



CONTRIBUTION TO THE CONSULTATION ON ENERGY STRATEGY FOR 2011-2020

Moving towards a European Energy Community: a Policy Proposal

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This contribution draws on Notre Europe's report which elaborates upon Jacques Delors' policy proposal for a European Energy Community. The report "Moving towards a European Energy Community: A Policy Proposal" which was written by Sami Andoura, Leigh Hancher, and Marc van der Woude is freely available for download online at <http://www.notre-europe.eu>.

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INTRODUCTION

When six European states decided in 1951 to integrate two key sectors of their economies to create a Community, their purpose was to replace conflict with cooperation and antagonism with prosperity. Energy was one of these two key sectors, and almost sixty years later, energy is still at the top of the political and economic agenda. However, the rules that ensured equal access to common resources no longer exist. Despite increased regulatory activity, Europe has lost its ability to pursue a truly common policy covering the three objectives that are essential to energy policy today: affordable access to energy; sustainable development of energy production, transport, and consumption; and security of supply. These objectives are not necessarily irreconcilable, provided that the right balance is struck and that technological innovation is efficiently and effectively channelled. The difficulty of this task is compounded by the various crises our societies are facing.

The climate crisis calls for new priorities yet simultaneously reduces the available options. Alternative policies are required, together with the decision-making capabilities necessary for the adoption of compulsory measures. It is dangerous and illusory to assume that these challenges can be addressed at the state or regional level, or that loose cooperative structures have the ability to make the necessary hard choices. If Europe's leaders wish to take on the new challenges collectively, they must ensure that Europe's energy policy provides the decision-making tools to support these difficult policy choices and yet remains flexible enough to accommodate change.

The aim of *Notre Europe's* contribution to the European Commission's Public consultation on "Towards a new Energy Strategy for Europe 2011-2020" is on the one hand to examine whether the above mentioned three objectives can be achieved under the existing European energy policy

in a consistent and credible manner, and on the other hand to determine what institutional framework would be needed for an enhanced European energy policy for 2011-2020. The first section of this contribution gives a brief overview and assessment of the policies developed at the European level so far. It concludes that Europe does not have the tools needed to implement a common energy policy. Section two assesses whether the new legal basis under the Lisbon Treaty could deliver a common European energy policy, and concludes that it does not offer prospects of radical change. On this basis, section three puts forward a policy proposal calling for a European Energy Community. It looks at the way in which this model could best be achieved and makes several recommendations.

SECTION I - Progress made over the last couple of years: a laborious process

It is undeniable that the Union is equipped with a relatively well-developed set of rules which are unique on the international scene. Moreover, in the light of the Strategic Energy Reviews, it is clear that there are ongoing attempts to improve the existing legal framework of secondary legislation. Nevertheless, when considered together, Community policy for achieving the three objectives remains **both incoherent in its aims and insufficient in its results**. Ambitious as the ‘20-20-20’ programme might appear, it is firmly rooted in dealing with the future of conventional energy sources and networks e.g. the ‘security-of-supply’ of conventional fuels. Sustainability is only addressed at the margins. Yet, it is evident from recent policy initiatives that the classic **distinction between internal/external security and hard/soft security no longer holds**. The concepts of internal and external security now transcend the national level – the recent Community drive to create an internal energy market in order to better define an external policy which ensures the EU’s ‘security-of-supply’ is a perfect illustration of this trend.

1) First Assessment: A Lack of Consistency

The current challenges urgently require **greater consistency in balancing the three key objectives**. The realisation of the objective of ‘security-of-supply’ forces us to develop renewable energy sources in order to mitigate the risks of fossil fuel supply shortages. **A consistent approach should allow for their mutual realisation**, even if prioritisation of any one of the three may vary at any point in time.

Yet, it is apparent that the current institutional setting and the policy initiatives that have emerged provide **little scope for real tradeoffs between the three key objectives at Community level**. This is in part a **result of the patchwork structure** which the traditional reliance on framework Directives for minimal harmonisation has spawned. This approach only makes for minimal progress and inevitably leaves too much room for member states to adopt divergent and heterogeneous implementation of rules and regulations and to justify these differences on the basis of national sustainability and security goals. **Divergent national regulation continues to frustrate the completion of internal market(s)** without necessarily contributing to the furtherance of a true Community dimension in relation to ‘sustainable development’ and ‘security-of-supply’.

