RAUE LLP

Legal Impact Assessment of the Framework Guidelines on Capacity Allocation Mechanisms for the European Gas Transmission Network

for

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Chapter 1:
Facts

A.
Consultation of Framework Guidelines

On 3 March 2011 the Agency for the Cooperation of Energy Regulators ("**ACER**") published Framework Guidelines on Capacity Allocation Mechanisms for the European Gas transmission network ("**FG-CAM**") for consultation until 2 May 2011. ACER has prepared the FG-CAM pursuant to Article 6 of Regulation (EC) No. 715/2009 (the "**Gas Regulation**") and on the basis of a request from the European Commission (the "**Commission**"). ACER plans to submit the revised FG-CAM at the beginning of July 2011 to the Commission.

According to Paragraph ("**para.**") 1.1 FG-CAM the Framework Guidelines aim at setting out clear and objective principals for the development of network codes pursuant to Article 6 (2) of the Gas Regulation. The network codes adopted on the basis of the FG-CAM shall be applied by Transmission System Operators ("**TSOs**").

I.
Principle of Bundling

Para. 2.4.1 of the FG-CAM describes the principal of bundled capacity ("**Principle of Bundling**") as follows:

> "The network code(s) shall set out that Transmission System Operators jointly offer bundled firm capacity services. The corresponding exit and entry capacity available at both sides of every point connecting adjacent entry-exit systems shall be integrated in such a way that the transport for gas from one system to an adjacent system is provided on the basis of a single allocation procedure and single nomination.
>
> In order to progressively bundle the entire technical capacity at a given interconnection point, capacity becoming available on one side of an interconnection point exceeding the available capacity on the other side of the same interconnection point shall be allocated for a duration not exceeding the expiration date of the corresponding capacity on the other side of the border. Transmission system operators shall seek to maximise the bundled capacity and to accelerate the bundling of capacity at interconnection

> points by encouraging their network users to free up their capacity booked on one side of interconnection points before its expiration date."

II.
Sunset Clause

With respect to existing capacity contracts, para. 2.4.2 of the FG-CAM (the "**Sunset Clause**") regulates the amendment of existing capacity contracts as follows:

> "The network code(s) shall ensure that existing capacity contracted before the entry into force of legally binding network code(s) shall be bundled no later than five years thereafter. Network users holding existing capacity contracts should aim at reaching an agreement on the split of the new bundled capacity. National regulatory authorities may moderate between the parties.
>
> If no agreement on the split of bundled capacity can be reached, the network code(s) shall entitle Transmission System Operators to split the bundled capacity between the original capacity holders proportionally to their capacity rights. The duration of the new bundled services shall not exceed the duration of the original capacity contracts they are built upon. Any further details of this procedure shall be set out in the network code(s).
>
> Network codes are not meant and do not regulate supply contracts, only capacity contracts. Insofar as these Framework Guidelines could have an effect on supply contracts, implementation of network codes shall not entitle contracting parties to cancel supply contracts. It could only serve to separate and amend the capacity contract if this is included in the supply contract."

Further, para. 1.3 FG-CAM stipulates that generally the adaptation of existing transportation agreements to the network codes shall be conducted according to the following rules:

> "The network code(s) shall provide that Transmission System Operators amend all relevant clauses in capacity contracts and/or relevant clauses in general terms and conditions relating to the allocation of capacity at relevant interconnection points, as defined in paragraph 1.2, in accordance with the terms of the network code. The relevant clauses shall be amended within six months after entry into force of the network code. This requirement shall apply regardless of whether the relevant contracts or general terms

and conditions provide for such an amendment. Paragraph 2.4.2 remains unaffected.

Upon expiry of transportation contracts the relevant capacity provisions shall not be subject to tacit extension."

B.
Implementation and Expected Effects of Bundling

I.
Implementation

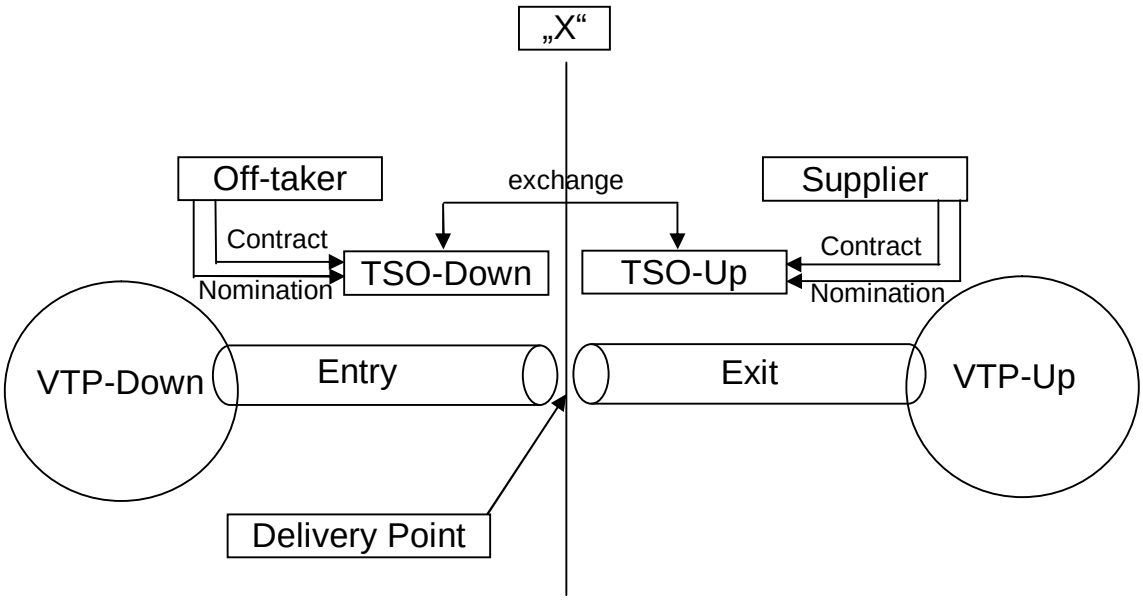
The FG-CAM do not specify in detail how the Principle of Bundling shall be implemented by TSOs and gas shippers (the "**Shippers**"). Such details are to be stipulated in a network code. According to para. 1.4 FG-CAM, the network code shall define the standardised content of transmission capacity contracts and of general terms and conditions for capacity allocation and capacity services.

In order to assess the need for changes in the future under the new network codes, it is helpful to examine the current procedure for capacity allocation, booking, nomination, and supply, before analyzing how this procedure needs to be changed in order to implement the Principle of Bundling as envisaged by the FG-CAM.

1. Current Procedure

If two Shippers want to exchange gas via a cross-border interconnection point ("**X-Interconnector**"), the supplier and the off-taker need to book both exit capacity in the network of the upstream TSO ("**TSO-Up**") and entry capacity in the network of the downstream TSO ("**TSO-Down**"). Typically, the supplier books the exit capacity upstream and the off-taker the entry capacity downstream. In order to execute the transport, the supplier nominates the gas volumes day-ahead with his shipper-code to the TSO-Up and the off-taker the same volumes with his shipper-code to the TSO-Down. The two TSOs then have to exchange the respective nomination information. If the two nominations match, the transport will be executed by the two TSOs. In this case, the supply contract between supplier and off-taker typically defines the X-Interconnector as the point of delivery. As a consequence, each party bears the transport costs and risks on "its" side of the X-Interconnector.

This procedure can be illustrated as follows:



2. Future Procedure

In order to bundle capacity allocation and nomination according to para. 2.4.1 FG-CAM, various models are discussed. We have identified three proposals for models to implement the Principle of Bundling:

a) Model 1

Under Model 1, either the supplier or the off-taker books the combined bundled capacity from both TSOs jointly. Such bundled capacity would include the services formerly separated into exit-capacity upstream and entry-capacity downstream. The Shipper booking the capacity would conclude one single transport contract, but with both TSOs as contracting counterparties of the said same contract. The two TSOs would have to cooperate in order to execute the capacity services being part of this contract. In order to initiate the gas flow from the upstream network to the downstream network, the procedures would differ depending on who has booked the capacity:

- If the supplier booked the bundled capacity (“**Model 1.1**”), he will nominate the gas flows – according to the rules of the capacity contract – either

- to both TSOs ("**Model 1.1.a**"), or
- only to one TSO to be defined in the capacity contract ("**Model 1.1.b**").

In both cases, there will only be a one nomination, which however may in the first case need to be addressed to two parties. In the second case, the TSOs would have to cooperate in order to exchange the nomination information.

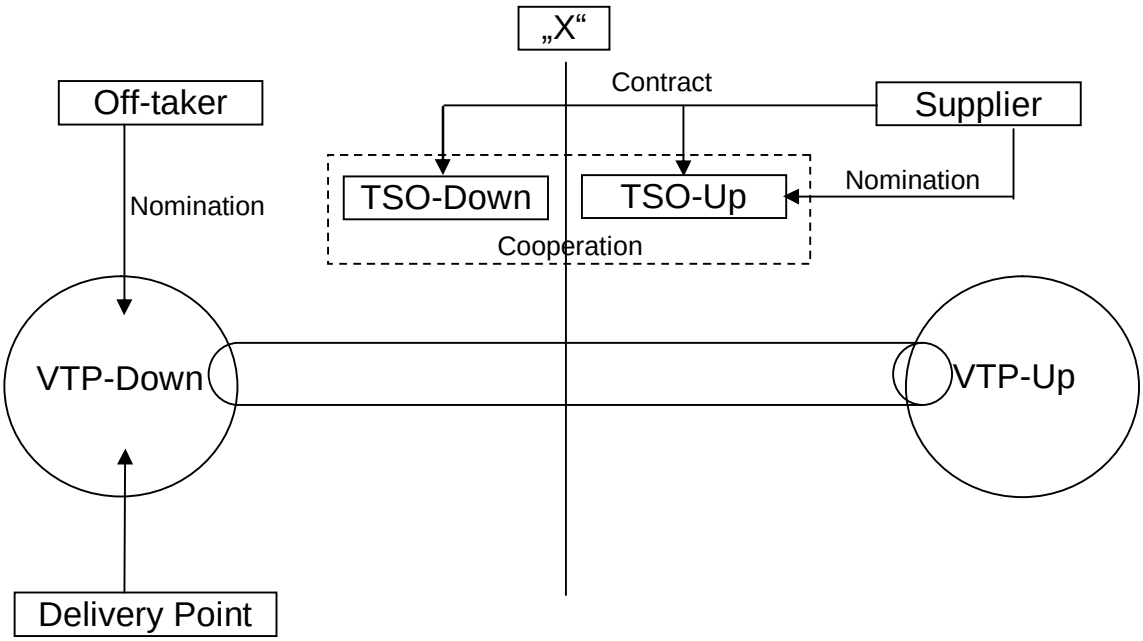
In addition to the nomination of the supplier, the off-taker will nominate the gas volumes at the virtual trading point or hub of the TSO-Down ("**VTP-Down**").

The effect would be that the point of delivery according to the supply contract has to be the VTP-Down. Theoretically, the parties may also agree on a different point of delivery, e.g. keep the X-Interconnector as delivery point. However, this would require that the supplier will ship the gas from this delivery point to the VTP-Down on behalf of the customer, which would lead to the need for a further agreement regarding the distribution of risks and costs for this transport. This does not seem very practical.

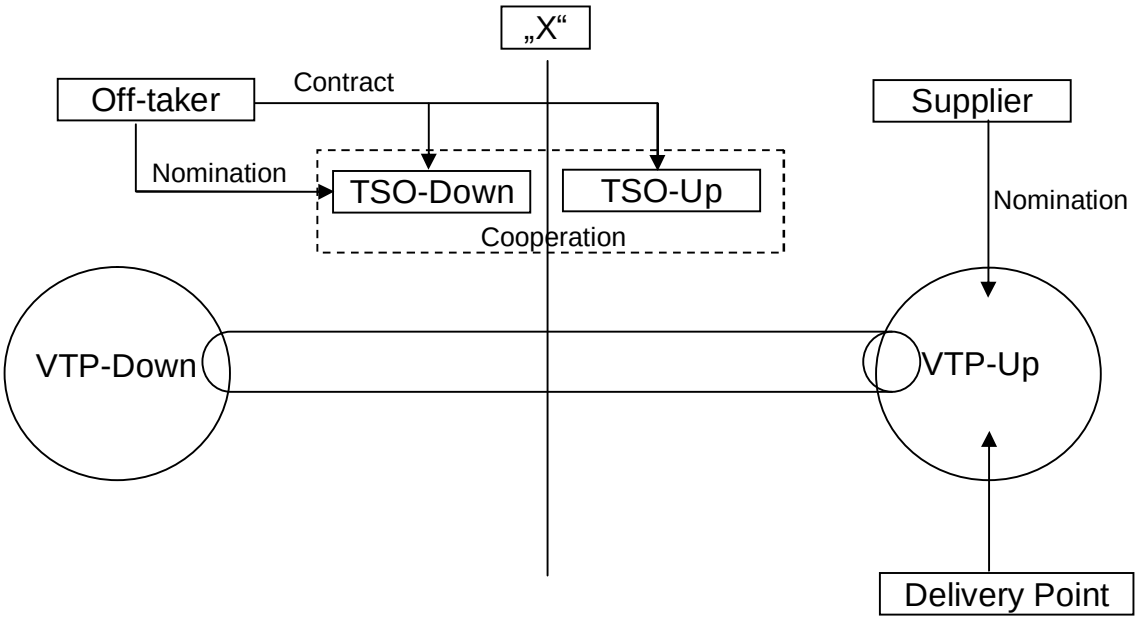
- If the off-taker books the bundled capacity ("**Model 1.2**"), he will also nominate the gas flows also to either both TSOs or to one TSO according to the respective stipulations of the capacity contract. The difference to Model 1.1 is that the delivery point would be the virtual trading point or hub in the network of the TSO-Up ("**VTP-Up**"). The supplier must nominate the gas volumes at this VTP-Up to the TSO-Up.

Models 1.1 and 1.2 can be illustrated as follows:

Model 1.1



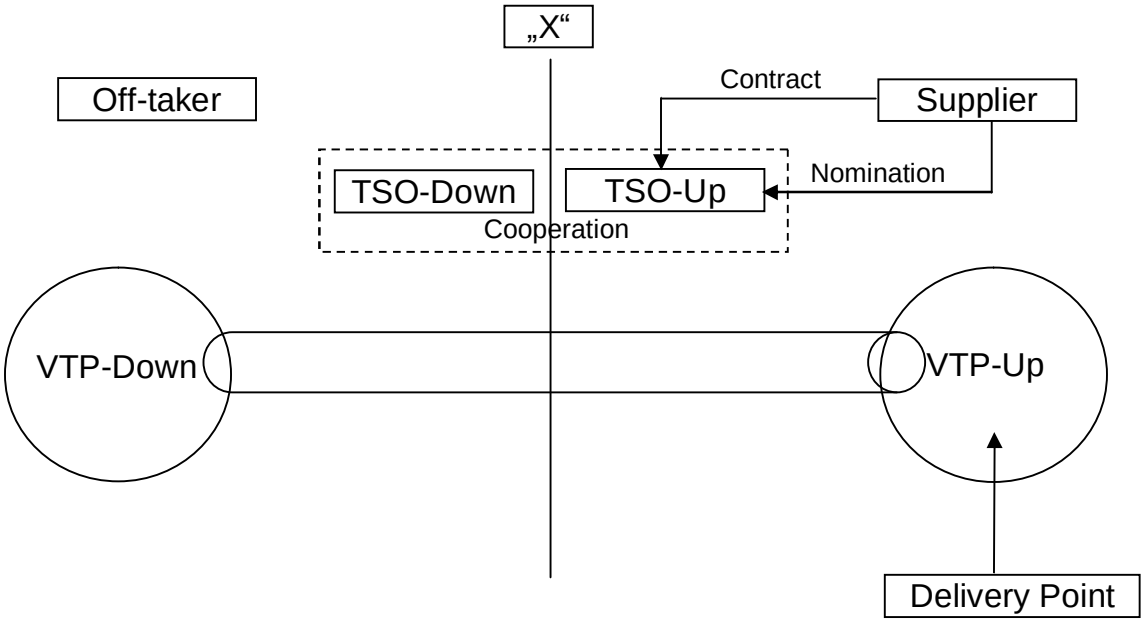
Model 1.2



b) Model 2

Model 2 distinguishes itself from Model 1 only with respect to the contracting parties. Under this model, the Shipper does only conclude a transport contract with one of the TSOs. The network code could stipulate that the Shipper has a free choice to select the TSO he wants to conclude the contract with ("**Model 2.1**"), or that both TSOs can determine the TSO who will conclude the contract with the Shipper ("**Model 2.2**"). In this model, the nomination will be communicated to the contracting TSO only. In any case, the two adjacent TSOs have to cooperate in order to execute the contract. Such a cooperation of TSOs to offer bundled capacity is already practised by the Gas Transport Cooperation (GATRAC) offering bundled Day-Ahead capacity for cross-border transports between Germany and the Czech Republic.[1]

This **Model 2** can be illustrated as follows (in case of booking by supplier):



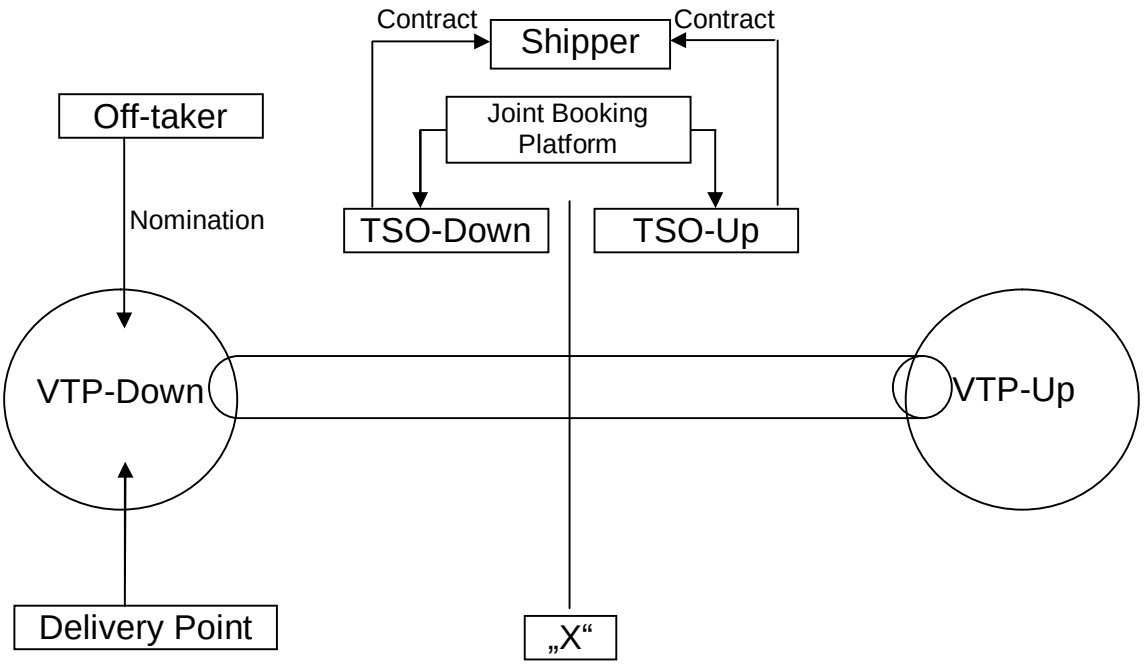
[1] www.gatrac.com.

c) Model 3

Model 3 has been proposed by ENTSOG.[2] The difference between this Model and Model 1 and 2 is that the Shipper has to conclude two contracts, one contract with the TSO-Down and one contract with the TSO-Up. Only the allocation of the capacity will be conducted via a joint booking platform set up by both TSOs.

