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# Governance through real-time compliance: the supranationalisation of European external energy policy

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## ABSTRACT

Member States have retained core competences in external energy policy since the beginning of European integration. Even the new ‘energy chapter’ in the Lisbon Treaty safeguards national prerogatives. Contrasting this trend, we show that throughout the past decade this national stronghold has been eroding and replaced by supranational oversight. Reviewing energy-related negotiations of Poland and Lithuania with Russia and new regulation on intergovernmental agreements, we demonstrate how the Commission gained control over Member States’ external energy relations. We explain the expansion of supranational authority with spillover pressures equipping the Commission with new procedural prerogatives. Central to this development was the institutionalisation a novel supranational instrument we call ‘real-time compliance’. The term denotes the prompt application of soft and coercive means, ensuring compliance of energy agreements between the Member States and third countries with EU rules. This expansion of supranational powers through procedural competences has implications for debates on European energy policy and European integration.

**KEYWORDS** Energy policy; European Commission; European integration; external governance; intergovernmental agreements; Russia

## Introduction

Two opposite forces have shaped the integration of European energy policy. While the European Commission supported a more integrated approach, Member States often resisted transferring sovereignty to the supranational level. These patterns are particularly evident in external energy policy. Until today, European Union (EU) members retained the final say over their energy imports and relations with supplier and transit countries. In times of growing political instability, particularly this latter aspect has gained attention. National administrations usually view secure energy supply of vital importance to national security and thus prefer autonomy over regional integration

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(Buchan, 2015; Maltby, 2013). Arguably these concerns countered supranational ambitions in the energy field. While the past two decades revealed a gradual increase of Commission authority in governing the internal energy market (Goldthau & Sitter, 2015a; Thaler, 2016), its influence regarding energy security and diplomacy remained limited until the late 2000s (Herranz-Surrallés, 2016, p. 1387).

However, since 2010 various events occurred that contrast with previous developments in the field. First, the Commission participated in energy-related negotiations of Poland and Lithuania with Russia and shaped the outcome of these bilateral agreements. Few years later, Decision 2017/684 on Member States' intergovernmental agreements (IGAs) in energy was adopted which equipped the Commission with significant powers. Both events demonstrate growing supranational influence on Member States' bilateral energy relations, challenging a national stronghold and accelerating the evolution of a European external energy policy.

In this article, we study this development by addressing two separate yet inherently interlinked questions. First, how did supranationalisation proliferate in an area dominated by intergovernmental prerogatives? And second, why could the Commission gain new governance capacity despite concerns over national sovereignty? As to the first question, our case demonstrates the successive institutionalisation of a novel supranational instrument that allows fostering compliance of Member States' bilateral energy agreements with EU rules. This instrument – a combination of soft and coercive means which we call 'real-time compliance' – grants the Commission influence over the drafting phase of such agreements, thereby shifting governance authority to the supranational level.

Why could this happen? Regarding the second question, we show that functional spillover pressures, originating in efforts to improve the functioning of the internal energy market, can explain the evolution of real-time compliance. Political and cultivated spillover-forces facilitate this process. However, unlike early neofunctionalists (Haas, 1958), we do not see the EU replacing the nation-state and all its functions. The Lisbon Treaty keeps key elements of external energy policy under Member State competence (Maltby, 2013; Ringel & Knodt, 2018). Instead, the kind of supranationalism we observe is rooted in the *procedural* expansion of instruments for compliance governance (rather than in a *legalised* expansion of supranational competences). The result is a Commission strengthened with new avenues to exert control over Member States' external energy policy.

This article contributes to three strands of literature. Firstly, exploring the integration of European external energy policy, especially the strengthened competences of the Commission, it complements scholarship on EU energy policy and the Energy Union (e.g., Oberthür, 2019; Szulecki, Fischer, Gullberg, & Sartor, 2016). Secondly, linking available compliance instruments to claims

about governance capacity, it conceptualises ideal-types of compliance governance and provides insights into centralised compliance governance beyond preventing non-compliance (e.g., Börzel, 2003; Hartlapp, 2007; Scholten, 2017). Thirdly, emphasising supranationalisation through a procedural expansion of governance instruments rather than a legalised transfer of competences, the article informs ongoing debates on European integration (Bickerton, Hodson, & Puetter, 2015; Dehousse, 2015). We discuss these contributions in more detail in the conclusion.

The article begins with a brief introduction to EU external energy policy, highlighting the lack of integration in energy diplomacy. The next section sets the scene to answer the research questions. It first develops a conceptual argument how compliance governance – especially real-time compliance – can be a powerful tool in challenging intergovernmental prerogatives. A review of neofunctionalist spillover mechanism provides the explanatory basis why new supranational governance capacity could trump concerns over national sovereignty. A case study then investigates the Commission's influence on Polish and Lithuanian energy negotiations with Russia, and the institutionalisation of supranational authority in external energy governance. Finally, we link the insights to the evolution of real-time compliance and discuss the role of spillover-forces in facilitating this development. The conclusion highlights the implications of these findings for research.

### **European external energy policy: incomplete integration**

European integration in energy has progressed significantly since the mid-2000s. The Commission was an important driver of this development, targeting energy market liberalisation, energy security, climate change and environmental protection (Buchan, 2015; Goldthau & Sitter, 2015a; Maltby, 2013). Today's European energy policy consists of a Treaty chapter (Article 194 TFEU), a framework strategy for an Energy Union, and a growing body of secondary legislation (e.g., Szulecki *et al.*, 2016). Yet despite these achievements, the field remains far from fully integrated. Overall competences remain shared with the Member States (Article 4 TFEU), leading to parallel governance arrangements (Buchan, 2015). Although dedicated attempts to facilitate coordination exist (Thaler, 2016), fragmentation is the main challenge for European energy governance.

