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Competition-Cooperation-Solidarity

Towards a European Energy Community: A Policy Proposal

Whereas many constraints affect the energy situation in Europe today and increasingly so until at least 2030, the European Union must guarantee the energy supply to its consumers, while simultaneously preserving the competitiveness of its economy and promoting sustainable development both internally and externally.

Initiated by Jacques Delors, this report is the harvest of the work of the Task Force of high-level European experts established by *Notre Europe* to study the feasibility of a European Energy Community. It gives an overview and assessment of the policies developed at European level so far and examines whether the existing European energy policy is capable of pursuing its three key objectives of “affordable access to energy; sustainable development of energy production, transport, and consumption; and security-of-supply” in a consistent and credible manner. Relying on the conclusions that the existing European energy policy is suboptimal, the report puts forward a policy proposal for a genuine ‘European Energy Community’. It explains why and what type of action is required to develop such Energy Community, identifying both the substantial elements which it should ideally cover and the legal and institutional policy instruments at the EU’s disposal for developing it. The report finally examines how this model could be best achieved and develops several recommendations to that effect.

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Policy Proposal by Jacques DELORS

Towards a European Energy Community: A Policy Proposal

Study by Sami ANDOURA, Leigh HANCHER and Marc VAN DER WOUDE



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Notre Europe

Notre Europe is an independent think tank devoted to European integration. Under the guidance of Jacques Delors, who created Notre Europe in 1996, the association aims to “think a united Europe.”

Our ambition is to contribute to the current public debate by producing analyses and pertinent policy proposals that strive for a closer union of the peoples of Europe. We are equally devoted to promoting the active engagement of citizens and civil society in the process of community construction and the creation of a European public space.

In this vein, the staff of Notre Europe directs research projects; produces and disseminates analyses in the form of short notes, studies, and articles; and organises public debates and seminars. Its analyses and proposals are concentrated around four themes:

- *Visions of Europe: The community method, the enlargement and deepening of the EU and the European project as a whole are a work in constant progress. Notre Europe provides in-depth analysis and proposals that help find a path through the multitude of Europe’s possible futures.*
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Notre Europe aims for complete freedom of thought and works in the spirit of the public good. It is for this reason that all of Notre Europe's publications are available for free from our website, in both French and English: www.notre-europe.eu. Its Presidents have been successively, Jacques Delors (1996-2004), Pascal Lamy (2004-05), and Tommaso Padoa-Schioppa (since November 2005).

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This report is the harvest of the work of the Task Force established by *Notre Europe* to study the feasibility of a European Energy Community. The Task Force comprised high-level European experts with Leigh Hancher and Marc van der Woude acting as co-presidents and Sami Andoura from *Notre Europe* acting as *rapporteur*. The members of the Task Force were the following: Nicole Ahner (Florence School of Regulation - EUI), Joachim Bitterlich (Vice President of *Notre Europe* – Director at Veolia Environment), Piet Eeckhout (Professor at King's College London), Wouter Geldhof (Partner Energy Law at Stibbe Brussels), Jean-Michel Glachant (Director of the Florence School of Regulation – EUI), Jürgen Grunwald (Director at the Legal Service of the European Commission), Erling Hjelmeng (Professor at the University of Oslo), Christopher Jones (Director at DG TREN, European Commission), Karl Kellner (Principal Adviser at DG TREN, European Commission), Pierre Lepetit (Vice President of *Notre Europe* – Inspecteur des Finances), Leonardo Meeus (Florence School of Regulation – EUI), Sophie Méritet (Associate Professor in Economics, CGEMP, University Paris Dauphine) and Michel Petite (former Director-General of the Legal Service of the European Commission – Of Counsel at Clifford Chance Paris).

The report has been discussed on the occasion of several meetings held in Brussels, Florence and Paris in 2009. The text of the report was drafted by Leigh Hancher, Marc van der Woude and Sami Andoura. While the draft text was being circulated between members of the task force, the rapporteur proceeded to the consultation of external experts to get preliminary feedback on the propositions developed in the report. Subsequently, the draft report was presented by Jacques Delors, Founding President of *Notre Europe*, to the European Steering Committee of *Notre Europe*, composed by high-profile European personalities (current and former Heads of State and Ministers, Commissioners, Ambassadors, MEPs, etc.) and debated in the frame of the annual meeting of the Committee held between the 6th and the 7th of November 2009 in Paris.

The draft text has received input from Pascal Lamy, Honorary President of *Notre Europe* and from several members of *Notre Europe*'s Board of Directors as well, namely: Jerzy Buzek, Sophie-Caroline De Margerie, Philippe De Schoutheete, Eneko Landaburu, Riccardo Perrisich, Julian Priestley, Gaëtane Ricard-Nihoul, Christian Stoffaës and others.

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The members of the Task Force and the European Steering Committee have expressed a range of views which are not fully reflected in the present text. The members of the Task Force do not necessarily endorse all the analyses and proposals introduced in the final version. Marc van der Woude, Leigh Hancher and Sami Andoura thank all participants for their valuable inputs, but take full responsibility for the content of the document.

MARC VAN DER WOUDE, LEIGH HANCHER & SAMI ANDOURA

A Call for a European Energy Community By Jacques DELORS

- I -

Europe faces several major crises: an energy crisis, with human activity consuming more resources than nature can provide; an environmental crisis, with climate change calling for a radical shift in the way we produce and consume energy; and an economic and financial crisis that limits our ability to find solutions quickly.

However, these crises also offer opportunities. The development of alternative, sustainable energy sources and green technologies is the key to a new industrial revolution based on sustainable development and new technologies that will help us emerge from the economic crisis. Will Europe choose to play a proactive role in the next industrial revolution, or will it be content to follow the lead set by others?

- II -

Europe needs a common energy policy in order to guarantee access for its citizens to energy at reasonable and stable prices; to maintain its industrial competitiveness; to promote sustainable development and the transition to a low-carbon society; and to ensure security of energy supply for all Europeans.

Despite a dramatic increase in regulatory activity designed to establish a broad European energy market and fight climate change, the European Union has struggled to develop a common energy policy. At the same time, the national solutions adopted by member states large and small have proven inadequate to the task and have increased the risk of diverging and even conflicting responses to common challenges.

- III -

To overcome the many stumbling blocks and doubts about the ability, as things now stand, of the European Union and its member states to face these challenges together, a new approach aimed at deeper integration and solidarity is required.

Because energy issues involve more than the environment and market liberalisation, specific rules and an overarching economic, political and strategic approach are needed.

- IV -

The creation of a coherent and integrated single regulatory space for energy in Europe calls for a number of measures. The market liberalisation process must be built on a suitable upgraded Europe-wide energy network. Price mechanisms must be put in place to correct the market when it proves incapable of

setting a socially acceptable energy price, while allowing private operators to make necessary investments in the network.

The diversification of Europe's energy mix must be encouraged by greater support for research and development in new green technologies and by greater reliance on renewable energies. These technologies require major investments in both production and transport. This in turn means that the EU must have independent and autonomous financial resources, including the power to levy taxes on certain goods and types of production in order to finance projects of common interest.

To ensure that no third country can engage in targeted reductions of energy supplies, the European Union must present a single interface in its relations with its external partners, both the producer and transit countries. This must include the ability to pool supply capacities should the need arise. In a major energy crisis, common strategic reserves must be available and distributed throughout Europe in a spirit of solidarity.

- V -

Europe has several options when it comes to meeting these crucial requirements. The most radical, but also the most promising, would be to create a European Energy Community with its own rules and methods specific to the energy field.

In the wake of the recent difficult treaty revision process, not all EU states may be ready to embark upon this route just yet. If this proves to be the case, those states wishing to move forward without delay must be able to do so. A differentiated approach of this kind is not without precedent. It has been used, in the past, to make major strides in the European project, including the Schengen area and the single currency.

- VI -

A common energy policy will clearly not be brought about overnight, and it will take time to carry out the full debate that is needed. But Europe cannot afford to wait indefinitely. Efforts to build a coherent and effective common policy must get under way now. This can be done by developing some elements of the policy without delay, preferably within the framework of enhanced cooperation as defined by article 20 TEU.

Some of the priority actions would be, for those states wishing to go forward:

- developing ambitious economic instruments to finance common research and development projects on alternative energies;
- deepening and structuring cooperation in Europe-wide energy networks;
- setting up oil and gas purchasing groups to facilitate procurement from foreign suppliers, thereby strengthening and focussing the EU's foreign policy in this field.

Although these steps may appear technical and limited in scope, they will lead to decisive changes, paving the way to greater cooperation and solidarity in the energy field.

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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 the 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.

Should we not work to reframe them in a manner commensurate with the challenges Europe faces? This would be a way of responding to the concerns of our fellow citizens and their call for a common political project in the field of energy. Rhetoric and declarations with no follow-through will not suffice if Europe's citizens are to continue to believe in the European ideal.

To support this proposal and provide an in-depth review of the challenges it addresses, *Notre Europe* is publishing the appended report. It was drawn up by a group of experts co-chaired by Marc van der Woude and Leigh Hancher, with Sami Andoura as rapporteur.

JACQUES DELORS

Reader's Guide

EXECUTIVE SUMMARY

INTRODUCTION – A POLICY PROPOSAL FOR RENEWED AMBITIONS

PART I – THE DEVELOPMENT OF AN ENERGY POLICY FOR EUROPE - A LABORIOUS PROCESS

PART II – MOVING TOWARDS A EUROPEAN ENERGY COMMUNITY

CONCLUSION - A COMMON ANSWER TO COMMON CHALLENGES

Part I of this report is an analysis of how the European energy policy has developed so far. Every section is followed by an assessment summarising the main findings.

The informed reader can directly go to the policy proposal for a European Energy Community developed in Part II.

Annexes and background papers such as 'EU Energy Facts and Figures', 'Handout of relevant Legal Texts and Articles' can be downloaded on *Notre Europe's* website at the following address: <http://www.notre-europe.eu>

Executive Summary

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 the 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. It is dangerous and illusory to assume that these challenges can be addressed at state or regional level, or that loose cooperative structures have the ability to make hard choices. The climate crisis calls for new priorities and reduces the available options. Alternative policies are required, together with the decision-making capabilities necessary for the adoption of compulso-

ry measures. 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 that it can accommodate change.

The aim of this report is to examine whether the three objectives can be achieved under the existing energy policy in a consistent and credible manner and to determine what institutional framework would be needed for an enhanced European energy policy. Part I describes the existing system. It gives a brief overview and assessment of the policies developed at European level so far and identifies deficiencies. It concludes that Europe does not have the tools needed to implement a common energy policy.

On that basis, Part II puts forward a policy proposal calling for a European Energy Community. The report looks at the way in which this model could best be achieved and makes several recommendations, concluding that the preferred option would be a new Energy Treaty within the existing EU structure.

PART I - THE DEVELOPMENT OF AN ENERGY POLICY FOR EUROPE - A LABORIOUS PROCESS

1. Energy Issues in European Treaties

Energy has been at the heart of European integration from the beginning, with the ECSC and Euratom Treaties. These two Treaties were and are unique in that they provide for a common policy with specific energy policy tools based on exclusive supranational powers vested in a central authority. Subsequent treaties – the EEC Treaty and successive amending treaties (e.g. Single European Act, Maastricht, Amsterdam and Nice) – did not provide the EU with an overarching legal basis for dealing with energy issues. With the expiration of the ECSC Treaty in 2002, the Euratom Treaty remains the sole legal basis for a common energy policy, but only in the nuclear sector. Under the EC Treaty system, energy policy measures could only be developed on the basis of general Treaty provisions - subject to the principle of subsidiarity - and internal market rules.

The inclusion of a new Energy Title in the Lisbon Treaty does not fundamentally change the current picture. The final text of the Energy Title is a carefully crafted compromise between national sovereignty over natural resources and energy taxation on the one hand and shared EU competence for other areas on the other.

2. Genesis of the European Energy Policy

Despite the absence of a specific Energy Title in the European Union Treaty before 2009, the Union nevertheless developed significant activities in the energy field, starting with modest measures to maintain stocks adopted in the aftermath of the oil crises. Later, in the mid-1990s, came the adoption of the Directives creating the internal electricity and gas markets. A first series of liberalisation measures adopted in 1996 and 1998 were supplemented by a second series of compulsory measures in 2003. The Commission subsequently carried out a broad sectoral review of this liberalisation process and proposed the Third Energy Internal Market package, which was adopted by the Council and Parliament in 2009 and provides a new regulatory framework for the promotion of the internal energy markets.

3. Have the Objectives Been Achieved? Assessment and Outstanding Issues

This strong internal market focus helps to explain why the Union does not have a fully-fledged energy policy. The objective of ensuring affordable access to energy is primarily pursued through the market liberalisation process, which is viewed almost as an end in itself. This can have negative consequences, not only for large and small energy users, but also for energy producers and suppliers, who may prefer long-term price stability to short-term price volatility. Furthermore, the current energy-related measures do not pursue the sustainability objective as an energy-specific issue. Sustainable access to energy is viewed as an environmental matter focused on fighting climate change. The carbon emissions trading system is essentially an environmental policy tool and is not designed to ensure long lasting access to energy resources. Finally, the security of supply objective has yet

barely been addressed at Union level. Measures remain limited to coordination of stocks and the technical operation of grids.