A single nomination within the meaning of para. 2.4.1 FG-CAM is defined by ENTSOG as a nomination uniformly submitted to both involved TSOs ("**Model 3.a**"). The two adjacent TSOs must ensure that a check is performed during the matching procedure confirming that it is the same Shipper sending the information to both TSOs. However, it is supposed to be possible for adjacent TSOs to only require Shippers to nominate towards the TSO responsible for matching, if both adjacent TSOs agree ("**Model 3.b**").[3]

This **Model 3** can be illustrated as follows (without showing the nomination procedure):



[2] ENTSOG, Capacity Allocation Methodology (CAM) Network Code, Launch Documentation, CAP0112-11, 21 March 2011, Final, p. 26.

[3] ENTSOG, Capacity Allocation Methodology (CAM) Network Code, Launch Documentation, CAP0112-11, 21 March 2011, Final, p. 27.

II.
Effects

The expected effects of bundling as set forth under para. 2.4.1 FG-CAM (the "**Expected Effects**") are described in various statements of the predecessor of ACER, the European Regulators Group for Electricity and Gas ("**ERGEG**"), and stakeholders which have been submitted before and during the consultation process. The Expected Effects have also been analyzed in an economic impact assessment study by Frontier Economics. It is not within the scope of this legal study to verify if and to what extent the Expected Effects will actually occur. For the purpose of this legal impact assessment, we assume that the Principle of Bundling will have the Expected Effects. ACER and the Commission will have to make their own assessment regarding the likelihood that such Expected Effects will occur. The Expected Effects which may be associated with the Principle of Bundling can be summarized as follows:

- Transaction costs will be reduced because only one allocation instead of two allocations has to be performed (**Effect 1**).[4]

- Handling costs will be reduced because only one nomination instead of two nominations will be necessary (**Effect 2**).

- Transaction risks will be reduced because Shippers at X-Interconnectors do no longer bear the risk that different capacity on either side of the border will be allocated (**Effect 3**).[5]

- Flange-trading at the X-Interconnector will no longer be possible; instead all gas volumes will be traded only at VTPs, either downstream or upstream, depending on who books the bundled capacity (**Effect 4**).[6]

- The concentration of all gas volumes at the VTPs will increase the liquidity at the hubs and reduce the market power of market-dominant players (**Effect 5**).[7]

- If the supplier books the bundled capacity, he can use capacity in excess of what is needed for transporting the gas volume demand of the off-taker ("**Spare Capacity**") for day-ahead trading of the surplus volumes at the VTP-Down. This

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4 ERGEG, Capacity Allocation on European Gas Transmission Networks Pilot Framework Guideline – Initial Impact Assessment –, Ref: E09-GNM-10-06,10 December 2009, paragraph 8.6, p. 46.

5 ERGEG, Capacity Allocation on European Gas Transmission Networks Pilot Framework Guideline – Initial Impact Assessment –, Ref: E09-GNM-10-06,10 December 2009, paragraph 8.3.2, p. 42.

6 ERGEG, Pilot Framework Guideline on Capacity Allocation Mechanisms, Public Consultation, Evaluation of Comments, E10-GWG-67-03, 29 June 2010, paragraph 2.5.2, p. 19.

7 ERGEG, Capacity Allocation on European Gas Transmission Networks Pilot Framework Guideline – Initial Impact Assessment –, Ref: E09-GNM-10-06,10 December 2009, paragraph 8.6, p. 46.

could increase market liquidity and the offering of gas volumes to third parties at the VTP-Down (**Effect 6**). Alternatively, the supplier can provide the quantity required by the off-taker under the supply contract by buying gas at the VTP-Down, thus releasing gas that would otherwise be committed to the supply contract to sell at the VTP-Upstream or further upstream [8]

- In case that the off-taker books the bundled capacity, he can use Spare Capacity and gas volumes in excess of what is needed to fulfil his demand downstream to trade either at the VTP-Up or the VTP-Down. This could increase liquidity and the offering of gas to third parties both at the VTP-Up and the VTP-Down (**Effect 7**).[9]

- Both by increasing the liquidity at the VTPs and by reducing transaction costs and risks at the respective X-Interconnectors, the VTPs in the various member states would be better connected which will foster cross-border trading, improve the EU internal market, and support competitive benefits (**Effect 8**).[10]

However, this does not automatically mean that all these Expected Effects will also occur as a result of the implementation of the Sunset Clause. The scope of this impact assessment is strictly limited to the analysis of the effect the Principle of Bundling including the Sunset Clause may have on already existing capacity and supply contracts. We are not analyzing the Principle of Bundling in general. Accordingly, we refer to the Expected Effects mentioned above only if and to the extent they may also be linked to the Sunset Clause. In this respect we assume that Effects 1 and 3 do not occur with respect to existing capacity contracts because the capacity already contracted does not have to be allocated again.

Chapter 2:
Scope of Study

On behalf of a group of six National Regulatory Authorities ("**NRAs**") from Austria, France, Germany, the Netherlands, Spain, and the United Kingdom, E-Control Austria commissioned RAUE LLP with a study to carry out an impact assessment of the provisions of the FG-CAM with the special focus on para. 2.4.2 The study shall address the following legal aspects:

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8 Frontier Economics, Economic Analysis of the Sunset Clause, July 2011, paragraph 4.3.2, p. 15.

9 Frontier Economics, Economic Analysis of the Sunset Clause, July 2011, paragraph 4.3.3, p. 17.

10 ERGEG, Capacity Allocation on European Gas Transmission Networks Pilot Framework Guideline – Initial Impact Assessment –, Ref: E09-GNM-10-06,10 December 2009, paragraph 8.6, p. 46; ERGEG, Pilot Framework Guideline on Capacity Allocation Mechanisms, Public Consultation, Evaluation of Comments, E10-GWG-67-03, 29 June 2010, paragraph 2.5.2, p. 18; Frontier Economics, Economic Analysis of the Sunset Clause, July 2011, paragraph 4.3.3, p. 17.

a) To what extent can European legislators (or NRAs) lay down conditions requiring changes to long-term capacity contracts? Is transitional legislation sufficient to justify such modifications? ("**Question a)**")

b) To what extent is it legally possible to introduce such conditions in a network code / implementing acts to be adopted via comitology procedure? ("**Question b)**")

c) Is the Sunset Clause provided for in para. 2.4.2 of the FG-CAM compatible with the Gas Regulation? In particular, does it amend non-essential elements of this Regulation by supplementing it (Article 6(11))? ("**Question c)**")

d) What are – if any – the legal risks for TSOs associated to the modification of existing capacity contracts according to the "default rule", namely the modification of entry and exit capacity rights without the agreement of their holders (splitting of bundled capacity under para. 2.4.2 of the FG-CAM)? And how likely are these risks to occur? How could the risk of legal challenges be mitigated? ("**Question d)**")

e) Can the bundling of capacity contracts and the resulting change of the delivery point be considered as a significant change to a long-term supply contract between European importers and external suppliers which would entail a unilateral right to terminate a long-term supply contract even though the FG-CAM expressly prohibits the termination of contracts on that basis? What is the potential impact on European security of supply? ("**Question e)**")

In addition to this study E-Control Austria on behalf of the group of NRAs also commissioned Frontier Economics with a separate analysis regarding the following questions:

f) What are the effects of bundling on market presence and market power of 3rd country natural gas undertakings?

g) What are the effects of bundling on market presence and market power of EU natural gas undertakings?

As agreed with E-Control Austria, the scope of this study is limited to the analysis of European law, as well as French and German civil law. When analyzing the effects of the FG-CAM on existing capacity contracts we have based our findings on the following model contracts:

- The transmission contract on GRTgaz's natural gas transmission system, version as of 1 May 1, 2011, appendix 1 – General terms and conditions (the "**GRTgaz Transmission Contract**"),

- The agreement between the German gas network operators concerning the cooperation according to the § 20 (1b) Energy Industry Act ("Vereinbarung über die Kooperation gemäß § 20 Abs. 1b EnWG zwischen den Betreibern von in Deutschland gelegenen Gasversorgungsnetzen"), version as of 29 July 2008 ("**CoA**").

With respect to the analysis of the effects on long term supply contracts, we have not been provided with any such contracts as these are subject to strict confidentiality rules. We therefore have based our analysis on general rules of German and French civil law and certain assumptions regarding typical clauses which according to our experience are very likely to be found in most or all of the long term supply contracts.

Chapter 3:
Summary of Findings

A.
To what extent can European legislators lay down conditions requiring changes to long-term capacity contracts?

- All in all, we can conclude that European legislators can lay down new conditions for existing long-term capacity contracts as far as this does not infringe superior rules and principles of EU law and especially the fundamental rights and freedoms of the concerned private subjects. With regard to the Sunset Clause, we are of the opinion that the obligation to implement the new capacity service in the existing capacity contracts does not infringe the principle of contractual freedom, the right to property, the freedom of movement of goods, or the freedom to provide services.

- The Sunset Clause lawfully defines the limits of these rights and freedoms for TSOs and Shippers. The Sunset Clause will oblige the contracting parties to amend the existing long-term capacity contracts. With regard of the margin of assessment of the European legislators, the limitation to these rights and freedoms seems suitable and necessary to implement the new capacity service in the existing contractual relations.

- The transitional period of five years allows for a balanced changeover for the contracting parties according to their interest of legal certainty. Whilst the transitional legislation does not itself justify the restriction of contractual freedom,

it is able to reduce the intensity of the intervention, thereby contributing to a proportional measure.

- However, with regard to the mode of implementation after the transitional period we have concerns about the TSO's unilateral right and obligation to impose the new system. In our view, such authorization would run counter to the principle of *pacta sunt servanda* according to which no contracting party shall have the right to unilaterally terminate or change the contract in absence of corresponding contractual stipulations. We therefore recommend to oblige all parties of the capacity contracts to jointly split the bundled capacity proportionally to their capacity rights and to leave it to NRAs to impose appropriate sanctions on the parties not implementing the provisions in time. A proposal for a modified wording of para. 2.4.2 FG-CAM is attached to this study as an **Annex**.

B.

To what extent is it legally possible to introduce such conditions in a network code / implementing acts via comitology procedure?

- The EU comitology system is regulated by Council Decision 1999/468/EC of 28 June 1999, as amended by Council Decision 2006/512/EC, to be interpreted in the light of Articles 290 and 291 TFEU. The comitology system consists of different procedures for the exercise of implementing powers conferred on the Commission. Under this system, all Commission's measures of general scope designed to amend non-essential elements of a basic instrument are subject to the regulatory procedure with scrutiny set forth under Article 5a of the Comitology Decision.

- According to settled case-law, the European legislator can legitimately delegate implementing powers to the Commission without distorting the European structure and the institutional balance. The European law distinguishes between essential rules which have to be reserved to the legislators' power and implementing measures which may be delegated to the Commission. Therefore, the European legislator cannot empower the Commission to adopt provisions which can be qualified as essential. It should be noted that the European Court of Justice has held that the term "essential" is to be interpreted in a restrictive manner The Gas Regulation does not delegate power to adopt essential rules in that meaning. It legitimately delegates power to the Commission to adopt a network code which only supplements or amends certain non-essential elements of the Gas Regulation.

- By executing delegated powers, the Commission especially shall not exceed the implementing powers provided for in the basic instrument and has to respect the principles of subsidiarity and proportionality.

C.

Is the Sunset Clause provided for in para. 2.4.2 of the FG-CAM compatible with the Gas Regulation? In particular, does it amend non-essential elements of this Regulation by supplementing it (Article 6 para. 11)?

- The Gas Regulation does not explicitly provide for legal grounds to impose network codes which interfere with the capacity allocation under existing capacity contracts.

- However, in the light of the general understanding of the scope of European energy regulation and in the context of all provisions of the Gas Regulation, the Gas Regulation provides implicit grounds for such regulations. Hence, we conclude that the Sunset Clause is compatible with the Gas Regulation.

- The Sunset Clause amends non-essential elements of the Gas Regulation by supplementing it. It is therefore in line with the legal requirements regarding the delegation of regulatory powers to the Commission, as established by Art. 290 TFEU, Article 6 para. 11 of the Gas Regulation, the Comitology Decision, and decisions of the European Court of Justice.

D.

What are the legal risks for TSOs associated to the modification of existing capacity contracts according to the "default rule"?

- The Modification of existing contracts according to the "default rule" does not impose a significant risk to the TSOs if the "default rule" will be stipulated as proposed in the **Annex** to our assessment.

- Only Model 2.1 for implementing the Principle of Bundling is suitable for existing contracts because all other models may require the conclusion of a new contract with a TSO not identical with the counterparty under the existing capacity contract. Such a change of the counterparty does not have a basis in any contractual or statutory rights to adjust a contract.

- According to the existing German and French capacity contracts, TSOs have a unilateral right to amend a contract in order to ensure compliance with the

requirements of the network code; this includes the unilateral right to adjust a contract to the Principle of Bundling.

- According to German law both TSOs and Shippers have a contractual claim against each other to adapt an existing capacity contract to implement the Principle of Bundling. Such claims can be based on the Change-of-Circumstances-Clause and the Severability Clause.

- According to German law both parties also have a statutory claim against each other to comply with the Sunset Clause. Such claims can be based on the statutory Doctrine of Frustration.

E.
Can the bundling of capacity contracts entail a unilateral right to terminate a long-term supply contract?

- Our analysis has shown that an adjustment of the supply (commodity) contract to implement the Principle of Bundling is possible according to contractual and – at least in Germany - statutory adjustment clauses. As a consequence, no party of the supply contract has a unilateral right to terminate the contract according to German or French civil law. The other party could reject such a termination. The termination would be void.

- Accordingly, the introduction of the Principle of Bundling for existing contracts does not bear a significant legal risk for the security of supply, at least with respect to our analysis of the German and French civil law.

Chapter 4:
Analysis

A.
To what extent can European legislators lay down conditions requiring changes to long-term capacity contracts?

Under this question, it is to be examined to what extent European legislators can lay down conditions requiring changes to long-term capacity contracts and whether transitional legislation is sufficient to justify such modifications.

European legislators can lay down new conditions for existing long-term contracts provided that this does not infringe superior rules and principles of European Law. Thus, the legal provisions have to correspond with the fundamental principles of European Law and especially with the individual rights of the concerned private subjects, i.e. the TSOs and the Shippers as contracting parties of the existing long-term capacity contracts.

The new rules laid down in the network code, especially the Sunset Clause, will have different effects on the rights of the contracting parties. We will first describe the applicable legal framework (sub I.), then assess possible infringements of the fundamental rights of the TSOs and the Shippers (sub II.), and finally analyze impacts on their fundamental freedoms (sub III.)

I.
Applicable Legal Framework

The Sunset Clause will be part of the network code which is to be adopted by the European Commission. Hence, it will constitute a legally binding act of an institution of the European Union. It is settled case-law that the European Union has its own legal system with own institutions and own personality.[11] By executing the powers transferred by the Member States, the European institutions are not submitted to national law systems[12] but only to the Union's law, especially the fundamental

[11] See ECJ Case 26/62 Van Gend & Los [1963] ECR 1, 25; see also Case Rs. 6/64 Costa/ENEL [1964] ECR, 585, 593.

