

# WHAT IS THE SCOPE OF THE EU EXTERNAL COMPETENCE IN THE FIELD OF ENERGY TODAY?

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Note : the following analysis made by Ms Chrysanthi Tramountana is part of her thesis to obtain her Master at the College of Europe. This thesis has been awarded in June 2019 by the Jacques Delors Institute as a remarkable contribution to the development of the Energy Union. In spite of the Clean Energy Package for all Europeans being successfully adopted in June 2019 and the completion of the internal energy market, the external dimension of the latter continued to be considered as a matter of competence of the Member States, as witnessed by the NordStream saga described earlier in the [policy brief of the Jacques Delors Institute, written by Jean-Arnold Vinois and Thierry Bros](#).

*The analysis made below demonstrates that the European Commission should not be shy in defending directly the EU positions in respect of third countries by using the collective power of the European Union, through international negotiations. This analysis supports the conclusions and recommendations made in the abovementioned policy brief.*

## Introduction and scene setting ■

The EU as subject of international law has been thoroughly analyzed by the doctrine and case-law in both pre-Lisbon and post-Lisbon era. The Union's ability to undertake international obligations, conclude international agreements and participate in international organisations derives from the legal personality attributed to the EU.<sup>1</sup> Under the principle of conferral,<sup>2</sup> there are specific areas where the Union has exclusive competence to conclude agreements with third States,<sup>3</sup> whereas in terms of shared competence between the EU and Member States, the international agreements concerned are usually concluded as mixed agreements, where the duty of sincere cooperation

between the Member States and European institutions comes into play.<sup>4</sup>

Nevertheless, the exclusive external competence of the EU in a specific field of policy may also result not from an explicit legal basis for external action in the Treaties, but rather implicitly from other Treaty provisions due to the fact that measures were implemented within their framework<sup>5</sup> or for the attainment of a specific objective for which the EU has the competence to act in the internal front.<sup>6</sup> The *rationale* behind this doctrine of implied powers –already codified in the Treaty of Lisbon–<sup>7</sup> is related to the unity, consistency and full effectiveness of EU law.<sup>8</sup> In other words, it would not be possible for the EU project to promote its objectives if it was powerless in the international scene. What would be achieved in the internal front would be easily compromised if Member States had the competence to make different arrangements in international *fora*, arrangements that would have also been obliged to abide by, under the general principle of international law '*pacta sunt servanda*'.

1. Article 47 TEU.

2. Article 2 TFEU.

3. For the purpose of our analysis, see Articles 3(1)(e) and 207 TFEU.

4. Article 4(3) TEU.

5. Judgment of 31 March 1971, *Commission v Council (ERTA)*, C-22/70, EU:C:1971:32, paragraph 16.

6. Opinion of 26 April 1977, *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels*, Opinion 1/76, EU:C:1977:63, paragraph 3; Opinion of 19 March 1933, *Convention No 170 of the International Labour Organisation Concerning Safety in the Use of Chemicals at Work*, Opinion 2/91, EU:C:1993:106, paragraph 7.

7. Articles 3(2) and 216 TFEU.

8. Opinion of 7 February 2005, *Lugano Convention*, Opinion 1/03, EU:C:2006:81, paragraph 128.

On the other hand, the now explicit legal basis for energy, provided in Article 194 TFEU, creates considerable doubts as to the delimitation of competence between the EU and Member States when it comes to the conclusion of international agreements. However, as –under the circumstances of Europe’s high dependency on third supplier countries– this is not a minor matter, but rather a vital one for the Union’s security and sustainability in the future, it should not remain a disputed issue.

To the author’s view, when it comes to infrastructure projects affecting security of supply or long-term supply contracts with third countries, and given the interconnection and integration of the EU Internal Market, those agreements can no longer be deemed as related to a sole Member State. On the contrary, the whole Union’s interest and security of energy supply is at stake, thus the issue should be addressed as an EU matter, rather than as some Member State’s national interest.