Particularly the external dimension of European energy policy remains incomplete (Herranz-Surrallés, 2015, p. 916; Maltby, 2013, p. 440). The supranational role has only advanced in market governance beyond EU territory and sustainability promotion, but less so in energy diplomacy (Herranz-Surrallés, 2015, pp. 914–915). Supranational instruments for external market governance include rules-based market multilateralism (Energy Charter Treaty), norm export through the externalisation of energy market legislation (Energy

Community, EEA) and bilateralism (Energy Dialogues) (Aalto, 2008; Goldthau & Sitter, 2014, 2015b; Hofmann, Jevnaker, & Thaler, 2019). Sustainability promotion is reflected in the EU's quest for clean energy and its fight against global climate change (Bäckstrand & Elgström, 2013; Oberthür & Groen, 2018). Further integration in these two areas appears likely. Albeit Article 194 TFEU does not explicitly confer external competences to the Union it does so implicitly and thereby 'provides fertile legal ground for the development of a full-blown EU external energy policy' (Vooren & Wessel, 2014, p. 439). EU external competence in energy can be implied from the internal competences for energy policy, making the nature of EU external competence shared and preemptive (also reflected in Article 3(2) TFEU). Moreover, the successive adoption of internal rules – especially the three legislative packages in the field of electricity and gas as well as the Clean Energy Package – has provided a strong foundation for external supranational action (Marhold, 2019).

In contrast, question marks remain behind the Commission's future role in energy diplomacy. Prior to the Lisbon Treaty, its tasks were confined to promoting diversification and handling crises, while Member States (or domestic companies) maintained relations with suppliers (Herranz-Surrallés, 2016). Article 194(2) TFEU then specified EU members' right to decide about their energy mix and supply structure. This means that they remain competent to conclude international agreements with suppliers and cannot be preempted by EU-internal action from doing so (Vooren & Wessel, 2014, p. 441). National preferences therefore continue to dominate energy diplomacy and joint action depends on intergovernmental cooperation. The remainder of this article illustrates how the Commission could gain influence in energy diplomacy despite its weak policy-making capacities and push integration in EU external energy policy.

### **Real-time compliance as an instrument for integration**

This section conceptualises the role of a novel instrument which we call 'real-time compliance' in creating supranational governance authority. At a basic level, governance denotes the capacity 'to develop some means of making and implementing collective choices' (Peters & Pierre, 2009, p. 91). In practice, Member States failing to comply with common rules undermine the effectiveness of EU policies. Instruments capable of ensuring compliance with EU regulation are therefore a fundamental element of supranational governance capacity. Owing to its function as guardian of the treaties, the Commission possesses various instruments to monitor, assist and enforce Member States' implementation of EU policies and compliance with the *acquis communautaire* (Börzel, 2003; Cremona, 2012; Tallberg, 2002).

Scholarly contributions distinguish between two approaches that develop expectations about the sources of compliance or non-compliance. The

*enforcement approach* rests on the realist assumption that states have incentives to defect compliance based on their own cost-benefit calculations. Such behaviour is best prevented by an independent authority equipped with coercive instruments. Here, EU studies have stressed the role of the Commission and the Court of Justice of the European Union (CJEU) in monitoring and enforcing compliance (Hartlapp, 2007, p. 655; Tallberg, 2000, 2002, pp. 611–612). In contrast, the *management approach* highlights administrative, financial or technical limitations and ambiguities over legal interpretations as sources for non-compliance. Presuming that rule violation is unintended rather than a deliberate strategy to oppose EU norms, the remedy is best found in supportive instruments. Capacity building, guidance in rule-interpretation and transparency are therefore considered more effective in improving compliance than coercive enforcement (Conant, 2012, pp. 6–8; Hartlapp, 2007, pp. 655–656; Tallberg, 2002, pp. 613–614).

The discussion of the two approaches hints at a qualitative difference, as to whether compliance is an outcome or a process. From the perspective of the latter, compliance ‘does not refer to the simple result of obedience, but to the overall process through which obedience is gradually constructed’ (Chiti, 2012, pp. 31–32). Elements that characterise this process – including negotiations, legal developments and institutional change – aim at improving administrative capacity to ensure compliance. They are mainly underpinned by the creation of ‘soft’ instruments for compliance governance associated with the management approach but can also feature coercive means.

Understanding compliance as a process rather than a binary outcome has conceptual consequences in that it further adds a temporal dimension to compliance studies (Börzel, 2003, p. 205, 220). Against this background, we divide the compliance process into two distinct stages. The first stage denotes the period *before* a breach of compliance with EU rules has occurred. To keep the status quo and prevent violation in the future, utilised instruments are preemptive and seek *ex-ante* control over the compliance process. The second stage encompasses the period *after* a violation of EU rules has happened. Instruments utilised in this stage are corrective and aim at restoring compliance through *ex-post* control over the compliance process.

The distinctions between compliance approaches (enforcement vs. management) and targeted stages in the compliance process (*ex-ante* vs. *ex-post* control) structure compliance governance into four ideal-types, displayed in Table 1. Each box features examples of supranational compliance instruments. The coercive-preemptive Type I enforces *ex-ante* control through authorisation or veto. The soft-preemptive Type II manages *ex-ante* control through interpretive guidance, coordination or capacity building. The coercive-corrective Type III enforces *ex-post* control through infringement proceedings that can result in sanctions. Finally, the soft-corrective Type IV

**Table 1.** Four ideal-types of compliance governance and examples of instruments.

|                                      |   | Approach to ensuring compliance  |   |
|--------------------------------------|---|--|---|
|                                      |   | enforcement  | management  |
| Targeted stage in compliance process | <i>ex-ante</i> control (before violation) | (I) <i>coercive-preemptive</i> :<br>authorisation, use of veto powers    | (II) <i>soft-preemptive</i> :<br>interpretive guidance, coordination, capacity building |
|                                      | <i>ex-post</i> control (after violation)  | (III) <i>coercive-corrective</i> :<br>infringement procedures, sanctions | (IV) <i>soft-corrective</i> :<br>evaluation, learning, naming and shaming               |

manages *ex-post* control over the compliance process through joint-evaluation, learning or naming and shaming. ‘Real-time compliance’ denotes the combination of soft and coercive instruments at an *ex-ante* stage of the compliance process (Type I and II). Although overlapping with the analytical category ‘*ex-ante* control’, the concept is distinct in that it embodies the idea of an integrated and prompt compliance *governance*. As we shall see, this involves close coordination with and participation by the Commission.