[12] See in that sense ECJ Case 36-58, 37-58, 38-59 and 40-59 Präsident Ruhrkohlen-Verkaufsgesellschaft and others / ECSC High Authority [1969] ECR 423, 438.

freedoms[13] and the fundamental rights which according to settled case-law form an integral part of the general principles of law inspirited by the constitutional rights common to the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms[14].

In the following, we therefore will asses the Sunset Clause with special regard to these rights and freedoms as guaranteed within the Union's legal system.

II.
Fundamental Rights

In the following, we will first assess whether the Sunset Clause constitutes an infringement of fundamental rights. Among the fundamental rights and principles, in particular contractual freedom (sub 1.), right to property (sub 2.), and the principle of legitimate expectations (sub 3) could be affected.

1. Contractual Freedom

It needs to be assessed whether the sunset clause infringes contractual freedom.

a) Scope

Contractual freedom is one of the most important offshoots of individuals' freedom to arrange their own affairs and therefore a part of their individual rights.[15] The freedom of contract is inseparably linked to the freedom to conduct a business, which is laid down in Article16 of the Charter of Fundamental Rights of the European Union ("**EU-CFR**") and recognised as a general principle of the Union's law, Article 6 para. 3 Treaty on the Functioning of the European Union (**"TFEU"**).[16]

In the opinion of the European Court of Justice (hereinafter "**ECJ**") and the Court of First Instance (hereinafter "**CFI**"), the right of contract is

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[13] See ECJ Case C-114/96 Kieffer and Thill [1997] ECR I-3629, paragraph 27 and the case-law cited.

[14] See, inter alia, ECJ Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 23; see also ECJ Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37.

[15] For German law Larenz, K., Wolf, M., Allgemeiner Teil des bürgerlichen Rechts, 9th ed., Munich 2004, n. 2; for Austrian law, Koziol, H., Welser, R., 'Grundriss des bürgerlichen Rechts' Vol. I: Allgemeiner Teil – Sachenrecht – Familienrecht, 11th ed., Vienna 2000, p. 84; for French law, Aubert, J.-L., Savaux, É., Les obligations. 1. Acte juridique, 12th ed., Paris 2006, p. 72, n. 99; for Spanish law, Díez-Picazo, L./Gullón, A., Sistema de derecho civil, Vol. I, 10th ed., Madrid 2002, p. 369 et seq.

[16] See Opinion of Advocate General Jacobs in Case C-7/97 Bronner [1998] ECR I-7791, paragraph 56, where he stated that 'the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification'.

characterised by the principle of freedom of the parties to arrange their own affairs, according to which, in particular, parties are free to enter into obligations with each other.[17] Economic operators have to enjoy contractual freedom.[18] Furthermore, the ECJ held that the right of parties to conclude and to amend contracts cannot be limited in the absence of Community rules imposing specific restrictions in that regard.[19]

The freedom of contract is linked to the protection of the principle of legal certainty and stability of legitimately established legal relations. The protection of these principles might require transitional measures with the objective of allowing a reasonable period during which conformity with Community law will have to be achieved.[20]

Moreover, the freedom of contract is linked to the principle of continuity of contracts (*pacta sunt servanda*) which constitutes a general principle of law recognised by every legal order.[21] According to this principle, generally no contracting party is allowed to unilaterally terminate or change a concluded contract unless the contract authorises this party to do so. In the absence of such stipulation, every change or amendment of contract generally requires the agreement of all contracting parties.

b) Restrictions

In the following, it is to be examined whether the Sunset Clause constitutes a restriction to contractual freedom.

aa) Impact of Regulation on Existing Contracts

When introducing the Principle of Bundling, the European legislators are required to take into account impacts on the principle of contractual freedom and freedom to conduct a business. However, it lies in the nature of almost any regulatory provisions that the addressees of such provisions are submitted to considerable impacts

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17 See ECJ Case C-499/04 Werhof [2006] ECR I-2397, paragraph 23; see also CFI T-170/06 Alrosa / Commission [2007] ECR II-2601, paragraph 49 and the case-law cited therein.

18 ECJ Case C-518/06 Commission v Italy [2009] ECR I-3491, paragraph 66; see also ECJ Joined Cases C-215/96 and C-216/96 Bagnasco and Others [1999] ECR I-135, paragraphs 45 and 46, and Case C-277/05 Société thermale d'Eugénie-les-Bains [2007] ECR I-6415, paragraph 21.

19 See ECJ Case C-240/97 Spain / Commission [1999] ECR I-6571, paragraph. 99.

20 See Opinion of Advocate General Maduro in Case C-347/06 ASM Brescia SpA / Comune di Rodengo Saiano, paragraph 50.

21 See ECJ Case C-162/96 Racke v Haupzollamt Mainz [1998] ECR I-3655, paragraph 49; see also CFI Case T-154/01 Distilleria Palma/Kommission [2004] ECR II-1493, paragraph 45.

on their contractual freedom. The impact of regulation on existing contracts is even an intermediate goal of the regulatory measure.

This is also reflected in para. 1.3 FG-CAM which requires all contracts (new and old) to be amended in compliance with the new rules of the network code. The same purpose is pursued by the Sunset Clause, although the Sunset Clause grants the parties a transition period of five years instead of only six months as under para. 1.3 FG-CAM. The Sunset Clause aims to change the system for capacity allocation and nomination fundamentally and for all capacities irrespective whether capacity has already been contracted prior to the date the network code entered into force. The implementation of the new system will require several changes to existing long-term capacity contracts. This will undoubtedly affect the contractual freedom of the respective parties to such contracts.

bb) Impact by Network Code

In this context, we would like to point out that the restrictions to contractual freedom will not be the effect of the FG-CAM which according to Recital 15, Sentence 2 Gas Regulation do not constitute a legally binding act but an intermediate step in the comitology procedure. Only the network code to be proposed by ACER and adopted by the Commission will oblige parties to revise existing long-term capacity contracts.

cc) Further Restriction by Unilateral Right of TSO

Under the Sunset Clause as proposed in the draft FG-CAM, TSOs shall be entitled and obliged to split the bundled capacity between the original capacity holders proportionally to their capacity rights if the contracting parties do not come to an agreement within a transitional period of five years. The legal right and obligation of one contracting party to unilaterally change existing contracts has an impact on the principle that in absence of a corresponding contractual stipulation contracts can only be amended by agreement of all contracting parties and not unilaterally by one party. The right and obligation of the TSOs to unilaterally split the bundled capacity affects the principle of *pacta sunt servanda*.

c) Justification

In the following, it is to be examined whether the identified restrictions to contractual freedom are justified.

aa) General Requirements

According to settled case-law, fundamental rights can be restricted, particularly in the context of a common organisation of the market, provided that those restrictions correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes the very essence of the rights guaranteed.[22]

Article 6 para. 1 TFEU provides that the Union recognises the rights, freedoms and principles set out in the EU-CFR which shall be interpreted in accordance with the general provisions in Title VII of the EU-CFR. According to Article 52 para. 1 EU-CFR, any limitation on the exercise of the rights and freedoms recognised by the charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

bb) Objectives of General Interest

The objectives pursued by the Sunset Clause have to correspond with the aim of the Gas Regulation and the European Union's general objectives.

The Expected Effects associated with the Principle of Bundling in general and the Sunset Clause in particular are described in Chapter 1 sub B.II. of this study. All these Expected Effects aim to support the following aims of the TFEU and the Gas Regulation:

- to establish and ensure the functioning of the internal market (Article 26 TFEU),

[22] See ECJ Case 44/79 Hauer [1979] ECR 3727, paragraph 32; ECJ Case 265/87 Schräder [1989] ECR 2237, paragraph 15, and Case 5/88 Wachauf [1989] ECR 2609, paragraphs 17 and 18.

- to strengthen the economic cohesion of the European Union (Article 174 TFEU),
- to contribute to the establishment and development of trans-European networks (Article 170 para. 1 TFEU),
- to ensure the functioning of the energy market and to promote the interconnection of energy networks (Article 194 para. 1 lit. a) and d) TFEU),
- to ensure non-discriminating network access and to abolish isolated markets (Recital 11 and Article 1 lit. a) Gas Regulation),
- to complete the internal market in natural gas (Recital 12 Gas Regulation),
- to provide and manage effective and transparent access to the transmission networks across borders (Recital 15 Gas Regulation),
- to enhance competition through liquid wholesale markets for gas (Recital 19 Gas Regulation),
- to facilitate the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in gas and providing mechanisms to harmonise the network access rules for cross-border exchange in gas (Article 1 para. 1 lit. c) Gas Regulation),
- to promote the completion and functioning of the internal market in natural gas and cross-border trade and to ensure the optimal management, coordinated operation, and sound technical evolution of the natural gas transmission network (Article 4 Gas Regulation),
- to ensure that TSOs offer services on a non-discriminatory basis to all network users (Art. 14 para. 1. lit. a) Gas Regulation).

Hence, we conclude that on the basis of the Expected Effects the obligation to change existing capacity contracts in order to implement the Principle of Bundling with a transitional period of five years contributes to pursue these European objectives of general interest.

The Sunset Clause and the corresponding rule in the envisaged network code have no objective differing from the underlying objectives of the TFEU or the Gas Regulation.

cc) Legal Basis

The restrictions of contractual freedom must have a legal basis.[23] As the distribution of competencies within the European Union does not strictly follow the principle of separation of powers,[24] the principle of legality does not require an act of parliament.[25] However, any limitation of the principle of contractual freedom has to be based on a legal rule of European law imposing specific restrictions in that regard.[26]

In this part of the study, we assume that the conditions requiring changes in existing long-term capacity contracts will be introduced by lawful provisions corresponding to the Gas Regulation. The question whether and to what extent it is legally possible to introduce such conditions in a network code via a comitology procedure and the question whether the Sunset Clause is compatible with the Gas Regulation will be further assessed under sections B. and C. of this Chapter.

dd) Proportionality

Finally, the new conditions have to be suitable for securing the attainment of the objective which it pursues and shall not go beyond what is necessary in order to attain it.

In this context, it is to be emphasized that the ECJ has reiterated repeatedly that the examination whether certain measures are appropriate and necessary requires an appraisal of complex economic or technical matters. In this respect, the Commission

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23 See ECJ Cases 46/87 and 227/88 Hoechst / Commission [1989] ECR 2859, paragraph 19.

24 See Bumke, Rechtsetzung in der Europäischen Gemeinschaft – Bausteine einer gemeinschaftsrechtlichen Handlungsformenlehre, in: Schuppert/Pernice/Haltern, Europawissenschaft, p.. 643.; see also Hummer, Paradigmenwechsel im Internationalen Organisationsrecht - Von der „Supranationalität" zur „strukturellen Kongruenz und Homogenität" der Verbandsgewalt, in: ders., Paradigmenwechsel, p. 145; see however for a the principle of institutional balance Jacqué, CMLR 2004, 383, and Lenearts/Verhoeven, Institutional Balance as a Guarantee for Democracy in EU Governance, in: Joerges/Dehousse, Good Governance, p. 35.

25 See Weber, NJW 2000, 537, 543.

26 See ECJ Case C-240/97 Spain / Commission [1999] ECR I-6571, paragraph. 99.

enjoys a broad margin of assessment.[27] Furthermore, the ECJ stated that with regard to the broad discretion of the European legislator corresponding to the political responsibilities given to it by primary European law, the lawfulness of a certain measure can be doubtful only if the measure is manifestly inappropriate with regard to the objective which the competent institution is seeking to pursue.[28]

(1) Change of Existing Gas Capacity Contracts

(a) Suitability

Under Chapter 1 section B.II. of this study we have assumed that with regard to the Expected Effects, Effects 2 and 4 – 8 are associated with the Sunset Clause. Effects 4 – 8 are all aiming at an increase of the liquidity at VTPs. However, the argument has been raised that there is no evidence that liquidity would increase for longer term volumes because delivery at a VTP and not at a flange. Moreover, the concern has been expressed that a possible produce or buy strategy of gas producers could even reduce liquidity.[29]

The analysis of these concerns is part of the impact assessment conducted by Frontier Economics. For the purpose of this study, we assume that there are no indications that the introduction of the Principle of Bundling for existing capacity contracts is manifestly inappropriate to achieve the Expected Effects 4 – 8 as described in Chapter 1 section B.II. If this assumption is correct, the European Commission within its broad discretion may assume that the Sunset Clause is suitable to achieve such Expected Effects.

Furthermore, the Sunset Clause may not be suitable to achieve the aims pursued if the contracting parties would have no contractual or legal possibility to implement the new system in an existing capacity contract. A legal obligation to change existing capacity contracts would be unreasonable and unacceptable if there were no contractual or legal rights entitling

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27 See ECJ Case 42/84 Remia v Commission [1985] ECR 2545, paragraph 34; see also Joined Cases 142/84 and 156/84 British American Tobacco and Reynolds Industries v Commission [1987] ECR 4487, paragraph 62.

28 See ECJ C-306/93 SMW Winzersekt [1994] ECR I-5555, paragraph 21.

29 See EUROGAS' statement to draft FG-Cam of April 2011, page 5.

the parties to change the contracts. However, according to our findings in section D. of this Chapter 4, we do not see insurmountable legal obstacles hindering the parties to adapt the existing capacity contracts to the Principle of Bundling.

Therefore, we conclude that with regard of the Commission's broad margin of assessment, the obligation to change existing capacity contracts is suitable to attain the legitimate objectives described above.

(b) Necessity

The question whether the Sunset Clause goes beyond what is necessary to achieve the objectives pursued depends on the availability of alternatives. There are two potential alternatives:

- The existing capacity contracts remain unchanged and flange-trading will still be possible on the basis of these contracts.

- A combined product is provided by the TSOs.[30]

The analysis of the last alternative is not part of this impact assessment because the proposal of combined products instead of the Principle of Bundling is no specific alternative to the Sunset Clause but proposed as an alternative to the Principle of Bundling as such. In this respect we can only note that we cannot see how Effects 4 – 8 as described in Chapter 1 section B.II could be achieved by the offer of combined products.

The question remains whether the objectives pursued can also be achieved if existing capacity contracts remain unchanged.

If the existing capacity contracts remain unchanged, the rules for capacity allocation and usage will not be harmonized for the term of the longest-running existing capacity contracts. Bundled cross-border transmission services and non-bundled services would co-exist for a period longer than five years. The Expected Effects of the Principle of Bundling would be reduced accordingly. In particular, none of the Effects 4 – 8 would be

[30] See EUROGAS' statement to drafted FG-Cam of April 2011, page 6.

possible for gas volumes transported on the basis of these contracts.

Further, Shippers with old capacity contracts and Shippers with new contracts would be treated differently. Such unequal treatment infringes the principle of non-discrimination at least with respect to capacities at the same interconnection point or virtual interconnection point (see para. 2.4.3 FG-CAM). The co-existence of two systems of cross-border transportation may impede the harmonization of cross-border capacity allocation and usage and may be detrimental to the liquidity of wholesale markets for natural gas.

Therefore we conclude that within its broad margin the European Commission may legitimately assume that the Sunset Clause will have better effects with regard to the objectives pursued by the FG-CAM than a FG-CAM without a Sunset Clause and that there is no alternative available which can achieve the same effects with lesser impact for the parties affected. With regard to the European Commission's broad margin of appreciation we cannot conclude that the obligation to implement the intended Principle of Bundling in the existing capacity contracts is disproportionate to the aims pursued.

(c) Respect of the Very Substance

The Sunset Clause shall respect the very substance of contractual freedom (Article 52 para. 1 of EU-CFR).[31] We already noted that it lies in the nature of regulatory provisions that the addressees of such provisions are submitted to considerable impacts on their contractual freedom. The impact on existing contracts is the intermediate aim of the regulatory measure. This impact is justified if it does not infringe the very essence of contractual freedom. Regardless of the scope of the very substance of a fundamental right,[32] we can note that the obligation to implement the new Principle of Bundling in the

[31] See also ECJ Case 265/87 Schräder [1989] ECR 2237, paragraph 15; Case 5/88 Wachauf [1989] ECR 2609, paragraph; Joint Cases C-453/03, C-11/04, C-12/04 and C-194/04 ABNA et al. [2005] ECR I-10423, paragraph 87.

[32] See in a rather relative sense ECJ Case C-408/03 Commission/Belgium [2006] ECR I-2647, paragraph 68.; Case C-347/03 Regione autonoma Friuli-Venezia Giulia and ERSA [2005] ECR I-3785, paragraph 121; Pernice, in: Grabitz/Hilf, EUV/EGV, Art. 164 EGV, para. 62 d; Rengeling, Grundrechtsschutz, p. 26; see in the sense of an absolute essence Kingreen, Calliess/Ruffert, EUV/EGV, 2nd edition, Art. 6 EUV, paragraph 76; see also Günter, Berufsfreiheit und Eigentum in der Europäischen Union, p. 30.

existing capacity contracts does not affect all contractual stipulations which the parties stay free to adhere or change upon mutual agreement. In addition, the contracting parties will be able to execute the existing long-term capacity contracts within the new allocation system. Thus, the impact to the existing contracts does not infringe upon the very essence of contractual freedom.