To that extent, the ideal proposal would be the amendment of the Lisbon Treaty in order not anymore to constitute a carefully drafted political compromise with no added value, but rather to realistically face the challenge of energy security and treat it as one of the most vital issues for the further realisation of the European project. Otherwise, the Union will remain “an easy target for divide-and-rule policies by third-country suppliers and especially Russia”,<sup>9</sup> further exposed to geopolitical games and pipeline politics, and lost between balancing divergent Member States’ national interests and the leverage exercised by third supplier countries. It is for this reason why an amendment to Article

194 TFEU should be made so as to provide the EU with express exclusive competence, or at least stop reserving national competence in terms of energy mix and the general structure of supplies.

However, as this might not seem feasible at the moment, we can instead analyse the extent to which the EU can assume exclusive competence in the scope of the Treaty as it currently stands. One last point to be made is that according to settled case-law, the question of whether the EU can assume implicit competence in the international scene –especially when it comes to an exclusive one– must be made *ad hoc* in accordance with a “a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules”.<sup>10</sup>

Drawing inspiration from the Commission’s request for a mandate to negotiate an Agreement with Russia on the regulatory framework applicable to Nord Stream 2,<sup>11</sup> and more specifically, not only the hesitance of the majority of Member States to allow the EU to negotiate but also the Legal Opinion of the Council finding the EU incompetent, as well as from the fact that back in 2011, the Commission was given the mandate to negotiate an Agreement on the Trans-Caspian Pipeline with Azerbaijan and Turkmenistan<sup>12</sup> –a project that never came into reality, the available legal instruments for the Union assuming exclusive competence in the international energy scene are now going to be analysed. After all, traditionally in the EU External Relations law, it is the interplay between formal provisions and

9. S. Andoura and J. Vinois, From the European Energy Community to the Energy Union: A Policy Proposal for the Short and the Long Term, Notre Europe, 2015, p.92, retrieved 30 October 2019, <http://www.institutdelors.eu/wp-content/uploads/2018/01/energyunion-andouravinois-jdi-jan15.pdf>.

10. *Lugano Convention*, *supra* note 8, at 124.

11. *Commission Seeks a Mandate from Member States to Negotiate with Russia an Agreement on Nord Stream 2*, Commission, Press Release, 2017, retrieved 30 October 2019, [http://europa.eu/rapid/press-release\\_IP-17-1571\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1571_en.htm).

12. Council Decision, To Authorise the Commission to Negotiate an Agreement between the Republic of Azerbaijan, the Republic of Turkmenistan and the European Union on a Legal Framework for a Trans-caspian (Natural Gas) Pipeline System, Partial Declassification, 11.11.2014, retrieved 30 October 2019, <http://data.consilium.europa.eu/doc/document/ST-11315-2011-REV-3-EXT-1/en/pdf>.

actual needs that results in innovative solutions.<sup>13</sup>

## 1 ■ Exclusive competence under the Common Commercial Policy legal basis

International agreements in the energy sector, especially in terms of supply or infrastructure, can be concluded on the CCP legal basis, provided in Articles 3(1) and 207 TFEU, rather than on the ambiguous energy provision. Although the CCP did not always constitute an expressly exclusive competence, it was rapidly evolved as such in the pre-Lisbon case-law. The *rationale* behind this –by nature– exclusivity lies in the need for consistency, coherence and effectiveness in the Union’s commercial interests, as well as in the risk of potentially distorting competition and compromising the functioning of the Single Market if Member States were to make different arrangements in their trade policies with third countries.<sup>14</sup>

For this purpose, the CJEU had always adopted a “sweeping approach”,<sup>15</sup> adjudicating that if the agreement in question was at least partly related to trade, the conclusion of the whole agreement would be based on the CCP,<sup>16</sup> the scope of which was thus considerably expanded. The Member States responded to this *de facto* expansion of the Community’s exclusive competence by incorporating explicit legal bases in the successive revisions of the Treaties in view

of delimiting in advance the competences between them and the Community.<sup>17</sup>

An interesting example –with multiple implications for the newly established legal basis for energy, is the then newly established legal basis for environmental policy in the Single European Act. In the first case of an international agreement with both a trade and environmental aspect,<sup>18</sup> and in order to provide the new environmental legal basis with what is called *effet utile*, the Court recognised that the CCP would now have to be interpreted in a narrower way, leaving space for the new legal basis to produce effect.<sup>19</sup>

However, this is not the case on the subsequent *Energy Star Agreement* judgment,<sup>20</sup> where the CJEU deployed a “*centre of gravity test*”.<sup>21</sup> According to this, if the effects on trade of the agreement in question are ‘direct and immediate’<sup>22</sup>, whereas the environmental effects are only ‘indirect and distant’,<sup>23</sup> then the agreement will be based on a sole legal basis, namely that of the CCP.