The four ideal-types of compliance governance inform our understanding of the compliance process in the EU in two ways. Firstly, they provide an analytical toolbox of compliance instruments that structures research along a procedural (soft or coercive instruments) and a temporal (preemptive or corrective instruments) dimension. For a long time, empirical enquiries have arguably been biased towards supranational enforcement practices through infringement proceedings, leaving other logics of compliance governance unexamined (Hartlapp, 2007, p. 654). Yet, *ex-post* enforcement faces limits, even when successful action by the Commission is brought to the CJEU. Our cases presented below are indicative of this. Once signed under international law, IGAs between an EU member and a third country cannot easily be undone or changed, even if in breach of EU law. *Ex-post* compliance through infringement proceedings are therefore a suboptimal solution and additional strategies appear essential to prevent violation in the first place (Scholten, 2017). Indeed, recent empirical studies report a steady decline in court referrals (Falkner, 2018) and a diversification of compliance instruments, such as the application of informal compliance management tools (Hofmann, 2018). Given these insights and in accordance with what others have argued (Börzel, 2003; Tallberg, 2002, pp. 632–633), we assume that compliance instruments across the four ideal-types of compliance governance are complementary. Consequently, any expansion of the Commission’s compliance toolkit –

including the novel exercise of real-time compliance – implies an increase in supranational control over the compliance process.

Secondly, the types of intervention and their combination underline patterns in the relationship between supranational institutions and Member States. Among *ex-ante* instruments, prior authorisation is for instance more intrusive to national governing autonomy than interpretive guidance, since the latter could be ignored. The combination of two instruments (i.e., alignment with interpretive guidance to get authorisation) is particularly intrusive though, because it limits Member States' margin of manoeuvre. Research highlighting that soft compliance tools work best under the shadow of harder instruments supports this point (Hartlapp, 2007; Saurugger & Terpan, 2016). We thus assume that an expansion of real-time compliance is particularly effective in providing the supranational level with additional authority over the compliance process.

### ***Integrative spillover pressures in external energy governance***

How could this intrusive supranational instrument advance despite Member State concerns over sovereignty in the energy diplomacy domain? Both intergovernmentalism and neofunctionalism fail to fully capture this development. Neither has integration been in full control of Member States (as intergovernmentalists expect) nor has a transfer of legalised competences to the supranational level occurred (as neofunctionalists predict). Instead, we argue that supranationalisation in the external energy field ensues from a *procedural* expansion of European compliance instruments.

Specifically, we posit that spillover pressures can explain the resulting shift in governance authority. We build on the neofunctionalist idea of spillover, rooted in the assumption that initial integration fosters further integration and that regional integration processes thus take on their own dynamic (Haas, 1958). However, differently from what early neofunctionalists claim, we conclude that this process leads to a *procedural* expansion of competences rather than a *legalised* expansion manifested in EU Treaties. Based on the works of Haas and Leon Lindberg, three different spillover types have featured prominently in the academic literature. *Functional spillover* refers to pressures that require further integrative steps to achieve the initial goal of integration. They are caused by growing interdependence of policy sectors and issue areas in modern politics and economics. Since sectors and issues cannot be integrated in isolation from each other, integrative pressures spill over from one to other, functionally related sectors (Niemann & Schmitter, 2009, p. 49; Tranholm-Mikkelsen, 1991, pp. 4–5). *Political spillover* is driven by national political elites, who agree that problems cannot be sufficiently addressed at the domestic level. This causes a process of socialisation and learning, resulting in a shift of preferences, political activities and even loyalties to a European core



(Niemann & Schmitter, 2009, p. 50; Tranholm-Mikkelsen, 1991, pp. 5–6). *Cultivated spillover*, finally, highlights the role of supranational institutions in promoting integration. Seeking to extend their own powers, the Commission, the European Parliament and other European institutions offer mediatory services to diplomatic negotiations that may upgrade the common interest. Supranational institutions therefore take on a life of their own, fostering the integration process through various means, including acting as a broker or policy entrepreneur (Niemann & Schmitter, 2009, p. 50; Tranholm-Mikkelsen, 1991, p. 6). In the following empirical sections, we illustrate how real-time compliance has proliferated in EU external energy governance and explore to what extent the different spillover types can account for this development.

### **Towards real-time compliance: the Commission in the negotiation room**

Recent years saw supranational involvement in energy diplomacy that went far beyond previous experiences. On two occasions, Poland (2010) and Lithuania (2010–2014), the Commission participated in Member States' energy-related negotiations with Russian suppliers. Rather than being individual cases, we argue that these examples became test-grounds for supranational external energy governance through real-time compliance. We show how experiences from these negotiations underpinned the legislative process leading to the adoption of Decision 2017/684 (henceforth called the 'revised IGA decision') which institutionalised supranational authority. Our analysis rests on 17 semi-structured expert interviews, conducted between 2011 and 2016.