(d) Transitional Legislation

Further, it needs to be assessed what impact the transitional provisions in the Sunset Clause has on the proportionality of such clause. In our view, the proportionality of the Sunset Clause is maintained by such provisions since the new system does not become mandatory immediately but only after a transitional period of five years: The transitional legislation allows the parties to continue the execution of the contract for a reasonable period during which conformity with the new conditions has to be achieved. The transitional period gives parties the option to renegotiate and amend the capacity contracts in force and thus to find a mutual agreement about the concrete implementation of the bundling system. The transitional rule responds to the fact that changing the system of cross-border transports is a complex issue which may require appropriate preparations by the parties involved, also taking into account the indirect effect on the commodity contracts. The complexity of the issues to be dealt with is taken into account by extending the regular transition period for existing contracts according to para. 1.3 FG-CAM with respect to the particular implementation of the Principle of Bundling from six months to five years.

Hence, the provision of a transitional period significantly longer than in the regular case allows a balanced changeover to the new legal conditions for the contracting parties. Therefore, the object of transitional legislation responds to the public interest to respect the legitimately established legal relations protected by the principle of *pacta sunt servanda* and of legal certainty.[33] Transitional legislation does not itself justify the restriction of

[33] See also Opinion of Advocate General Maduro in Case C-347/06 ASM Brescia SpA / Comune di Rodengo Saiano, paragraph 52.

contractual freedom, but contributes to a proportional mode of implementation.

Hence, the transitional provision further supports our assessment that the Sunset Clause is proportional since the new system does not become mandatory immediately but only after a transitional period of five years.

(e) Mode of Implementation

In the following, we will assess the mode of mandatory implementation of the Principle of Bundling in case the contracting parties do not amend the existing capacity contracts in a timely fashion.

According to the Sunset Clause, TSOs shall be entitled to impose the split of capacities if the contracting parties do not find a mutual agreement within the transitional period of five years. The TSOs' right to impose the implementation corresponds with the legal obligation of the TSOs to unilaterally implement the system if necessary.

It has been argued that such legal obligation to unilaterally impose new rules within existing contracts without counterbalancing rights of the other party to terminate the contract constitutes an unjustifiable infringement of the fundamental principle of *pacta sunt servanda.*[34]

We are unable to conclude that there is a sufficient justification for such an infringement. In our view, it is not necessary to entitle and to oblige one single party to change the existing contract in the light of the new legal conditions. It would be suitable and sufficient to oblige all parties of the relevant existing capacity contract to implement the Principle of Bundling by agreeing to an according adjustment of the contract.

In the case that the parties do not find an agreement the NRAs have the power to impose appropriate sanctions on the parties not implementing such provisions. Although the European regulatory framework mainly targets TSOs' activities, NRAs can impose the implementation of regulatory rules vis-à-vis all

[34] See in that sense EUROGAS' statement to draft FG-Cam of April 2011, page 3.

natural gas undertakings. According to Article 41 para. 1 lit. b) of Directive 2009/73/EC ("**Gas Directive**"),[35] NRAs shall have the duty to ensure compliance of transmission and distribution system operators, and where relevant system owners as well as of any natural gas undertakings, with their obligations under the Gas Directive and other relevant Community legislation, including with regard to cross-border issues. According to Article 2 No 1 of the Gas Directive, natural gas undertakings are all natural or legal persons carrying out production, transmission, distribution, supply, purchase, or storage of natural gas. Hence, under the premise of proper implementation of the Gas Directive, NRAs are also authorized to impose the obligations under the Sunset Clause vis-à-vis Shippers, whether they are suppliers or off-takers.

For these reasons, the unilateral right and obligation of TSOs to impose the change of capacity contracts would violate the principle of proportionality. We share the legal concerns which have been raised[36] that entrusting TSOs with the right or the task of unilaterally changing transmission contracts could be held as abusive. In consequence, we recommend an alternative Sunset Clause as provided for in the **Annex** to this study.

(2) Need of Changes to Supply Contracts

In the following, we will assess whether the Sunset Clause also constitutes a relevant impact on existing supply (commodity) contracts.

(a) Indirect Reflex

With regard to Shippers' contractual relations, we note that the implementation of the bundling system in the capacity contracts could entail several changes in the supply contracts. For example, the Shippers might have to renegotiate contractual stipulations with respect to the definition of the gas delivery point and the gas prices. Thus, the implementation of the

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35 Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (L 211/94).

36 See ENTSOG, Supporting Document to the Capacity Allocation Mechanisms (CAM) Network Code Consultation of 21 June 2011, page 26.

system in the capacity contracts will cause a certain need to amend supply contracts.

However, these effects are only an indirect result of the FG-CAM and the intended network code. According to the FG-CAM, the network code shall not prescribe such changes of the supply contracts. According to the Sunset Clause, the network codes are not meant to regulate supply contracts. As a consequence, the shippers stay free to adhere to the existing supply contracts even if theses contracts might not be executable within the new system. The need for contractual adjustment is an indirect reflex of the network code. Therefore, the network code does not directly restrict the contractual freedom of the parties of the supply contracts. Consequently, the collateral need of changing the import contracts does not constitute a restriction of the freedom to contract.

(b) Exclusion of Right of Termination

Further, it is to be examined whether the Sunset Clause infringes contractual freedom, as subsection 3 of the Sunset Clause provides that the implementation of network codes in the existing capacity contracts shall not entitle contracting parties to cancel supply contracts, and that it could "only serve to separate and amend the capacity contract if this is included in the supply contract". According to our interpretation, this subsection is not meant as a prohibition of statutory or contractual rights to terminate supply contracts but rather a prohibition that a network code adopted on the basis of the FG-CAM may not entail a stipulation entitling any party of a supply contract to a termination of such contract. In this respect we conclude that such prohibition only reflects the limited competencies of the Commission when adopting a network code.

Under the principle of conferral according to Article 170, 174 and 194 TFEU, the European Union can only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein (see Article 5 para. 1 TEU in conjunction with Article 7 TFEU).[37]

[37] See ECJ Case C-403/05 Parliament v Commission [2007] ECR I-9045, paragraph 49; see also Opinion 2/94 ('ECHR accession') [1996] ECR I-1759, paragraphs 23 and 24.

According to this principle, all competencies not conferred upon the European Union in the Treaties remain with the Member States (see Article 4 para. 1 TEU). In the light of the principle of conferral, we have serious doubts that the European Union has a general competency in the area of contract law.[38] We are therefore unable to state that the European legislators' competency related to the energy market establishes a power to regulate general questions of contractual relations, especially general questions related to the conclusion and termination of private contracts.

Moreover, the explicit exclusion of the right to terminate a contract can affect the very essence of contractual freedom and thus go beyond what is necessary to attain the objectives pursued by the new system. In our view, there is no reason to restrict the rights of a party to terminate a contract under the conditions provided by national law system. It is a question of national contract law whether the Shippers have the right to terminate existing contracts.

2. Right to Property

In the following, we will assess whether the sunset clause infringes the right to property.

a) Scope

The right to property belongs to the general principles of the European Union's law.[39] It is also laid down in Article 17 para. 1 EU-CFR:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

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[38] With regard to the relevant discussion in German literature see Winkler, in: Grabitz/Hilf, Das Recht der EU, 2009, Art. 308 EGV, paragraph 147.

[39] See ECJ Case C-347/03 Regione autonoma Friuli-Venezia Giulia and ERSA [2005] I-3785, paragraph 119.

The right corresponds with the right to peaceful enjoyment of possessions according to Article 1 of Protocol No 1 to the European Convention on Human Rights.[40]

According to the European Court of Human Rights ("**ECHR**"), such possessions can be either existing possessions or assets, including claims, in respect of which a person can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of a property right[41]. According to Article 345 TFEU, European law shall not prejudice the rules in Member States governing the system of property ownership.

b) Restrictions

The Sunset Clause affects the individual rights stipulated in the existing long-term capacity contracts. The implementation of the Principle of Bundling will affect these contractual rights (and obligations) of the contracting parties and thus the right to property as guaranteed in Article 17 para. 1 EU-CFR and Article 1 of Protocol No 1 to the European Convention on Human Rights.

c) Justification

Such a restriction to the right to property has to be justified.

According to settled case-law, the right to property is not absolute but must be viewed in relation to its social function. The exercise of the right to property can be lawfully restricted if the restrictions correspond to objectives of general interest pursued by the European Union and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.[42].

The argument has been raised that any intervention in the existing contracts, especially if enforced by NRA or other competent authorities, might be considered as an expropriation of contractual rights and thus a violation of the right to property.[43] Considering these arguments and the

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40 In that relation see ECHR, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi/Ireland, no 45036/98.

41 See ECHR, Kopecký v. Slovakia [GC], no. 44912/98, paragraph 35.

42 See ECJ Case C-306/93 SMW Winzersekt [1994] ECR I-5555, paragraph 22; see also ECJ Joined Cases C-37/02 and C-38/02 Di Lenardo and Dilexport [2004] ECR I-6911, paragraph 82 and the case-law cited. With regard to ECHRs case law see , inter alia, ECHR, Jokela v Finland, no. 28856/95, paragraph 48: "According to the case-law of the European Court of Human Rights, in order to be justified, an impact to the right of property must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to that aim."

43 See ENTSOG, LGT Opinion on ACER CAM FG art 2.4.2, of 26 May 2011, page 1.

restrictions at issue, we can conclude that the obligation to change the existing capacity contracts does not constitute a deprivation of possessions as referred to in the first paragraph of Article 1 of Protocol No 1 to the European Convention on Human Rights.

Furthermore, we can state that the obligation to implement the Sunset Clause will not prejudice the rules in Member States governing the system of property ownership according to Article 345 TFEU.

Finally, we can conclude, that as far as the interference in the existing contracts can fall under the scope of Art 17 para. 1 EU-CFR and the second paragraph of Article 1 of Protocol No 1 to the European Convention on Human Rights and thus constitute an impact to the right of property, the obligation to amend existing contracts is justified for the reasons we laid down under section 1 of this Chapter. Taking into account the objectives sought as well as the Commission's broad margin of appreciation, we can not state that the restrictions on the right to property constitute a disproportionate and intolerable interference impairing the very essence of the right to property.

3. Principle of Protection of Legitimate Expectations

In the following, we will assess whether the new system infringes the principle of legitimate expectations.

It is settled case-law that the right to rely on the principle of the protection of legitimate expectations applies to a situation in which a European institution has, by giving precise assurances, founded justified expectations.[44] Especially in cases where a prudent and alert economic operator could have foreseen the measure likely to affect his interests, he cannot argue that there is an infringement of expectations.[45] Furthermore, according to the ECJ's settled case-law the scope of the principle of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future and effecting situations which arose under the earlier rules.[46]

In that light, neither the TSOs nor the Shippers may claim infringement of legitimate expectation as no European institution has created justified

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44 See CFI Case T-333/03 Masdar (UK) v Commission [2006] ECR II-4377, paragraph 119.

45 In that sense see Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 v Commission [2006] ECR I-5479, paragraph 147 and the case-law cited; see as well Case C-519/07 P Commission v Koninklijke FrieslandCampina [2009] ECR I-8495, paragraph 84.

46 See Case 203/86 Spain v Council [1988] ECR 4563, paragraph 19; Case C-60/98 Butterfly Music [1999] ECR I-3939, paragraph 25; Case C-162/00 Pokrzeptowicz-Meyer [2002] ECR I-1049, paragraph 55.

expectations that there will be no change of the regulatory system for the allocation and nomination of cross-border capacities, e.g. by introducing the Principle of Bundling. TSOs' and Shippers' potential expectations that the system will stay unchanged do not fall within the scope of the principle of legitimate expectations. Even if those expectations were protected under that principle, the restrictions would be justified for the reasons we have already elaborated with regard to the impact on contractual freedom.

III.
Fundamental Freedoms

The obligation to change existing capacity contracts can also infringe various fundamental freedoms. The potentially affected freedoms are especially

- the freedom of movement of goods (Article 28 TFEU), and
- the freedom to provide and receive services (Article 56 TFEU).

1. Freedom of Movement of Goods

It seems questionable if the Sunset Clause infringes the freedom of movement of goods as laid down in Article 28 TFEU.

a) Scope

The free movement of goods (Article 28 TFEU) is guaranteed by the prohibition of quantitative restrictions on imports and all measures having equivalent effect between Member States of the European Community. According to settled case-law, the prohibition of measures having equivalent effect to restrictions as set out in Article 34 TFEU covers all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.[47]

According to the ECJ's judgment in Commission v France,[48] delivered on 23 October 1997, the import and export of gas falls within the scope of the freedom of movements of goods.

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[47] See ECJ Case 8/74 Dassonville [1974] ECR 837, paragraph 5; Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 11; Case C-420/01 Commission v Italy [2003] ECR I-6445, paragraph 25; Case C-41/02 Commission v Netherlands [2004] ECR I-11375, paragraph 39; Case C-147/04 De Groot en Slot Allium and Bejo Zaden [2006] ECR I-245, paragraph 71; Case C-54/05 Commission v Finland [2007] ECR I-2473, paragraph 30; Case C-143/06 Ludwigs-Apotheke [2007] ECR I-9623, paragraph 25; and Case C-265/06 Commission v Portugal [2008] ECR I-2245, paragraph 31.

[48] ECJ C-159/94 Commission / France [1997] ECR I-5815, paragraph 27.

In addition, the ECJ held that the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the Community institutions.[49]

b) Restrictions

We doubt that the Sunset Clause affects Shippers' ability to move gas between Member States. The intended new system aims to harmonize and facilitate the cross-border gas transports and thus to foster the free movement and the cross-border trade of gas. A system with the objective to simplify the transport of gas contributes cannot restrict the free movement of goods. Therefore, we have serious doubts that the new system can be considered as a measure having equivalent effect within the meaning of Article 34 TFEU, even under a broad definition of such term.

Furthermore, the Sunset Clause will affect all TSOs and Shippers in the same manner, both in law and in fact. Therefore, the new system can likely be classified as non-discriminatory selling arrangement within the lines of settled case-law.[50]

c) Justification

Even if the indirect impacts of the Sunset Clause on supply contracts where to be qualified as a measure having equivalent effect to restrictions as set out in Article 34 TFEU, those restrictions would be justified with regard to the aim to establish a harmonized integral market. Regardless of possible justifications on grounds of public morality, public policy, or public security (Article 36 TFEU), potential restrictions to free movement of goods can be justified in accordance with the ECJ's case-law based on *Cassis de Dijon*: Hereunder, it is held that restrictions which are not inherently discriminatory have to be accepted if they are necessary to satisfy mandatory requirements in the public interest.[51] The Sunset Clause ensures that the new capacity service will be implemented over time to remove certain obstacles to transport gas between Member States and different networks. This satisfies mandatory requirements of harmonization and liberalisation of the gas market. It is adequate and necessary to submit market participants

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49 See ECJ Case C-114/96 Kieffer and Thill [1997] ECR I-3629, paragraph 27 and the case-law cited.

50 In that relation see, inter alia, ECJ Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 16; Case C-292/92 Hünermund and Others [1993] ECR I-6787, paragraph 21; Case C-254/98 TK-Heimdienst [2000] ECR I-151, paragraph 23; Case C-71/02 Karner [2004] ECR I-3025, paragraph 37; Case C-20/03 Burmanjer and Others [2005] ECR I-4133, paragraph 24; Case C-441/04 A-Punkt Schmuckhandel [2006] ECR I-2093, paragraph 15; Case C-434/04 Ahokainen and Leppik [2006] ECR I-9171, paragraph 19.

51 See ECJ Case 120/78 Rewe [1979] ECR 649, paragraph 8.

to the consequences of a system change if the change aims to strengthen competition and the movement of goods in the relevant markets. Therefore, possible transitional or final limitations resulting from the system change have to be accepted under the freedom of movement of goods.

2. Freedom to Provide Services

Finally, we will assess whether the Sunset Clause affects the freedom to provide services (Article 56 TFEU).

a) Scope

According to settled case-law, the freedom to provide services, as laid down in Article 56 TFEU, requires not only the elimination of discriminations on grounds of nationality against providers of services who are established in another Member State, but also requires the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which could prohibit, impede or render less advantageous to the provisions of cross-boarder services[52].

The freedom guarantees not only the active provision of services, but with regard to the recipients of services also the freedom to receive services in another Member State as well as every other situation of cross-border service.[53] Thus, according to ECJ's case-law, the freedom to provide services also covers situations in which the service is for a recipient who is established in the same Member State as the person providing the service as long as the services are offered and/or provided in another Member State.[54] However, the scope of the freedom to provide services cannot be applied to activities which are confined in all respects within a single Member State.[55]

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52 See ECJ Case C-76/90 Säger [1991] ECR I-4221, paragraph 12; Case C-43/93 Vander Elst [1994] ECR I-3803, paragraph 14; Case C-272/94 Guiot [1996] ECR I-1905, paragraph 10; Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 25; Case C-222/95 Parodi [1997] ECR I-3899, paragraph 18; Joined Cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453, paragraph 33; Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 21; and Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 22.

53 See ECJ Joined Cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377, paragraphs 10 and 16; Case C-262/02 Commission v France [2004] ECR I-6569, paragraph 22; Case C-429/02 Bacardi France [2004] ECR I-6613, paragraph 31; see also Case C-76/05 Schwarz and Gootjes-Schwarz [2007] I-6849, paragraph 36.

54 See ECJ Case C-198/89 Commission v Greece [1991] ECR I-727, paragraph 10; Case C-154/89 Commission v France [1991] ECR I-659, paragraph 10; Case C-180/89 Commission v Italy [1991] ECR I-709, paragraph 9; and Case C-20/92 Hubbard [1993] ECR I-3777, paragraph 12.