The case concerned an agreement between the Community and the United States on the implementation of a common energy-efficient labelling program for office equipment. On the one hand, the agreement was facilitating trade by allowing manufacturers to apply one single standard, the Energy Star logo, so as to sell their products on both American and European markets. On the other hand, the agreement was intended to

13. See M. Cremona, “EU External Relations: Unity and Conferral of Powers”, in L. Azoulay (ed.), *The Question of Competence in the European Union*, New York, Oxford University Press, 2014, p.65, at 85.

14. See M. Cremona, “External Relations and External Competence of the European Union: the Emergence of an Integrated Policy”, in P. Craig and G. De Burca (eds.), *The Evolution of EU Law*, 2nd ed., Oxford, Oxford University Press, 2011, p.217, at 246.

15. See I. Govaere, “EU Common Commercial Policy Throwing off Shackles of ‘Midity’”, in I. Govaere, R. Quick and M. Bronckers (eds.), *Trade and Competition Law in the EU and Beyond*, Cheltenham, Edward Elgar Publishing, 2011, p.144, at 146-152.

16. Opinion of 4 October 1979, *International Agreement on Natural Rubber*, Opinion 1/78, EU:C:1979:224.

17. Govaere, *supra* note 15.

18. Opinion of 6 December 2001, *Cartagena Protocol on Biosafety*, Opinion 2/00, EU:C:2001:664.

19. Govaere, *supra* note 15.

20. Judgment of 12 December 2002, *Energy Star Agreement*, C-281/01, EU:C:1971:32.

21. Govaere, *supra* note 15.

22. *Energy Star Agreement*, *supra* note 20, at 39-43.

23. *Ibidem*.

promote energy-efficient products, and thus reduce energy consumption.

The Court reiterated established case-law that the choice between two legal bases constitutes an objective assessment of factors, such as ‘the aim and the content’ of the measure at stake. If said assessment suggests that the measure simultaneously pursues two objectives, whereas the one is deemed as ‘the main or predominant’ one, the agreement must be concluded on the sole legal basis related to this specific objective. On the contrary, it is only exceptionally that an agreement can be based on a dual legal basis, when the two objectives are ‘inseparably linked’.

Subsequently, the CJEU found that the Energy Star Agreement was simultaneously pursuing a commercial and an environmental-protection purpose, the former being predominant in comparison to the latter. Although the Agreement was related to an energy-efficiency program, it was found to have a direct effect on trade, thus it had to be concluded based on the CCP under the exclusive competence of the Community. This was the conclusion of the Court at a time when there was an explicit legal basis for environmental-protection measures.

The abovementioned analysis clearly indicates that the Court insists on an extended CCP scope, which is not limited to a simple external projection of the Internal Market, but it is also deployed in relation to other explicit legal bases in the Treaties, such as the environment or energy, so as to provide the EU with the armoury of exclusive competence in its relations with third States.<sup>24</sup>

The extended scope of the CCP through the ‘direct and immediate effect on trade’ test

survives the post-Lisbon era,<sup>25</sup> whereas Article 207(1) TFEU now explicitly contains ‘the achievement of uniformity in measures of liberalisation’ as one of the concepts falling under the CCP legal basis. It follows that an energy-related agreement on a project, such as the Nord Stream 2 Pipeline, would have a direct effect on trade, since its predominant objective would be to facilitate gas trade between Gazprom and European companies by ensuring the flow of Natural Gas in the EU Internal Energy Market. The latter is regulated by the Third Energy Package which provides free Competition rules having to be applied homogeneously, without any risk of being compromised due to divergent bilateral agreements with third-country suppliers, such as Russia. For all the above reasons, to the author’s view, such an agreement would fall under the exclusive competence of the EU, based on the CCP. The strong political element of such agreements, being an obstacle to the Union’s assuming of exclusive competence, is acknowledged but cannot in itself prevent the applicability of the CCP, as evident by Opinion 1/78 of the Court.<sup>26</sup>