Apart from these conceptual shortcomings, Europe's current energy rules and policy suffer from structural deficiencies:

- **First, there is a lack of compliance with internal market rules.** Member States now have an obligation to implement the Third Energy Internal Market Package, yet most of them failed to correctly implement the two previous packages.
- **Second, Europe's policy tools are incomplete.** The EU does not have the authority to set guidelines for research and development activities and investments in networks. Nor does it have taxation powers which would allow it to discourage certain activities and to finance more efficient and sustainable alternatives. Larger policy issues, such as the general direction of Europe's energy sector and security of supply, are mainly addressed in declaratory or analytical policy statements (such as the Strategic Energy Reviews), but not in hard rules.
- **Third, Europe's energy policy does not have an external dimension.** Although the Lisbon Treaty moderately improved the EU's external representation, the EU is absent on the international energy scene. It is minimally represented in international organisations, if at all. Its strong belief in (internal) market forces as a cure-all allocation method is not necessarily shared by major actors on both the supply (e.g. Russia, Iran, Venezuela) and demand (e.g. China and India) sides. Nor does the European Union have any significant impact on strategic issues involving EU energy imports. Europe is an easy target for divide-and-rule policies by third-party suppliers. Overall, Europe lacks international credibility. Moreover, the fact that Europe has not developed a comprehensive common energy policy is an obstacle to the development of a common foreign policy.

Various other factors contribute to the absence of an effective energy policy and, hence, to the structural weakness of the EU and its member states. One of the most important factors concerns the member states themselves. Each member state perceives energy as a strategic issue and is intent on maintaining national

control over energy resources and national preference as a matter of national policy. Member states also prefer to work on an intergovernmental basis within international bodies such as the IEA, rather than to act collectively within the European institutions. Member states are right to view energy as strategic, but wrong to believe that separate and/or diverging national approaches will enable them to achieve their strategic objectives.

Conclusion: A Fragmented European Energy Policy

Part I of the report concludes the analysis of Europe's present energy policy with three major findings:

- **First, Europe's current energy policy is not consistent.** It is based on energy-related measures that are essentially seen as side issues of other policy measures, and it fails to pursue energy policy objectives as ends in themselves. In this context, energy-specific measures are often treated as derogations to internal market rules rather than as rules in their own right. The implementation of Europe's energy policy is spread over other policy areas and shared with member states. Past experience shows that member states have jealously guarded their sovereignty over energy resources, their right to determine environmental protection standards and their right to conduct relations with third-country oil and gas suppliers and governments.
- **Second, Europe and its institutions lack the capability to develop a real energy policy.** The decision-making process is complex and slow and will remain so, even after the entry into force of the Lisbon Treaty. Most policies require national implementation and member states either fail to take the necessary measures or do so in divergent ways. Europe cannot take direct action itself. It does not have competence to set the direction of research and development and investments.
- **Third, Europe's current energy policy lacks credibility and legitimacy.** Compliance by member states and major players is an issue. In addition, the policy is inconsistent in its simultaneous reliance on market forces and apparent distrust of them. Liberalisation measures are accompa-

nied by complex market oversight and consumer protection rules. Finally, Europe's current policy is not built on a consensus among the major stakeholders. It is imposed on the market players and they do not necessarily support it.

In conclusion, although much has been achieved in the last decade, this has been at the cost of fragmentation. The fact that fragmentation has become institutionalised to such a surprising degree in the current process is a far more serious concern in terms of long-term prospects, and could well prove an obstacle to the creation 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.

The European Union does not have the policy tools that could allow it to pursue a common energy policy, and hence to offer an effective response to the mounting energy crisis that all countries now face. This handicap also undermines the Union's ability to address the financial crisis and climate change and to seize the opportunities that these crises create. The response to the threats caused by the energy, economic and environmental crises will undoubtedly involve technological breakthroughs. Without an effective common policy, Europe risks remaining dependent on external energy sources and/or foreign technologies.

PART II - MOVING TOWARDS A EUROPEAN ENERGY COMMUNITY

Currently there are calls for a more ambitious policy. Urgent action is needed to address the challenges raised by the energy and climate crises, including external dependency, and to transition to a low-carbon economy in Europe. Such efforts must be undertaken collectively, at European level, and should be energy-specific and results-oriented.

1. The Need for Common Action

If Europe and its peoples are to control their own destiny, as they did in 1951, they must close ranks to tackle the challenges of the energy crisis. In the first

place, collective action is an **objective requirement**. No member state has the resources to face the challenges on its own. Large-scale basic research requires international efforts.

Secondly, the need for a common response is also a **legal requirement**. If member states are to maintain the current level of integration, they must develop a common policy compatible with internal market rules. Energy policy cannot be disconnected from Europe's internal market: diverging national regulations, national preferences with respect to certain resources and competing subsidy schemes all threaten the foundations of the internal market and hence the edifice on which European prosperity rests.

Third, there is also a **normative requirement** for a common energy policy. The European Union Treaty is more than an economic treaty. It also fosters cohesion and solidarity between member states. There is no point in having a Union if some of its members literally leave others in the cold.

Hence the fourth requirement for a common energy policy: this **requirement is political in nature** and relates to Europe's ability to make its voice heard on the international scene. As long as Europe is not represented as a block in international forums or in relations with foreign energy suppliers, it will not carry much weight. The idea that international issues can be adequately addressed at the national level is misguided and dangerous.

2. The Need for Energy-Specific Action

For an ambitious common energy policy to be effective, its content must be energy-specific. Energy is not just any good. In many respects it raises complex issues. Energy is indispensable to all human or industrial activity. Demand is inelastic and supply often requires very large investments. Moreover, energy is increasingly being transported and transmitted via networks. The construction and operation of these grids raise technical, financial and regulatory issues. Finally, energy sources and technologies change over time. A common energy policy should therefore be flexible, to accommodate changing conditions.

The collective response to these energy-specific issues must be efficient.

A common energy policy should do more than provide a passive response to market forces. It must include the authority to make R&D investment decisions. It must be more than a series of loose commitments that member states can choose to uphold, or not. A common energy policy should be compulsory. This also means that it should not be dependent on national financial contributions; it must have its own resources. And, last but not least, an energy policy can only be effective if it has democratic legitimacy and is supported by all stakeholders. Democracy, civil society involvement and the rule of law should be the legal cornerstones of the new policy.

3. The Content of a Common Energy Policy: Essentials and Desirables

The goals should be ambitious in terms of substance and procedure. A robust energy policy that is capable of delivering on a long-term strategy to meet Europe's challenges should cover 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.

Lessons can be learned from past European experience. Many of the tools listed above were incorporated in the ECSC Treaty and are also found in the Euratom Treaty. Those energy-specific treaties provided a common approach to the energy (transition) issues of their time and have proven relatively successful.

4. Main Issues at Stake: All or Some; Within or Outside the EU Structures; the Scope of the Policy

The incorporation of these types of tools into a sufficiently robust legal framework will of necessity raise a number of key institutional questions. As this report explains, there are several crucial issues to be resolved. For example, should the drive for the creation of a new European Energy Community involve all or only some member states? The report submits that it should not be a requirement for all member states to embrace the new energy policy – at least not in the short term.

Assuming there is sufficient political will among a number of states to proceed; how is this to be accomplished in institutional terms? If differentiated integration is considered desirable or inevitable, then how should we balance the rights and obligations of those inside the new structure and those that remain outside? The need to make the new energy policy compatible with the existing structures does not mean that it should necessarily be locked into those structures.

Energy policy is difficult to define, and its definition evolves over time. Yet the scope of an ambitious energy policy must be clearly spelled out, since it will necessarily require a different mode of cooperation than the approach currently in place. The member states that choose to join a new scheme, as well as those that do not, must be aware of the extent to which the proposed enhanced cooperation applies to them, and of its implications in related policy areas. Obviously, any new policy must preserve, not threaten, the energy '*acquis communautaire*' and what has already been accomplished in the effort to create an internal energy market.

5. The Road to a Common European Energy Policy

A final but related issue to be addressed is the question of how to take the project forward. The report outlines a number of options:

1. Amending the Lisbon Treaty
2. Using the enhanced cooperation mechanisms
3. Adopting a new energy-specific treaty
4. *Ad hoc* and/or transitional arrangements

These options are not mutually exclusive; combinations are possible, allowing for flexibility. However, there are only a limited number of ways to achieve most or all of the stated objectives in an effective and legally consistent manner.

The Lisbon Treaty (Option 1) will not fundamentally change the existing situation, unless it is amended to cover the new policy goals. This cannot realistically be expected in the short to medium term. Member states and their citizens may not wish to embark upon yet another institutional venture. Conversely, Article 20 TEU on enhanced cooperation (Option 2) offers many advantages over the standard integration methods provided in the Lisbon Treaty. But the farthest-reaching measure would be the conclusion of a new Energy Treaty establishing a new European Energy Community (Option 3). This would enable participating member states to take efficient action on all the objectives. More modest and perhaps transitional measures, such as regional/functional forms of cooperation arrangements (Option 4) may turn out to be effective in at least some specific policy areas.

6. Moving Towards a European Energy Community

Having reviewed the advantages and disadvantages of these various options, the report concludes that the optimal solution would be the creation of a new European Energy Community with full responsibility for all aspects of energy policy. Such a Community would be the best vehicle allowing member states to develop a common energy policy in the most efficient and democratic manner possible.

This option would create a stronger and more coherent European energy regulatory space governed by credible institutions able to deliver effective solutions on the basis of democratic legitimacy. It would also place the EU in a stronger position to export European regulatory norms to its international partners. The report proposes a treaty establishing a European Energy Community and involving all member states and the EU, but with initial participation possibly limited to those member states that are prepared to accept the pros and cons (opt in). It would be concluded under the EU umbrella and the existing EU institutional framework, but would operate according to its own specific rules.

7. A Pragmatic Start

Attractive as it might seem as a blueprint, the preferred route is unlikely to be implemented in the very near future. Support will have to be built and won gradually. With this in mind, the report recommends the adoption of various forms of enhanced cooperation measures in the interim, with a view to strengthening and supporting EU action without losing sight of the final goal of a true European Energy Community. To this end, the report explores several possible options, without claiming to be comprehensive. These include:

- **Strengthened cooperation with respect to Energy Networks;**
- **A common Energy Fund for financing new technologies** in renewable energies and networks;
- **The establishment of Gas Purchasing Groups** either by private operators and/or by member states, which could ultimately form a Gas Purchasing Agency.

CONCLUSION

The report proposes a two-pronged approach. The first goal would be to move towards a new European Energy Community, which would operate under the present Union structure but according to rules that would only be compulsory for those member states that join it in a move to take a proactive approach to the energy crisis. Other member states could join later when they believe the

time has come to collectively take the initiative. The second goal would be the adoption by the European Union and some member states of *ad hoc* measures designed to meet and anticipate the objectives of the Energy Community on specific issues.

These initiatives have a common goal: to promote the integration of energy markets for the benefit of peoples in Europe and beyond. Freedom from energy insecurity reduces the seeds of conflict. And peace is what Europe is all about.

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Introduction – A Policy Proposal for Renewed Ambitions

In 1951 six European states decided to pool their interests in two key sectors of the economy in order to create a Community that would replace conflict by cooperation and animosity by prosperity. Energy was one of these sectors. Almost sixty years later energy is still at the top of the political and economic agenda, but the rules that once served to ensure equal access to common resources no longer exist. Despite a spectacular increase in regulatory activity destined to create a large European energy market and to face climate change, European states still prefer to foster national solutions to global threats and challenges. However, ensuring economic prosperity for all and meeting the challenge of climate change necessarily require collective energy-related solutions. It is in the field of energy that the next industrial revolution will occur. As in 1951, there must be a concerted endeavour to help collective ambitions focus on energy.

European states still prefer to foster national solutions to global threats and challenges

All energy policies today must deal with three issues: ‘affordable access to energy’; ‘sustainable development’ of energy production, transport, and consumption; and ‘security-of-supply’. The objective of ‘affordable access to energy’ implies that all Europeans must be able to access to energy at reasonable and

stable prices. In this respect, is access to energy a matter for a happy few or is it a common good to which all Europeans must have access at affordable conditions? This economic and societal question also has a temporal dimension, which brings us to the second objective of ‘sustainable development’. It implies the capability of ensuring access to energy to all human beings of actual and future generations and taking into account the prerequisites of a healthy environment. This question is not only about climate change, but also addresses the problem of the exhaustibility of existing resources, particularly problematic for Europe. This leads us to the last and final objective of ‘security-of-supply’ which implies that all Europeans will have access to energy increasingly imported from outside Europe if and when they need it, and wherever they are in Europe.

Reconciling these three key objectives is not an easy task. This difficulty is exacerbated by the various crises facing our societies. In the short to medium-term, the economic and financial crisis limits our means to find instantaneous solutions and puts a strain on our ability to invest. At the same time, however, developing sustainable and affordable alternative energy sources is the key to the new industrial revolution that will contribute to solving the economic crisis. Moreover,

The future of its energy policy has become a major long-term geopolitical, economic, environmental and social concern for Europe

finding alternative energy sources is a prerequisite to reducing our dependency on imports of natural resources from unstable or unreliable countries and, also, to diminishing the likelihood of international conflicts or tensions over increasingly scarcer resources. And finally, Europe and the world as a whole have to cope with the most threatening crisis of all: the climate crisis which will inexorably affect our present way of life. The future of its energy policy has thus become a major long-term geopolitical, economic, environmental and social concern for Europe.

Believing that these challenges can be faced individually at state level or considering that loose cooperative structures will suffice to make hard choices is misguided and dangerous. The climate crisis calls for new priorities and reduces the number of options. Choices must be made. Alternative policy measures are required, calling for a decision making capability for adopting unavoidable measures. If European leaders wish **to tackle the new challenges collectively, they must ensure that the European Union has the decision making tools** that are required to make these

difficult policy choices and to timely adapt these choices in the light of changing circumstances.