55 See ECJ Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 37; Case C-332/90 Steen [1992] ECR I-341, paragraph 9; Joined Cases C-29/94 to C-35/94 Aubertin and Others [1995] ECR I-301, paragraph 9.

Finally, it is settled case-law that the general prohibition of restrictions to the freedom to provide services applies not only to national measures but also to measures adopted by the European institutions.[56]

b) Restrictions

With regard to the suppliers, we can state that the freedom to receive services is not concerned as the shippers still have the (theoretical) option to conclude capacity contracts with the TSOs in the relevant adjacent gas networks.

However, as part of the necessary contractual amendments, the Sunset Clause requires an extension of the services to be provided by TSOs. The TSOs will no longer be able to offer cross-border exit- or entry-capacities without the corresponding bundled capacity in the adjacent market coordinated with the relevant TSO of that network. In case the TSOs want to offer the services to clients in the adjacent market, the situation contains the cross-boarder element. As the Sunset Clause provides for mandatory implementation of the Principle of Bundling, it will affect the TSOs' freedom to decide which cross-boarder services they want to provide.

c) Justification

A restriction on the freedom to provide services can be justified provided that it serves overriding requirements relating to the public interest. Moreover, the measure has to be suitable for securing the attainment of the objective which it pursues and shall not go beyond what is necessary in order to attain it.[57] With regard to our analysis on justified restrictions of contractual freedom (see above sub I.1 of this Chapter) the obligation to implement the Principle of Bundling with the Expected Effects will contribute to the functioning of the internal energy market in a proportionate fashion. With regard to the broad discretion of the European legislators, we therefore can conclude that the restrictions to the freedom to provide services are justified.

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[56] See ECJ Case 15/83 Denkavit Nederland v Hoofdproduktschap voor Akkerbouwprodukten [1984] ECR 2171, paragraph 15; see also Case C-51/93 Meyhui v Schott Zwiesel Glaswerke [1994] ECR I-3879, paragraph 1.

[57] See, inter alia, ECJ Joined Cases C-94/04 and C-202/04 Cipolla and Others [2006] ECR I-11421, paragraph 61; Case C-250/06 United Pan-Europe Communications Belgium and Others [2007] ECR I-11135, paragraph 39; and Case C-212/06 Government of the French Community and Walloon Government [2008] ECR I-1683, paragraph 55.

B.
To what extent is it legally possible to introduce such conditions in a network code / implementing acts via comitology procedure?

As analysed under section A. of this Chapter, the obligation to implement the new Principle of Bundling in existing long-term contracts, as laid down in the Sunset Clause, constitutes a restriction of several rights and freedoms, especially of contractual freedom. In the following, we will assess whether this obligation to change existing contracts can be provided in legally binding conditions (network code) adopted via a comitology procedure in general. The specific question whether the Sunset Clause to be implemented in the network code is compatible with the specific provisions of the Gas Regulation will be discussed under section C. of this Chapter.

I.
Background

Before elaborating on the legal principles and limits of comitology under EU law, we have to note in advance that the instrument of comitology underwent considerable transformations over time.

The origins of comitology already date back to the delegation of implementing measures within the Common Agricultural Policy in 1962. Today, the comitology system is regulated by Council Decision 1999/468/EC of 28 June 1999[58] as amended by Council Decision 2006/512/EC[59] (the "**Comitology Decision**"). As the former system of comitology was criticised for its lack of transparency and democratic legitimacy because the European Parliament was excluded from efficient control[60], the current Comitology Decision is laying down different procedures for the exercise of implementing powers conferred on the Commission, which requires that all Commission's "quasi-legislative" measures are subject to a regulatory procedure with scrutiny under which the Parliament has a right of control.

Pursuant to Article 2 para. 2 of the Comitology Decision, wherever a legal act as basic instrument adopted in accordance with the procedure referred to in Article 251 of the former Treaty establishing the European Community (hereinafter "**TEC**") provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, *inter alia,* by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements, those measures shall be

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58 L 184, 17.7.1999, p. 23.

59 L 200, 22.7.2006, p. 11.

60 In that context see European Parliament, resolution 2010/C 8 E/05of 23 September 2008 with recommendations to the Commission on the alignment of legal acts to the new Comitology Decision (2008/2096(INI)).

adopted in accordance with the regulatory procedure with scrutiny as laid down in Article 5a of the Comitology Decision. Thus, in general, the regulatory procedure with scrutiny has to be used for such measures of general scope that apply essential provisions of basic instruments or such measures designed to adapt or update certain non-essential provisions of a basic instrument.

However, the Treaty of Lisbon has brought further considerable changes to the formal and material requirements regarding the possibility to empower the Commission to provide delegated or implementing acts within European legislation via a comitology procedure. Especially Articles 290 and 291 TFEU constitute a new legal framework for the system of Commission's delegated and implementing acts. Whereas the new formal conditions do not strictly apply to the *acquis communautaire* adopted before the Treaty of Lisbon, it is questionable whether at least the material conditions of the new Union's primary law have to be observed in current and future comitology procedures, as the subject matters partially overlap. However, with regard to the hierarchy of Union's acts, it is recognized in legal literature that the existing secondary legislation has to be interpreted in the light of the new requirements of primary law.[61]

In the light of these observations, we will now in the following have a look at the general admissibility of comitology (sub II.) before assessing the legal limits to this instrument (sub III.).

II.
Admissibility of Comitology Procedure

The following ECJ's leading decisions confirm and treat the legal admissibility of the comitology procedure:

- Already in 1970, the ECJ stated that the legality of a committee procedure cannot be disputed in the context of the institutional structure of community. The European legislator can legitimately delegate an implementing power to the Commission without distorting the European structure and the institutional balance.[62]

- Also in 1970, the ECJ held that the legislative scheme of European primary law as well as the consistent practice of the European institutions establishes a distinction between legal measures and derived law intended to ensure their

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[61] See Kotzur, in: Geiger/Khan/Kotzur, EUV/AEUV, 5th edition, Munich 2010, Art. 290 paragraph 9 and the references cited therein.

[62] See ECJ Case 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel / Köster [1970] ECR 1161, paragraph 9.

implementation. According to the ECJ, it is sufficient that the basic elements of the matter to be dealt with are adopted in accordance with the legally provided procedure whereas the provisions implementing the basic act may be adopted according to a different procedure.[63]

- Later, the ECJ clarified that the European law distinguishes between essential rules which have to be reserved to the legislators' power and rules of merely an implementing nature which may be delegated to the Commission.[64]

- With special regard to the comitology procedure, the ECJ repeatedly confirmed that the (second) Comitology Decision was adopted on the basis of European primary law, and that the possibility to confer on the Commission powers for legal implementation covers the establishment of implementing rules and the application of rules to specific cases by means of acts of individual application.[65]

- Also, the ECJ explicitly stated that the Comitology Decision lays down in a non-binding manner the different procedures for the exercise of the implementing powers conferred on the Commission.[66] However, the ECJ held that, as a measure of secondary legislation, the (second) Comitology Decision cannot add to the rules of the European primary law,[67] but that the European institutions may not depart from the rules of conduct without giving the reasons which have led it to do so.[68]

- Moreover, the ECJ emphasized that according to Comitology Decision, the regulatory procedure should be chosen for measures of general scope designed to apply essential provisions of basic instruments. These measures have to be contrasted with the concept of management measures including, inter alia, those relating to the implementation of programmes with substantial budgetary implications.[69]

In that light, we can conclude that (if certain requirements are met) the delegation of power to the Commission to adopt non-legislative or implementing acts is generally

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63 See ECJ Case 30/70 Scheer / Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1197, paragraph 15.

64 See ECJ Case C-240/90 Germany / Commission [1992] ECR I-5383, paragraph 36.

65 See ECJ Case C-122/04 Commission v Parliament and Council [2006] ECR I-2001, paragraph 36 and the case-law cited.

66 See ECJ Case C-443/05 P Common Market Fertilizers / Commission [2007] ECR I-7209, paragraph 114.

67 See ECJ Case C-240/90 Germany v Commission [1992] ECR I-5383, paragraph 42.

68 See ECJ C-378/00 Commission / Parliament and Council [2003] ECR 2003 I-937 paragraph 51 and the case-law cited therein.

69 See ECJ Case C-122/04 Commission / Parliament and Council [2006] ECR 2006 I-2001, paragraph 34.

admissible within the European law system. Today, Article 290 para. 1 TFEU explicitly provides that European legislator – under certain conditions – may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. Moreover, according to Article 291 para. 2 TFEU, the European legislator shall confer implementing powers on the Commission, or, in specific cases on the Council, where uniform conditions for implementing the legally binding act are required.

III.
Legal Limits

With regard to the principle of legality, the delegation of powers has to respect the limits deriving from European primary law. Especially, the use of comitology shall not infringe general principles of European Union's law.

As we already pointed out, the Sunset Clause will affect fundamental rights. It is settled case-law that restrictions to fundamental rights must have a legal basis.[70] Also, according to Article 52 para. 1 EU-CFR, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law. However, with regard to the absence of a strict separation of powers within the European Union's system,[71] the principle of legality of fundamental restrictions does not require an act of parliament.[72] Hence, also Commissions' measures adopted via comitology procedure may constitute legal restrictions to the fundamental freedoms provided that the delegation of powers and the execution of the delegated powers meet all relevant legal conditions.

1. Limits to the Delegation of Powers

In the light of the abovementioned case-law as well as the new legal framework for the comitology system as laid down in Articles 290 and 291 TFEU, the European legislator cannot empower the Commission to adopt such provisions which have to be qualified as essential. The Gas Regulation empowers the Commission to establish network codes on various subjects including third-party access rules, capacity-allocation and capacity-management rules (see Article 6 in

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70 See Cases 46/87 and 227/88 Hoechst / Commission [1989] ECR 2859, paragraph 19; with special regard to contractual freedom see Case C-240/97 Spain / Commission [1999] ECR I-6571, paragraph 99.

71 See Bumke, Rechtsetzung in der Europäischen Gemeinschaft – Bausteine einer gemeinschaftsrechtlichen Handlungsformenlehre, in: Schuppert/Pernice/Haltern, Europawissenschaft, 643; see also Hummer, Paradigmenwechsel im Internationalen Organisationsrecht - Von der „Supranationalität" zur „strukturellen Kongruenz und Homogenität" der Verbandsgewalt, in: ders., Paradigmenwechsel, page 145; see however for a the principle of institutional balance Jacqué, CMLR 2004, 383, and Lenearts/Verhoeven, Institutional Balance as a Guarantee for Democracy in EU Governance, in: Joerges/Dehousse, Good Governance, page 35.

72 See Weber, NJW 2000, 537, 543.

connection with Article 8 para. 6 c) and g) of the Gas Regulation). None of the relevant provisions of the Gas Regulation entitle the Commission to adopt provisions of essential nature. Therefore, from the perspective of the Gas Regulation as the basic act, we conclude that the Gas Regulation only delegates to the Commission the powers to adopt a network code to supplement or amend certain non-essential elements of the basic act. The more specific question whether the Sunset Clause indeed (only) amends non-essential elements of the Gas Regulation will be discussed in relation with our answer to the question whether the Sunset Clause is compatible with the Gas Regulation (sub C. of this Chapter).

2. Limits to Execution

When executing delegated powers, the Commission has to respect the principle of legality.

Thus the Commission shall not exceed the implementing powers provided for in the basic instrument, i.e. the Gas Regulation. Furthermore, the Commission shall not adopt provisions which are not compatible with the aim or the content of the basic act.

Finally, the adopted provisions have to respect the principles of proportionality and subsidiarity:

- With regard to the principle of proportionality, the adopted provisions shall not infringe fundamental rights and freedoms and therefore shall not go beyond what is necessary to attain the aim pursued.

- With regard the principle of subsidiarity, as laid down in Article 5 para. 3 TFEU and the Protocol on the Application of the Principles of Subsidiarity[73], the European institutions shall always asses whether the objective pursued can be better achieved at Union level rather than on the level of member states.

On this basis, we can conclude that the Sunset Clause as to be implemented in the network code will not infringe the principle of proportionality and the principle of subsidiarity: As we already assessed, the Sunset Clause constitutes a proportionate measure to attain the objective pursued by the new system and the Gas-Regulation. Regarding the principle of subsidiarity, we have no doubt that the Sunset Clause as to be implemented in the network code is necessary on a European level. The clause aims at ensuring an efficient implementation of the

[73] Protocol No 2 annexed to the Treaty on European Union (C 310/ 207).

Principle of Bundling for cross-border transports. Obviously, this objective can be better attained by European network code than by different network codes on the level of the Member States.

C.
Is the Sunset Clause provided for in para. 2.4.2 of the FG-CAM compatible with the Gas Regulation? In particular, does it amend non-essential elements of this Regulation by supplementing it (Article 6 para. 11)?

Under this question, it is to be examined whether the sunset clause provided for under the Sunset Clause is compatible with the Gas Regulation, and whether it amends non-essential elements of the Gas Regulation by supplementing it (in line with Article 6 para. 11 Gas Regulation).

In the following, we will first assess if and to what extent the Sunset Clause is generally compatible with the Gas Regulation (sub I.). We will then, more specifically, assess if the implementation of the Sunset Clause through the network code amends a non-essential element of the Gas Regulation (sub II.).

I.
Compatibility with Regulation

The first part of Question c. refers to the compatibility of the Sunset Clause with the Gas Regulation. It needs to be determined what “compatibility” means in this context.

The Sunset Clause is to be implemented on the basis of the Gas Regulation. Hence, it obviously needs to be in line with the principles set forth thereunder, and the Gas Regulation needs to provide legal grounds for setting forth the Sunset Clause. The Sunset Clause is therefore compatible with the Gas Regulation if the Regulation provides for legal grounds that such measures may be implemented by the Commission in a network code.

For the assessment of this question, we will first develop how and to what extent the Gas Regulation sets forth grounds for implementing acts regarding trans-border capacity allocation in capacity contracts (sub 1.). We will then develop to what extent such provisions cover implementing acts on existing contracts (sub 2.).

1. Capacity Allocation Provisions in General

It needs to be assessed to what extent the Gas Regulation provides legal grounds for implementing acts regarding trans-border capacity allocation in capacity contracts.

Article 1 (a) and (c) Gas Regulation establish the setting of non-discriminatory and harmonized rules for access conditions to natural gas transmission systems in general and for cross-border exchanges in particular, as well as facilitating the emergence of a well-functioning and transparent wholesale market, as the subject matter and scope of the Gas Regulation.

Article 6 of the Gas Regulation makes reference to Article 8 para. 6 and 7. Hereunder, it is provided that network codes are to be established on an array of subjects, e.g:

> *6. The network codes referred to in paragraphs 1 and 2 shall cover the following areas, taking into account, if appropriate, regional special characteristics:*
>
> *…*
>
> *(c) third-party access rules;*
>
> *…*
>
> *(g) capacity-allocation and congestion-management rules;*
>
> *7. The network codes shall be developed for cross-border network issues and market integration issues and shall be without prejudice to the Member States' right to establish national network codes which do not affect cross-border trade.*

The Guidelines attached to the Gas Regulation as Annex I include the following provisions:

> *1. Third-party access services concerning transmission system operators*
>
> *1. (…)*
>
> *2. Harmonised transport contracts and common network codes shall be designed in a manner that facilitates trading and re-utilisation of capacity contracted by network users without hampering capacity release*

These provisions clearly provide for grounds to establish network codes (to be developed under the procedural requirements of Article 6 Gas Regulation) with

regard to third-party access and capacity allocation (see Article 8 para. 6 c) and g) Gas Regulation). The FG-CAM, including the provisions in the Sunset Clause, in principle fall under this category, and can set forth provisions to be implemented through capacity contracts and/or general terms and conditions.

2. Provisions for Existing Contracts

The Sunset Clause is specific insofar as it does not only stipulate that rules are to be implemented for capacity contracts yet to be concluded, but also to existing capacity contracts. It needs to be assessed whether the Gas Regulation provides sufficient grounds for introducing such a provision.

We have elaborated above that the implementation of such a provision with regard to existing contracts, and the effect such implementation has on the fundamental rights and freedoms of the relevant contract parties, is justifiable given the objective of the provision (see section A. of this Chapter). However, a lawful implementation of such a provision requires that the legal basis of the implementing provisions sets forth sufficiently that (also) an adjustment of existing contracts may be subject to implementing regulations.

The Gas Regulation hardly mentions existing contracts. Recital 21 of the Gas Regulation makes an explicit reference:

> *(21) There is substantial contractual congestion in the gas networks. The congestion-management and capacity-allocation principles for new or newly negotiated contracts are therefore based on the freeing-up of unused capacity by enabling network users to sublet or resell their contracted capacities and the obligation of transmission system operators to offer unused capacity to the market, at least on a day-ahead and interruptible basis.* ***Given the large proportion of existing contracts and the need to create a true level playing field between users of new and existing capacity, those principles should be applied to all contracted capacity, including existing contracts****.*

However, this recital only refers to enabling network users to sublet and resell their capacity and of the TSO to offer unused capacity ("use-it-or-lose-it" principle), not to general allocation. The Gas Regulation does not specifically stipulate that (general) capacity allocation provisions may also refer to existing capacity contracts, thereby creating the need to adjust such contracts. They do also not explicitly refer to "forced implementation" provisions as set forth in the Sunset Clause. This is remarkable, given the substantial impact such interference with existing contracts evokes.

