters (PJCC). As one writer rightly suggests, Article 24 refers to 'the implementation of this Title and to matters falling under Title VI'. This means that agreements based on Article 24 must aim at reaching the CFSP and PJCC

[103] See Cremona, 'External Relations and External Competence', above n 10, at 137.

[104] On the international legal personality of the Union, see D Vignes, 'L'Absence de personalité juridique de l'Union Européene: Amsterdam persiste et signe' in G Hafner *et al* (eds), *Liber Amicorum Professor Seidl-Hohenverldern :In Honour of his 80th Birthday* (The Hague, Kluwer Law International, 1998) at 757. Compare to RA Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5 *European Foreign Affairs Review* 507 at 533. See also N Neuwahl, 'A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam' (1998) 3 *European Foreign Affairs Review* 177. Compare also Art I-7 of the Constitution where explicit reference is made to the legal personality of the Union. Some believe that the inclusion of this provision was a logical consequence of the decision to merge the existing treaties into one. See M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 CML Rev 1347 at 1350 [hereinafter 'The Draft Constitutional Treaty']

objectives alone, such as strengthening the security of the Union in all ways (Art 11).[105] Therefore, their activities cannot extend to cover matters embodied in the TEC. Moreover, Declaration no 4 of the Amsterdam IGC provides that the provisions of Article 24 and any agreement resulting from them shall not imply any transfer of competence from the Member States to the Union. This means that Article 24 should not be construed to strip the Member States of their treaty-making competences.

Nonetheless, even if there was a clear demarcation of competences between the Union and the Member States in the provisions of the TEU, some doubts would persist in dividing these competences in practice, not only between the Union and the Member States but also between the Union and the Community. This is even more the case considering that the acts of the European Council are not 'justiciable'. The European Council has never been subject to judicial review by the ECJ, due to the fact that it was not considered by the Court as an institution of the Community (Arts 230 and 234). As two writers suggest, this results in the European Council being able to 'set standards in its conclusions directly for the national legislative processes independently from the Union's order of vertical competences' without further supervision of the ECJ.[106]

On the other hand, as section 7.2 of this study shows, the measures adopted in the sphere of common foreign and security policy reveal that the distinction between Community policy areas and areas of intergovernmental cooperation is blurred, allowing the intergovernmental features to encroach upon Community competences (eg the adoption of common strategies).[107] Although some decisions by the ECJ did not allow a measure to be brought outside the ambit of an exclusive competence by its political dimension, such as the Common Commercial Policy,[108] it is inevitable that expansion of measures in the framework of the CFSP will eventually increase the friction between the competences of the Union and the Community.

[105] See RA Wessel, 'Revisiting the International Legal Status of the EU', *ibid*, at 533.

[106] See von Bogdandy and Bast, 'Vertical Order of Competences', above n 46, at 259.

[107] See also R Baratte, 'Overlaps between European Community Competence and European Union Foreign Policy Activity' in E Cannizzaro, *The European Union as an Actor in International Relations*, above n 12, at 51. See also B Weidel, 'Regulation or Common Position? The Impact of the Pillar Construction on the European Union's External Policy' in S Griller and B Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (Vienna, Springer, 2002) at 23. On the lack of 'primacy' and direct effect of CFSP measures see, B de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?' [hereinafter 'The Pillar Structure'] in T Heukels, N Blokker and M Brus (eds), *The European Union after Amsterdam, A Legal Analysis* (The Hague, Kluwer Law International, 1998) at 53 [hereinafter *European Union after Amsterdam*]. See also E Denza, *The Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press, 2002), Chapter 1.

[108] See, eg, Case 70/94, *Werner*, [1995] ECR I-3189 or Case 124/95, Centro-Com, [1997] ECR I-81 at para 30, where the ECJ explicitly provides that 'even where measures have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the common commercial policy'.

It is interesting to reveal briefly here that this fact has not been taken into account in the recent negotiations on a Treaty Establishing a Constitution for the European Union. It was proposed to create a distinct category of competence for the CFSP, detached from the overall categorisation of competences of the Union as a whole in other areas.[109] The only justification provided for this distinct approach to the CFSP is that the 'separate paragraphs given to the CFSP and to the coordination of Member States' economic policies reflect the specific nature of the Union's competences in those areas'.[110] This different approach to the issue of the CFSP suggests that the characteristic of a concurrent competence—ie the Union and the Member States have the power to legislate and adopt legally binding acts while Member States are able to exercise their competence, only if and to the extent that, the Union has not yet exercised it—would not be applicable to CFSP measures. On the other hand, Article I-13(2) of the Constitution provides that the Union shall have exclusive competence 'for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope'. Putting the regrettable attempt to summarise the case law in one provision aside[111] this suggests that exclusive competence can also arise within the CFSP through the conclusion of international agreements, as the reference is to the Union which is comprised of the CFSP Would this exclusive competence function similarly to the way the exclusive competence of the Community functions? In other words, would the conclusion of international agreements by the Union in the field of CFSP lead to pre-emption? The Constitution does not clarify this issue as it links pre-emption to 'shared competences' which does not include the CFSP in its ambit.[112] Hence, this ambiguity suggests that nothing in the Constitution simplifies the complexity of the division of competences and its extension to the field of the CFSP