Indeed, the concept of energy and energy policy varies over time and differ from one country to another. Such variation depends to a large extent on the state of technological development and local conditions. These differences are important to bear in mind when developing energy policies. The choices made today should not prejudice future developments. Nor do today’s choices reflect perpetual wisdom. Policy tools and measures may lose their rationale and should therefore be reconsidered on a regular basis. **The varying notion of energy calls for a flexible energy policy.**

The aim of this report is to examine whether the existing European energy policy is capable of pursuing its three key objectives in a consistent and credible manner. The main questions addressed by the report are the following: does Europe have an institutional framework that is sufficiently developed to boost and absorb these future changes? Can collective ambitions flourish under the existing rules or do they need to be changed? And, if this is not the case, what new systems or rules are required to address these deficiencies? These issues are at the core of this report and can basically be summarised in one key question: what institutional framework is needed for an enhanced energy policy for Europe?

What institutional framework is needed for an enhanced energy policy for Europe?

Part I of this report concerns the existing system. It gives a brief and necessarily incomplete overview and assessment of the policies developed at European level so far, and assesses whether these policy measures can achieve the three key objectives assigned. Relying on the conclusions of Part I that the existing policies are suboptimal, **Part II puts forward a policy proposal for an enhanced ‘European Energy Community’.** It explains why and what type of action is required to develop a real European Energy Community, identifying both the substantial elements which it should ideally cover and the legal and institutional policy instruments at the EU’s disposal for developing it. The report finally examines how this model could be best achieved and develops several recommendations to that effect.

PART I

THE DEVELOPMENT OF AN ENERGY POLICY FOR EUROPE – A LABORIOUS PROCESS

“See to foresee, foresee to forestall”

Auguste Comte (1789-1857)

I. Energy Issues in the Treaties

Whereas energy has been at the heart of European integration from the beginning with fully fledged energy treaties (the European Coal and Steel Community Treaty of 1951¹ (ECSC) and the Euratom Treaty of 1957),² the Treaty of Rome (EEC Treaty of 1957) did not even mention the word energy.³ The successive amending Treaties (e.g. the Single European Act, Maastricht, Amsterdam and Nice) also did not provide the EU with an overarching legal basis to deal with energy issues. Recently, the Lisbon Treaty, providing for a legal basis for such a policy, has brought new attention for energy as a policy issue at European level. **The sections below give an overview and an assessment of the position of energy and energy policy under the subsequent European Treaties.**

1.1. European Coal and Steel Community Treaty

A common market for coal and steel was the basic idea underlying the ECSC Treaty. Article 3 ECSC listed an orderly **supply to that market as one of the main objectives of the Community**. This was the first expression of the concept of ‘security-of-supply’ in Community law. ‘Affordable access to energy’ was also identified

1. ECSC Treaty - Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951.

2. Euratom Treaty - Treaty establishing the European Atomic Energy Community, Rome, 25 March 1957.

3. The ECSC Treaty applying to almost 80% of the energy market in the early nineteen-fifties due to the then still predominant role of coal, and the Euratom Treaty to 100% of future nuclear energy as from the late nineteen-fifties.

as a policy objective. Access to production sources should be guaranteed on equal terms and at the lowest possible price levels. Finally, although ‘sustainable development’ appeared a remote issue in 1951, Article 3 ECSC also lists sustainability as a priority action item by promoting “*a policy of using natural resources rationally and avoiding their unconsidered exhaustion*”.

The policy tools to achieve these objectives were the suppression of trade barriers, restrictive and discriminatory practices and the control of state subsidies. These tools and the corresponding powers were conferred to a supranational body, the **High Authority**, which had three legal instruments available (decisions, recommendations and opinions)⁴ to carry out its responsibilities vis-à-vis member states as well as coal and steel undertakings. It was essentially financed by levies imposed on coal and steel production. It could also be active on the capital markets by attracting funds and granting loans.

Ensuring a proper balance between supply and demand was also for social and employment reasons one of the tasks assigned to the High Authority. Article 58 ECSC authorised the High Authority to impose production quotas and impose levies on excess production. Similarly, Article 59 ECSC concerned allocation procedures for production in case of shortages. The High Authority held far reaching powers in reallocating consumption quota or in imposing export restrictions. Another interventionist competence concerned the fixing of maximum and minimum prices. Finally, the High Authority was entrusted with the application of competition rules and with social policy concerning wages and working conditions in the relevant industries. In exercising these powers, it had to ensure that the Community industry remained competitive.

Despite some common features, the ECSC Treaty differed considerably from the EC Treaty. The ECSC Treaty was not a framework Treaty, but a ‘*Traité Loi*’ setting out relatively detailed rules which would be applied directly by a central authority. These rules did not require much implementation at national level. The High Authority had **truly supranational powers**. The ECSC had its **own resources funded directly by a Community levy**. It also had the power to adjust the laws of

4. Decisions were binding in their entirety. Recommendations were binding as to the aims to be pursued but left open the choice of the appropriate methods for achieving those aims. Opinions had no binding force.

supply and demand by its own interventions by imposing production quotas and prices. However, the ECSC did not explicitly provide for external powers allowing the High Authority to represent the ECSC in international organisations or to conclude international treaties. This is probably because the authors of the ECSC did not perceive an international dimension in 1951; coal and steel were essentially a matter for the six member states, and the majority of the energy resources covered by the Treaty were based inside the Community and not outside as it is now. Since the expiration of the ECSC Treaty in 2002, the coal and steel sectors are governed by the less interventionist rules of the EC Treaty.

The High Authority had truly supranational powers. The ECSC had its own resources funded directly by a Community levy

1.2. Euratom Treaty

The use of nuclear energy for civil purposes was still in an exploratory phase when the Euratom Treaty was concluded in 1957. This state of technical development is reflected in the Treaty itself. It is **essentially research-driven** in that it seeks to promote research and disseminate knowledge. The Community even obtained the possibility to acquire and license patents. Additionally, the Treaty authors were aware of the technical difficulties and the dangers of nuclear energy. Protection against radiation and safety control were indeed major policy areas alongside the research objectives.

Despite its essentially technical nature, the Euratom Treaty contains various, more commercial, provisions. First, the Commission can advise on investment projects. Second, the Treaty actively **promotes industrial cooperation** by providing an explicit legal basis for joint ventures. Third, it creates an internal market for the nuclear products listed in one of the annexes of the Treaty. Fourth, the Treaty contains a detailed chapter on a common policy on the supply of fissile materials.

According to Article 52 Euratom, this common policy is based on two principles: the prohibition of privileged access to nuclear materials and the **creation**

of a Supply Agency.⁵ This Agency has the right of option to procure materials produced in the territories of member states and the exclusive right to conclude contracts relating to the supply of these materials coming from inside or outside the Community. The Agency may not discriminate in any way between users on grounds of the use which they intend to make of the supplies requested, unless such use is unlawful.

The option right of the Agency implies that every producer of nuclear materials in the Community must offer its output first to the Agency. If the Agency exercises its right, the Agency will acquire the property – except in the case of special fissile materials – the property of which is vested in the Community pursuant to Article 86 Euratom.

Users requiring the products which the Agency thus owns or possesses must regularly inform the Agency of their future requirements and the desired terms and conditions for the supply thereof. The Agency must meet all orders. If the Agency cannot meet their demand, it will supply them pro rata. The Agency will stock, store or export the special fissile materials that do not meet internal Community demand. As regards nuclear materials that do not originate in the Community, the Agency fulfils a similar function by exercising its exclusive right to conclude supply contracts with foreign suppliers. The Commission may grant derogations to this right if the Agency cannot meet demand within a reasonable delay or on reasonable terms.

Despite the predominant role that the Euratom Treaty thus confers on the Agency, prices are supposed to be determined by the laws of supply and demand. In

The unique provisions of the Euratom Treaty's common supply policy have not been used to their full extent

addition, the Council can decide to impose fixed prices at the Commission's request.

The unique provisions of the Euratom Treaty's common supply policy have not been used to their full extent. Market forces soon appeared to be able to match supply and demand, thus diminishing the need for a central intervention. In addition, the

5. Rules of the Supply Agency (1960, 777 and OJ 1975, L 193/87) and Revision of the Statutes by Council Decision 73/45/Euratom (OJ L83/20).

interest in nuclear energy has declined in many member states. Some member states have decided to phase out nuclear production all together. This implies that apart from nuclear safeguards, research as well as health and safety policies have remained the most visible activities under the Euratom Treaty.

1.3. EC Treaty

It was only in 1992 with the conclusion of the Maastricht Treaty that energy appeared in the EC Treaty, albeit in modest form. In order to achieve the general Treaty objectives listed in Article 2 EC, Article 3 EC lists a series of action areas. Ironically, energy policy is relegated to the same level of importance as measures in the spheres of civil protection and tourism. Moreover, contrary to other policy areas such as consumer protection and environment, **the EC Treaty does not contain an enabling provision** that lays down the specific objectives, commitments and procedures underlying Community action in the sphere of energy.

Energy policy is relegated to the same level of importance as measures in the spheres of civil protection and tourism

At the same time, the modest place of energy policy in the list of action items did not preclude the possibility of developing and pursuing such a policy on the basis of the EC Treaty's general provisions. Thus, the provisions on the internal market, in particular Article 95 EC on harmonisation measures and the rules on the coordination of economic policy have provided a legal basis.

1.4. Lisbon Treaty

Despite considerable political opposition in the negotiations on the new Lisbon Treaty,⁶ energy now receives an explicit recognition in Article 4 of Part I of the Treaty on the Functioning of the European Union (TFEU) as one of the Union's shared competences. Part III, which assembles amends and renumbers the EC Treaty rules affecting the energy sector, is not substantially amended. A **separate**

6. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2008/C 115.

energy Title (XXI) is now included, consisting of a single Article 194 TFEU specifying how competence is to be shared.

Article 194 TFEU sets out the **four main aims of Union policy on energy** – (i) to guarantee the functioning of the energy market, (ii) to ensure ‘security-of-supply’ of the Union, (iii) to promote energy efficiency and the development of new and renewable forms of energy, and finally (iv) to promote the interconnection of energy networks. 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 prejudice to Article 194 (2) TFEU dealing with environmental policy. Legislation furthering these aims can be adopted by qualified majority but any matter falling within the scope of Article 194 (2) TFEU is subject to unanimity. The same unanimity rule continues to apply to energy taxation measures – as confirmed by Article 192 (3) TFEU.

A carefully crafted compromise between national sovereignty over natural resources and energy taxation issues, and a shared Union competence for the rest

The final text of the energy Title is thus a result of a carefully crafted compromise between, on one hand, national sovereignty over natural resources and energy taxation issues, and, on the other, a shared Union competence for the rest. As a result it is probable that European institutions cannot adopt measures directing a member state to invest in certain types of energy production or to produce sufficient volumes from its own energy resources for the benefit of the rest of the Union, even in the interest of Europe-wide security-of-supply. Nor can the Union institutions usurp the functions of national governments in the event of an energy crisis.⁷

With regard to **nuclear energy**, the relationship between the EC Treaty and the Euratom Treaty proved a source of controversy during the Intergovernmental Conference (IGC) leading up to the drafting of the Constitutional Treaty. It is hardly surprising that the Lisbon Treaty failed to resolve this. Although some member

7. This is confirmed by Declaration N° 35 annexed to the Final Act (OJ 2007/C 306/02 p. 261, Declaration 35). Nevertheless the new Article 122 confirms the Union’s competence to adopt preventative measures to avoid security threats and may provide a basis for political backing for more far-reaching preventative measures in the future.

states called for the abolition of the Treaty and the consolidation of a number of its provisions into the new Treaty, the Euratom Treaty now forms part of the new constitutional arrangements, albeit in essentially unamended form (Protocol N° 36).⁸ Other member states supported the idea of revising and updating the Euratom Treaty, and confirmed their willingness to do so in a Declaration to the Final Act of the Lisbon Treaty.⁹

Certain other new provisions could potentially improve the co-ordination of the Union’s external action on energy, although the reforms now embodied in Part 5 of the new Treaty have not greatly altered the underlying principle that this is an area based on intergovernmental decision-making.¹⁰ The new High Representative for the Union in Foreign Affairs and Security Policy is at the heart of the reforms. A wide range of policies will fall under its supervision. She¹¹ will be responsible for ensuring coherence across all aspects of external action policies, and will be supported by an External Action Service with a separate budget. Nevertheless, **the High Representative will not have competence over all EU policies with an external dimension, most notably environment or energy.** Additionally, although she is expected to play a crucial role in the coordination of member states’ foreign policies, her ability to present a common EU position in international organisations and conferences will remain dependent on prior unanimous agreement among the member states on the topic in question.

8. OJ 2008/C 115/203, Protocol No 36.

9. OJ 2007/C 306/02, p. 268, Declaration 54.

10. Two new Declarations (13 and 14) state 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. Declaration 14 also stresses that the provisions in the Treaty do not give powers to the Commission or the European Parliament. Member States are obliged to support the Union’s external and security policy in a spirit of loyalty and mutual solidarity (Art 11 (3)). Yet the new Treaty does not make provision for enforcement mechanism nor does it grant jurisdiction to the European Court of Justice (ECJ) to ensure that these provisions are complied with. Individual Member States can thus deviate from an agreed common position should they deem it in their interest to do so.

11. Lady Catherine Ashton has been appointed as new High Representative for the Union in Foreign Affairs and Security Policy. <http://www.consilium.europa.eu/showPage.aspx?id=1847&lang=fr>.

ASSESSMENT

However paradoxical it may appear, energy seems to be the only sector where the Communities, in their almost 60 years of legal development, **have been moving from a high degree of integration down to a lower level, never being able to regain the common vision and courage of their founding years.**

With the expiration of the ECSC Treaty in 2002, the Euratom Treaty remains the sole legal basis for a common energy policy, but limited to the nuclear sector. However, the interest of the member states in nuclear energy has sharply declined since 1986, and is only now starting to reappear. **Under the EC Treaty system energy policy measures can only be developed on the basis of the general Treaty provisions, in particular on internal market rules** and in due respect for the principle of subsidiarity. In a certain sense, this relative decline in European competence can be explained by changes in energy production and consumption patterns. In the nineteen-fifties coal and nuclear energy were considered to be the main primary sources of energy. The two energy-specific Treaties concluded during that period focused on these two sources and were ultimately overtaken by the increased importance of oil, gas and electricity. One could argue that the two Treaties were static and were not designed to keep pace with changing energy uses.