One single objective – **realising the internal market – has systematically been prioritised and put forward as the panacea allowing the Community to pursue the three objectives**. Whereas a well-functioning market, corrected by public service obligations and consumer protection rules, may contribute to achieving the accessibility objective, it is far less effective as a tool to promote the other two objectives. Focusing on the internal market may even come at the expense of the lack of progress on these other objectives. The realisation of the internal market is not an end as such, but a means to an end. Increased internal market accessibility

is not likely to lead to greater external security without progress on the external dimension.

The realisation of the internal market is also not a guarantee that either demand or supply of energy is likely to be sustainable. Rather, its aim is to secure access to competitive sources of fuel. Although **energy relates to specific products and uses which call for specific rules**, it has so far been addressed only through the basic EC rules on completing a competitive internal market (four freedoms and competition) – without taking fully into account the specificities of energy markets and the fact that state intervention (at all levels) in or on these markets, is likely to be an ongoing “fact of life.” All measures aiming at promoting ‘sustainable development’ are based on allowing derogations from the primary Treaty rules (EC) on free movement and competition, including state aids. It is evident that in meeting the national binding quotas under the new Renewables Directive, member states will have to supplement or subvert pure market mechanisms. Indeed this is the very rationale for an approach based on quotas and targets.

An interesting paradox is that although the legal framework for reconciling competition and ‘security-of-supply’ objective is established in the EC Treaty, based on the derogations that are possible under Articles 81 (3), 87 (3) and 86 (2) EC, this has **not been used to promote consistency or legal certainty**. Rather, potential conflicting objectives are dealt with on a case-by-case basis. The Electricity and Gas Directives also allow case-by-case derogation from the general regime of Third Party Access (TPA), as well as allowing for the adoption of positive measures to ensure universal supply obligations and to nominate suppliers of last resort. Nevertheless, there is as yet no consistent, systematic guidance or coordinated general policy response at the Commission level as to how the existing Treaty provisions on competition should be applied to deal with ‘security-of-supply’. There are no further guidelines or communi-

cations on state aid and energy. Similarly, the Commission has prevaricated in producing general guidance on long-term energy capacity and commodity contracts – and their compatibility with the Treaty competition provisions – despite its repeated promise to issue such guidance.

Given the global nature of the climate threat, energy sustainability for Europe can only be achieved through European-wide action internally and externally. A European-wide action will be insufficient to win the battle against climate change if Europe acts in isolation from its international partners. Yet, **energy sustainability is broader than a purely environmental concept**, and in this respect, the Community’s external environmental competencies are insufficient for developing an effective and credible energy sustainability policy both internally and externally. **Consistency is undermined by an over-reliance on derogations for member states** in order to accommodate the resulting mismatches between the external and internal dimensions of EU climate change policy.

In short, **European energy policy is essentially an internal market policy flanked by measures adopted in the context of the Community’s environmental policy, and without a concrete real foreign policy dimension**. The other two objectives of ‘sustainable development’ and ‘security-of-supply’ have either been pursued in the context of legal or conceptual derogations to the market rules or as issues ancillary to the Community’s environmental policy.

2) Second Assessment: A Lack of Capability

A key question cannot be avoided: **is the Union capable of meeting the challenges of securing the three objectives** – even in the short-term and in relation to the challenges for conventional fuels by 2020? Insofar as it is obliged to implement policy through secondary legislation, it is hardly a radical observation that the **decision-making process is far from**

efficient. Indeed, the very concept of packages – a first, a second, a third and maybe even a fourth – confirms and reinforces the idea that energy policy is fragmented. The scope of each package is relatively narrow, and the process inevitably involves postponing the resolution of controversies to subsequent rounds of packages. Yet, the roll-out of the internal market goal in a complex market often raises new issues on which decisions must be taken sooner rather than later. Progress on adopting and subsequently reforming climate change measures has taken a similar, **‘package and postpone’ approach** yet this has not progressed in tandem with the reform of energy legislation – with the result that substantial contradictions arise and the realisation of the key objectives may be compromised.