However, in the light of the general understanding of the scope of European energy regulation and the context of all provisions of the Gas Regulation, we come to the conclusion that the Gas Regulation implicitly provides for legal grounds to introduce such a stipulation for the following reasons:

- The applicability of network-related regulatory provisions on existing contracts is generally accepted. E.g., tariff regulations always apply (also) to existing contracts. Still, the Gas Regulation does not specifically mention this (see Article 8 para. 6 k) Gas Regulation).

- Such applicability to capacity allocation is necessary to ensure a non-discriminatory market practice and a level playing field for market participants (see Article 1 of the Gas Regulation), thereby fostering competition in the gas market.

- The applicability of capacity allocation principles leads to the need for adjusting existing contracts. This is generally undisputed, and has inter alia been explicitly stipulated under para. 1.3 FG-CAM. In the more general para. 1.3 FG-CAM, the implementation period is even limited to only six months, whereas the Sunset Clause provides for a much more generous transition period.

- In order to ensure that the full applicability of regulations to existing contracts can be achieved, there is a need for a clause that provides for the implementation in the case that parties to the respective contracts do not come to a consensus regarding the adjustment. One could raise the question whether the draft of the Sunset Clause in its current form – with its unilateral delegation of adjustment rights to TSOs – is compatible with the Gas Regulation, as such delegation may potentially go beyond the implicit legal grounds provided in the Gas Regulation for a Sunset Clause (see sub A.I.1.c) dd) (1) (e) of this Chapter). However, we have no doubt that the adjusted Sunset Clause, as provided in the **Annex** to this study is sufficiently covered by the stipulations of the Gas Regulation, and hence compatible with the Gas Regulation.

Given the legal regime applicable today for the delegation of regulatory powers to the Commission (esp. Articles 290 and 291 TFEU, which have not yet been applicable when the Gas Regulation came into force), we consider it advisable to clarify the applicability of gas market regulations for existing contracts in the basic legal act in the future. However, this does not change our assessment that on the basis of the existing Gas Regulation, the (modified) Sunset Clause can be established.

II.
Amendment of Non-essential Elements

As we have concluded that the stipulation of the Sunset Clause can be implemented on the basis of the Gas Regulation, it must further be assessed whether such stipulation may be conducted through the special comitology procedure set forth under Article 6 Gas Regulation.

The legal standards set forth by European law for the amendment to the Regulation refer to formal legal acts, such as the network codes, but not (directly) the FG-CAM. Hence, we (again) assume that the question refers to the formal legal act implementing the network code.

1. Applicable Legal Standard

a) Comitology Decision

Question c. is explicitly citing Article 6 para. 11 Gas Regulation when raising the issue of the Sunset Clause amending a non-essential element of the Regulation:

> *11. The Commission may adopt, on its own initiative where the ENTSO for Gas has failed to develop a network code, or the Agency has failed to develop a draft network code as referred to in paragraph 10 of this Article, or upon recommendation of the Agency under paragraph 9 of this Article, one or more network codes in the areas listed in Article 8(6).*
>
> *Where the Commission proposes to adopt a network code on its own initiative, the Commission shall consult the Agency, the ENTSO for Gas and all relevant stakeholders in regard to the draft network code during a period of no less than two months.* ***Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28(2).***

Article 28 para. 2 Gas Regulation refers to the comitology procedure according to Article 5a para. 1 to 4 and Article 7 of the Comitology Decision.

We understand that the FG-CAM are assembled under the regular procedure set forth under Article 6 Gas Regulation, and that it is intended that the Commission will adopt the network codes developed on that basis by ENTSOG. In our view, the provision at the end of Article 6 para. 11 Gas

Regulation, given its systematic context, only seems to refer to cases where the Commission proposes to adopt a network code on its own initiative, but not in cases where the Agency has recommended a network code pursuant to Article 6 para. 9 Gas Regulation. This would mean that Article 6 para. 11 subpara. 2 Gas Regulation would not to be applicable if the procedure set forth in Article 6 Gas Regulation is adhered to by all involved parties. Moreover, this puts into question whether Article 5a para. 1 to 4 and Article 7 of the Comitology Decision is applicable, as Article 28 Para 2 of the Gas Regulation clearly states that Article 5a para. 1 to 4 and Article 7 of Comitology Decision shall (only) apply where reference is made to this paragraph. Such reference is (only) made in Article 3 para. 5, Article 6 para. 11, Article 7 para. 3 and 4, Article 12 para. 3, and Article 23 para. 3 Gas Regulation.

However, it is difficult to imagine that such a result is intended by the Gas Regulation:

- Article 2 para. 2 of the Comitology Decisions provides for the application of the regulatory procedure with scrutiny where the basic act has been adopted in accordance with the procedure referred to in the former Article 251 of the former TEC (today: Article 294 TFEU) and where this act provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, inter alia, by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements. With regard to the basic act in question, the Gas Regulation has been adopted in accordance with the former Article 251 TEC. Furthermore, the network code shall establish binding conditions supplementing the provisions of the Gas Regulation. Therefore it seems appropriate – and with regard to the rights of the European Parliament even necessary – to adopt the network code within the regulatory procedure with scrutiny.

- Moreover, according to Article 7 para. 3 Gas Regulation, the Commission may adopt amendments to any network code adopted under Article 6 Gas Regulation under the condition that those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28 para. 2 Gas Regulation. If the Commission must follow the regulatory procedure with scrutiny when amending an existing network code,

this clearly indicates the Commission also shall *a fortiori* respect that procedure while adopting such network code for the first time.

Hence, it is feasible to assume that Article 5a of the Comitology Decision is to be applied with regard to the establishment of the network code. This is apparently in line with the intentions of the involved parties: We understand that the network code is to be subject to the comitology procedure according to Article 5a of the Comitology Decision. Therefore, the legal standards stipulated therein are to be applied.

b) General Principles and Article 290 TFEU

However, even if Article 6 para. 11 Gas Regulation and/or Article 5a of the Comitology Decision were not to be applied, the reference to non-essential elements is not specific to the comitology procedure under Article 6 Gas Regulation, but refer to a general principle for the delegation of certain legislative power to the Commission in a basic (secondary) legal act. Such standards regarding the need to stipulate essential elements in the basic legal act have been developed by the ECJ in numerous rulings.[74] Moreover, they are now set forth under Article 290 para. 1 TFEU. The TFEU has come into effect on 1 December 2009 and hence after the Regulation. However, it is widely recognized that the legal standards set forth in the TFEU – and more specifically Article 290 TFEU – need to be applied when interpreting provisions regarding the delegation of powers under secondary legal acts.[75]

2. Definition of Non-essential Elements

In order to assess whether the Sunset Clause is non-essential, the term needs to be defined. Article 6 para. 11 of the Gas Regulation, the Comitology Decision, and Article 290 TFEU do not contain a definition of this term.

We have elaborated above to what extent the Sunset Clause leads (or could lead) to an infringement with fundamental rights and freedoms, especially contractual freedom. For this purpose, we have assessed how substantial the interference with the clause is, and applied the principles of proportionality to the Sunset Clause in that respect.

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74 See ECJ Cases 25/70 Einfuhrstelle/Köster [1970] ECR 1161 paragraph 6; C 240/90 Germany/Commission [1992] ECR I-5383 paragraph 37; C-66/04 UK/Parliament and Council [2005] ECR I-10553 paragraph 48; CFI Joint Cases T-64/01 and T-65/01 Afrikanische Frucht-Compagnie [2004] ECR II-521 paragraph 119.

75 Kotzur, in: Geiger/Khan/Kotzur, EUV/AEUV, 5th edition, Munich 2010, Art. 290 paragraph 9.

With respect to the question to be assessed under this section, one could assume that the differentiation between essential and non-essential will correspond to the impact the Sunset Clause has on such rights and freedoms. However, it is widely acknowledged that the differentiation between essential and non-essential elements of a regulation must be made on the basis of a different criterion: It must be determined to what extent the essential policy decisions, the fundamental guidelines of European policy have been made in the basic (secondary) legal act, and that the delegation of powers to the Commission may only take place with regard to setting rules of an implementing nature.[76] In other words: The differentiation is not to be made from an individual rights perspective, but with regard to the policy impact of the respective element of regulation.[77] It should be noted that the ECJ has in this context consistently held that the term "essential" is to be interpreted in a restrictive manner[78], whereas the term "implementation" is interpreted rather broadly.[79]

3. Para. 2.4.2 as Amendment to Non-essential Element

It needs to be assessed to what extent the Sunset Clause is (only) of an implementing nature or whether it sets more fundamental policy rules.

As described above, the Gas Regulation establishes regulations on a wide array of issues regarding conditions of access to natural gas transmission networks. Specifically, it explicitly sets forth the competency of the Commission to establish network codes which cover rules on various issues including third-party access rules and capacity-allocation and capacity-management rules (Article 8 para. 6 c) and g) of the Gas Regulation).

Although it is certainly true that the Sunset Clause may have rather substantial consequences for existing capacity contracts on an individual level, it does not constitute an amendment to an essential (policy) element of the Gas Regulation: The Gas Regulation itself clearly stipulates that network codes are to be implemented, and that such network codes are to include regulations regarding

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76 ECJ Case C 240/90 Germany/Commission [1992] ECR I-5383 paragraph 37.

77 Callies/Ruffert, 4th Edition, 2011, AEUV Art. 290 para. 14, Siegel, DÖV 2010, 1, 1; Hummer/Oberwexer, in: Streinz, EUV/EGV, Art. 202 EGV, para. 34; Kotzur, in: Geiger/Khan/Kotzur, EUV/AEUV, 5th edition, Munich 2010, Art. 290 paragraph 4.

78 See Advocate General Kokott in Case C-66/04 UK / Commission and Council [2005] with reference to ECJ Cases C-356/97 Molkereigenossenschaft Wiedergeltingen [2000] ECR I-5461 paragraph 21; C 240/90 Germany/Commission [1992] ECR I-5383 paragraphs 36 and 37.

79 See Advocate General Kokott in Case C-66/04 UK / Commission and Council [2005] with reference to ECJ Cases C-159/96 Portugal/Commission [1998] ECR I-7379, paragraph 40; 23/75 Rey Soda [1975) ECR1279, paragraph 10; Joined Cases C-9/95, C-23/95 and C-156/95 (Belgium and Germany/Commission [1997] ECR I-645, paragraph 36; Case 22/88 Vreugdenhil [1989] 2049, paragraph 16; C-478/93 Netherlands/Commission [1995] I-3081, paragraph 30; Joined Cases 279/84, 280/84, 285/84, and 286/84 Walter Rau [1987] ECR 1069, paragraph 14.

third party access and capacity-allocation and congestion-management. It lies in the nature of delegation provisions as provided under Articles 6 and 8 para. 6 of the Gas Regulation that the Commission must elaborate the details of the more general delegation provisions. By doing so, the Commission merely implements the basic (secondary) legal act. Here, such implementation includes certain rules in that context (capacity allocation) for the case that parties to capacity agreements do not implement the network codes in a timely fashion, which is necessary to fulfil the general objectives of the Gas Regulation. Hence, the Sunset Clause implements the policies established by the Gas Regulation, but does not by itself set new policies.

D.
What are the legal risks for TSOs associated to the modification of existing capacity contracts according to the "default rule"?

In order to implement the Principle of Bundling, the TSOs and the Shippers have to conclude corresponding capacity contracts. The question is if and how already existing contracts concluded prior to the introduction of the Principle of Bundling can be adjusted to the new regulatory framework and the requirements of the network codes.

The following analysis is based on our findings under sections A. and C. of this Chapter. According to our analysis, it is possible to authorize TSOs by means of European legislation to unilaterally change the capacity contracts. Instead, only a regulation which obliges all parties of the capacity contracts to adjust such contracts to the new regulatory framework is compliant with European law. A proposal for an according new wording of the second paragraph of para. 2.4.2 of the FG-CAM is attached to this study as an **Annex**. If this is implemented, a risk for a TSO may then only result if the civil law of a member state provides for a stipulation according to which the Shipper may have a right – despite the order in para. 2.4.2 FG-CAM to adjust the contract - to

- prevent such adjustment, or
- to terminate the capacity contract, or
- to request damage compensation from the TSO because of the adjustment of the contract.

Conversely, there is no risk for a TSO if he can request from the Shipper to agree to an adjustment of the contract. In the following, we will analyse the existence of any such

right only for the German and French law as agreed with the NRAs commissioning this study.

I.
Germany

According to German civil law, the adjustment of existing capacity contracts can be based on contractual rights (sub 1.) or statutory rights (sub 2.).

1. Adjustment based on Contractual Rights

All German gas network operators concluded an ”Agreement of Cooperation as per § 20.1 b) EnWG (German Energy Industry Act) between the operators of gas supply networks situated in Germany“ (“**CoA**”). According to Article 1 Section 3 CoA, all gas network operators have agreed to incorporate in their capacity contracts the network access conditions (”**NAC**“) laid down in Annex 3 of the CoA. Article 60 Section 4 NAC stipulates a unilateral right of the network operator to adjust the network access conditions:

> „Notwithstanding Section 1, second sentence, and Section 2 of this Article 60, the network operator shall be entitled to amend these Network Access Conditions and the price list with immediate effect for all existing contracts of the shipper or balancing group manager if an amendment is necessary to comply with relevant laws or regulations and/or legally binding stipulations by national or international courts and authorities, including but not limited to stipulations by the Federal Network Agency (*Bundesnetzagentur*), and/or generally accepted rules of technology. In any such case, the network operator shall inform the shipper or balancing group manager without undue delay. If the amendment results in material economic disadvantages for the shipper or balancing group manager under its contract, the shipper or balancing group manager shall be entitled to terminate its contract at the end of the month following the effective date, subject to 15 (fifteen) working days' advance notice. In any such case, the other Party shall not be entitled to claim compensation. Section 2 of Article 46 shall remain unaffected. This provision shall apply mutatis mutandis to amendments required as a result of further mergers of market areas.“

Further the NAC stipulate a Changes-in-Circumstances-Clause in Article 57 Section 1 as follows:

> “If unforeseeable circumstances occur during the term of a contract which have considerable economic, technical or

> legal effects on the contract but which were not provided for in the contract or in these Network Access Conditions or were not considered when the contract was concluded, and if it would consequently be unreasonable for a party to fulfil a particular contractual provision, the party affected shall be entitled to require from the other party a corresponding amendment of the contractual provisions that takes account of the changed circumstances as well as all economic, technical and legal consequences for the other party."

Finally, the capacity contracts comprise the following Severability Clause:

> 1. If any of the provisions of this Agreement or its Appendices are or become invalid or unenforceable, the other provisions of the Agreement and its Appendices shall remain in full force and effect.
>
> 2. The parties undertake to replace the invalid or unenforceable provisions in an appropriate procedure by other provisions having as far as possible the same economic results. The foregoing provision shall also apply to any gaps in this Agreement or its Appendices."

We will analyze the three abovementioned provisions in order to determine whether they may form a sufficient legal basis for an adaptation of existing capacity contracts to the Principle of Bundling. It has to be taken into account that not all capacity contracts may have incorporated the NAC. If capacity contracts for entry- or exit-capacity at the X-Interconnectors have been concluded prior to the entering into force of the CoA, it may be the case that such contracts do not contain all provisions of the NAC. However, according to our experience, it can be assumed that all such older contracts contain a Change-of-Circumstances-Clause equivalent to Article 51 NAC and a Severability Clause equivalent to Section 61 NAC. Even if the wording may differ, we assume that the similar provisions may lead to the same results.

a) Unilateral Right to Adjust

As a basic principle, Article 60 Section 4 NAC entitles the TSO to unilaterally adjust an existing capacity contract to the requirements of a binding network code. Such adjustment is necessary to comply with the regulations of the European Commission as an international authority. It may only be questionable whether the specific changes necessary for implementing the Principle of Bundling fall under this right. In this regard, the following aspects have to be taken into account:

aa) Adjustment Right

(1) Conclusion of New Contract

An adjustment in that sense that the Shipper must in the future conclude a contract also with the TSO on the other side of the X-Interconnector is not a mere adjustment of a contract according to Article 60 Section 4 NAC, but implies the conclusion of a new contract with a new counterparty. This can not be requested on the basis of Article 60 Section 4 NAC. Accordingly, an adjustment of the capacity contract to implement Model 1 and 3 (see Model definitions under section B.I.2. of Chapter 1) will not be possible. The same applies to Model 2.2 if the TSOs do not allow a conclusion of the contract with the TSO being already the contractual counterparty of the Shipper. This means ultimately that only Model 2.1 can be executed with effect for existing capacity contracts. Otherwise, TSOs would risk that the Sunset Clause obliges the TSOs to adjust contracts although there is no legal basis to execute such an adjustment. This is true not only for the unilateral adjustment according to Article 60 Section 4 NAC, but according to all contractual and statutory adjustment rights analyzed in the following. To bear such a risk will be unreasonable for a TSO and it would not be proportionate to impose such a risk on a TSO, s. sub. A.II.1.c)dd)(e) of this Chapter.