The **ECSC and Euratom Treaties** were and are unique in that they provide for specific energy policy tools. The authors of these Treaties felt that an energy policy should be **a common policy based on exclusive supranational powers.** This is particularly so for the ECSC Treaty which lays down a relatively detailed set of rules to be applied directly by a central authority and which left member states little room for manoeuvre. At the same time, the stakeholders in the energy sector were directly involved in the central decision making. Another common feature concerns the role played by the common market. Whilst the allocation of resources primarily takes place *via* the laws of supply and demand, the Treaties provided for corrective measures in certain circumstances. This concerned for example access to resources, which the two Treaties perceive as being common to all member states and to which

all market participants should have access on a non-discriminatory basis. The Euratom Supply Agency, for example, is conceived as a single buyer and distributor, with regard to domestic production and consumption as well as imports and exports. Moreover, the Treaties provided for quota and pricing interventions and explicitly acknowledged the need to promote research and development.¹²

As will be shown below, recourse to the general provisions of the EC Treaty have allowed the Community to develop a significant legislative activity in the energy field since the mid nineteen-nineties, even if **this activity could not be considered as a common policy like the ones pursued by the ECSC and Euratom Treaties.** These general legal foundations, however, **did not necessarily allow the Community to address the specific requirements of the energy sector,** a fact which may not only explain certain legal shortcomings within the Community, but also partly account for its difficult legal standing in promoting its energy interests on the international scene. In this respect, the inclusion of a new energy Title in **the Lisbon Treaty (TFEU) does not fundamentally alter that picture.**

12. In particular through the building-up of emergency stocks, the proportional sharing out of scarce resources, price-fixing and financial support to prospecting programmes (Euratom) or through the establishment of consumption priorities, resource allocations and production programmes, as well as through the fixing of maximum or minimum prices (ECSC).

II. Genesis of the European Energy Policy

The need for specific energy policies increased over time, as states started to impose conditions on the extraction and use of fossil fuels. In the early nineteenth century, energy-related policy essentially concerned the granting of concessions, taxation and, in some cases, pollution. Safety and environmental considerations became gradually more important, in parallel with the increased use of fossil fuels, in particular coal and oil. ‘Security-of-supply’ became a real policy issue during the First World War. Supply lines were threatened either by (sub)marine warfare and/or commercial blockades preventing neutral countries from supplying the belligerent states with energy, and in particular with oil. Ever since, ‘security-of-supply’ has been one of the key issues of any energy policy. Even as recently as 1984 the European Court of Justice ruled that ‘security-of-supply’ in petroleum products corresponded to a public safety requirement justifying certain derogations to the Treaty’s free movement rules.¹³

During the second half of the twentieth century access to energy at reasonable prices also became a policy objective. The welfare state implied that citizens should have guaranteed access to electricity and, where applicable, to gas on

13. Judgment of the Court of 10 July 1984 – *Campus Oil Limited and others v Minister for Industry and Energy and others* – Case 72/83.

non-discriminatory terms throughout the territory. Against this social background, energy became a utility. The firms supplying this energy, the so called utilities, were often **entrusted with public service obligations to ensure this universal service**. In many member states this public involvement was seen to imply that the **utilities became publicly owned companies and/or monopolies**.

2.1. First Initiatives in the Field of Energy

The **first stimulus to take steps in the field of energy policy was the Suez Crisis in 1956-57** which exposed the vulnerability of importing countries. Following the crisis, the Council adopted Directive 68/414/EEC which obliged member states to maintain emergency stocks of oil and petroleum products corresponding to 65 days' of consumption. A second wave of initiatives took place in reaction to the price and supply shocks provoked by the third (1967) and fourth Arab-Israeli conflicts (1973). In 1968, the new Commission released its 'First Guidelines for a Community Energy Policy'¹⁴ which promoted common action to assure a better 'security-of-supply' (cooperation in case of supply shortage) as well as the establishment of a common market for energy. In 1972, the Commission adopted a Communication on the 'Necessary Progress in Community Energy Policy 1975-1985'.¹⁵ Subsequently, the Council adopted, in 1972, two Directives, one requiring member states to inform the Commission about their hydrocarbon importations,¹⁶ the other requiring them to report on investment projects in the oil, gas and electricity sectors.¹⁷

In 1972, following OECD initiatives in the field of crisis management,¹⁸ the EEC raised the emergency oil and petroleum stock requirement to 90 days' of consumption.¹⁹ Later on, in response to the 1973 oil crisis, initial measures were adopted in the OECD's framework, notably the creation of the **International Energy Agency** – the initial role of which was to co-ordinate measures in times

14. *First Orientation for a Common Energy Policy*, Communication from the EC to the Council, 18 December 1968.

15. COM (72) 1201.

16. Council Regulation 1055/72 on imports of crude oil and natural gas.

17. Council Regulation 1056/72.

18. In 1971-72, OECD measures have been taken in order to deal with temporary and serious oil shortages.

19. Council Directive 72/425.

of oil supply emergency.²⁰ It was only in 1977 that the Community developed its own emergency system by adopting two Decisions: one on the export of crude oil and petroleum products from one member state to another in the event of supply difficulties²¹ and another to cut back consumption of primary energy resources in the case of supply difficulties.²²

Facing **limited success in the adoption and implementation of the above-mentioned proposals** and Directives by the member states, the Commission presented in 1973 a new paper on the need to draw up a Community energy policy.²³ However, the Council turned out to be incapable of reconciling the divergent interests of the member states.

Another wave of Community initiatives took place during the nineteen-eighties. The Commission released in 1981 its communication on the 'Development of an Energy Strategy for Europe'.²⁴ The document reflected a new approach vis-à-vis energy matters by accepting the possibility of maintaining a diversified and decentralised energy policy. At the same time, common action could also be undertaken in areas where it was required by the Treaty, and in cases where this was more efficient. After the 1986 oil price collapse, and the Chernobyl nuclear accident, the Council adopted another set of conclusions mapping out the energy policy objectives for the 1995 horizon,²⁵ and underlining again the necessity of *"adequate and secure availability of energy on a satisfactory economic basis, as a prerequisite for the pursuit of the economic and social objectives of the Community and of the member states"*.

20. Created as a response to the oil crisis of 1973-74, the IEA's initial role was to co-ordinate measures in times of oil supply emergencies. It is an intergovernmental organisation which acts as energy policy advisor to member countries in their effort to guarantee reliable, affordable and clean energy for their citizens. 19 EU Member States are members of the IEA. Accession is open for the European Communities as well. The European Union has a quasi-member status, with the European Commission participating in the IEA governing board meetings and in its different committees on long term cooperation, on oil markets and emergency preparedness, on R&D and on relations with non-member countries.

21. Decision 77/186/EEC.

22. Decision 77/706/EEC.

23. *Guidelines and Priority Actions under the Community Energy Policy*, SEC (73) 1481, April 1973.

24. COM (81) 540 final.

25. OJ 1986/C 241/1.

2.2. First Steps towards the Creation of Energy Internal Markets: 1986 to 1998

A turning point in the elaboration of a common energy policy and the development of an EU internal market for energy was the adoption of the Single European Act (SEA) in 1986.²⁶ The SEA Treaty introduced several amendments which had direct impact on the energy sector. The Delors Commission's programme to establish an internal market by the end of 1992, further developed in the **White Paper on 'Completing the Internal Market'**,²⁷ moved towards the inclusion of the

Moved towards the inclusion of the energy sector within the overall framework of the EU internal market

energy sector within the overall framework of the EU internal market (e.g. application of Community Law, removal of territorial barriers, approximation of indirect taxation, etc.). In addition, the extension of the qualified majority system of voting in the Council enhanced the possibility of finding a common ground on energy issues.

Subsequently, the Commission produced a report on 'The Internal Energy Market'²⁸ which described the existing obstacles to the completion of the internal energy market, and which proposed measures to eliminate these obstacles. The report can also be considered as a first step towards the liberalisation of energy markets. Its recommendations led to the **first Directives adopted at the beginning of the nineteen-nineties**. However, these Directives were not broad in scope and only concentrated on transparency of gas and electricity prices,²⁹ the transit of electricity and gas through the main EU networks,³⁰ and the progressive liberalisation of certain activities related to hydrocarbon products.³¹ In 1992, the then Commissioner for energy, an advocate of energy sector liberalisation, set up a special Internal Energy Market task force. However, the proposed 'Cardoso package', which already comprised the principles of free energy flows,

26. Single European Act, OJ L 169, 29 June 1987.

27. COM (85) 0310.

28. COM (1988) 238 final.

29. Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, OJ L 185, 17.7.1990, p. 16–24.

30. Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids, OJ L 313, 13.11.1990, p. 30–33, and Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids, OJ L 147, 12.6.1991, p. 37–40.

31. Directive 94/22/EC of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons, OJ L 164, 30.6.1994, p. 3–8.

free implantation of producers and the free choice of suppliers by consumers, was not accepted by the member states.

Having reconsidered its original approach to energy liberalisation, the Commission came back with a new proposal. In 1995, the Commission presented a Green Paper³² detailing its global vision of the EC's role in the energy sector, with the objective of satisfying domestic and industrial users' needs at the least cost. A White Paper³³ providing for a 5-year indicative 'Action Plan' was adopted in the same year. The 'Action Plan' culminated in 1996 and 1998 in the first Electricity³⁴ and Gas³⁵ Directives, which marked the first serious steps towards the liberalisation of electricity and gas markets.

The first Electricity and Gas Directives marked the first serious steps towards the liberalisation of electricity and gas markets

Based on the concept of eligibility, liberalisation was to be progressive, applying gradually to different categories of consumers. Introducing a partial opening of national markets to competition, both Directives required member states to progressively liberalise certain segments of their electricity and gas markets (electricity generation and supply as well as gas supply) and to progressively enlarge the categories of customers eligible to choose their suppliers of electricity and gas. Even if less ambitious than the Commission had wished, this first legislative package allowed those member states in favour of market liberalisation to go further without waiting for the others.

2.3. The Incomplete Integration of EU Energy Markets

Since its inception, the liberalisation process has taken place at different speeds in different member states: some, following the UK example, liberalised their markets quite early on, while others were very reluctant to do so. In the light of the

The liberalisation process has taken place at different speeds in different member states

32. *For a European Union Energy Policy, Green Paper of the Commission*, COM (94) 659, Brussels, 11.1.1995.

33. *An Energy Policy for the European Union*, White Paper of the Commission, COM (95) 682, Brussels, 13.12.1995.

34. Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity. OJ L 27, 30.1.1997, p. 20–29.

35. Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas. OJ L 204, 21.7.1998, p. 1–12.

large differences that remained between member states in terms of liberalisation and market opening, the European Council of Lisbon in 2000³⁶ stressed the need to accelerate this process. Aiming at completing the creation of internal market in gas and electricity sectors, **the second Electricity and Gas Directives adopted in 2003**³⁷ gave new impetus to it, requiring national gas and electricity markets to be liberalised by 1st July 2004 for large consumers and by 1st July 2007 for all consumers.

Global opening of EU energy internal market in 2005 had only reached 66% for electricity and 57% for gas

However, global opening of EU energy internal market in 2005 had only reached 66% for electricity and 57% for gas.³⁸ The implementation of the second Electricity and Gas Directives remained incomplete in many member states, as can be seen by the **wave of infringement procedures**³⁹ **launched by the Commission against 17 member states**⁴⁰ **in April 2006.**

Additionally, the Commission launched a sector inquiry of considerable scale in the energy sector in 2005.⁴¹ The inquiry published in January 2007 concluded that consumers and businesses were losing out because of inefficient gas and electricity markets and high energy prices (see Section 3.1. in Part I).

2.4. The New Energy Debate and the Adoption of the ‘Energy and Climate Package’

A rapidly changing energy context, characterised by increase in energy prices, increasing external dependency, and the growing awareness of climate change, coupled with recent events and energy crises (Russia-Ukraine, Belarus, etc.) jolted the EU into debating a comprehensive European energy policy at the

36. Lisbon European Council of 23/24 March 2000, Presidency Conclusions No. 100/1/00, Brussels, 24 March 2000.

37. Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas, L 176, 15.7.2003, p. 57–78; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, L 176, 15.7.2003, p. 37–56.

38. DEHOUSSE, Franklin, ANDOURA, Sami and Oth.: Towards a Real New Energy Policy for the European Union?, *Studia Diplomatica*, Vol. LX, n°2, 2007: Towards a Real European Energy Policy?

39. IP/06/430 of 4 April 2006, *The Commission takes action against Member States which have not opened up their energy markets properly*. MEMO/06/152 of 4 April 2006, *Infringement procedures opened in the gas and electricity market sector, by Member State*.

40. Member States concerned were Austria, Belgium, the Czech Republic, Germany, Estonia, Spain, France, Greece, Ireland, Italy, Lithuania, Latvia, Poland, Sweden, Slovakia and the United Kingdom.

41. *Commission Inquiry in the Gas and Electricity Sector*, launched on 13 June 2005, OJ C 144, 14.6.2005, p. 13.

informal Hampton Court summit in 2005.⁴² A **new more dynamic and ambitious approach to a European energy policy** then emerged, initiated by the European Commission in its Green Paper ‘A European Strategy for Sustainable, Competitive and Secure Energy’,⁴³ debated by the European Council in March 2006.⁴⁴ The Commission issued in January 2007 the so called ‘**Energy and Climate Package**’ with its communication on ‘An Energy Policy for Europe’⁴⁵ as the centrepiece.