A further striking feature of many recent energy measures is their **declaratory or facilitative nature** – leaving the decision to take a particular action or initiative either to the member states or the market. Constant fine-tuning through non-binding declarations and guidelines concocted by a proliferation of *ad hoc* expert bodies has become the order of the day. Strikingly, there is an apparent **failure to transpose experience gained in enforcing one set of objectives to another.** Non-binding targets for renewables were ignored for a decade and were only replaced with binding targets in 2009. Non-binding targets for investment in energy infrastructures are not likely to produce any other result.

In addition, the **Community toolbox is incomplete and inadequate.** The battle for sustainable energy requires a new industrial revolution – re-orienting our economy towards a low-carbon economy. For this revolution to take place, **massive R&D into new low carbon/carbon-free technologies is needed.** Although since 2007, there is a Strategic Energy Technology Plan (SET Plan) – towards a low-carbon future, it is not accompanied by any significant incentives (financial), or indeed, binding legal obligations on member states to make any incentives available.

With respect to one of the few instruments at its disposal to encourage infrastructural development, sustainable or otherwise, the TEN-E policy, the Commission itself acknowledges that *“European network policy has been reactive and partial – and has only aimed to plug gaps and deal with bottlenecks for internal security-of-supply reasons”*. The **TEN-E provisions do not allow the EU to mandate any action at all** – they are primarily facilitative of national initiatives and as such are not capable of either realising cross border initiatives or promoting new technologies or energy diversity. TEN-E needs are not fully aligned or coordinated with other major EU programmes which have an impact on infrastructural development. Insofar as these initiatives are being realised, this is through *ad hoc* and informal instruments and organisations.

In relation to all three objectives, current Community powers and related instruments do not aim at (nor are they able to achieve) what should surely be the key objective of a robust energy policy: **moving sustainable energy sources economically and reliably over long distances both internally and externally.** Indeed, one important challenge is the geographical location of energy production. All forms of Renewable energy are all confronted with considerable geographical limitations. It follows that an invigorated European policy must be able to deliver the development of a flexible structure for the transmission and distribution of sustainable energy. This, in turn, raises the question of local versus large scale or centralised production of energy, and with it the division of decision-making competences. In the future, it is likely that more sustainable forms of energy will be produced locally (small scale). But at the same time “back-up” or supplementary supplies of conventional fuels from main grids are necessary. A fragmented approach cannot deliver this type of result.

But the central question must not be ignored: where does initiative to take action lie with respect to these three key objectives? We are forced

to acknowledge that, in reviewing what has been achieved so far, there are indeed simply no common concepts which can form a basis for action. Common action requires an understanding of the causes that justify such action. We have no generally accepted working definitions of sustainable energy, of solidarity, or of energy crises that might prompt common action. Even with respect to short-term energy security measures for conventional fuels, there is no Community power to draw up emergency plans because, at least at present, there is **no common concept of an emergency**. Nor are there any (explicit) legal powers for the Community and/or the member states to respond to bilateral deals between member states and their external energy supplier(s). **On the external dimension, capacity for decision-making is weak and fragmented**, and without any clear power of initiative for any of the parties involved.

3) Third Assessment: A Lack of Credibility

While it is perhaps too early to reach a conclusion regarding the likelihood of the realisation of the ‘20-20-20’ strategy, the track record is hardly reassuring. Even with respect to the objective which we can consider to be the most developed – ‘affordable access to energy’ – the Commission has been forced to **launch an unprecedented number of enforcement actions** to secure compliance with the Second Package of internal market Directives. Given the EC’s limited resources, its tenacity is admirable. But the results will not be apparent for the several years it takes for the European Court of Justice to reach a final judgement. In the meantime, member states can continue to ignore their legal obligations with impunity. And yet the Commission remains the key “enforcer” – **private enforcement is the exception and not the rule**. This is equally true with respect to the enforcement of competition law.

Furthermore, even if one sees the creation of an internal energy market as a measure to achieve the objective of ‘affordable access to energy’,

the **Community’s energy policy is ambivalent**. Market forces in the energy sector are trusted with moderation. Not only are public service obligations required for guaranteeing universal accessibility, but energy consumers are also perceived as needing additional protection over and above the existing standard consumer protection rules. Moreover, regulation is becoming a lasting and increasingly intrusive feature of the internal energy markets. The scope and intensity of regulation increases not only for networks (unbundled), but also for non-network activities.