## 2 ■ Exclusive competence under the ERTA doctrine

On the alternative, if the CCP cannot be deemed applicable, the Court has formulated the doctrine of implied powers in order to safeguard the internal *acquis*, through the preservation of external unity.<sup>27</sup> The famous *ERTA judgment* suggests that enhancing the Community’s position in the international scene and ensuring the autonomy of its legal order is more important for the European project than the scope of its powers.<sup>28</sup> Additionally, when it comes to the safeguarding of the Internal Market, the Court has

<sup>24</sup>. Cremona, in Craig and De Burca, *supra* note 14, p.225.

<sup>25</sup>. Judgment of 18 July 2013, *Daiichi Sankyo*, C-414/11, EU:C:2013:520, paragraph 51.

<sup>26</sup>. *Opinion 1/78*, *supra* note 16.

<sup>27</sup>. Govaere, *supra* note 15, p.149.

<sup>28</sup>. Cremona, in Craig and De Burca, *supra* note 14, p.219.

proven to be considerably innovative and dynamic.<sup>29</sup>

In 1970, the Commission requested the annulment of Council proceedings for the negotiation of the European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport by the Member States, due to the fact that the Community had already harmonised social legislation for road transport, thus it should be the one to make such negotiation. The Commission was based on the *ratio legis* of the common transport policy provision and on common sense for the *effet utile* of said provision. Turning to an interpretation based on the general system of Community law, the CJEU adjudicated the following:<sup>30</sup>

*“Each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.*

*As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.*

*[...] (T) o the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the*

*framework of the Community institutions, assume obligations which might affect those rules or alter their scope.”*

It follows that the consequence of having the Union legislating in a specific area, namely the prohibition on Member States to act,<sup>31</sup> is also applicable to its external action so as to ensure the unity, consistency and full effectiveness of EU law.<sup>32</sup> The principle of pre-emption applies even in the case of no contradiction between the Member States’ action and that of the EU’s common rules.<sup>33</sup>

The codification of the ERTA doctrine in Article 3(2) and 216 TFEU provides an independent source for the Union’s competence based not on the subject matter but rather on the legal instrument the EU has utilised.<sup>34</sup>

The reason is that on an area of shared competence, the EU may have legislated and thus prevented Member States from acting, but it is also likely that the whole area is not covered by EU law, thus there are certain choices to be made by the Member States. In order to safeguard the unity of the internal *acquis* on the outside, the Court has always deployed ‘an area which is already covered to a large extent by Community rules’ test,<sup>35</sup> meaning that if the area has been largely covered by EU law, then the mere competence of Member States to act in some aspects of their internal legal order does not preclude the Union’s competence from being exclusive in its external action. The test is based on an examination of the ‘scope’, the ‘content’ and the ‘nature’ of the measures at

29. I. Govaere, “L’Etablissement des Règles des Marchés Nationaux ou Régionaux: de l’Etat Régulateur Souverain aux Organisations d’Intégration Régionale Promotrices, Protectrices et Intermédiaires”, (2003) 3-4, *Revue Internationale de Droit Economique*, p.313-337, at 324-326.

30. *ERTA*, *supra* note 5, at 17-22.

31. Article 2(2) TFEU.

32. *Opinion 1/03*, *supra* note 8, at 128.

33. Judgment of 4 September 2014, *Commission v Council (Protection of Neighbouring Rights of Broadcasting Organisations)*, C-114/12, EU:C:2014:2151, paragraph 71.

34. See F. Castillo De La Torre, “The Court of Justice and External Competences after Lisbon: some Reflections on the Latest Case Law”, in P. Eeckhout and M. Lopez-Escudero (eds.), *The European Union’s External Action in Times of Crisis*, Oxford, Hart Publishing, 2016, p.129, at 158-162.