The European Council⁴⁶ subsequently endorsed the package, designed to establish a **comprehensive European energy policy by 2009**. This new energy policy consists of **three pillars**: increasing ‘security-of-supply’; ensuring the competitiveness of European economies and the availability of energy at affordable prices; and promoting environmental sustainability and combating climate change. Interestingly, most of these objectives were in fact already present in the Commission papers of the nineteen-nineties, but never endorsed by the Council before. The six priority areas for action identified in the package are energy for jobs and growth, tackling security and competitiveness of energy supply through solidarity among member states, a more sustainable, efficient and diverse energy mix, fighting climate change, encouraging innovation, and relations with third countries.

A major step forward made by the new energy and climate package is the commitment made by the EU to reach significant targeted objectives concerning greenhouse gas reduction, renewable energies and energy efficiency e.g. the **“20-20-20” energy policy targets in 2020**. While this shift is a valuable step towards the creation of an energy policy for Europe, the implementation of the agreed objectives remains the most important and difficult part of this process. The European Council of March 2007 also reaffirmed the necessity to achieve the opening of energy markets before mid-2007 and to properly implement the

42. Press Conference at EU Informal Summit, Hampton Court, 27 October 2005, <http://www.eu2005.gov.uk>.

43. *A European Strategy for Sustainable, Competitive and Secure Energy*, Green Paper of the Commission, COM (2006) 105 final, Brussels, 8.3.2006.

44. European Council of 23/24 March 2006, Presidency Conclusions No 7775/1/06 REV1, Brussels, 18 May 2006.

45. An Energy Policy for Europe, Communication from the Commission to the European Council and the European Parliament of 10 January 2007, COM (2007) 1.

46. European Council 8/9 March 2007, Presidency Conclusions No 7224/07 (CONCL 1), Brussels, 9 March 2007.

internal market rule. It further agreed on the necessity to adopt several additional legislative measures.

While another energy package has just been adopted, almost all member states are still in violation of the existing community legislation on electricity and gas

This new impulse led to the negotiation and adoption by the European Parliament and the Council of a **Third Energy Internal Market Package in June 2009** (see Section 3.1. in Part I). Paradoxically, while another energy package has just been adopted, **almost all member states are still in violation of different provisions of the existing community legislation** on electricity and gas, e.g. the second Package of 2003.⁴⁷

Additionally, the Commission initiated in 2007 an institutionalised review of the energy policy, designed to provide an overall framework for frequent discussion of energy issues in the European institutions. The Commission has to put forward **updated Strategic European Energy Reviews (SEER)**, monitoring progress and identifying new challenges and responses, to be presented to the Council and European Parliament on a regular basis. While the first SEER of 2007⁴⁸ mainly dealt with the completion of internal markets for energy, the second, released in 2008,⁴⁹ has addressed the issue of energy security.

47. Commission acts to ensure effective and competitive energy market across Europe, IP/09/1035, Brussels, 25 June 2009.

48. *Op. Cit.* 44.

49. Second Strategic Energy Review - An EU Energy Security and Solidarity Action Plan COM (2008) 0781.

ASSESSMENT

As shown above, the European Union has encountered **many obstacles in developing a common energy policy**. There are numerous causes which may explain this phenomenon.

First, **historical reasons** partially explain why the EC Treaty did not identify energy as one of the main policy areas. When the Treaty of Rome was concluded in 1957, coal was the most important primary energy source. The six founding member states had pooled their interests in that area in the context of the ECSC. In addition, the Euratom Treaty would also ensure cooperation in the field of the nuclear energy, at that time as the other primary energy source which could give the Community its energy independence. In 1957 natural gas was not yet perceived as an important source of primary energy and oil was considered sufficiently covered by the rules on the free movement of goods. As regards electricity, the state of technical development of electricity grids hardly allowed large-scale cross-border electricity trading. So, at the time, the 1951 ECSC Treaty and the 1957 Euratom Treaty offered a sufficient legal basis for a common energy policy.

A second factor is that there have always been huge differences between member states in terms of availability of natural energy resources on their territory. The “energy-rich” member states have been reluctant to share their fossil fuels. This has been accentuated over time and has made those member states think only in national terms and contemplate their energy resources as their reserved domain (“*chasse gardée*”).

A third factor, reflected in the Treaties, is that member states asserted **national sovereignty over their energy mix**. Member states were and are keen to remain sovereign in shaping their energy policies. As a consequence, EU countries have repeatedly responded to crisis and challenge on their own terms. These individual responses have included international cooperation outside the institutional structures of the EC Treaty (such as the IEA) and to the pursuit of industrial policies leading to the creation of national champions.

National approaches and national choices of traditional alliances contributed to a national response to ‘security-of-supply’ issues and to developing privileged bilateral relations with external suppliers. In general, member states are reluctant to see the EU interfering in areas of national sovereignty (foreign and security policy) and often prefer international cooperation as the best defence of their national positions.

The fact that the EU has not been capable of developing a common foreign policy has reinforced this tendency, and remains an obstacle for the realisation of a comprehensive common European energy policy. Indeed, as will be shown below, energy policy has an important strategic dimension (mainly the relations with external suppliers) which has been systematically neglected at the EU level, and remains the prerogative of the member states. **The paradox is that *vice versa*, the fact that Europe does not have developed such comprehensive common energy policy is an obstacle to the development of a common foreign policy.**

III. The Three Objectives of the European Energy Policy: Assessment and Outstanding Issues

The next sections will assess in more detail the measures that have been adopted at European level in pursuit of the three objectives assigned to energy policy, namely: ‘affordable access to energy’ (3.1.), ‘sustainable development’ (3.2.) and ‘security-of-supply’ (3.3.). For the analysis, the measures taken are categorised under each objective.

3.1. Affordable Access to Energy

The objective of ‘affordable access to energy’ implies that all Europeans must be able to access energy at reasonable and stable prices. The creation of a wide and liquid energy market throughout Europe is a means to ensure that this objective can be achieved. Ensuring effective competition between various suppliers is intended to keep prices under pressure and guarantee consumer choice. It is this approach that has been followed by the European Union in developing an energy policy. As the recent Strategic European Energy Reviews (SEER) I and II have acknowledged, the emphasis of the Community’s energy policy has been on

All Europeans must be able to access energy at reasonable and stable prices

promoting free trade and competition in a wide European market, assuming that the achievement of a single market for electricity and gas will exert downward pressure on prices and ensure ‘security-of-supply’. This aim has been pursued through the enforcement of the primary Treaty rules on free movement and competition as well as the adoption of packages of secondary legislation, culminating in the recent adoption of a third package of Directives and Regulations along with the creation of a specialised energy regulatory agency (ACER).

3.1.1. The Liberalisation Process: Energy through the Prism of the Internal Market

i. Second and Third Energy Internal Market Packages. Although legislation providing for the liberalisation of gas and electricity markets was adopted in the nineteen-nineties, the main legislative package to date in this sector consists of the second Electricity and Gas Directives of 2003. These provided for the full opening of energy markets for all non-household customers as of July 2004, and for all customers as of July 2007. Their adoption was conditional on the consensus that member states had to reach on public-service obligations. For many member states market opening could not go at the expense of the universal and public services offered by the traditional utilities. The first substantive provisions of both the Electricity and Gas Directives therefore start by spelling out the main principles according to which these sectors should be organised. These principles include **an obligation to provide a universal service benefiting all households**. This implies a right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices.

These Directives – **all based on Article 95 EC** – also contain detailed provisions on grid access (third party) and regulation. They impose detailed rules on the separation (unbundling) of supply and production activities on the one hand, and grid related activities on the other hand. These rules apply to both Community and non-Community undertakings. Moreover, in order to ensure compliance with these rules, member states are required to appoint independent national regulatory authorities (NRAs).

The Directives were also complemented by other initiatives aiming to complete the internal energy market: a Regulation promoting cross-border trade in electricity (2003)⁵⁰ and a Regulation setting up non-discriminatory rules for conditions on access to gas transmission networks (2005).⁵¹

These liberalisation measures focus on market opening and network regulation and are essentially legal in nature. But it takes more to ensure market opening and to install effective competition. The liberalisation measures faced a **market structure characterised by state intervention and the mono- or oligopolistic presence of incumbent firms**. The heritage of the past cannot simply be regulated away. However, as a result of the technical and legal developments discussed in this report, monopolistic approaches are no longer tolerated to meet these public service obligations.

In 2005 the Commission launched a **large-scale sector inquiry** into the causes of the weak functioning of the market mechanism in the electricity and gas sectors.⁵² The report which the Commission presented in 2007 confirmed the suspicions that market structure and industry practices were inadequate for competition to play its welfare-creating role. It concluded, *inter alia*, that:

A large-scale sector inquiry confirmed the suspicions that market structure and industry practices were inadequate

- energy markets are still **highly concentrated** and **national in scope** in most cases;⁵³
- new entries have been few as these **lack access to electricity and gas**, due to long-term contracts and to vertical integration between wholesalers and retailers, which forecloses the markets;
- new entrants also **lack access to infrastructures** and to information about the transport capacities;

50. Regulation (EC) No. 1228/2003 of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity. OJ L 176, 15.7.2003, p. 1–10.

51. Regulation (EC) No 1775/2005 of 28 September 2005 on conditions for access to the natural gas transmission networks, OJ L 289, 3.11.2005, p. 1–13.

52. *Op. Cit.* 39.

53. On the electricity wholesale market, the three biggest generators still control more than 70% of generation capacity in 15 Member States. The high level of concentration on the electricity wholesale market is confirmed by the fact that there was a moderately concentrated market in only eight Member States. In the gas wholesale market, the concentration is even greater. The three largest wholesalers have a market share of 90% or more in 12 Member States. As far as the electricity retail market is concerned, the market share of the three largest companies in the whole retail market was over 80% in 14 Member States. On the gas retail market, the market is moderately concentrated in only one Member State.

- third party access and unbundling rules have proved to be insufficient to prevent vertically integrated incumbents from **favouring their affiliated companies**;
- **investments** in infrastructures are insufficient.

Based on these findings, the inquiry **confirmed the need for urgent action**. The Commission mainly undertook two types of activities. It reinvigorated the enforcement of competition rules in the energy sector and it relied on the sector inquiry report to propose new and more intrusive regulation, in particular as regards the unbundling of network and supply activities.

ii. The Third Energy Internal Market Package. In June 2009, after long and difficult negotiations, the European Parliament and the Council agreed on the adoption of the Third Energy Internal Market Package, **aiming at putting in place the regulatory framework needed to make market opening fully effective**. The new legislation consists of two Directives⁵⁴ dealing with internal markets for gas and electricity and three Regulations, two⁵⁵ governing the conditions for access to those markets, and the third⁵⁶ establishing an ‘Agency for the Cooperation of Energy Regulators’ (ACER). The third Electricity and Gas Directives have to be transposed into national law after their entry into force, with the exception of the rules on unbundling of transmission in 2011. The ACER should be up and running in 2010.

The Third Energy Internal Market Package offers a **good basis to achieve the complete liberalisation of gas and electricity markets**. It provides for more effective regulatory oversight by truly independent and competent National Energy Regulators. The establishment of a new European Network for Transmission System Operators (ENTSO), with the task of developing common technical codes and security standards should further increase cross border collaboration and

54. Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC. 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.

55. Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003. Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005.

56. 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.

investment. The effective separation of the production and sale of energy from the transmission of energy (stricter unbundling supply from transmission activities of integrated companies) should further create a level playing field in energy markets. The transparency of the markets and the rights of citizens in the market opening process, as well as the obligations on member states to protect vulnerable energy consumers, are reinforced. The aim of implementing intelligent metering systems is targeted at covering 80% of the population by 2020.

The Third Energy Internal Market Package also strengthens the **coordination of energy regulators** through the creation of a ‘network’ agency for the cooperation of energy regulators (ACER). Energy regulation was previously coordinated on a voluntary basis in different bodies involving various stakeholders: the CEER (Council of European Energy Regulators), ERGEG (Energy Regulatory Advisor of the European Commission), ENTSO-E (European Electricity Networks), and the Florence and Madrid Fora. The Commission acknowledged the limits of the current method, stating that *“the present approach, which in practice usually requires the agreement of 27 regulators and more than 30 transmission system operators (TSOs) to reach agreement is not producing sufficient results. It has led to a number of non-binding codes and efforts to reach agreement on common approaches through ‘gradual convergence’ but has not led to real decisions on the difficult issues that now need to be taken.”*

A major improvement brought about by the new Package is the streamlining of this coordination in new institutional structures. In particular, the ACER will be a separate entity, independent from the Commission.⁵⁷ It will monitor the TSOs’ 10-year investment plans⁵⁸ and the cooperation between TSOs. The Agency is also responsible for taking individual decisions on specific cross-border issues. It can additionally adopt non-binding guidelines, but it is not empowered to adopt binding rules. As such, ACER is not a “real” European regulator, but more a platform of cooperation for the national regulators. Binding decisions are only possible for technical matters. It should be noted in this context that

ACER is not a “real” European regulator, but more a platform of cooperation for the national regulators

57. See also *Vidal Quadras Report* and European Parliament approval, 10.07.2007.

58. COM (2005) 59 final.

European case law (Meroni)⁵⁹ does not allow the Commission to delegate regulatory and decisional powers which are not explicitly foreseen in the Treaty to entities such as ACER.

Despite the improvements brought about by the new Package, it also reflects a certain distrust in market forces, with increasingly detailed regulation, scope for market intervention by regulators, and heightened consumer protection.