As for the other two objectives, ‘sustainable development’ and ‘security-of-supply’, in the current framework the Commission is probably the only institution capable of securing their effective realisation and enforcement – both inside and outside the Union. **Market actors, consumers and third parties derive very few concrete, enforceable rights** from these aspects of Community policy and are therefore denied effective redress through access to the courts. The Commission’s **over-reliance on informal and ad hoc bodies and networks** has similar results. While this may be an effective way of delivering short-term results, this process is not amenable to any form of enforcement beyond political pressure – pressure that can only be applied by those who are politically empowered to do so. For those excluded from this process, it is inevitable that they question its credibility as well as its legitimacy.

Preliminary Conclusion: A Fragmented European Energy Policy

As the above overview confirms, the internal market objective has been the key element of the European energy policy, overemphasising this objective alone to the detriment of the other two objectives of ‘sustainable development’ and ‘security-of-supply’. **The realisation of the internal market is not an end as such, but a means to an end**. Focusing on

the internal market may even come at the expense of the lack of progress on these other objectives.

In this market-oriented context, the **‘sustainable development’ and ‘security-of-supply’ objectives are pursued either as secondary objectives** of wider community policies, in particular the Community’s environmental policy, **and/or as derogations to the rules of free circulation** and undistorted competition.

Energy policy has thus been pursued in a fragmented, “pixelised” manner. One may wonder whether this fragmented and secondary/derogatory approach will suffice to bring about the industrial and societal change that will make Europe less dependent on fossil fuels supplied from often unstable sources.

Of the three policy objectives, it is the ‘security-of-supply’ objective that has received the least attention at European level. Whereas the sustainability objective has benefited from Europe’s leading role in environmental matters, **‘security-of-supply’ is still largely unexplored as a policy area.** Despite relatively intense analytical activities, in the form of surveys and policy papers, concrete measures are scarce and inefficient. As a consequence, the European Union is simply **not in a position to collectively counter common threats and/or to project its own position on the international scene.**

At the same time, fragmentation is also the result of a **persistent lack of political backing for Community initiatives.** The legal competence and policy tools currently available are insufficient to promote the forms of research and of industrial cooperation that will allow Europe to achieve the sustainability and ‘security-of-supply’ objectives. At present, **these policies are pursued at the national level, with the inherent risks of divergence and contradictions.**

Fragmentation is also caused by a lack of consistency between objectives and a low level of credibility of results – not least because the major part of the burden of implementing and enforcing policy falls on the Commission. This fragmentation of the European energy policy also prevents effective projection of internal policies into the international arena.

In conclusion, **although much has been achieved in the last decade, further progress has been hampered by fragmentation.** This should not necessarily be interpreted as a negative assessment of the short-term results of the Union’s ongoing efforts. **Pragmatic and *ad hoc* approaches, minimum framework legislation, packaging and postponing, accommodating concessions and brokering political compromises are perhaps all an inevitable part of the price** that has to be paid in moving the energy debate forward both on the internal and the external levels. Fragmentation accommodates flexibility.

However, **the fact that fragmentation has become institutionalised to such a surprising degree in the current process is a far more serious source of concern for the long-term perspective.** It could well prove an obstacle to the formation and implementation of a robust policy capable of spearheading Europe’s (and its neighbours) transition to a carbon-free or low-carbon economy by 2050.

SECTION II – The new energy policy under the Lisbon treaty: no prospect of radical change

now that the Lisbon Treaty has entered into force, one should consider its potential to deliver an efficient energy policy. It contains several institutional improvements, such as the new decision-making procedures which could benefit the Union’s energy policy. In addition, it explicitly

acknowledges energy as a policy area for the first time since the ECSC and Euratom Treaties, and provides for a new legal basis for Union action in that field. Directives and Regulations can henceforth be adopted on the basis of Article 194 TFEU.

However, the inclusion of a new energy Title in the Lisbon Treaty does not fundamentally change the existing division of competences between the Union and the member states on energy or climate change-related issues, and can be seen as a mere codification of the existing practice in that area. The final text of the energy Title is the result of a carefully crafted compromise between national sovereignty over natural resources and energy taxation issues and shared Union competence over the rest. Essentially the same pre-existing flaws and gaps remain.