#### ***Poland: precedent to invite the Commission***

In January 2010, Polish state-controlled gas supplier PGNiG and Russian state-owned Gazprom concluded a draft agreement on transit and extension of Russian gas supplies delivered through the 'Yamal-Europe' transmission pipeline from Siberia to Poland and the EU (Thaler, 2020, Chapter 6). The deal covered Russian gas deliveries to Poland until 2037, increased the total amount of Russian gas supplied and set the conditions for gas transit through Poland to Western Europe until 2045. In the negotiations, Gazprom had the double-hatted role of the future gas supplier and majority shareholder of EuRoPol Gaz S.A., the owner of the Polish section of the Yamal pipeline. This constellation caused the draft agreement to include provisions that contradicted key principles of EU energy market liberalisation; namely unbundling of energy suppliers from network operators, third-party pipeline access and the re-sale of excess gas.<sup>1</sup>

Initially, the Polish side did not endorse the draft agreement, awaiting the Commission's approval of conformity with EU internal market rules, mainly the Third Natural Gas Directive.<sup>2</sup> Soon after, the Commission warned Poland of infringement because it deemed the draft arrangement for pipeline operation on EU territory incompatible with EU law. Poland should guarantee the sound implementation of new energy market regulation, especially the unbundling of suppliers from network operators and third-party access.<sup>3</sup> Worried that a full application of EU gas market principles to the Polish Yamal section would challenge their business model of vertically integrated companies, the Russian response was outspoken. Visiting Brussels in July 2010, the Russian Deputy Energy Minister condemned the unbundling approach Poland had applied to the rest of its gas transmission system and threatened to cut off gas supplies to Poland if no mutually acceptable solution was found for the operation of the Yamal pipeline.<sup>4</sup>

The following month, the Commission expressed its official reservations about the draft agreement. It insisted on access of other operators to the pipeline, equitable and transparent tariffs for access, and increased reverse flow capacities at the Polish border (Agence Europe, 2010). Therefore, several Polish politicians suggested involving the Commission in the negotiations to help resolving the conflict with Gazprom. Shortly after, the Commissioner for Energy, Günther Oettinger, offered participation.<sup>5</sup>

At first, the Polish administration wanted to resolve the Commission's doubts alone with Gazprom. Nevertheless, they kept close contact and informally discussed the topic at ministerial level where the Commission specified the requested changes. Following an agreement between Commissioner Oettinger and the Polish Minister for Economy, Poland sought to renegotiate various parts of the draft agreement with Russia in early September 2010. Nevertheless, Gazprom opposed the Commission-backed Polish amendments, indicating a reluctance to give up control over pipeline operation and grant third-party access. Warsaw was concerned that Gazprom might link its demands for pipeline operation to parallel negotiations on the terms of gas purchase – a package deal that would leave Poland stuck between conflicting legal obligations of EU and international law. It, therefore, invited the Commission to accompany and assist its delegation to Moscow.<sup>6</sup> The Commission experts initially seated themselves in the back of the room, but Russian negotiators soon invited them to join the main table and provide clear answers to open questions. Following renewed requests from the Polish administration, the Commission participated continuously in the negotiations, aligned its position with Poland in preparatory meetings and analysed the conformity of draft provisions with EU law.<sup>7</sup>

Negotiations ended in October 2010 with the signing of a new Yamal IGA and a commercial agreement between companies. Less than what was originally intended, the agreements only covered gas supplies to Poland until 2022 and

an extension of transit through Polish territory until 2019. Nevertheless, with references to pipeline access for external operators, independent pipeline management and possible resale of purchased gas, the Commission's key demands were fully met.<sup>8</sup> Aware of his institution's contribution, Commissioner Oettinger concluded, '[w]e managed to ensure that the IGA between Russia and Poland was brought into line with EU law' (European Commission, 2010).

### ***Lithuania: Commission support against dominant business interests***

In 2010, Lithuania started implementing the Third Natural Gas Directive.<sup>9</sup> It requested each EU member to choose one out of three possible models to unbundle their transmission system operators (TSO). Domestic politicians favoured the ownership unbundling (OU) model, convinced it would help diversifying gas imports from Russia through restraining Gazprom's ownership in the main gas TSO, Lietuvos Dujos. Gazprom and E.ON Ruhrgas, the other major shareholder of Lietuvos Dujos, criticised that Lithuania had made a particularly interfering choice since the OU model required most restructuring of ownership. In an open letter to the government, they warned that a hasty implementation of OU could cause disruptions of gas supply. Moreover, Gazprom raised gas import prices and publicly linked this increase to the OU choice (Pakalkaite, 2016). These actions intended pressuring the government to derogate from the transposition or opt for another unbundling model.<sup>10</sup> Nevertheless, strong domestic political support caused Lithuania to adhere to the OU model.

From early 2010, the Commission became involved in the case. Initially, it made extensive use of its formal right to comment on the draft legal acts designated to transpose the directive. By 2011, the Lithuanian government invited Commission officials to join negotiations with Gazprom and E.ON.<sup>11</sup> After successful transposition of the directive, cooperation with these companies was required for full ownership unbundling of Lietuvos Dujos. In this process, the government hoped to benefit from the Commission's weight and experience to overcome a feeling of 'smallness' *vis-à-vis* two powerful energy companies and reach a better deal.<sup>12</sup> Negotiations took place in Vilnius and Brussels. The Commission and Lithuania organised preparatory meetings to align positions.<sup>13</sup> Commission representatives sat at the negotiation table, joined Lithuania's bilateral meetings with Gazprom and E.ON, and mediated conference calls with Russian government officials.<sup>14</sup> Russian negotiators accepted the close Commission involvement since the Polish negotiations.<sup>15</sup>

In the negotiations, the Commission insisted on full implementation of the Third Energy Package. This clear position strengthened Lithuanian arguments against Gazprom.<sup>16</sup> Consequently, Vilnius not only benefitted from supranational presence in the negotiation room but spread the Commission's messages whenever possible. For instance, when the disagreement with the

shareholders of Lietuvos Dujos intensified, the Lithuanian minister of energy published various letters from Commission representatives, including President Jose Manuel Barroso, which supported his country's implementation path. At the same time, Commission officials wanted to keep negotiations on the implementation of the directive isolated from questions over gas prices.<sup>17</sup> Preaching EU rules undermined Gazprom's strategy to link these issues – a package deal likely in breach of EU law.<sup>18</sup>

In February 2012, the Commission's involvement in the case reached a formal level. Gazprom representatives had continuously lobbied Lithuanian officials to postpone the implementation of the directive. Arguably they had hoped that the upcoming Lithuanian elections of October 2012 would bring about a change in government, and that the new administration would cancel the transposition and opt for another unbundling model (Pakalkaite, 2016).<sup>19</sup> Sceptical about Gazprom's demands, the Lithuanian administration again invited the Commission. In a meeting, the Commission, Lithuania and Gazprom signed a joint statement, which granted only marginal concessions to the roadmap while upholding the final implementation deadline.<sup>20</sup> Given that the supposedly next administration had made clear to continue the chosen unbundling path, Gazprom had to accept the compromise.