35. *Opinion 2/91*, *supra* note 6, at 25-26.

stake, taking also into consideration foreseeable future developments of EU law.<sup>36</sup>

The incorporation in the successive Treaty revisions of new legal bases with an explicit external power, such as the environmental-protection provision in the Single European Act, has rendered the doctrine less indispensable for the EU assuming external powers. Nevertheless, it is still necessary for policies without an express reference to external competence, such as energy,<sup>37</sup> especially taking into account that the external energy policy is highly interrelated with the Internal Energy Market,<sup>38</sup> in a way that every international energy agreement can potentially have a major impact on the internal *acquis*, 'affecting or altering the scope' of the liberalisation rules brought about by the Third Energy Package.

In the example of Nord Stream 2, the relevant agreement with Russia would be likely to 'affect or alter' free competition rules applicable in the Internal Energy Market, since the project is an off-shore pipeline not subject to the common rules for the functioning of the internal Natural Gas market, provided in Directive 2009/73/EC<sup>39</sup> and Regulation 715/2009.<sup>40</sup> Consequently, the Natural Gas coming from Russia and entering the EU market –being a fully integrated and interconnected market– through Germany, will not be regulated in accordance with the most fundamental principles of EU energy law.

Therefore, and in order to safeguard the unity, consistency and full effectiveness of EU law, the principle of pre-emption should be applied, and the EU should assume exclusive competence in the negotiations with

Russia. The mere fact that, under the Third Energy Package, Member States retain some margin of manoeuvre with regards to internal measures does not in itself preclude such exclusive competence on the part of the Union. Taking into consideration the 'scope', the 'content' and the 'nature' of the liberalisation measures in question, in conjunction with the fact that the process of liberalisation of the energy market has taken decades, as well the fact that after the Third Energy Package, the EU did not stand still but rather established the Energy Union, in view of further strengthening Internal Energy Market, energy security and the position of the EU in the international energy scene, the area must be considered as 'largely covered' by EU law and the Union should be able to assume exclusive competence based on Article 3(2) TFEU.

The author suggests that even in the absence of such a link between the international agreement at stake and the functioning of the Internal Market, the EU could still assume exclusive external competence on the energy sector, "*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*".<sup>41</sup> By codifying the ERTA doctrine, the Lisbon Treaty appears to provide a general 'catch-all' competence, by breaking the link in the internal power the EU needs to acquire for the external competence to come into play. No longer is there the obligation for the Union's participation in the international scene, to have the internal powers for the specific objective pursued; what is only needed now is that it will concern at least one of the Treaty objectives –including the broadly-drafted ones in Article 21 TEU– and

<sup>36</sup>. *Opinion 1/03*, *supra* note 8, at 126.

<sup>37</sup>. C. Blumann, "Les Compétences de l'Union Européenne dans le Domaine de l'Energie", (2009-2010) 4, *Revue des affaires européennes*, p.7737-748, at 747.

<sup>38</sup>. Cremona, in Craig and De Burca, *supra* note 14, p.222.

<sup>39</sup>. Directive 2009/73/EC of July 13, 2009, concerning Common Rules for the Internal Market in Natural Gas, [2009] O.J. L211/94.

<sup>40</sup>. Regulation 715/2009 of July 13, 2009, on Conditions for Access to the Natural Gas Transmission Networks, [2009] O.J. L211/36.

<sup>41</sup>. Article 216 TFEU.

that the action will be ‘within the framework of the Union’s policies’.<sup>42</sup>

In the example of a potential international agreement with Russia on Nord Stream 2, the abovementioned conditions would be fulfilled, since the project is related to energy security –the issue of security is one of the main objectives of the Union’s external action, as enshrined in Article 21(2) (a) TEU– and it comes within the framework of the energy policy of the EU. Hence, in any case, the EU can assume exclusive external competence in the energy sector, based on Articles 3(2) and 216 TFEU.