A closer look at the new Treaty provisions does not justify a more optimistic conclusion. Article 194 TFEU sets out the four main aims of the Union's energy policy, which cover existing energy policy rather than proposing any real extension of powers. These aims are to be executed in a spirit of solidarity between the member states. Article 194 (2) TFEU stipulates however that Union legislation shall not affect a member state's choice between different energy sources and the general structure of its supply. Without any definition of the principle of solidarity, or any guidance on how to apply it when developing a new energy policy, it remains not clear whether it will receive any application in practice, or whether any concrete obligation will derive from it for the EU and the member states.

It also excludes majority voting in various policy areas featuring on the menu of desirable measures. The unanimity rule does indeed continue to apply to measures which are "primarily of fiscal nature" and/or those which "affect a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply". Even so, the

Council may unanimously decide to reintroduce the ordinary decision-making procedure.

Article 194 TFEU also subordinates energy policy to two other main Union policies: the achievement of the internal market and environmental policy. Article 194 TFEU does indeed only allow for an EU energy policy "in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment". This market-oriented and environmental perspective may restrict the scope of the Union's energy policy.

A similar concern arises over the relationship between energy policy and economic policy and in particular Article 122 TFEU. This provision concerns the Union's competence to adopt preventative measures to avoid security threats. It provides a legal basis for political action in situations of shortages, in particular energy shortages. Despite an explicit reference to energy, the relationship between Article 122 TFEU and Article 194 TFEU is unclear. Where the latter is based on the normal decision-making procedure, Article 122 TFEU confers the decision-making power to the Council acting alone on a Commission proposal, hence excluding the Parliament from the process.

The extent to which the Lisbon Treaty will allow the Union to act more effectively on the international scene is another grey area. It is true that the Treaty establishes a High Representative for the Union in Foreign Affairs and Security Policy and that this person is responsible for ensuring the consistency of all external action. She is also to be supported by an External Action Service and will have a separate budget. However, the High Representative and the European External Action Service will not have competence over all EU policies with an external dimension, most notably environment or energy. Also, decision-making powers in the international field will not change fundamentally. They continue to rely

on intergovernmental cooperation. Indeed, Declarations 13 and 14 (TFEU) specify that the Treaty will not affect the member states' ability to formulate and implement their foreign policy, including representation in third countries and international organisations, and that the provisions in Treaty do not give new powers to the Commission or the European Parliament.

It follows from this brief overview that the Lisbon Treaty does not offer prospect of radical change from the present situation.

SECTION III - Next steps

1) Long Term Solution: Moving Towards a European Energy Community

The challenges and opportunities which our societies face today call for decisive and immediate action. Urgent action is needed to address the challenges raised by the energy and climate crises, and to realise a transition to a low-carbon European economy. It is in the field of energy that the next industrial revolution will occur. **Ensuring economic prosperity for all and meeting the challenge of climate change necessarily imply energy-related solutions.** The urgency of the situation further requires that public policies reorient societies to more sustainable, targeted and secure energy uses. As such, this **action must be European, energy-specific and result-oriented.** Europeans should develop a common answer to common threats that are profoundly relevant to their current state of integration as well as to the future wellbeing of the global community. But, all this requires setting collective ambitions at a higher level both in terms of substance and procedure. As in 1951 and 1957, there must be a concerted endeavour to help collective ambitions focus on energy. A unique challenge requires a unique response.

The solution proposed in order to achieve that ultimate goal is **to develop a real European Energy Community that deals with a wide range of issues, including, at the very least:**

- A well functioning **internal energy market**, that is liquid and competitive both at the wholesale and retail level;
- An **integrated and smart network** that not only supports the internal market, but also helps Europe to achieve its sustainability and security of supply objectives;
- **Price stabilisation** measures if and when market forces fail to deliver socially acceptable results or threaten to undermine crucial investment decisions;
- A **diversified European energy portfolio** through stimulated innovation (R&D) and the use of renewable energy sources;
- The power to raise levies and to allocate Europe's **own resources**;
- Adequate **crisis management** and **strategic reserves**, that can be dispatched and used for the benefit of all Europeans;
- **External powers** allowing Europe to project and secure its goals on the international scene, and where needed to pre-empt supply deals.