The example illustrates how close cooperation with the Commission repeatedly strengthened the Lithuanian position and ultimately preserved the integrity of EU law. Under growing pressure to be fined for non-compliance with the transposition laws, E.ON sold its share of Lietuvos Dujos to the Lithuanian state in mid-2014. Having lost its main ally, Gazprom soon followed the example and the OU model was fully implemented (Pakalkaite, 2016).<sup>21</sup>

### ***Enabling real-time compliance: the institutionalisation of ex-ante assessments***

News about Commission involvement in energy negotiations with third country actors quickly spread in the Council and capitals. Member States broadly agreed that supranational assistance successfully challenged Russian market power and facilitated an advantageous outcome for Poland and Lithuania.<sup>22</sup> Yet they also raised concerns over sovereignty.<sup>23</sup> For the Commission, experiences from the Polish and Lithuanian negotiations underpinned the necessity of a more explicit supranational role in energy diplomacy and provided an argument to propose new regulation.<sup>24</sup>

Concerns over the consequences of Member States' bilateral energy relations with third countries for security of supply and the functioning of the internal energy market had previously been a driver of integration. The Security of Supply Regulation of 2010 required EU members for the first time to communicate existing and newly concluded IGAs with third countries on gas infrastructure and supplies to the Commission.<sup>25</sup> The provision was though kept brief,

and two years later, Decision 994/2012/EU (henceforth called the '2012 IGA decision') introduced a fully-fledged information exchange mechanism. It specified in more detail the information exchange, entailed provisions on confidentiality, offered Commission observership in negotiations and notably extended supranational information access to electricity and oil.

Justifying the need for dedicated regulation, the Commission highlighted in its proposal the problematic constellation when suppliers' commercial interests clashed with EU energy market rules. It argued that the threat of supply shortages could pressure Member States to accept regulatory concessions in their IGAs that were incompatible with the *energy acquis* and undermined the functioning of the internal energy market. Beyond gathering information, the Commission had therefore proposed mandatory compliance assessments of new IGAs with EU rules. These checks were to become the most contested element in the legislative process. The Commission contended that the existing infringement mechanism – an instrument for *ex-post* control – did not guarantee conformity of the negotiated IGAs with EU law. Encouraged by the positive experiences from the Polish negotiations, it, therefore, proposed to be able to enter bilateral negotiations and perform compliance checks at an early stage (European Commission, 2011).<sup>26</sup> The majority of Member States rejected this provision, concerned that a blueprint for Commission participation in negotiations and judgement over the draft IGA would undermine national sovereignty.<sup>27</sup> Consequently, the 2012 IGA decision included only a 'slim version' of the information exchange mechanism, obliging EU members to share the content of IGAs with the Commission.

The following years revealed that the 2012 IGA decision, despite a record of 124 notified energy IGAs by 2016 (European Commission, 2016a, p. 3), did not adequately address the identified problems. The prime example was South Stream, a pipeline project to transport Russian natural gas via the Black Sea and Bulgaria to Europe. Six EU members had signed IGAs with Russia, which undermined core principles of the Third Energy Package. Since these agreements lacked unilateral termination clauses, the Commission's request for renegotiation was legally not enforceable. Eventually, only Moscow's withdrawal from the project by the end of 2014 avoided a conflict between EU and international law (Goldthau & Sitter, 2015a, Chapter 5).<sup>28</sup> A Commission report summarised the problems encountered with *ex-post* compliance checks. It emphasised that in the absence of a termination or suspension clause, changes to a concluded IGA proved almost impossible without the third country's consent. The Commission alone could not resolve the conflict between Member States' obligations under international and EU law and, consequently, experienced 'considerably limit[ed] enforcement powers [...], even if an infringement process was to be launched' (European Commission, 2016a, pp. 3–4). The Commission thus presented its main instrument to

ensure compliance of IGAs with EU rules, *ex-post* enforcement through infringement proceedings, as ineffective.

The inability to handle problematic cases provided the Commission with a strong argument to strengthen supranational oversight. In February 2016, it proposed a revision of the 2012 IGA decision, which again included a provision for supranational *ex-ante* assessments of IGAs. Member States would be obliged to notify the Commission before entering negotiations and provide regular information on the progress of the talks. Draft agreements would need to be submitted to the Commission to assess compliance with EU legislation. Only following the Commission's approval could IGAs be formally concluded (European Commission, 2016b). This authorisation procedure caused heated debates in the Council. A small group of Member States – mainly those from Central and Eastern Europe, which share a dependence on Russian gas supplies and a legacy under Soviet rule – supported the proposal. They also advocated a right for the Commission to enter negotiations rather than having to await an invitation. Without such a right, they argued, the third party could insist on negotiating without the Commission and threaten to otherwise end the talks. Another group of Member States strictly opposed the proposal, viewing the *ex-ante* provision as a threat to sovereignty. In line with Article 194(2) TFEU, these countries wanted to exclude the Commission from external energy relations and retain their right of contractual autonomy.<sup>29</sup>

In June 2016, energy ministers agreed on supranational *ex-ante* control, albeit restricted to IGAs in the field of gas. In October, the European Parliament called for a stronger role of the Commission through a right to enter negotiations and supranational compliance checks for IGAs on gas, oil and electricity. The revised IGA decision of April 2017 became a compromise. The Commission was denied an explicit right to unilaterally enter negotiations but could request participation in negotiations if deemed necessary. Supranational *ex-ante* assessments became a new requirement for IGAs in the fields of gas and oil, implying a strengthening of Commission competences in energy diplomacy.<sup>30</sup>

### **Spillover-forces facilitate supranational control through real-time compliance**

The previous section illustrated the practice and gradual institutionalisation of *ex-ante* compliance checks in energy diplomacy. In EU governance, such pre-authorisation instruments are known from areas of exclusive EU competence. In competition policy, mergers and state aid measures require prior notification and can only be implemented if the Commission declares them compatible with EU rules.<sup>31</sup> Moreover, in the context of the European semester, Member States must have their budgetary plans approved by the Commission

(Verdun & Zeitlin, 2018). However, the *ex-ante* instrument described in this article applies to an area of shared competence between the EU and Member States. Given the explicit non-communitarisation of energy diplomacy in the Lisbon Treaty, the expansion of supranational powers is particularly intrusive to national governance authority. This section illustrates how this development was possible despite Member States' concerns over sovereignty.