As one writer submits, the inclusion of the CFSP in the overall competences of the Community is necessary in order to guarantee 'greater transparency and higher level of clarity' while preserving the intergovernmental character of the CFSP which would not necessarily be damaged.[113] However, the final version of the Constitution did not take these issues into account and created a distinct framework of competences for CFSP measures (Art I-16). Although Member States are to refrain from actions contrary to the Union's interests or which are likely to impair its effectiveness (Art I-16(2)), it remains to be seen how this provision would limit the activity of the Member States in practice, taking into account that the ECJ still has no jurisdiction in this field.[114]

[109] For the background to the negotiations on this issue see I Pernice and D Thym, 'A New Institutional Balance for European Foreign Policy' (2002) 7 *European Foreign Affairs Review* 369.

[110] See the Note of the Convention Presidium on Draft of Art 1 to 16, Feb 2003, CONV 528/03 at 16.

[111] See also B de Witte, 'The Constitutional Law of External Relations' in I Pernice and MP Maduro (eds), *A Constitution for the European Union: First Comments on the 2003: Draft of the European Convention* (Baden-Baden, Nomos, 2004) [hereinafter 'The Constitutional Law'].

[112] See also Cremona, 'The Draft Constitutional Treaty', above n 104, at 1351.

[113] See S Griller, 'External Relations' in de Witte '*Ten Reflections*', above n 19, at 140.

The measures embodied in the framework of the CFSP will be analysed in chapter 7.2. It suffices to say here that the division of competences in the CFSP framework reveals interesting points with respect to the security of energy supply. There are CFSP measures in place that could be interpreted as measures contributing to a secure energy supply for Europe. Given that these measures are legally binding, they must be included in a survey of Europe's external energy policy. This relationship is fully explored in chapter 7.

As mentioned before, in order to reveal the relevance of the discussion of the division of competences to Europe's energy supply security, it is necessary to look at all of the existing and possible measures that can be undertaken by both the Community and the Member States in the energy sector. The advantages or disadvantages of expanding the Community's competence in this specific field will be analysed at the end of next chapter. The objective of that chapter is to analyse these internal measures in order to verify their efficiency in guaranteeing Europe's security of energy supply as a whole, and also to relate that efficiency to the issue of competences. As explained in the first chapter, it is absolutely ineffective to design an energy policy focusing solely on internal security measures while Europe's dependence on external energy sources is set to increase in the years to come. It is thus necessary to first analyse those internal measures which, as the next chapter provides, are divided into hard measures (legally binding) and soft measures (in the form of Communications or Green and White papers), where the importance of Europe's external security of energy supply has been repeatedly raised. As these measures have soft law characteristics it is necessary to briefly analyse their role in the legal framework of the Community. Following this discussion, the role that the Community and the Member States should or could play in guaranteeing energy security will be examined. This study concludes that the aim should be efficient cooperation between the two rather than an antagonistic approach that focuses solely on which party (the Community or the Member States) prevails and excludes the other in guaranteeing Europe's security of energy supply.

[114] Art III-376 of the Treaty Establishing a Constitution for Europe.

4

Internal Outlook: EU Measures in the Field of Energy

4.1. INTRODUCTION

THIS CHAPTER EXAMINES the most important secondary legislation in the Community's internal market that is relevant to the analysis of the internal security of energy supply. These internal measures have direct or indirect implications for energy supply security from both an internal and external perspective. As explained in the previous chapter, in the absence of an express provision in the EC Treaty, the external competences of the Community could be expanded through the increase in the numbers and the areas covered by secondary legislation. The potential for this expansion can be verified through the close analysis undertaken in this chapter of the content of this legislation. Thus, the external aspects of Community measures dealing with the internal energy market are discussed herein, while chapters 5 and 6 discuss external relations in the form of bilateral, regional or multilateral relations, which have implications for security of energy supply. On the other hand, it should also be determined whether the mere establishment of purely internal measures would guarantee adequate security of energy supply or whether specific external measures should accompany them. Moreover, there are various important soft law measures, mainly in the form of White or Green Papers, which specifically deal with the issue of Europe's security of energy supply. These soft law instruments have strong external implications, whose importance should be scrutinised from a legal point of view. The final part of this chapter compares the analysis of the law of division of competences and secondary legislation in the field of energy, and reveals the merits of providing either the Community or the Member States with the powers to carry out measures to guarantee an optimum security of energy supply.

The high degree of governmental ownership and control of the energy sector had, for a long time, constrained its liberalisation and opening up in Europe. Moves towards liberalisation in all the major sectors of the European economy began to take shape immediately after the inception of the European Community, and we are now witnessing their maturity. The energy sector's isolation from