This common project offers the member states the opportunity to design a common energy policy in the most efficient and democratic manner. It will require a stronger and more coherent European energy regulatory space governed by credible institutions capable of delivering effective solutions on the basis of democratic legitimacy. It should also be capable of exporting European regulatory norms in a credible and convincing way to the Union's partners on the international scene.

This common project will **inevitably call for enhanced integration and the transfer of sovereignty in order to intervene in sensitive policy areas.** The coordination of research policies, the steering of investment

decisions, the creation of solidarity mechanisms and the need to speak in unison on the international scene all imply a powerful and supranational approach. This does not mean, however, that the new energy policy will be an affair of distant technocrats.

On the contrary, a common energy policy can be a full **success only if all participating states contribute**. For example, specialisation between states offers the most efficient way to ensure a diversified energy portfolio and to create *de facto* solidarity. Within these logical limits, each member state will not only be responsible for its own national production, but also for European-wide production. However, the conception and coordination of these policies requires a central and supranational decision-making platform.

The new European Energy Community would therefore **ideally be placed within the framework of the present Union structure and rely on the institutional machinery of the Union**. The new Community would, however, develop new rules as to how these institutions would function in the policy areas covered by the new European Energy Community. Involvement of the European Parliament and seamless judicial control would be the basic rule upon which the new policy should work. The conclusion of new constitutional rules also allows the participants to set up new organs, such as the creation of a European Energy Fund and an ‘Economic and Social Committee for Energy’, or, conversely to set aside (real or perceived) institutional obstacles, such as the ‘Meroni’ case law which is said to prevent the putting into place of a true European regulator. Similarly, nothing would prevent the participants from ensuring that the **Energy Community is represented on the international scene by one supranational body** that will be the sole interlocutor with energy suppliers from third countries. Last, but not least, the decision-making process within the European Energy Community would need to be **based on majority voting and not unanimity**.

All these advantages do not take away from the fact that the creation of a new Energy Community under the Union structure will **unavoidably give rise to complex demarcation issues**, notably the definition of the scope of the new Community. Unlike the ECSC Treaty or the Common Agricultural Policy, the scope of the new Energy Community should not rest upon relatively static lists of products and technologies. **Locking in the new Community would conflict with its dynamic and innovative aspirations**. The new Community should rather rely on a series of clearly and elaborately defined objectives and provide for an accelerated procedure which would allow the European Court of Justice to issue a binding opinion in case where the scope of the new rules is unclear and/or disputed.

Last but not least, it follows that the **best available legal option for achieving this European Energy Community is to conclude a Treaty under the Union structure**. Obviously, the conclusion of such a Treaty by the European Union and all 27 member states is to be preferred because it avoids all sorts of complex questions regarding the scope of the Treaty and the potential relation between the participating and non-participating states. However, not all member states may be willing at this stage to pool their energy policies under one common supranational structure. The adoption of the Lisbon Treaty was a long and tedious process and not all member states and their people are necessarily willing to immediately embark upon yet another institutional adventure.

These political constraints lead to the conclusion that a **“fully fledged and opt-in” European Energy Community allowing the more ambitious member states to embrace the common energy policy whilst leaving the door open for the more reticent states is the best option** at Europe’s disposal. The fact that some ambitious states take the lead in developing a genuine Energy Community does not mean that the general measures adopted under this Energy Community are not developed for the benefit of the whole European Union. Nor does this mean that the general measures

developed under the current Union structure should not be improved for the benefit of all member states.

2) Short-Term Solution: First Pragmatic Steps

Whereas it **may take some time before a European Energy Community is drafted**, negotiated, concluded and ratified, the existing system still has room for improvement. There is and, therefore, will remain a **pressing need to develop interim solutions**. Enhanced Cooperation under Article 20 TEU and Functional and/or Regional Arrangement offer some possibilities to that effect. Functional cooperation could focus on well defined goals that prepare the ground for the wider policy objectives promoted by a European Energy Community.

Three initiatives that could possibly be achieved by some member states without having to wait for all member states to reach an agreement, but without jeopardising more ambitious plans for a future Energy Community are the following: Strengthened cooperation for Energy Networks, a Common Energy Fund for developing new Technologies, and the Establishment of a European “Gas Purchasing Group.”