There is another reason to be cautious. The adoption of legislative measures is one thing; applying and respecting these rules is another. Until now member states have a poor track record when it comes to respecting the rules to which they have officially committed. More than five and a half years after the deadline (1 July 2004) set for implementation of the second Electricity and Gas Directives, **most member states are still in breach of their obligations.**⁶⁰ The Commission has taken legal steps to ensure the full and correct implementation of certain provisions, through a new wave of infringement procedures in June 2009⁶¹ against 25 member states.

iii. The Regional Market Initiatives. The European Regional Market Initiative⁶² was launched in spring 2006 by the European Regulators Group for Electricity and Gas (ERGEG) and includes both an Electricity Regional Initiative (ERI) and a Gas Regional Initiative (GRI). The European Regional Market Initiative created seven regional electricity markets as follows: Baltic, Central-East, Central-South, Central-West, North, South-West and the France-UK-Ireland regions. With regards to the Gas Regional Initiative, it created three regional gas markets: North-West, South and South-South East regions. Each electricity and gas region has a lead regulator from one of the member states forming the group.

59. Judgment of the Court of 17 July 1959. - Società Industriale Metallurgica di Napoli (S.I.M.E.T.), Meroni & Co. Industrie Metallurgiche, Erba, Meroni & Co. Industrie Metallurgiche, Milan, Fer.Ro (Ferriere Rossi) and Acciaierie San Michele v High Authority of the European Coal and Steel Community. - Joined cases 36/58, 37/58, 38/58, 40/58 and 41/58.

60. Several Member States, including DK, LU and NL, have now correctly implemented both Directives through appropriate national legislation. There has also been progress in other Member States: CZ, FI, DE, GR, LV, LT, SI and UK brought their national laws into line with EU legislation after a reasoned opinion was issued by the Commission.

61. *Commission acts to ensure effective and competitive energy market across Europe*, IP/09/1035, Brussels, 25 June 2009.

62. *Safeguarding the move to a single EU energy market*, ERGEG Regional Initiatives Progress Report, November 2009: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_INITIATIVES/Progress_Reports/2009.

The aim of the Electricity and Gas Initiatives is to foster integration of Europe's electricity and gas markets. Initiatives reflect a step-by-step approach, moving from national markets to regional energy markets as a stepping stone towards a single EU energy market. Several positive effects have been noticed following the implementation of the initiatives – namely, more transparency, interoperability, better cooperation between stakeholders, network operators and regulators, better monitoring of compliance with Community law, and increased cross-border trading of electricity and gas. Additionally, positive results were perceived during the gas dispute between Ukraine and Russia in January 2009 when Regional Initiatives allowed better management of the situation in the South-South East region, badly hit by the gas crisis.

A step-by-step approach, moving from national markets to regional energy markets as a stepping stone towards a single EU energy market

Regional Market Initiatives are currently voluntary, which is one of the weaknesses of the instrument since the realisation of the objectives depends on the willingness of numerous stakeholders' active contribution: member states, grid operators, national regulators, traders, industry, etc. However, once the new Package is implemented, it will transform the context within which the Regional Initiatives operate into **one with binding and enforceable rules.**⁶³

3.1.2. The Specific Role of Competition Law

By ensuring that resources are allocated by the laws of supply and demand, the competitive process contributes to achieving the objective of 'affordable access to energy'. The Commission has used the EC competition rules in three ways to promote effective competition in the energy markets.

First, it has been creative in developing new theories of harm in **merger control** cases. Cross-border transactions by and between large national players very often triggered its exclusive jurisdiction. In this context, the Commission has

63. In fact, the Third Energy Package will introduce Framework Guidelines and Network Codes which – on the proposition of the European Commission – could go through the comitology procedure that would make each relevant network code binding.

often sought to improve market structures beyond what one could reasonably assume to be the competitive harm resulting from the transaction in question.

For example, in the EDF/ENBW⁶⁴ case, the Commission considered that EDF's acquisition of joint control over ENBW led to the elimination of ENBW as a potential competitor which could have undermined EDF's dominant position on the French market. In order to avoid a prohibition decision, EDF accepted to sell part of its French capacity under auction schemes (virtual power plants). Similarly, E.ON was also prepared to offer far-reaching commitments when it acquired MOL's wholesale and storage facilities in Hungary.⁶⁵ The commitments led to the elimination of all structural links between MOL and E.ON, in particular as regards the transport network. E.ON also offered to sell significant quantities of gas to newcomers, thus improving the liquidity on the Hungarian gas wholesale markets.

The Commission has used this pragmatic and innovative approach in various cases (DONG⁶⁶, Hidrocarbónico⁶⁷, sometime by acting in concert with national competition authorities (Veba/Viag)⁶⁸. However, where no commitments were feasible, the Commission has not hesitated to prohibit the creation of new energy giants (EDF/GDF/ENI)⁶⁹. On the other hand, purely national mergers which do not have a Community dimension because most of the turnover of the merging parties is achieved in one and the same member state are not caught by the Commission jurisdiction. These purely national concentrations can lead to national champions that the Commission must tolerate (E.ON/Ruhrgas, Gas Natural/Endesa, etc).⁷⁰

Second, the Commission has also relied on **commitments in abuse of dominance cases as a means to steer markets when applying antitrust rules**, pursuant to Article 9 of Regulation 1/2003⁷¹. For example, threatened with heavy fines for

64. Case COMP/M.1853 — EDF/EnBW.

65. Case COMP/M.3696 — E.ON/MOL.

66. Case COMP/M.3868-DONG/Elsam/Energi E2.

67. Case COMP/M.2684 - EnBW / EDP / CAJASTUR / HIDROCARBÓNICO.

68. Case COMP/M.1383 - Exxon/Mobil and Case COMP/M.1673 - VEB/VIAG.

69. Cases COMP/39.315 — ENI ; COMP/39.316 — GDF foreclosure; COMP/39.386 — Long term electricity contracts in France; COMP/39.387 — Long term electricity contracts in Belgium; COMP/39.401 E.ON — GDF collusion; COMP/39.442 — French electricity wholesale market; and COMP/39.351 — Svenska Kraftnät.

70. Mergers: Commission Prohibits Acquisition of GDP by EDP and ENI about E.ON-Ruhrgas in Germany; Endesa-Gas Natural in Spain and GDF-Suez, IP/04/1455 of 9 December 2004.

71. Council Regulation (EC) No 1/2003, 19. 12. 2002. on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.

abusive conduct on the German electricity wholesale markets, E.ON accepted to sell off its high voltage electricity grid, and a significant and varied portfolio of generation capacity. Similarly, Distrigaz presented a complex scheme of measures to ensure market liquidity in Belgium. Under this scheme, it guaranteed that at least 70% of its customers would become contestable for newcomers every year. Here again, the consequences of not playing the Commission's game can be costly, as experienced by GDF and E.ON for their market sharing practices concluded in the context of the joint exploitation of a gas transit pipeline.

Third, the Commission has **stretched the application of the Treaty rules on state aid**. It intervened both in Poland and Hungary against long-term power purchasing agreements concluded between incumbent producers and public supply companies, on the grounds that the long-term purchasing conditions led to the transfer of state aid to the producers.⁷²

But the Commission's proactive approach in the energy sector, whereby it uses the full range of its policy tools, has its **limits**. Competition rules only apply if they are triggered by specific events: restrictive practices for Articles 81 and 82 EC, a concentration under Regulation 139/2004⁷³ and state aid for the application of Articles 87 and 88 EC. Competition rules only apply *ad hoc*, and *ad hoc* solutions cannot offer an all-encompassing solution to structural market failures.

Competition rules only apply *ad hoc*, and *ad hoc* solutions cannot offer an all-encompassing solution to structural market failures

3.1.3. The Role of Other EC policies

i. Taxation. The creation of the energy internal market depends to some extent on taxation policy. **Indirect taxation directly affects the price of energy** and of its transport and can have serious distortive effects. Non-taxation, double-taxation, and divergence of taxation rates can influence cross-border exchanges of energy and fuel, thus impeding competition and the internal energy market's

72. *State aid: Commission requests Hungary to end long-term power purchase agreements and recover state aid from power generators*, IP/08/850, Brussels, 4 June 2008.

73. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22

development. In 2003, **two instruments** on indirect taxation of energy activities were adopted. The first Directive restructuring the Community framework for the taxation of energy products and electricity was adopted after more than a decade of negotiation. It has extended the scope of the EU's minimum rate system for energy products previously restricted to oil,⁷⁴ to all energy products, notably electricity and gas.⁷⁵ Member states are prevented from applying divergent rates of taxation. However, since the Directive establishes **only a minimum rate**, differences in rates remain. The second initiative was the modification of the VAT Regulation in 2003 by a Directive taking into account the specificities of energy-linked operations.⁷⁶ This Directive harmonised the rules on the place of supply of electricity and gas in order to attain a real internal market for electricity and gas without VAT obstacles.

These tax initiatives essentially serve the creation of the internal market. They **do not aim to promote certain forms of energy use** to the detriment of others. Nor do they have as their object to limit the competence of member states so as to cap energy prices and hence to keep energy affordable and accessible for European consumers.

ii. Trans-European Networks in Energy. The role of infrastructure and networks is of fundamental importance for the operation and development of an efficient European energy market. They interconnect markets, offer trading platforms and lead to international solidarity. The technical infrastructure which Europe had in the early phases of liberalisation was not designed to perform these functions. The grids and networks essentially have a technical function, at least in the electricity sector.

Significant investments have to be made to transform the grids so that they can support market integration. These investments are primarily a matter for member states. However, well functioning networks are covered by the so-called TEN programmes. The Trans-European Networks (TENs) policy **aims at promoting the**

74. Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, OJ L 316, 31.10.1992, p. 12–15.

75. Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31.10.2003, p. 51–70.

76. Council Directive 2003/92/EC of 7 October 2003 amending Directive 77/388/EEC as regards the rules on the place of supply of gas and electricity, OJ L 260, 11.10.2003, p. 8–9.

interconnection and the interoperability of national networks and the access to those networks, not only within the EU, but also in its neighbouring area (See Section 3.3. in Part I).

The EC Treaty provides powers to develop Trans-European Energy Networks (TEN-E). The Treaty provisions (Articles 154-156 EC on trans-European networks), and the legislation implementing these provisions apply to all types of energy infrastructure. New Community guidelines adopted in 2006 for trans-European energy networks list and rank, according to the objectives and priorities laid down, projects eligible for Community assistance. They also introduced the concept of 'project of European interest'. These projects are expected to improve market accessibility across the Union. In addition, they strengthen project coordination and fully incorporate the new member states. In practice, much of the EU policy on the development of these networks has been devoted to electricity and gas. The current implementing legislation is focused on these types of projects. The list of eligible projects⁷⁷ refers only to electricity and gas networks. European co-ordinators have also been appointed for a number of key projects.

iii. Part of EU Budget for Energy. Important financial investments in terms of infrastructures are necessary for the completion of the energy market. The costs of future energy infrastructure projects at European level are particularly high and payoffs are often very long. According to the Commission's projections,⁷⁸ for the completion of priority projects the EU needs at least €19 billion in investments for gas pipelines and €6 billion for electricity transmission before 2013. However, EU budget devoted to energy projects is **limited**. The EU budget for energy, mainly consisting in the budget allocated for TENs' projects, is **only about €20 million per year**. Community funding for energy investments is restricted primarily to the TEN-E programme. The EU's financial intervention in energy projects (network) remains marginal and mainly consists in funding feasibility studies or basic engineering studies⁷⁹. The other financial

The EU budget for energy remains marginal and mainly consists in funding feasibility studies

77. Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for Trans-European Energy Networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L 262, 22.9.2006, p. 1–23.

78. *Priority Interconnection Plan*, Communication from the Commission to the Council and the European Parliament – COM (2006) 846 final, Brussels, 10.1.2007.

79. TENs funding is only available to companies located in a Member State of the EU but not to companies located in

instruments that participate in the development of TENs in energy are the structural funds, the cohesion funds, the loan guarantees of the European investment funds and the European Investment Bank's loans.

A Regulation establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy through a **'European Energy Programme for Recovery'** (EEPR Regulation) was recently agreed between the Commission, the Parliament and the Council.⁸⁰ The EEPR Regulation establishes a financing instrument for the development of projects in the field of energy in the EU and sub-programmes to advance these objectives in the fields of: electricity and gas infrastructures (Interconnections), offshore wind energy (OWE), and carbon capture and storage (CCS). The new EEPR Regulation is however limited in duration to 2010, and is funded from a surplus in the present Community budget.

iv. Consumer Rights. Opening the EU's energy markets to competition should at the end of the day benefit consumers, be they private households or companies. In most markets, the laws of supply and demand, protected by the general competition rules, ensure that scarce resources are allocated on the basis of consumer demand. Consumer protection rules may grant additional protection to individual consumers.

The retail energy market is underperforming for consumers

The Community legislator has put considerable emphasis on this aspect. Before market opening, consumers had to buy their energy from monopoly suppliers that had little incentive to reduce prices or compete for customers by offering quick and reliable services. In the light of these traditional purchasing patterns, one may fear that consumers are unlikely to switch to new suppliers. This has been a matter of concern for the European Commission.

The Commission singled out in its latest Scoreboard Report (February 2009) that **the retail energy market is underperforming for consumers**.⁸¹ The key parameters used are price levels, consumer satisfaction, consumer complaints,

third countries.

80. Based on Articles 156 and 175 (1) EC.

81. *Consumers: Energy, banking, and urban transport underperforming for consumers*, IP/09/202, Brussels 02 February 2009.

switching rates and safety.⁸² Some of the key findings are that electricity and gas supply services score particularly badly. In terms of reported price increases with about 60% of consumers reporting price increases from their energy supplier, while only 3-4% saw price decrease. In terms of the comparability of offers and the ease of switching, energy is the sector where consumers are least likely to switch suppliers: only 7% switched gas supplier and 8% electricity (compared, for example with 25% for car insurance or 22% for the internet).