(2) Split of Capacity

Insofar as according to the Sunset Clause the contracted capacity shall be split between the capacity holders/Shippers on both sides of the X-Interconnector, such split would result both in a reduction of the capacity already contracted and in an enhancement of the services rendered by the TSO to the Shipper. The reduced capacity would not only encompass the possibility to entry or exit the respective system of the TSO at the border, but it would add the transport of the gas from the Virtual Trading Point of the TSO-Up to the Virtual Trading Point of the TSO-Down. Such an amendment affects the main obligations under the capacity contract. However, even such amendment of the main obligations is not excluded by Article 60 Section 4 NAC. According to this provision, any adjustment of contractual clauses shall be possible if necessary to comply with regulations of international authorities. Therefore, the TSO

can base a unilateral adjustment of the capacity contract in compliance with the Sunset Clause on Article 60 Section 4 NAC.

(3) Price

Further, the price has to be adjusted to the amended regulatory framework. Such a unilateral price adjustment is explicitly mentioned in Article 60 Section 4 NAC and therefore also permissible.

(4) Annex Adjustments

As a consequence of the enhancement of the service to be performed cross-border in cooperation by both adjacent TSOs, further adjustments to the capacity contract may be necessary, e.g. with respect to balancing and nomination. Such adjustments are an annex to the implementation of the Principle of Bundling and can be performed unilaterally by the TSO based on Article 60 Section 4 NAC.

bb) Termination by Shipper

The provisions of Article 60 Section 4 NAC are subject to the statutory rules for General Terms and Conditions ("**GTC**"). According to German law, such GTC are only effective if they do not discriminate unreasonably against the other contracting party. As unilateral adjustment rights may enable one party to change the contractual balance to the disadvantage of the other party, such rights are subject to strict requirements. In any case, the respective clause has to stipulate as clear as possible under which preconditions an adjustment is permissible and what the scope of a potential adjustment may be.[80] It is widely recognized that a change of statutory rules is to be considered as a sufficient ground to adjust a contract. Therefore, the adoption of a new network code requiring the implementation of the Principle of Bundling is sufficient to base a unilateral adjustment on a contractual general term and condition.

However, even in such case it is required that the other contracting party is granted the right to terminate the contract if the adjustment is not acceptable for him. This is the reason why Article 60 Section 4

[80] Münchner Kommentar, BGB, 5th edition 2007, § 305 Rdnr. 79.

NAC stipulates that a Shipper is entitled to terminate its contract if the amendment results in material economic disadvantages for the Shipper.

Such a termination – if the requirements are met – does not result in compensation claims of the Shipper against the TSO because any such claims are explicitly excluded by Article 60 Section 4 NAC.

In case of a termination, the TSO may fear that as a consequence of a termination he may loose revenues if he will not be able to allocate the free capacity immediately to another Shipper. However, it seems rather unlikely that a shipper will bear material economic disadvantages which may entitle him to a termination. If he terminates the capacity contract he would loose his capacity rights and would no longer be able to fulfil his off-take or delivery obligations under the gas supply contract(s). Theoretically, he may be able to book new capacity. But in accordance with the rules of the FG-CAM and the network codes such capacity will in any case be bundled capacity. Accordingly, he would not gain anything by terminating the contract.. A termination of a capacity contract may only result in even greater economic disadvantages than a continuation of the amended old capacity contract because the Shipper would risk that he is not able to acquire new (bundled) capacity. Therefore, it seems very unlikely that the preconditions for a termination of a capacity contract by the Shipper according to Article 60 Section 4 NAC will ever be met.

cc) Limitations of Adjustment Right

A unilateral adjustment of a capacity contract according to Article 60 Section 4 NAC is subject to one very material restriction: In any case, a mutual agreement to an adjustment precedes any unilateral adjustment by the TSO. In such case the adjustment is not necessary to implement the binding stipulations of an international authority within the meaning of Article 60 Section 4 NAC. Such a priority of a mutual agreement is stipulated in para. 2.4.2 FG-CAM both in the wording as proposed by ACER and as proposed by us in the **Annex**.

This means that prior to a unilateral amendment of a capacity contract by the TSO, the TSO and the Shipper have to initiate negotiations on the basis of the Change-of-Circumstances-Clause and the Severability Clause as analyzed further in this study. Only if such negotiations do not result in a mutual agreement prior to the deadline stipulated in the Sunset Clause, the TSO is entitled to

unilaterally amend the contract(s) and to split the bundled capacity/capacities proportionally between the Shippers on both sides of the X-Interconnector.

b) Change-of-Circumstances-Clause

aa) Preconditions

Article 57 Section 1 NAC is a typical Change-of-Circumstances-Clause as agreed virtually in all contracts between companies. On the basis of such a clause, a contracting party cannot unilaterally amend a contract, but the party can request the other party to agree to an amendment. This corresponds with the purpose of para. 2.4.2 FG-CAM to support a mutual agreement on the adjustment of existing capacity contracts in order to implement the Principle of Bundling. Therefore, it has to be analyzed whether the preconditions for such an adjustment claim according to Article 57 Section 1 NAC are fulfilled.

With the entering into force of the network code implementing para. 2.4.2 FG-CAM, an unforeseeable circumstance in the meaning of Article 57 Section 1 NAC will occur. At the time the parties concluded the contract, neither the TSO nor the Shipper could foresee that the Principle of Bundling will be adopted by the European Commission according to Article 6 para. 9 of the Gas Regulation.

The occurrence of this unforeseeable circumstance does have considerable economic, technical and legal effects on the contract. The contract as concluded between the parties may not be executed any more. Otherwise, the parties have to face sanctions by the National Regulatory Authorities on the basis of the specific laws enacted in the member states according to Article 41 para. 1 lit. b) Directive 2009/73/EC ("**Gas Directive**").

The parties have not provided for this case in the contract. Given the potential sanctions the parties are facing, it would be unreasonable for both parties to continue the contract as concluded.

For this reason, the preconditions are met entitling both parties to request from the other party an adjustment of the contractual provision to the changed circumstances.

bb) Scope of Adjustment

According to Article 57 Section 1 NAC an amendment of the contract can be requested that takes account of the changed circumstances as well as all economic, technical, and legal consequences for the other party. This means that the interests of both parties have to be balanced.

It is in the interest of the TSO to avoid sanctions by the regulatory authorities, to make the contract compliant with the network code and to continue the contract with the Shipper.

The Shipper has the same interests. Additionally, it is in his interest to book only bundled capacities which fit to the corresponding supply contract. Therefore, the Shipper has to contact his counterparty under the supply contract first in order to find an agreement with him on the question of who shall hold the bundled capacity in future. If it will be the Shipper, he has to agree with the TSO on a corresponding adjustment of the capacity contract. His adjustment right according to Article 57 Section 1 NAC then is aimed at exactly such an amendment.

If the Shipper agreed with his counterparty under the supply contract that the other party shall hold the bundled capacity in the future, the Shipper would not have an interest to adjust the contract. Such adjustment would not make any sense, but only a termination of the existing capacity contract. However, Article 57 Section 1 NAC does not provide for a termination right. A termination right can only be based on the statutory rules concerning the “Doctrine of Frustration” and the “Termination of the performance of a continuing obligation”, as will be discussed sub 2).

As a result the Shipper may determine the volume of the bundled capacity to be implemented in the adjusted contract. The TSO then must make sure that the adjacent TSO can provide the corresponding capacity services (see Model 2.1) which may require that the adjacent TSO contacts “his” Shippers to verify that they increase or decrease their share of the bundled capacity accordingly.

Only if the Shipper does not determine the volume of the bundled capacity he needs, the TSO can request from the Shipper to agree to an adjustment in compliance with the Sunset Clause, as described above. The Shipper is obliged to agree to such an adjustment both

according to Article 57 Section 1 NAC and the provisions of the network code implementing the provision of para. 2.4.2 FG-CAM. Further, the right of the TSO to unilaterally split the capacity on the basis of Article 60 Section 4 NAC remains unaffected.

c) Severability Clause

Both parties of a capacity contract have a right to request an adjustment of the contract according to the Severability Clause in Article 61 NAC. Two cases have to be distinguished:

aa) Invalidity of Contractual Provisions

An amendment of the contract can be requested if provisions of the contract are or become invalid. Invalidity may occur if the future stipulations of the Principle of Bundling and the Sunset Clause are to be considered as a statutory prohibition. In such case any provisions violating the Principle of Unbundling would be void according to Section 134 German Civil Code. A statutory prohibition may result also from European Law as it is – for example - generally accepted for the prohibition of agreements restricting competition according to Article 101 TFEU.[81]

A statutory rule can only be regarded as a statutory prohibition resulting in the invalidity of violating contractual stipulations if the law does not stipulate otherwise. This is the case here, as para. 2.4.2 FG-CAM explicitly states that the parties have to adjust the contracts, which implies that those contracts are not automatically void after the Sunset Clause enters into effect. Both parties shall – to a certain extent - have discretion how to adjust the contract; the proportionate split is only mandatory if the parties do not reach a different agreement. Accordingly, provisions in the network code implementing the Sunset Clause according to para. 2.4.2 FG-CAM are not to be regarded as a statutory prohibition.

bb) Unenforceability

In any case, the requirements of the second alternative of the Severability Clause are met. The execution of the transport of gas in the current manner is no longer possible because of the introduction of the Principle of Bundling. As described above, various provisions of

[81] BGH, GRUR 91, 559.

the capacity contract have to be adapted to the changed regulatory framework. According to Article 61 Section 2 NAC both parties are obliged to agree to such an adjustment. The same obligations result from para. 2.4.2 of the FG-CAM.

2. Adjustment based on Statutory Rules

German civil law provides for statutory rules granting rights to adjust or terminate a contract even without a corresponding stipulation in the contract. According to Section 313 Civil Code, an adjustment can be requested according to the Doctrine of Frustration. Section 314 Civil Code provides for a right of a party to terminate a permanent obligation if there is a compelling reason.

a) Doctrine of Frustration

aa) Preconditions

If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different conditions had they foreseen this change, Section 313 Civil Code stipulates that an adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

These preconditions generally match with those of the Change-of-Circumstances-Clause in Article 51 Section 1 NAC. It is generally accepted that changes of legislation which have an effect on the performance under the contract fall under the “circumstances” within the meaning of Section 313 Civil Code.[82] This does only not apply in the case that the respective change of legislation falls into the area of responsibility of either of the parties.[83] However, this is obviously not the case because neither the TSO nor the Shipper could foresee that a network code on the basis of Article 6 Section 9 Gas-Regulation may introduce the Principle of Bundling.

Section 313 Civil Code does not apply if the legal consequences of the change of legislation with respect to existing contracts are

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[82] Münchener Kommentar, BGB, 5th edition, 2007, § 313 paragraph 178.

[83] Münchener Kommentar, BGB, 5th edition 2007, § 313 paragraph 58.

provided for in the statute itself, for example such that existing contracts shall remain unaffected.[84] This is not the case here. According to para. 2.4.2 FG-CAM, existing capacity contracts shall be adjusted to comply with the new rules of the network code. This shows that the Sunset Clause in para. 2.4.2 FG-CAM is in principle nothing else than a specification of the Doctrine of Frustration.

bb) Remedies

Section 313 para. 1 Civil Code provides for an adaptation of the contract taking into account the new circumstances. If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may terminate the contract according to Section 313 para. 3 Civil Code. In any case, the amendment of the contract - if possible - always precedes a termination.[85]

As described above, an adjustment of the capacity contract is only possible if the Shipper agreed with his counterparty of the supply contract that the Shipper shall hold the bundled capacity. In this case, the contract has to be adapted in such a way that it only encompasses bundled capacity.

If the Shipper agreed with his counterparty of the supply contract that this counterparty shall hold the complete bundled capacity, an adaptation of the capacity contract would not be possible and for both parties unreasonable. In such case, the Shipper has a right to terminate the capacity contract according to Section 313 para. 3 Sentence 2 Civil Code.

However, this does not bear a specific risk for the TSO. He is not obliged to pay any compensation to the Shipper because the termination does not fall into his scope of responsibility. It is also unlikely that he will bear any significant economic losses. The entry- or exit-capacity allocated to the Shipper will become part of the bundled capacity to be allocated by the adjacent TSO. According to Model 2.1 as proposed by us, the adjacent TSO will pay the TSO the same capacity fee as the Shipper paid to the TSO in the past for the non-bundled capacity.

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84 Münchener Kommentar, BGB, 5th edition 2007, § 313 paragraph 114; BGH NJW 1958, 1540.

85 Münchener Kommentar, BGB, 5th edition 2007, § 313 paragraph 102.

b) Termination of Permanent Obligations, Section 314 Civil Code

An existing capacity contract is a contract on the performance of a permanent obligation. Such a contract can be terminated according to Section 314 Civil Code without a notice period if there is a material reason. There is a material reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period.

These requirements can only be met if an adaptation of the contract to comply with the changed circumstances is not possible or unreasonable.[86] Here, such an adaptation is possible, as described above, in the case where the Shipper shall hold the complete bundled capacity according to an agreement with his counterparty of the supply contract. Accordingly, a termination pursuant to Section 314 Civil Code is excluded in this case.

A termination according to Section 314 Civil Code will be possible both for the TSO and the Shipper if the Shipper agreed with his counterparty of the supply contract that the counterparty shall hold the complete bundled capacity in future. Again, in this case a continuation of the capacity contract does not make sense and is unreasonable for both parties.

Again, as explained above, such a termination does not bear a specific risk for the TSO.

II.
France

According to French civil law, the adjustment of a contract can be based on contractual rights (sub 1.) but such adjustment is in principle prohibited in absence of a specific contractual provision (sub 2.).

1. Adjustment based on Contractual Rights

a) Unilateral Right to Adjust

Appendix 1 of the General Terms and Conditions of the GRTgaz Transmission Contract (in the following also the "**GRTgazTC**") contains a

[86] Palandt-Grüneberg, 69th edition 2010, § 313 para. 14; BGH NJW 1958, 785; BT-Drs. 14/6040, p. 177.

Clause 4 “Changes and amendment to the Contract” dealing with amendments following legislative and regulatory changes.

Clause 4.1 of the GRTgazTC reads as follows:

> **“4.1 Amendments following legislative and regulatory changes**
>
> In the event that new legislative or regulatory provisions that may apply directly or indirectly to the Contract, or a ruling of the Energy Regulatory Commission, should come into force during the period of execution of the Contract, GRTgaz shall adjust the Contract to the new circumstances. GRTgaz shall notify the Shipper of these amendments to the Contract and publish them on its website. The new contractual terms and conditions shall become legally applicable and shall automatically replace the present terms and conditions on the date when they come into force, without compensation of any kind.
>
> If the regulatory measures taken in application of amended Law 2003-08 of January 3, 2003 lead to a change in the tariff structure for use of the Network, the Parties shall agree to come together and make their best efforts to transpose into the new tariff structure the capacity subscribed under the Contract and directly concerned by this amendment.”

With respect to this adjustment right we conclude that Clause 4.1 of the GRTgazTC grants similar rights to the TSO in France as Article 60 Section 4 NAC in Germany.

Concerning the potential termination right of the Shipper described above for Germany, we are not aware of a similar rule under French law. The risk of termination by a Shipper in case of unilateral adjustment by GRTgaz arising from a regulatory change as indicated by Clause 4.1 of the GRTgazTC is irrelevant as it is expressly stated that “the new contractual terms and conditions shall become legally applicable and shall automatically replace the present terms and conditions on the date when they come into force, without compensation of any kind”. The amendment is prepared by GRTgaz, notified to the Shipper and published on the website of GRTgaz. The Shipper is required to abide by the contractual adjustment without being allowed to claim any compensation or right to terminate the agreement.

b) Change-of-Circumstances-Clause

Clause 4.2 of the GRTgazTC reads as follows

> **"4.2 Other changes**
>
> In the event that GRTgaz should amend the Contract for reasons other than those referred to in sub-clause 4.1 above, GRTgaz shall notify the Shipper of the said amendment and shall publish the new contractual terms and conditions on its public website. These shall become legally applicable and shall automatically replace the present terms and conditions on the date when they come into force, without compensation of any kind, provided that they have been published on GRTgaz's public website at least twenty-five (25) days before they come into force.
>
> If, within fifteen (15) days of receiving the new contractual terms and conditions referred to in the above paragraph of this sub-clause 4.2, the Shipper informs GRTgaz in writing and can demonstrate that they result, for the Shipper, in an imbalance in the Contract compared with the balance that existed when the Contract was signed, the Parties shall come together and seek mutual agreement on adjustments that can be made to the Contract on the principle of nondiscrimination between users of the Network. If the Parties fail to reach an agreement within thirty (30) days of the publication of the new contractual terms and conditions, the Shipper may terminate the Contract without notice or compensation."

Although not drafted as a typical Change-of-Circumstance provision, Clause 4.2 GRTgazTC has a comparable nature and legal regime. Typically known as hardship clause under French law, it obliges the parties to renegotiate their contract should a change of circumstances lead to a drastic shift of the economical balance of the agreement that was prevailing at the time of its execution.

Under French law, the purpose of a hardship provision is to oblige the parties to renegotiate certain terms of the agreement. It differs from an indexation clause where, outside of the parties' intent, the conditions of the agreements are automatically amended (price increase for example). It also differs from a force majeure provision which sets forth the reasons making the continuance of the contract impossible to perform and therefore lead to its termination.

Clause 4.2 GRTgazTC contemplates the situation where, for any reason(s) other than the one mentioned in Clause 4.1 GRTgazTC "should" amend the contract. Clause 4.2 GRTgazTC does not give any detail with respect to such reason(s) and does not make specific reference to a change of circumstances. As drafted, the provision does not seem to allow the

Shipper (but only GRTgaz) to claim for an adjustment of the contract should a change of circumstances affect its situation.