The Polish and Lithuanian negotiations included a novelty that enabled direct supranational influence on national energy diplomacy. A senior Commission official was always present in the negotiation room to voice possible violations of the *energy acquis*. Implicitly made aware that an agreement considered incompatible with EU law would be challenged at court, the countries incorporated this input, which gave the Commission *de facto* veto powers over the agreement. We call this type of compliance governance coercive-preemptive. In addition, Commission officials shared information, facilitated deliberation and gave weight to Polish and Lithuanian concerns through mere presence in the negotiations. They also organised preparatory meetings to align positions and used coffee breaks to provide legal expertise and influence the content of discussions.<sup>32</sup> These interventions mirror a type of compliance governance that we label soft-preemptive.

The strategy to combine coercive and soft instruments at the *ex-ante* stage made supranational interventions prompt and precise, ensuring compliance with EU law in real-time. We suggest that this approach to comprehensive compliance governance at the *ex-ante* stage is best described as 'real-time compliance'. In our examples, it allowed the Commission to restrict negotiation outcomes within the scope of its own legal interpretation. Compared to *ex-post* instruments, governance through real-time compliance thus prevented the conclusion of an agreement undermining EU rules and the risk of a conflict between EU and international law.

Governance through real-time compliance is not a formalised element within European external energy policy. While the revised IGA decision institutionalises supranational *ex-ante* control through the assessment, it does not confer the Commission a right to enter negotiations and actively manage compliance. However, negotiation dynamics presumably enable the Commission to exercise this managing role. Learning of the Commission's new supervisory role, third parties will be reluctant to sign an agreement whose provisions are unlikely to take effect if challenged at the CJEU. To ensure legal certainty, they may, therefore, pressure the EU member not only to abide by the *ex-ante* assessment but also to facilitate a trilateral dialogue with the Commission. The Polish example demonstrates this pattern. While Warsaw sought supranational presence to strengthen its position, the Russian side explicitly invited Commission officials to provide immediate answers to open questions. The implications are two-fold. Firstly, the

Commission can directly influence negotiations and apply soft-preemptive compliance instruments associated with the management approach. Secondly, the right of judicial interpretation, which normally rests with the CJEU, *de facto* shifts to the Commission. The result is a significant strengthening of executive powers with a prerogative of the judiciary. As a new governance instrument, real-time compliance, therefore, owes much of its relevance to informal procedures that extend the Commission's governance capacity to realms previously not reachable by supranational control.

How was the expansion of supranational governance powers possible in a field dominated by national interests? Our examples suggest that spillover forces – mainly functional and to a lesser degree political and cultivated spillover – facilitated this development. Functional spillover is reflected in the recognition that the attainment of key energy policy objectives – namely the functioning of the internal energy market and security of supply – required a more explicit supranational role in energy diplomacy. Examples like the Polish and Lithuanian negotiations as well as various pipeline projects revealed intrinsic linkages between internal and external dimensions of energy governance. External pressures were perceived as a credible threat to the integrity of the internal energy market, especially when exerted by powerful foreign actors like Russian state-owned Gazprom. The Commission and Member States wanted to avoid situations in which national administrations autonomously subscribed to IGAs with third countries that undermined EU rules. Since such arrangements are governed by international law, they could not easily be undone with existing *ex-post* enforcement tools. The European Commission, the European Parliament and Member States concluded that for the proper functioning of the internal energy market, IGAs with third parties needed to fully comply with the EU *energy acquis* and that new tools were required to ensure this compliance.

Remarkably, unlike early accounts of neofunctionalism suggest, this did not trigger a transfer of competences to the supranational level through a treaty change. Rather, our observations support novel claims about the works of functional spillover, postulating that 'competences at one stage in the policy cycle may necessitate the creation of capacity in another stage in order to ensure adequate policy implementation' (Scholten & Scholten, 2017, p. 925). Perceived as increasingly compelling, the functional pressures eventually culminated in the creation of a new *type* of procedural supranational competence, i.e., supranational oversight in external energy policy through real-time compliance. The 2017 IGA decision notably presented the *ex-ante* checks as a necessary measure to prevent non-compliance with EU rules and energy market failures. Overall, our case thus highlights that the procedural expansion of supranational governance authority in the energy diplomacy domain is a functional solution to ensure the functioning and preserve the integrity of the internal energy market.



While functional pressures were dominant among the three spillover types, political and cultivated spillover further reinforced the supranationalisation of EU external energy policy. Political spillover is mirrored in national administrations reassessing their preferences and eventually endorsing a transfer of governing authority to the Commission. Those Member States concerned about their relationship with energy suppliers learned that close collaboration with the Commission could help to overcome own shortcomings and result in joint-gains. Poland as well as Lithuania benefitted from the Commission's administrative capacity and knowledge which facilitated a favourable negotiation outcome. Those Member States predominantly concerned about their sovereignty learned that existing *ex-post* instruments were not adequate to ensure the integrity of the internal energy market. In the legislative process leading to the 2017 IGA decision, they agreed to a more explicit supranational role in the energy diplomacy domain, but also limited the transfer of governing authority by denying the Commission a right to unilaterally enter negotiations.