The Commission also launched in 2008 the **Citizens' Energy Forum**, bringing together consumer representatives, the electricity and gas industry, national energy regulators and representatives of the member states and countries from the South East European Energy Community. It is a regulatory forum intended to discuss and promote the creation of competitive retail markets and the protection of consumer interests. The results of this consultation showed the limited extent to which European citizens, and in some cases member states, understood how European legislation protects their rights.

Finally, the Third Energy Internal Market Package seeks to **improve consumer rights** across the EU with provisions on billing, consumption data, the role of regulators and vulnerable consumers, together with better enforcement. Regulators, with other relevant authorities, must ensure that consumer protection measures are enforced and that customers benefit through the efficient functioning of their national market. Concerning the protection of consumers, a number of new provisions aim at its reinforcement.

As mentioned above, these measures should be welcomed **as transitional steps toward fully competitive markets**. By contrast, if they are necessary on a lasting basis, one may wonder whether market opening and competition suffice to make energy accessible to all and in particular to the final customer. This last comment leads us to the evaluation of the benefits of liberalisation measures as a means to achieve the objective of 'affordable access to energy'.

82. *The Consumer Market Scoreboard and the Market Watch process. Questions and answers*, MEMO/09/44, Brussels 02 February 2009.

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It should be noted in the first place that these measures allow member states to impose public service obligations and require them to provide for a universal service benefiting all households. However, **price formation is left to market forces** which the liberalisation measures are supposed to foster. Competitive markets generally ensure that prices are kept under pressure and that energy, like all other products, is sold at the lowest possible price by the most efficient supplier. But competition does not necessarily mean that prices will go down.

Prices in the energy sector are volatile.⁸³ This is particularly true for oil prices and the prices of other energy products that are linked to the oil price. Movements in oil prices on the international market directly influence electricity and gas prices due to the fact that the oil price is often used as a reference price in long-term gas supply agreements.

The electricity industry is a cyclical industry. Additional revenues gained as a result of relative under-capacity will allow the industry to invest in new capacity. New investments may lead to relative overcapacity and hence to lower prices. These fluctuations and the high revenues generated by the industry in times of relative under-capacity are not always socially acceptable.

In integrated electricity markets, one could expect that price fluctuations would be similar throughout the Community. This is not the case. **Electricity prices and price trends still vary from one member state to another.** Various factors explain these differences. The fuel mix differs from one state to another. So, does the availability of sufficient generation capacity. Some member states may face relative over-capacity whereas others face under-capacity. In addition, the overall competitiveness of their wholesale and retail markets differs considerably.

83. For instance, in the first half of 2008, the Brent average monthly price increased by 36%, while between July and December 2008, the Brent average monthly price decreased by 64%, given the worldwide economic crisis and declining oil demand.

Energy prices may differ as result of direct interventions by member states in the price mechanism. **More than half of the member states still have regulated retail prices.**⁸⁴ The effects of regulated energy prices continue to be a major issue of debate between the member states and the Commission. The Commission considers that regulated energy prices are incompatible with EU law on the grounds that in terms of the proper functioning of the internal energy market such effects can lead to a distortion of competition (e.g. entry barriers for new suppliers and disincentives to switch supplier), and that regulated energy prices do not send the right price signals (influencing investments and incentives for energy efficiency). Member states defend regulated energy prices on the ground that they constitute a protection of “vulnerable customers”. The Commission’s response is that while short-term solutions, such as regulated prices, might appear to be advantageous in the light of rapidly increasing energy prices, it should not be confused with maintaining regulated prices for all (or certain categories of) consumers and that only carefully targeted price regulation may be necessary in order to protect individual consumers in certain specific circumstances. The debate on the issue is still open.

It is probably too soon to assess whether the Commission’s focus on open competitive markets will suffice as a policy tool to achieve the ‘affordable access to energy’ objective. It will **take some time before the “pre-liberalisation” oligopolistic market structures erode and evolve into a competitive integrated market.**

The fact that **member states fail to respect their commitments** is a worrying sign. This lack of enforcement undermines the credibility of Europe’s energy policy. Another matter of concern relates to Europe’s ability to create the interconnected infrastructure that is a prerequisite for an integrated energy market. Significant investments have to be made. Unfortunately, it is clear that **Comm-**

84. The Member States that have regulated prices for electricity and gas are: BG, DK, EE, FR, HU, IE, IT, LV, LT, PL, PT, RO, SK and ES. In GR, CY and MT there are regulated prices for electricity. DE abolished regulated electricity prices in 2007 (households and small businesses). FI has regulated prices for gas. In most Member States price regulation is not confined to household customers.

unity budgets are too limited to provide the necessary funding. Moreover, as long as regulatory regimes continue to diverge, private investors will not be stimulated to invest. It remains to be seen whether the regulatory cooperation foreseen by the Third Energy Internal Market Package will suffice to overcome these differences.

3.2. Sustainable Development

The concept of sustainability refers to ‘sustainable development’. It supplements development standards, traditionally expressed in quantitative terms (national income per capita, etc.) with three important qualitative aspects: a generational aspect, an environmental aspect and a social aspect. At the United Nations Conference on Sustainable Development in Rio de Janeiro in June 1992 these aspects were clearly defined in principles 3–4 of the Rio Declaration on Environment and Development: *“The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations (principle 3); In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it (principle 4)”*.

The sustainability debate in energy is tackled almost exclusively from an environmental angle

The environmental dimension of ‘sustainable development’ has been in the spotlight for some years. Similarly the sustainability debate in energy is tackled almost exclusively from an environmental angle, often reducing the debate to a purely environmental debate. In the European Union this tendency is reinforced by important competences regarding environment, as opposed to energy⁸⁵. The objectives of an environmental policy were enshrined in the Treaty Framework by the Single European Act.

85. The importance of “institutional” aspects is shown by the fact that it is mostly (according to some “only”) because no unanimity could be reached in the European Council on a tax on carbon dioxide emissions, that through the Community’s environmental competence and qualified majority voting the Emission Trading Directive has been adopted in order to tackle climate change at a European level.

In addition to the environmental aspect, the generational and social aspects of ‘sustainable development’ should not be forgotten. We would define the concept of ‘sustainable development’ in the field of energy as: the capability of ensuring access to energy at a reasonable price to all human beings of actual and future generations and taking into account the prerequisites of a healthy environment.

3.2.1. Sustainable Development in Energy – Climate Change

The climate change challenge is certainly an environmental one but, as it is also threatening the poorest countries more than the rich countries, and future generations more than the actual one, it touches also on all the aforementioned aspects of ‘sustainable development’. In the field of energy, the sustainability debate is intertwined with the climate change debate. The climate change challenge is indeed closely linked to the volume of energy and the way it is produced (centrally – decentralised, from nuclear, fossil or renewable sources), transported (through/by grids, pipes, cables, vessels) and consumed (energy savings, rational energy use). Indeed energy production and use account for 80% for all greenhouse gases emitted in the EU.

In the field of energy, the sustainability debate is intertwined with the climate change debate

The UN Framework Convention on Climate Change stated in 1992 that the objective of *“stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”* (Article 2). The Kyoto Protocol of 11 December 1997, which entered into force on 16 February 2005 and in which the acceding industrialised countries undertake binding commitments to reduce their greenhouse gas emissions by 2012 by 5 percent compared to 1990 levels, is the cornerstone of the international action against climate change. The Community acceded to the Kyoto Protocol on 25 April 2002⁸⁶ and so committed itself to reducing its greenhouse gas emissions by 8 percent by 2012.

86. Council Decision 2002/258/EC, OJ, L 130, 15 05 2005.

Climate change was first recognised as an issue to be addressed by EC environmental policy in the EC's Fourth Environmental Action Programme covering the period 1987-1992. This gave rise to a set of Energy Efficiency and Energy Labelling Directives in the nineteen-nineties.⁸⁷ By the time the Community adopted its Fifth Environmental Action Programme for the period 1993-2000, climate change was identified as one of the seven priority areas for the Community's environmental policy. As more evidence for climate change effects resulted in more political awareness, Community action on climate change gained momentum. This was underlined by the Sixth Environment Action Programme 'Environment 2010: Our future, Our Choice', which identified among other things the long-term objective of limiting global increases in temperature to a maximum of 2 degrees Celsius over pre-industrial levels. The 2 degrees level was again reconfirmed in the 'Commission Communication on Winning the Battle against Global Climate Change' of 10 January 2007.⁸⁸

At the Spring Council of March 2007, under the heading "An integrated climate and energy policy", the European Council underlined the **leading role that the European Union should play in international climate change negotiations** and the need for an international agreement for post-Kyoto (2012). The Council reaffirmed that by 2050 the developed countries should cut their greenhouse gas emissions by 60% to 80% compared to 1990. The Council adopted the independent EU commitment to achieve at least a 20% reduction of greenhouse gas emissions by 2020 compared to 1990, which would be increased to a 30% reduction as its contribution to a global and comprehensive agreement for the period beyond 2012, "*provided that other developed countries commit themselves to comparable emission reductions and economically more advanced developing countries to contributing adequately according to their responsibilities and respective capabilities*".⁸⁹ The Council also noted the increasing share of developing countries to the greenhouse gas effect, reaffirmed the principle of common but differentiated responsibilities and its readiness to support these countries in lessening their vulnerability and adapting to climate change.

87 Council Directive 92/75/EEC OJ L 297, 10-13 1992. Council Directive 92/42/EEC OJ L 167, 06-22 1992. Council Directive 96/57/EC OJ L 236, 09-18 1996.

88. COM (2005) 35.

89. Brussels European Council, 8/9 March 2007, Presidency Conclusions, 7224/1/07 REV 1.

The Council adopted its 'Action Plan for the Energy Policy for Europe (EPE)',⁹⁰ confirming the **20-20-20 objectives**: to achieve by 2020 (i) 20% greenhouse gas reductions compared to 1990 levels, (ii) saving 20% of the EU's energy consumption compared to projections for 2020, (iii) a 20% share for renewable energy in overall EU energy consumption, (iv) a 10% binding minimum target to be achieved by all member states for the share of biofuels in overall EU transport petrol and diesel consumption.

Notwithstanding the fact that the climate change crisis is the most pressing example of the importance of 'sustainable development' in energy, its prerequisite should not be restricted to the climate change crisis only. Even without a climate change crisis, non-conventional energy sources (non-fossil) will have to be developed for the very simple reason that fossil fuels are finite. Realising the objective of 'security-of-supply' forces us to develop renewable energy sources in order to mitigate the risks of fossil fuel supply shortages due to political or physical factors. This is confirmed by the fact that the first European Energy Efficiency Directives were adopted in 1978 and 1982 as a reaction to the oil crisis and even before climate change was on Europe's political agenda.

The **battle against climate change has upsides too**: developing renewable energy and energy-savings technologies and strategies enhances 'security-of-supply'; and the development of clean/low carbon energy technologies in order to avoid climate change is a growing economic sector. Creating high quality jobs and leadership in clean/low carbon energy technologies is also expected to be of key importance for Europe's competitiveness in the global economy.⁹¹

'Sustainable development' in energy should not be restricted to the climate change crisis only

90. *Op. Cit.* 85.

91. See the Commission Green Paper 'A European Strategy for Sustainable, Competitive and secure Energy' COM (2006) 105: "*The development and deployment of new energy technologies is essential to deliver security-of-supply, sustainability and industrial competitiveness*". See also the 'Stern Report': "*Tackling climate change is the pro-growth strategy for the longer term, and it can be done in a way that does not cap the aspirations for growth of rich or poor countries*".

3.2.2. European Instruments for Achieving Energy Sustainable Development

As described above the Community's environmental competences have been crucial for the development of the Community's energy sustainability policy. The promotion by the Community of environmental protection and sustainable development has a "constitutional status" in Article 2 TEU. Through the integration principle, "*environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development*". According to this principle, environmental objectives are integrated in other sectors such as energy, agriculture, transport, development aid, trade and external relations. It entails that if a given objective can adequately be achieved in different ways, the choice for the least environmentally harmful one should be made. It is also accepted that in very exceptional cases a measure can be declared invalid because certain environmental objectives have been taken into account insufficiently.

The **flagship** of the Community's climate policy (e.g. energy sustainability policy) was the setting up of a **European greenhouse gas Emission Trading Scheme (EU ETS)**.⁹² The EU ETS is the world's largest multi-country and multi-sector trading scheme. It covers about 11,500 installations and approximately 45 per cent of the EU's carbon dioxide emissions. The ETS is a cap and trade system under which companies operating large scale installations in the industry and power sector (energy, iron and steel, minerals, paper and pulp) must cover their carbon dioxide emissions by emission allowances that can be traded across the EU. It can also be linked to other cap and trade systems. Moreover, Kyoto projects of Joint Implementation (JI) and Clean Development Mechanism (CDM) credits can be used for compliance under the EU ETS. In order to meet the 20% greenhouse gas emission reduction target the EU ETS was amended by Directive 2009/29/EC.⁹³ Consequentially, as from 2013 the EU ETS will be extended to new sectors and new gases. The allocation system will shift from grandfathering to auctioning.

92. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

93. Directive 2009/29/EC of 23 April 2009, of the European Parliament and the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.