### 3 ■ Mixed international agreements and the solidarity principle

Following the series of cases mentioned above, namely the Opinion 2/00 on the *Cartagena Protocol* where the Court ruled in favour of the environmental-protection legal basis, and the *Energy Star Agreement case* where the CJEU decided that the CCP legal basis shall apply, the later *Rotterdam Convention case* exceptionally accepted a dual legal basis and implied the conclusion of a mixed international agreement.<sup>43</sup>

The difference between the two previous legal instruments for the Union’s assuming external exclusive competence in the international energy scene lies in the fact that the CCP provides for an *a priori* EU exclusive competence, while the competence based on Articles 3(2) and 216 TFEU arises from the adoption of internal measures that could

be affected or altered by the external measure.<sup>44</sup> As the scope of the internal measures might be narrower, the relevant external competence might not arise as an exclusive one, but rather remain shared between the Union and the Member States. Under those circumstances, the unity, consistency and full effectiveness of EU law is still preserved, through the Member States’ obligation to comply with the principle of sincere cooperation.<sup>45</sup>

Indeed, where agreements with a high political element are concerned, such as the ones with third-country suppliers, the unity of the Union might be preserved through the joint action of the EU and all Member States together, “with the powerful signal of concerted action that this sends”.<sup>46</sup> Then, the legal issue arisen is the extent and the scope of the legal obligation imposed on the Member States.

Although it is true that the ‘solidarity principle’ in Article 194 TFEU, as *lex specialis* to the principle of sincere cooperation for the energy policy, has no specific definition at EU law,<sup>47</sup> allowing its interpretation as of a mere declaratory nature, this is nevertheless an isolated opinion in theory. Taking into consideration the evolution of EU energy law, it is majority view that the ‘solidarity principle’ does not provide for a mere code of conduct, but rather carries with it special duties. To illustrate, it is not unlikely that unilateral actions on behalf of a Member State in the international energy scene, in contradiction with the ‘solidarity principle’, will lead

<sup>42</sup>. Cremona, in L. Azoulay, *supra* note 13, p.73.

<sup>43</sup>. Govaere, *supra* note 15.

<sup>44</sup>. See I. Govaere, “External Competence: What’s in a Name? The Difficult Conciliation between Dynamism of the ECJ and Dynamics of European Integration”, in P. Demaret, I. Govaere and D. Hanf (eds.), *European Legal Dynamics / Dynamiques Juridiques Européennes*, Brussels, PIE-Peter Lang, 2007, p.461, at 463.

<sup>45</sup>. Article 4(3) TEU.

<sup>46</sup>. Cremona, in L. Azoulay, *supra* note 13, p.77.

<sup>47</sup>. S. Andoura, *Energy Solidarity in Europe: From Independence to Interdependence*, Notre Europe, 2013, p.12, retrieved 30 October 2019, <http://www.institutdelors.eu/wp-content/uploads/2018/01/energysolidarity-andoura-ne-ijd-july13.pdf?pdf=ok>.

to the infringement proceedings of Article 258 TFEU.<sup>48</sup>

In the *PFOS* case, the CJEU found Sweden in breach of the duty of sincere cooperation because in a shared competence area, there was ‘a concerted Community action at international level’, requiring ‘if not a duty of abstention on the part of the MS, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks’.<sup>49</sup> What is interesting in this case is that the Court found such ‘concerted action’ to have started on the basis of a Commission proposal to the Council, which was nevertheless not adopted yet.<sup>50</sup>

#### 4 ■ What could it mean for the case of Nord Stream 2

For the author, the implications of such case-law in the example of Nord Stream 2 are clear, implying that the Commission’s proposal to the Council in 2017, for the negotiation on behalf of the EU of the legal framework applicable to the project, marks the departure of a ‘concerted action at international level’. Hence, the Member State concerned, namely Germany, now has the obligation to abstain from unilateral decisions towards Russia, or at least closely cooperate with the Commission in terms of the project.

Furthermore, if the agreement needed to be concluded with Russia in order to safeguard the internal energy *acquis*, is not concluded under the exclusive external competence of the Union, then it shall in any case be concluded as a mixed agreement, through the joint participation of the EU and the

Member States, in accordance with the ‘solidarity principle’.