Finally, cultivated spillover found expression in the Commission's active role as a policy entrepreneur. It framed the debate in a way that presented existing governance instruments suboptimal to ensure the integrity of the common market. These interventions reflect its intention of pursuing a 'more strategic approach' to compliance governance, including a strengthening of compliance assessment (European Commission, 2017, pp. 14–15). Moreover, it brokered compromise and built consensus among Member States and institutional actors. For instance, close cooperation ensured that the President of the European Council, Donald Tusk, as well as the chair of the responsible European Parliament Committee, Jerzy Buzek, shared the views embedded in the initial Commission proposal for the revised IGA decision.

## Conclusion

European external energy policy has become supranationalised despite Member State concerns over sovereignty. In this article, we demonstrate how this development is linked to the institutionalisation of a novel compliance instrument. 'Real-time compliance' enables the Commission to participate in and coordinate prompt compliance governance, ultimately strengthening supranational oversight in energy diplomacy. We further discuss how this shift in governance competence was enabled through (mainly functional) spillover-forces, driving integration in an area formerly characterised by national prerogatives.

Our findings have broader implications for research on compliance, European integration theories and external energy governance. Firstly, most compliance research in the EU emphasises supranational strategies to prevent Member States' non-compliance (Börzel, 2003; Falkner, 2018; Hartlapp, 2007; Scholten, 2017). Linking compliance instruments to the procedural expansion

of governing authority, this article reveals elements of compliance governance beyond this focus. Further research may investigate the relationship between available compliance tools, governance power and European integration, and address questions of democratic legitimacy and accountability.

Secondly, the evolution of governance through real-time compliance has implications for European integration theories. The Commission's central role contrasts the claims of new intergovernmentalism that Member States, represented in the European Council and the Council, define the main pace of integration in post-Maastricht Europe (Bickerton *et al.*, 2015). Particularly in times of strengthened nationalism and opposition to new competences for Brussels, procedural supranationalisation may become key for future integration without a Treaty change. This links governance through real-time compliance to ideas about a new supranationalism (Dehousse, 2015), as well as to an emerging body of literature which views the Commission as a policy entrepreneur gaining governance capacity in the energy realm through codified procedural obligations (Oberthür, 2019) and the 'harder' use of soft governance (Ringel & Knodt, 2018).

Finally, our findings have implications for the supranational role in external energy governance. It remains to be seen how sustainably the Commission will govern bilateral energy relations through real-time compliance and whether Member States appreciate such interventions or seek conflict. A limitation is that this article did not consider the case of a more powerful Member State, like Germany or France. It, therefore, merits studying whether such actors have restrained supranational ambitions to exert influence in external energy governance. Further research may also unveil the extent to which new governance capacities linked to procedural supranationalisation provide the EU with actor-ness in international negotiations and recognition by third countries (Gehring, Oberthür, & Mühleck, 2013) in external energy policy – and beyond.

## Notes

1. Interview C.
2. Directive 2009/73/EC.
3. Interview A, C, F.
4. Interview D.
5. *ibid.*
6. Interview B, C, F.
7. Interview C, D.
8. Interview C.
9. Directive 2003/55/EC.
10. Interview Q.
11. Interview O.
12. Interview E, G, K, M, N, O.
13. Interview N.
14. Interview D, Q.

15. Interview D.
16. Interview Q.
17. Interview J.
18. Interview D.
19. Interview K.
20. Interview D.
21. Interview M.
22. Interview A, B, C, D, G, H, I, N, P.
23. Interview H.
24. Interview C, P.
25. Regulation (EU) No 994/2010.
26. Interview E.
27. Interview E, L.
28. Interview C, L.
29. Interview L.
30. Decision (EU) 2017/684.
31. Council Regulation (EC) No 139/2004 and (EU) 2015/1589.
32. Interview C, D, G, N.

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## References

- Aalto, P. (2008). *The EU-Russian energy dialogue: Europe's future energy security*. Aldershot: Ashgate.
- Agence Europe. (2010, August 31). *Commission reservation regarding Poland/Russia gas agreement*.
- Bäckstrand, K., & Elgström, O. (2013). The EU's role in climate change negotiations: From leader to "leaditor". *Journal of European Public Policy*, 20(10), 1369–1386.
- Bickerton, C., Hodson, D., & Puetter, U. (2015). The new intergovernmentalism: European integration in the post-Maastricht era. *Journal of Common Market Studies*, 53(4), 703–722.
- Börzel, T. (2003) Guarding the treaty: The compliance strategies of the European Commission. In T. Börzel & R. Cichowski (Eds.), *The state of the European Union: Law, politics, and society* (pp. 197–220). Oxford: Oxford University Press.
- Buchan, D. (2015) Energy policy: Sharp challenges and rising ambitions. In H. Wallace, M. Pollack, & A. Young (Eds.), *Policy-making in the European Union* (7th ed., pp. 344–366). Oxford: Oxford University Press.
- Chiti, E. (2012) The governance of compliance. In M. Cremona (Ed.), *Compliance and the enforcement of EU law* (pp. 31–56). Oxford: Oxford University Press.
- Conant, L. (2012) Compliance and what EU member states make of it. In M. Cremona (Ed.), *Compliance and the enforcement of EU law* (pp. 1–30). Oxford: Oxford University Press.
- Cremona, M. (ed.). (2012). *Compliance and the enforcement of EU law*. Oxford: Oxford University Press.
- Dehousse, R. (2015, August 26). *The New Supranationalism*. Paper presented at the ECPR General Conference 2015, University of Montreal, Montreal.
- European Commission. (2010, November 4). *Statement on the Yamal-pipeline and the gas agreement between Poland and Russia*. SPEECH/10/620, Warsaw.
- European Commission. (2011, September 7). *Proposal for a decision setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy*. COM(2011) 540 final, Brussels.
- European Commission. (2016a, February 16). *Report from the Commission on the application of the Decision 994/2012/EU establishing an information exchange mechanism on intergovernmental agreements between Member States and third countries in the field of energy*. COM(2016) 54 final, Brussels.
- European Commission. (2016b, February 16). *Proposal for a decision on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU*. COM(2016) 53 final, Brussels.
- European Commission. (2017, January 19). *Communication from the Commission. EU law: Better results through better application*. 2017/C 18/02, Brussels.
- Falkner, G. (2018). A causal loop? The commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgments. *Journal of European Integration*, 40(6), 769–784.
- Gehring, T., Oberthür, S., & Mühleck, M. (2013). European Union actorness in international institutions: Why the EU is recognized as an actor in some international institutions, but not in others. *Journal of Common Market Studies*, 51(5), 849–865.
- Goldthau, A., & Sitter, N. (2014). A liberal actor in a realist world? The commission and the external dimension of the single market for energy. *Journal of European Public Policy*, 21(10), 1452–1472.