Strengthened Cooperation for Energy Networks at Regional level

The creation of a wide, competitive and liquid energy market throughout Europe remains one of the best means to ensure that the objective of ‘affordable access to energy’ can be achieved. Such a market requires well functioning grid networks – both within and without the Union. This objective to make truly European grids necessitates a European-wide regulatory approach. Maintaining regulatory diversities and a national focus are incompatible with this requirement. **Europe needs ‘smart cross border energy highways’** and the regulatory framework promoting them.

In order to achieve this goal, **a group of member states or even groups of member states could decide to intensify cooperation in further developing a common approach to energy networks, and around well identified objectives**. One could imagine for instance a more systematic and strengthened cooperation or even integration of energy regulators, agencies and other bodies, leading to the **creation of effective European Regional Energy Networks (EREN)**. Regional markets could be created through specific enhanced regional networks.

As regards the **institutional design**, the South East European Energy Community Treaty could be considered as a working model, and notably in terms of the possibility to combine different ‘circles’ of membership and related rights and obligations for core members, participants and observers. Additional features would include: formal coordination of TSOs, regional regulatory offices (composed by officials from the participating countries and observers from EU institutions), structured institutional roles for regional stakeholders, as well as democratic control through the national parliaments as well as the European Parliament.

In order to foster a mutually beneficial cooperation between the regional markets and the EU framework, **formal co-ordination with EU institutions would be a key feature of the ERENS**. The issues at stake do indeed affect all the Regulations and Directives of the Third Energy Internal Market Package. The ERENS, in close cooperation with ACER and the European Commission, would thus be responsible for securing full conformity of all proposals and decisions with the EU ‘*acquis*’ on energy markets.

Furthermore, **national competence and powers would not be undermined**, given that ownership of networks would remain a national matter, as well as the determination of national and regional tariffs, albeit within a harmonised framework. Additionally, the non-discrimination principle

would not only require equal access but also neutrality on ownership (public/private/mixed) as already guaranteed by the Union Treaties.

Such functional and pragmatic collaboration could **pave the way for more structured and comprehensive supranational cooperation**, with, for instance, the creation of independent regional executive energy agencies (RENAs). It could also be extended to other topics. The RENAs would become exclusively competent for the matters mentioned above, and become supranational bodies. In the longer term, those RENAs could eventually be merged under the authority of ACER, which would then be empowered to adopt EU *'acquis'* on network regulation, as is for instance possible under the South East European Energy Community Treaty.

In conclusion, this **pragmatic approach**, focused on functional integration among a coalition of the willing, could offer a successful and less politicised route towards an efficient new energy policy. European Regional Energy Network(s) would **act as a building block for the completion of a comprehensive single European energy market**. Hence, some member states, being members of different regional groups could serve as bridges between the different regional groupings.

Those Regional initiatives could further become the basic “bricks” of European operators, in the same way as they proved successful and efficient in the United States. They may offer a coherent but supplementary regulatory space complementing the EU framework. With the right institutional design, they could ensure that potential conflicts with the existing and future *'acquis'* can be carefully managed if not avoided. This approach also allows the combination of a centralised approach to cross-border interconnection issues and local initiatives on smart grids. Finally, it offers opportunities for enhancing external cooperation.

A Common Energy Fund for Developing New Technologies

In order to meet the diversification and sustainability objectives, the availability of **European-wide R&D programmes supported by adequate funding facilities** should be a predominant feature of the new European energy policy. In this respect, better coordination of research and development projects of regional scale on low-carbon energies could play a major role. Coordinated action between some member states as well as between regional and even local levels of governance would deliver greater results than uncoordinated action at the national level. Cooperation at decentralised levels would further improve the appropriation by the socio-economic actors and by the ordinary citizens of the new strategy.

Against this background, the **creation of a common fund** to promote investment on research on alternative energy sources among a coalition of member states should be considered. By co-ordinating loans and subsidies promoting investments in renewable energy production and related R&D, as well as in networks, the Fund could contribute to achieving diversification objectives as well as encouraging technological innovation. The Fund could be financed from various sources, in particular from the proceeds of an energy levy on polluting forms of energy production.