#### 5 ■ The Green Network case as a leading light

The case concerns a request for a preliminary ruling,<sup>51</sup> as to whether an Agreement between Italy and Switzerland on green certificates, needed for electricity importers to justify the ‘green electricity’ quotas imposed by the national support scheme, designed in pursuance of the Second Energy Package, was falling under the exclusive external competence of the EU in the energy sector.

The CJEU proceeded on the ‘area already largely covered by EU law’ test, assessing the content of the Agreement in comparison with the content of Directive 2001/77<sup>52</sup> on the promotion of electricity produced from renewable energy sources in the internal electricity market. On the one hand, the Court found that such Agreement on green certificates was likely to affect the harmonised certification mechanism provided in Article 5 of the Directive, since it would allow certificates issued in a third country to be incorporated in the Internal Market. On the other hand, the Agreement was deemed to also interfere with the objectives of the Directive, in promoting the increase of renewable energy consumption in the energy mix of the Member States.

Taking also into consideration future developments of EU energy law, in view of the fact that the Court had to deliver its judgment almost ten years later, when the Third Energy Package had already been implemented, the Court concluded that such Agreement was likely to affect or alter the internal common

<sup>48</sup> T. Galanis, *Solidarity in the EU Legal Order: an Attempt to Approach a Founding Principle of EU Law*, Athens, Nomiki Bibliothiki, 2017, p.133-135 (in Greek).

<sup>49</sup> Judgment of 20 April 2010, *Commission v Sweden (PFOS)*, C-246/07, EU:C:2010:203, paragraphs 74-75.

<sup>50</sup> *Ibidem*, at 103.

<sup>51</sup> Judgment of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399

<sup>52</sup> Directive 2001/77/EC of September 27, 2001, on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market, [2001] O.J. L283/33.

rules, and thus it was falling under the exclusive competence of the Community.

What is also interesting is that the Court acknowledged that the Directive was leaving a wide margin of manoeuvre to Member States in relation to their designing of their national support scheme, but nevertheless adjudicated that such internal national powers do not prevent the EU from assuming exclusive external competence. This was also a point made by Advocate General Bot, in his Opinion for the case.<sup>53</sup> The *rationale* is that an international agreement, if concluded wrongly, will affect EU law in a more permanent way than a national law, which can easily be amended or abolished.<sup>54</sup>

One final point that should be made is that the issue at stake constitutes an *a priori* issue of energy mix choice, which normally remains under national competence, according to Article 194 TFEU. Therefore, the Court has ruled in favour of further European integration in the energy sector, moving forward to a broader interpretation of the energy legal basis, in conjunction with Articles 3(2) and 216 TFEU, in order to equip the EU with the effective tool of exclusive competence in the international energy scene.

However, this is not the case in the Nord Stream 2 Pipeline, where not only the Member States themselves, but also the Council's Legal Service, seemed extremely reluctant to go down this road. More specifically, as a response to the Commission's

seeking of a mandate to negotiate with Russia an Agreement on Nord Stream 2, the Council's Legal Service stood against EU's exclusive competence and concluded that the issue of whether the EU should negotiate such agreement, sending the message of a Union speaking with one voice, is of a political nature, rather than of a legal one.

Reversing this argument about the legal versus political nature of the mandate, the author is not persuaded that the underlying matter itself was indeed decided based on legal arguments and not in view of the strong political element inherent to international energy agreements, especially with Russia. In other words, it is not clear whether the problem was founded on the delimitation of competence between the Union and its Member States or on the prevailing national interests and the lack of solidarity which marks European integration from its very beginning.

To conclude and to the author's view, and as analysed before using the 'direct and immediate effect on trade' and the 'area largely covered by EU law' tests, the EU could be regarded as exclusively competent to negotiate and conclude such agreement, based on Articles 3(1) and 207 TFEU, and 3(2) and 216 TFEU, respectively. Hence, it is doubted whether the CJEU would have the same opinion as with the Legal Service of the Council, if the case was brought in Court.

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<sup>53</sup>. Opinion of AG Bot in Case C-66/13, *Green Network*, delivered on 13 March 2014, paragraph 79.

<sup>54</sup>. Castillo De La Torre, *supra* note 34, p.154-157