- Goldthau, A., & Sitter, N. (2015a) *A liberal actor in a realist world: The European Union regulatory state and the global political economy of energy*. Oxford: Oxford University Press.
- Goldthau, A., & Sitter, N. (2015b). Soft power with a hard edge: EU policy tools and energy security. *Review of International Political Economy*, 22(5), 941–965.
- Haas, E. (1958). *The uniting of Europe: Political, social, and economic forces 1950–1957*. London: Stevens.
- Hartlapp, M. (2007). On enforcement, management and persuasion: Different logics of implementation policy in the EU and the ILO. *Journal of Common Market Studies*, 45(3), 653–674.
- Herranz-Surrallés, A. (2015) European external energy policy: Governance, diplomacy and sustainability. In K. E. Jorgensen, A. K. Aarstad, E. Drieskens, K. Laatikainen, & B. Tonra (Eds.), *The SAGE handbook of European foreign policy* (pp. 913–927). Los Angeles: SAGE Publications.
- Herranz-Surrallés, A. (2016). An emerging EU energy diplomacy? Discursive shifts, enduring practices. *Journal of European Public Policy*, 23(9), 1386–1405.
- Hofmann, A. (2018). Is the commission levelling the playing field? Rights enforcement in the European Union. *Journal of European Integration*, 40(6), 737–751.
- Hofmann, B., Jevnaker, T., & Thaler, P. (2019). Following, challenging, or shaping: Can third countries influence EU energy policy? *Politics and Governance*, 7(1), 152–164.
- Maltby, T. (2013). European Union energy policy integration: A case of European Commission policy entrepreneurship and increasing supranationalism. *Energy Policy*, 55, 435–444.
- Marhold, A.-A. (2019). Externalising Europe’s energy policy in EU free trade agreements: A cognitive dissonance between promoting sustainable development and ensuring security of supply?. *Europe and the World: A Law Review*, 3(1), 1–18.
- Niemann, A., & Schmitter, P. (2009) Neofunctionalism. In A. Wiener & T. Diez (Eds.), *European integration theory* (2nd ed., pp. 45–66). Oxford: Oxford University Press.
- Oberthür, S. (2019). ‘Hard or soft governance? The EU’s climate and energy policy framework for 2030’. *Politics and Governance*, 7(1), 17–27.
- Oberthür, S., & Groen, L. (2018). Explaining goal achievement in international negotiations: The EU and the Paris agreement on climate change. *Journal of European Public Policy*, 25(5), 708–727.
- Pakalkaite, V. (2016, September). *Lithuania’s strategic use of EU energy policy tools: A transformation of gas dynamics* (OIES paper NG. 111).
- Peters, B., & Pierre, J. (2009) Governance approaches. In A. Wiener & T. Diez (Eds.), *European integration theory* (2nd ed., pp. 91–104). Oxford: Oxford University Press.
- Ringel, M., & Knodt, M. (2018). The governance of the European energy union: efficiency, effectiveness and acceptance of the winter package 2016. *Energy Policy*, 112, 209–220.
- Saurugger, S., & Terpan, F. (2016). Resisting ‘new modes of governance’: An agency-centred approach. *Comparative European Politics*, 14(1), 53–70.
- Scholten, M. (2017). Mind the trend! enforcement of EU law has been moving to “Brussels”. *Journal of European Public Policy*, 24(9), 1348–1366.
- Scholten, M., & Scholten, D. (2017). From regulation to enforcement in the EU policy cycle: A new type of functional spillover? *Journal of Common Market Studies*, 55(4), 925–942.
- Szulecki, K., Fischer, S., Gullberg, A., & Sartor, O. (2016). Shaping the “Energy Union”: between national positions and governance innovation in EU energy and climate policy. *Climate Policy*, 16(5), 548–567.

- Tallberg, J. (2000). Supranational influence in EU enforcement: The ECJ and the principle of state liability. *Journal of European Public Policy*, 7(1), 104–121.
- Tallberg, J. (2002). Paths to compliance: Enforcement, management, and the European Union. *International Organization*, 56(03), 609–643.
- Thaler, P. (2016). The European Commission and the European Council: Coordinated agenda setting in European energy policy. *Journal of European Integration*, 38(5), 571–585.
- Thaler, P. (2020). *Shaping EU Foreign policy towards Russia: Improving coherence in external relations*. Cheltenham: Edward Elgar.
- Tranholm-Mikkelsen, J. (1991). Neo-functionalism: Obstinate or obsolete? A reappraisal in the light of the new dynamism of the EC. *Millennium: Journal of International Studies*, 20(1), 1–22.
- Verdun, A., & Zeitlin, J. (2018). Introduction: The European semester as a new architecture of EU socioeconomic governance in theory and practice. *Journal of European Public Policy*, 25(2), 137–148.
- Vooren, B., & Wessel, R. (2014) *EU external relations law: Text, cases and materials*. Cambridge: Cambridge University Press.

## Appendix

### List of interviews

| Interview | Affiliation of interview partner |
|-----------|----------------------------------|
| A–E       | European Commission              |
| F–G       | European External Action Service |
| H–O       | EU Member State                  |
| P         | International Organisation       |
| Q         | Independent expert               |