The Establishment of European Gas Purchasing Arrangement(s)

Functional and pragmatic differentiation could also take shape in the creation of a European “Gas Purchasing Group”, in order to offer a **real negotiating power vis-à-vis external suppliers, and in particular, Russia**. The realisation of such a Purchasing Group could be based on existing EU legislation. A block-exemption regulation adopted on the basis of Article 101 (3) TFEU could offer the participating firms the necessary anti-trust security and allow the Commission to impose the necessary conditions to ensure that the upstream cooperation will not affect downstream competition.

The application of a block exemption regulation would also permit European gas importing companies to **create purchasing groups for ad hoc projects**, by using common subsidiaries or Groups of Economic Interest. These groups would have the following objectives: negotiating supply contracts with external suppliers; repartition of delivered gas between members; implementation of investment consortiums; exploitation of transport and stocking infrastructures inside and outside of the EU.

The implementation of this functional and pragmatic cooperation between major European gas importing companies and/or European member states could be gradual. The first step would be the **establishment of ad hoc national strategic authorities to supervise the cooperation** between importing companies and to ensure that it will not hamper the functioning of the internal market. The coordination of these national strategic authorities could be exercised by the High Representative for Common Foreign and Security Policy, under the principles of the common foreign and security policy. These national authorities should meet regularly to form a multinational supervising body, to elaborate a common working method and to establish mutual confidence between industry actors and strategic authorities. Once this is achieved, some member states could also decide **to** set up a higher level of integration by **creating a Gas Supply Agency**, inspired by the model of the Euratom Supply Agency. Here again, special authorisations would be needed from the Commission under Article 101 (3), 106 and 107 TFEU.

This proposal is in line with the current Community energy security objectives and agenda since – by establishing a stable legal framework – it would allow participating companies, member states and EU institutions to closely cooperate on strategic issues, such as building trans-European infrastructures or negotiating with external suppliers. If developed in a more integrated and supranational mode, the proposal of Gas Supply

Agency could improve energy crises management, avoid supply disruptions, develop common emergency mechanisms, reinforce solidarity within the EU, and finally advance the overall security-of-supply in Europe.

CONCLUSION – A common answer to common challenges

The analysis of Europe’s current energy policy and its legal potential to develop an ambitious and credible policy leads to the conclusion that its objectives are unlikely to be met. Europe’s energy policy goals are evolving, but in a way too slow and too piecemeal to meet the urgent challenges posed by the current climate and energy crises. More fundamentally, even if its full potential could be realised, the Lisbon Treaty does not allow the Union institutions to equip themselves with the legal instruments required to achieve the necessary policy objectives.

A real common energy policy can only be pursued in the form of a European Energy Community. Thinking that the Lisbon Treaty can be revised to accommodate a new Energy Community in the short-term is not realistic because member states just underwent a painful ratification process. Moreover, ambitions among the 27 member states diverge. Still, the lack of ambition of some should not be a reason to prevent others from progressing. The example of Monetary Union indicates that the structure set up by the Treaties could be sufficiently flexible so as to allow a group of member states to conclude a **“fully fledged and opt-in” European Energy Community** under the Union structure. This new specialised Community would rely on the institutional framework of the Union, but would be compulsory only for those member states that decided to embrace the plan for a new Energy Community. Other member states could follow if they think the moment has come to increase their level of ambition.

The legal and political difficulties inevitably associated with the longer term nature of any project to create a new European Energy Community should not be a reason to delay interim processes of further integration at the Union level in ensuring affordable access to secure and sustainable energy sources. Nor should it be a reason to prevent committed member states from concluding functional arrangements or using other mechanisms of enhanced cooperation dealing with specific issues, such as the enhanced operation of networks, the creation of an Energy Fund or the setting up of a Gas Purchasing Group and/or Supply Agency. Such initiatives should be welcomed, since they aim to serve the wider policy objectives and ambitions of a European Energy Community.

Hence, the development of an Energy Community along the above lines puts the ambitious member states back on the track which the founding fathers traced in 1951 when they concluded the ECSC Treaty, albeit in a manner that is technologically and democratically adapted to today's standards and to tomorrow's expectations.

All these initiatives, have after all, one common goal which is to promote energy market integration and solidarity between the peoples of Europe and beyond. Freedom from energy insecurity reduces the seeds of conflict. And peace is what Europe is about.