In case of adjustment of the GRTgazTC based on Clause 4.2, the new provision will automatically replace the previous one and come into force automatically without compensation of any kind to the Shipper.

However, the Shipper is entitled, within a limited period of time, to inform GRTgaz of the imbalance of the contract compared with what existed when the contract was signed. Then will follow a short period of negotiation between GRTgaz and the Shipper for them to reach a mutually acceptable adjustment. If the parties fail to reach an agreement, the Shipper will then be entitled to terminate the GRTgazTC without notice or compensation.

c) Severability Clause

The GRTgazTC does not contain a Severability Clause comparable to Article 61 NAC, although such provision is common in French contracts.

Even in absence of severability provision, statutory rules and case law govern the situation where one provision of a contract becomes null or unenforceable.

Article 1172 of the French Civil Code reads as follows:

> "Any condition relating to an impossible thing, or contrary to public morals, or prohibited by law, is void, and renders void the agreement which depends upon it."

Case law has progressively softened the consequence of the impact of the invalidity of one contractual provision (leading to the termination of the whole agreement) and has established a general rule applicable to all agreements: only the invalid provision is set apart and the other provisions of the agreement remain in full force, unless the invalid provision was the impulsive and decisive reason for the parties to enter into the agreement, in which case the whole agreement must be considered void.[87]

Therefore, in absence of a Severability Clause, French civil law does not automatically render void the agreement in the event one clause is considered void or contrary to French law. The question is however to assess whether the implementation of the Principle of Bundling and the Sunset Clause would render void or impossible the impulsive and decisive

[87] William Dross. *Clausier*. p. 352. Litec March 2011.

reason that led the parties to enter into the GRTgazTC. As a simple amendment of the capacity contract is possible in order to adjust the contract to the Principle of Bundling and as both Parties have an interest to continue the contract in order to generate revenues (TSO) and to fulfill obligations under the gas supply contract (Shipper), we conclude that the introduction of the separated booking of entry or exit capacity is not the impulsive and decisive reason to lead the parties to inter into the GRTgazTC.

2. Adjustment based on Statutory Rules

a) Absence of Doctrine of Frustration

Although commonly accepted in the legal system of many European countries, the Doctrine of Frustration, known in France as the "*théorie de l'imprévision*", is traditionally not recognized under French civil law.

Since a decision of the *Cour de Cassation* dated 1876 *("Canal de Craponne")*, it has been commonly admitted in France that civil judges are not allowed to amend the terms of a contract which became unbalanced following changes in economic circumstances. Hence, there is the necessity for the parties to insert a hardship clause in their agreement if they want to remedy the consequences of a potential change of circumstances.

This highly protective position of the contract "as entered into" has been continuously reaffirmed since then. A recent decision dated 29 June 2010 has nonetheless casted a doubt in the mind of legal academics on a potential change of the Cour de Cassation's position,[88] although it is still too early to conclude that the principle contained in the 1876 *Canal de Craponne* decision has been overturned.

b) Termination of Permanent Obligations

The legal regime applicable to the termination of a permanent obligation is based on Article 1780 of the French Civil Code which prohibits perpetual commitments:

> "One person may engage his services only for a time, or for a specified undertaking.

[88] William Dross. *Clausier*. p. 2195. Litec March 2011.

> The hiring of services made without determination of duration may always cease through the wish of one of the contracting parties.
>
> Nevertheless, the termination of the contract through the wish of one only of the contracting parties may give rise to damages.
>
> To fix the compensation to be granted, if any, account shall be taken of usages, of the nature of the services hired, of the time elapsed, of the deductions made and of the payments made in view of a retirement pension, and, in general, of all the circumstances which may establish the existence and determine the extent of the loss caused.
>
> The parties may not renounce in advance the contingent right to claim damages under the above provisions.
>
> The controversies to which the application of the preceding paragraphs may give rise, when they are brought before civil courts and before courts of appeal, shall be prepared for trial as summary proceedings and tried as emergencies."

Not all contracts are subject to this unilateral termination right given to each party at any time of the life of the agreement, but always subject to reasonable notice and potential payment of damages to the non-terminating party.

Only the agreement having an "unlimited" duration may be terminated this way, as opposed to agreements with a limited duration where the rule is that the parties must continue the performance of the agreement until the end of the term.

Based on the above, the *théorie de l'imprévision* and the corresponding necessity to insert a *hardship* provision are only relevant in agreements with a limited duration, as French law always give the right to the parties to an agreement with an unlimited term to exit such agreement should its conditions become too unfavorable.

c) Conclusions regarding an Adjustment of the GRTgazTC

In order to assess the impact of a potential change on the GRTgazTC, beyond Clause 4 GRTgazTC foreseeing a potential change in legislation, regulation or circumstances, it is necessary to know whether the agreement has or does not have a specified term.

Clause 3 of the GRTgazTC mentions that:

> "Unless specifically stipulated otherwise, the Contract shall come into force on the day it is signed and end on the date specified in the Special Terms and Conditions".

Assuming a term is actually specified in the Special Terms and Conditions agreement between GRTgaz and the Shipper, the GRTgazTC would then be considered as an agreement with a limited term with the following consequences:

- The parties would not be able to use the possibility given by Article 1780 of the Civil Code to unilaterally terminate the agreement.
- A party would not be able to unilaterally adjust the contract in the name of an unforeseeable event because of the absence of Doctrine of Frustration under French law, unless the stipulated such adjustment right in the contract.

E.
Can the bundling of capacity contracts entail a unilateral right to terminate a long-term supply contract?

The adaptation of the capacity contracts to the Principle of Bundling does not directly affect the supply contracts even if both contracting parties rely on corresponding capacity allocations to fulfil their mutual obligations to supply and off-take. However, it is questionable whether the adaptation of the capacity contracts may entitle a party of the supply contract to terminate the contract. In the following we first describe the typical stipulations of a long-term supply contract (sub I.) and then analyze the preconditions for a potential termination according to German and French Law (sub II.).

I.
Content of a Long-term Supply Contract

Typically cross-border long-term supply contracts (hereafter also "**Import-Contracts**") are integrated supply contracts. The supplier is obliged to deliver to the other party a certain yearly, daily, and hourly volume of gas. The other party has the corresponding obligation to off-take and pay the supplied gas volumes.

Integrated Import-Contracts normally do not contain detailed stipulations concerning gas transport. Instead, the contracts stipulate only the delivery point. The delivery point

is typically defined as the point directly behind the respective border, i.e. after import of the gas but before feeding the gas into the pipeline system of the receiving country.

A typical clause in an Import-Contract in this context may have the following or similar wording:

> „Transportation of the natural gas to the Delivery Point will be provided by the Seller at his own risk and expense. The Buyer shall be responsible for the feeding of the natural gas into the transmission system at the Delivery Point and the further transport of the natural gas at his own risk and expense."

The Import-Contracts determine the price to be paid for the gas supply. A wide variety of gas formulas exist. It could be a combination of a base or capacity price and a volume based price. The volume based price is typically subject to a price adjustment corresponding to the price for fuel oil, coal or a market-based gas price index or a combination of these. In addition to such automatic adjustment the long-term Import-Contracts provide for regular price reviews (typically annually or bi-annually), which aim at an adjustment of the price taking into account the market value of the gas in the market of the off-taker.

Further, Import-Contracts contain the clauses typical for business contracts such as a Severability Clause and a Change-of-Circumstances-Clause analogous to the clauses in Section 57 or 60 NAC.

II.
Possibility to Terminate Import-Contract

1. Germany

a) Adjustment instead of Invalidity of Supply Contract

The validity of an integrated long-term gas supply contract is not affected by the introduction of the Principle of Bundling and the Sunset Clause. The case is comparable to a case decided by the Bundesnetzagentur on 17 November 2006. In this decision, the Bundesnetzagentur banned the single-booking model as it was agreed in the first version of the cooperation agreement between the German gas network operators. According to this decision, it is only possible to book bundled capacity between the exit point at the end customer and the virtual trading point in each market area. The possibility to deliver gas at the so-called city-gate was abolished. Instead, the transport from the virtual trading point to the end-customer becomes part of the responsibility of the off-taker. The delivery point city-gate as

agreed in all old integrated gas supply agreements with local distribution companies does not longer exist since this decision.[89]

As a result of the abolition of the old delivery point, a new delivery point had to be agreed between the parties according to the principle of good faith stipulated in Section 242 German Civil Code.[90] The new delivery point under the new regulatory framework could only be defined as the virtual trading point of the respective market area.

The case is comparable to the implementation of the Principle of Bundling in existing capacity contracts. The old delivery point is abolished. As a new delivery point it is necessary to determine either the VTP-Up or VTP-Down.

b) Right to Adapt the Contract

Again, the basis for such an adaption of the contract can be the Change-of-Circumstances-Clause and the Severability Clause as agreed in the Import-Contracts or the statutory rules concerning the Doctrine of Frustration according to Section 313 German Civil Code. In all cases the question has to be answered whether an adaptation of the contract by shifting the delivery point from the border to a virtual trading point is reasonable for the parties. This will only be the case if the shift of the delivery point does not trigger unreasonable disadvantages for any party and thus frustrate the balance of the contract.

aa) Shifting the Delivery Point to the VTP

There are no indications for such unreasonable disadvantages. The economic consequences of the shifting of the delivery point can be fully compensated by an adjustment of the gas price.

(1) Costs of Transport

Under the non-bundling regime the costs of transportation up to the existing delivery point at the border have been taken into account by the supplier when calculating the gas price. *Vice versa* the off-taker also calculated the transport costs to benchmark the gas price offered by the supplier.

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89 BNetzA, Beschl. v. 17.11.2006, BK 7-06-074, p. 179, 181.

90 Palandt/Heinrichs, BGB, 69th edition 2010, § 269 paragraph 18.

It is relatively easy to adjust the agreed gas price to the increased or decreased costs of transport (depending on who will hold the bundled capacity in future). If the supplier bears the additional costs of transportation in case the delivery point is shifted to the VTP-Down, the gas price has to be increased by the corresponding capacity charges. If the delivery point is shifted to the VTP-Up, the off-taker can request to reduce the gas price by the capacity charges saved by the Supplier in future because he no longer has to transport gas from the VTP-Up to the border. The price adjustment is fairly easy to determine on the basis of the regulated and published tariffs of the TSOs.

(2) Price Review

The shift of the delivery point to the VTP-Up or the VTP-Down extends the trading options for the supplier and the off-taker. If the delivery point will be the VTP-Down, the supplier can use Spare Capacity for day-ahead trading of further volumes at the VTP-Down (**Case 1**). If the delivery point will be the VTP-Up, the off-taker can trade the gas both at the VTP-Up and the VTP-Down (**Case 2**). If the capacity will be split proportionally between supplier and off-taker, both effects occur simultaneously. Further, with the additional trading options at the VTPs, the competitive pressure at the trading points may increase.

In both cases a party of the supply contract may argue that the market value of the gas will be higher or lower as assumed at the time the contract had been concluded. With this argument a party may want to make use of the regular price review clauses or of any other contractual or statutory adjustment right as described in this study.

The argument that the shift of the delivery point would increase the competitive pressure resulting in a reduction of the margins of any of the contracting parties should not entitle any party to request an adjustment of the contract price, neither according to the contractual price review clauses or any other contractual or statutory adjustment right as described in this study. Even without the shift of the delivery point, the Import-Contracts do not provide for any exclusion of competition. Such a restriction of competition would violate Article 101 TFEU and would hence

be null and void. Accordingly, no contracting party is protected against competitive activities by the other party. It is no justification for an adjustment of the contract price if such competition is facilitated by the shift of the delivery point.

The potential change of the market value of the gas is also not a reason to adjust the contract and the contract price on the basis of the Change-of-Circumstances-Clause, the Severability Clause, or the statutory rules governing the Doctrine of Frustration. A potential change of the market value does not make the continuation of the contract unreasonable, neither for the supplier nor for the off-taker. A change of the market value does not lead to any disadvantage of the contract parties. This would be the case e.g. if either the production costs would increase significantly or the agreed currency would lost its value. Nothing similar happens in case of a shift of the delivery point. This means that the change of the market value may – if at all – only be taken into account in the course of the regular price reviews as agreed in the contract. As it is not within the scope of this study to analyze all sorts of price review clauses of Import-Contracts (which are highly confidential), we can only provide some general remarks in this respect. We assume that under any price review clause Case 1 and Case 2 have to be distinguished:

In **Case 1** the value of the gas for the Supplier may increase if he obtains an additional option to trade gas at the VTP-Down. According to the price review clauses known to us, such increase would not entitle the off-taker to request a reduction of the contract price. According to the typical price review clauses the benchmark for the new price is the price for which the off-taker can procure the gas alternatively for his market. However, the gas to be traded by the supplier after the shift of the delivery point to the VTP-Down is gas which is not supplied to the off-taker and therefore is not encompassed by the supply contract. This is gas which the Supplier can trade at any trading point he has access to and no price review clause we are aware of would entitle the off-taker to request a price adjustment if the value of such gas for the supplier changes. The benefits and risks associated with such changes of the market value remain with the supplier only.

The case could be different in **Case 2**. In this case the betterment of the off-taker may be taken into account by a price adjustment. As the typical price review clauses we know base the adjustment on the value of the supplied gas in the market of the off-taker, this value could be altered by the shift of the delivery point. Ultimately the contract price could be near or even equal to the wholesale price at the virtual trading points. If and to what extent a price adjustment can be requested by any of the parties depends on the specific wording of the contractual price review clauses and cannot be further analyzed in this study.

(3) Contract Party

In Model 2.1 neither the Supplier nor the Off-taker is forced to conclude a new capacity contract with a new TSO. Accordingly, there is no change of the contracting party which may make the continuation of the corresponding supply contract unreasonable.

bb) Split of Bundled Capacity

Finally, it needs to be analyzed what the legal consequences are in the case that the parties of the supply contract do not agree on who shall hold the bundled capacity in future. In this case, para. 2.4.2 FG-CAM provides for a proportionate split of the capacity between the current capacity holders, e.g. the supplier and the off-taker of a given supply contract. As a consequence, one portion of the gas needs to be delivered at the VTP-Up and the remaining portion at the VTP-Down whereby each party bears a corresponding part of the transportation costs and risks.

At first sight, such an adjustment of the supply contract may not be fully sensible but it is technically feasible. As the adjustment burdens and disburdens both parties in the same way, it corresponds with the hypothetical will of the parties taking into account the mutual interests in case another agreement cannot be found. Therefore, each party has a right to request an adjustment of the supply contract in that manner that the delivery point will be split between the VTP-Up and the VTP-Down. Further adjustments have to be done accordingly. However, this does not affect in any respect the possibility that the parties may find any other agreement.

cc) Conclusion: No Termination and Risk for Security of Supply

The foregoing analysis shows that an adjustment of the supply contract is possible according to the contractual and statutory adjustment clauses. As a consequence, no party of the supply contract has a right to terminate the contract according to Section 313 para. 3 German Civil Code or Section 314 German Civil Code. The other party could reject such a termination. The termination would be void. Accordingly, the introduction of the Principle of Bundling for existing contracts does not bear a significant legal risk for the security of supply.

2. France

In the event French law is applicable to the Import-Contract, the presence of a typical change-of-circumstances provision and a severability clause should provide a sufficient basis to adapt the contract; the result is not differing from the analysis of German law.

In addition, the *théorie de l'imprévision* is commonly recognized by international arbitrators (ICC for example) when applying French law and it is considered that a hardship clause is tacitly included in international agreements[91] meaning that each party will be entitled to request from the other parties to agree to amend the Import-Contract as described above.

In addition, as all Import-Contracts are entered into for a limited period of time, a unilateral termination by one party is not authorized under French civil law (unless authorized by the agreement itself).

* * *

[91] F. X. Testu. Contrat d'affaires. p. 211, 212. Dalloz Février 2010.

ANNEX

Draft for an
Alternative Sunset Clause (2.4.2 FG-CAM)

The network code(s) shall ensure that existing capacity contracted before the entry into force of legally binding network code(s) shall be bundled no later than five years thereafter. Network users holding existing capacity contracts should aim at reaching an agreement on the split of the new bundled capacity. National regulatory authorities may moderate between the parties.

If no agreement on the split of bundled capacity can be reached between the parties to the relevant existing capacity contracts, the network code(s) shall provide that ~~entitle~~ each party to such existing capacity contracts~~Transmission System Operators~~ shall be obliged to agree to an adjustment of the respective capacity contracts in such way that ~~to split~~ the bundled capacity is split between the original capacity holders proportionally to their capacity rights, and that the existing capacity contracts are adjusted accordingly. The duration of the amended capacity contracts with ~~new~~ bundled services shall not exceed the duration of the original capacity contracts ~~they are built upon~~. Any further details of this procedure shall be set out in the network code(s). According to Article 41 (1) b) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC the National Regulatory Authorities being competent for the respective TSOs may ensure compliance with the obligations of the network code and may impose appropriate sanctions on the parties of existing contracts not implementing the principle of bundling. In case of difference between the National Regulatory Authorities the Agency for the Cooperation of Energy Regulatory may be involved according to Article 7 (4) (5) of the Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators

Network codes are not meant and do not regulate supply contracts, only capacity contracts. Insofar as these Framework Guidelines could have an effect on supply contracts, implementation of network codes shall not entitle contracting parties to cancel supply contracts. It could only serve to separate and amend the capacity contract if this is included in the supply contract.