Another key driver of the Community's sustainability policy is the **promotion of renewable energy sources**. The first Directive on the promotion of electricity produced from renewable sources in the internal electricity market⁹⁴ aimed at the development by 2010 of 12% of the gross inland energy consumption from renewable sources and 22,1% of the electricity from renewable sources for the EU as a whole. It fixed national indicative targets for the member states. However, already in 2004 it became apparent that **the 12% share could not be met by 2010**. In order to meet the 20% share of renewable energy sources in energy consumption by 2020, an annual 1,2% increase of renewable energy sources will be needed for a period of 10 years. Therefore the new Directive 2009/28/EC⁹⁵ sets national binding targets for the member states. However, fossil fuels will remain of particular importance for energy production (electricity) during the next decades, and will thus continue to emit tons of carbon dioxide. The promising techniques of carbon capture and storage have to be further developed in order to keep green house gas emissions and the related climate increase under control. A new Directive on geological carbon dioxide storage⁹⁶ sets a legal framework for carbon capture and storage.

The battle for sustainable energy requires a new industrial revolution reorienting our economy towards a low carbon economy. For this revolution to take place Research & Development (R&D) into new low carbon/carbon free technologies is far more important than the legal instruments referred to above. The Commission has presented its **Strategic Energy Technology Plan (SET Plan) – towards a low carbon future**.⁹⁷ The SET Plan aims at: (i) in the short-term increasing research to reduce costs and improve performance of existing technologies, and encouraging the commercial implementation of these technologies involving e.g. second-genera-

The battle for sustainable energy requires a new industrial revolution reorienting our economy towards a low carbon economy

94. Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

95. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

96. Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006.

97. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - A European strategic energy technology plan (Set-plan) - 'Towards a low carbon future' - COM/2007/0723 final.

tion biofuels, capture, transport and storage of carbon, integration of renewable energy sources into the electricity network and energy efficiency in construction, transport and industry; (ii) in the longer term supporting the development of a new generation of low carbon technologies (new technologies relating to renewable energies, energy storage, sustainability of fission energy, fusion energy, and the development of Trans-European Energy networks). **However, the SET Plan is neither flanked by any meaningful incentives (financial), nor by binding legal obligations.**

By contrast, there are also **less successful aspects** of the Community's policy. In this regard reference has to be made to the **Community's external environmental competence** (Article 174 (4) EC): the Community has competence to cooperate with third countries and competent international organisations and to negotiate and conclude agreements. Such agreements must be concluded in accordance with Article 300 EC Treaty. Under this procedure, the Commission, after being mandated by the Council, conducts the negotiations on behalf of the Community. The Council then decides to conclude the agreement negotiated by the Commission. The Council acts by qualified majority in adopting both the mandate to the Commission and the decision on entering into the agreement. However, the Community's external competence of Article 174 (4) EC Treaty is non-exclusive (mixed competence) and member states also participate in the negotiation of international agreements. In fact the member states' influence would often be greater than that of the Commission.

The Commission claimed exclusive competence for negotiating international agreements in the field of environment on the basis of the Community's exclusive competence for the Common Commercial Policy (CCP) to the extent that those agreements touched upon commercial issues. However, in its 2/00 Opinion⁹⁸ on adherence to the Protocol of Cartagena adopted in the context of biodiversity, the European Court of Justice (ECJ) excluded the application of Article 133 EC Treaty, considering that its main purpose was the protection of biological diversity (and the fact that it also affected trade could not alter this finding). The ECJ further stated that there was **no exclusive Community competence** on the basis of Article

98. Opinion 2/00 of the Court of 6 December 2001 (Cartagena Protocol — Conclusion — Legal basis — Articles 133 EC, 174 (4) EC and 175 (1) EC — Living modified organisms — Environmental protection — Common commercial policy).

175 EC Treaty, considering that the harmonisation at Community level of the Protocol's scope of application was very partial. The Commission's international exclusivity aspirations in the field of environment were thus abated.

Another less successful feature of the Community's policy concerns taxation. The EU achieved **very modest results in its achievements to use tax mechanisms in order to enhance energy sustainability (CO2 tax)**.⁹⁹ The member states opposed for reasons of principle the adoption of provisions on taxes at Community level. However, Directive 2003/96¹⁰⁰ on the taxation of energy products was finally adopted. It introduces minimum rates on electricity and energy products and member states may exempt electricity produced from alternative energies. Nevertheless, it contains a long list of possibilities for member states to apply reduced rates and is far from a harmonisation of energy tax rates, let alone a beginning of a CO2 tax. What is more, the recent Commission Proposal for a Council Directive amending Directive 2003/96,¹⁰¹ increasing the minimum levels of taxation for gas oil at Community level, was blocked in the Council by the member states.¹⁰²

The EU achieved very modest results in its achievements to use tax mechanisms in order to enhance energy sustainability (CO2 tax)

99. See the Commission proposal in 1991 on the EC-wide introduction of a combine CO2 energy tax (1992) OJ C 196/1, which has never been adopted by the Council.

100. Council Directive 2003/96/EC.

101. Council Directive amending Directive 2003/96/EC as regards the adjustment of special tax arrangements for gas oil used as motor fuel for commercial purposes and the coordination of taxation of unleaded petrol and gas oil used as motor fuel COM (2007) 52.

102. See also the Commission proposal COM (2005) 261 for a Directive to restructure tax bases of the annual circulation and registration taxes in order to make passenger taxes more CO2-efficient "passenger car related taxation", which was blocked in the Council ("different views were expressed on how to achieve this objective, in particular on the need for a Community initiative in this field").

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The positive example of the Kyoto Protocol and the negative example of the first Renewable Energy Directive prove that pursuing energy sustainability and/or fighting climate change require international action through legally binding obligations for member states. As the Community has no clear energy competence, **energy sustainability has been addressed almost exclusively through the Community's environment competence.** However, energy sustainability cannot be restricted to environmental issues only. Consequentially the Community's environmental competence is not broad enough to adequately address the needs of energy sustainability.

Further consequence of the lack of a Community energy competence is that Community action in the field of energy (sustainability) can **easily be blocked by the member states.** Indeed the member states heavily rely on their national sources of energy, be it oil (UK), gas (Netherlands), nuclear (France), coal (Germany) and wish **to keep national control for energy policy.** The same applies to energy taxation: the member states have always been reluctant as regards Community action in the field of (energy) taxation.

There are also **inconsistencies, overlaps and gaps** due to the fact that within the Commission energy sustainability matters are dealt with by different directorates-general (DG TREN, DG Environment, DG Comp, DG Tax), each operating from/within its own paradigm.

This **lack of a real efficient decision-making capability** in the field of energy and the corresponding need to use other competences (environment, internal market) and/or to negotiate *ad hoc* compromises with the member states leads to **a fragmented energy policy.**

3.3. Security-of-Supply

Guaranteeing both short and long-term 'security-of-supply' is central to current European energy policy. The focus on 'security-of-supply' is an inevitable result of the **Union's increasing dependence on imported oil and natural gas.** In addition to the geopolitical challenges which must be confronted in order to secure reliable volumes of imports of oil and gas into the Union, scarcity of domestic resources will become more pressing in the years to come. Moreover, the extent of external dependence **varies considerably between the 27 members states.** In comparison with the other two energy policy objectives of 'affordable access to energy' and 'sustainable development', the goal of improving the Union's 'security-of-supply' has not been achieved; policy and legal frameworks have developed in a sporadic and piecemeal fashion.

The goal of improving the Union's 'security-of-supply' has not been achieved; policy and legal frameworks have developed in a sporadic and piecemeal fashion

3.3.1. Legal and Policy Framework

i. Policy Framework. Since the launching of the Commission's Green Paper of 2006, efforts have continued to design a 'common response' to energy security issues.¹⁰³ Yet although the tradition of diagnosing the problem is now well established, this **Green Paper failed to deliver a step change in policy.** The subsequent Council Conclusions of May 2007 endorsed high level ambitions but did little to signal improved delivery. The first and second Strategic Energy Reviews continue this tradition of diagnosis, but concrete and coherent action remains elusive. Rather, **the pattern is to embrace new ambitions.** *Ad hoc* arrangements, such as the establishment of advisory bodies like the European Energy Supply Observatory have been the rule. The latest Strategic Energy Review (SEER II)

103. See for instance the Joint Paper from the European Commission and the High Representative Javier Solana in 2006 (*An external policy to serve Europe's energy interests*, June 2006, S160/06), which describes the main elements of an integrated energy policy for Europe with a strong external dimension. This paper tries to set out the criteria for any European external energy policy. According to the paper, such policy must be coherent (backed up by all Union policies, the Member States and industry), strategic (to fully recognise the geo-political dimensions of energy-related security issues) and focused (geared towards initiatives where action at EU level can have a clear impact in furthering its interests). It divides the concept of energy security into two main building blocks: functioning markets (extension of EU energy market to its neighbours within a common regulatory area) and diversification (diversifying energy sources and geographical origin as well as transit routes).

The requisite policy and legal instruments are seldom aligned to deliver them

outlining an ‘Energy Security and Solidarity Action Plan’ sets ambitious targets for 2020 and beyond to 2050. But even if these plans are agreed to and implemented, the review itself acknowledges this to be only a first step. Essentially, while various priorities for Europe are listed, the requisite policy and legal instruments are seldom aligned to deliver them.

ii. Legal Framework. Under the current legal framework, several specific instruments, including secondary legislation, have been introduced in order to address primarily short-term ‘security-of-supply’ crises or ‘events’ leading to supply disruption.¹⁰⁴ The Commission’s recent ‘**infrastructure package**’, comprising two Regulations and published on 16 July 2009, is the first set of measures designed to tackle longer term structural issues. The Third Energy Internal Market Package also contain provisions to supervise and if necessary prevent third-country investors taking control over Community networks, in particular where these investors belong to vertically integrated companies in their home state.¹⁰⁵ To date however, the focus of the current instruments falls into two categories: internal measures pertaining to the stability of supply of oil, natural gas and electricity (in particular by way of stocking requirements for oil and gas), and bilateral agreements with third countries, aimed at enlarging the energy market (also referred to as market governance mechanisms), and facilitating imports and investments.

3.3.2. Internal Perspective: ‘Security-of-Supply’ and its Limitations

‘Security-of-supply’ has been addressed in several specific secondary legal instruments, in particular the three Directives in the field of oil,¹⁰⁶ natural gas¹⁰⁷ and electricity¹⁰⁸ respectively.¹⁰⁹ Council Directive 2006/67 on oil (and earlier,

104. Commission’s proposal for a Council Regulation concerning the notification to the Commission of investment projects in energy infrastructure within the European Community, COM (2009) 361.

105. Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity. Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks.

106. Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products.

107. Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply.

108. Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment.

109. See for background, Green Paper – *Towards a European strategy for the security of energy supply*, COM (2000) 769 final.

related instruments of 1968 and 1973) is currently under review now that the SEER II has confirmed that the existing system is **not suitable for delivering a coordinated response**, in cooperation with the International Energy Agency mechanisms,¹¹⁰ to an acute supply crisis. Council Directive 2004/67 on gas has also recently been the subject of a Commission evaluation,¹¹¹ as is required by the current Directive, and will be subject to a far-reaching amendment and recast as a Regulation. This Electricity ‘SOS’ Directive is also perceived as weak.

The first obvious limitation is that these measures **leave policy formulation and implementation to the individual member states**. The latter are merely required to have a policy, the content of which is **neither harmonised nor coordinated at European level**. Notably, none of these instruments provides for a supranational, coherent approach to responding to strategic issues of supply.¹¹²

None of these instruments provides for a supranational, coherent approach to responding to strategic issues of supply

A second limitation is the focus of the current legal framework, which is aimed at dealing with acute breakdowns in conventional energy supply, or with severe weather, as in the case of the Gas ‘SOS’ Directive, as opposed to securing a stable and reliable supply in the longer run. This is particularly so in the field of oil and gas, where, obviously, increased stocking requirements are suitable only as short-term, reactive solutions. The measures are not designed to anticipate or limit the likelihood or cost of a supply disruption.

A third limitation is that there are **major ‘gaps’ in their specific coverage**. These measures only concern fuels and not networks. The Gas ‘SOS’ Directive does not deal with Liquefied Natural Gas (LNG), for example. In this regard, the legal instruments neither take into account the changing nature of the European energy markets nor the development towards a more diversified production of energy: **they remain focused on yesterday’s forms of energy**.

110. The basis for the emergency policy of the IEA lies within the Agreement on an International Energy Program, the treaty upon which the IEA was founded in 1974.

111. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply - COM (2008) 0769 final.

112. The Gas Coordination Group established under the Gas SOS Directive represents an attempt at establishing an instrument with a broader perspective, though that Group is not vested with any powers.

Finally, although there have been developments on demand-side security (e.g. energy efficiency), there is little integration or coherence at the level of existing legal instruments between these two aspects of EU energy policy. This is hardly remarkable given that the former's focus is on the long-term while the latter is resolutely short-term. In sum, the existing legislation fails to deliver a consistent

Different measures apply to different forms of energy and there is no envisaged mechanism that would allow a truly coordinated response to a short-term crisis

approach to different forms of energy, and is **not credible in achieving its own limited objectives**. There are no institutions invested with the capability to take effective decisions. Enforcement is elusive. Should the new package¹¹³ launched on 16 July 2009 be adopted as proposed, this will lead to improvements but the overall framework will remain incomplete. Different measures apply to different forms of energy and there is no envisaged mechanism that would allow a truly coordinated response to a short-term crisis.

3.3.3. External Relations and Energy Supplies

i. Bilateral Initiatives. Bilateral initiatives towards third countries **have proliferated**. The Commission has initiated several *ad hoc* initiatives and strategic partnerships, including a new Partnership and Cooperation Agreement with Russia, Free Trade Agreements and various Partnership and Cooperation Agreements concluded in the context of the European Neighbourhood Policy (ENP).¹¹⁴ There is diversity even within the ENP framework: some 12 countries have concluded an ENP Action Plan (AP) – which include action on energy (e.g. Egypt and Azerbaijan) whereas other major suppliers to the EU have not (e.g. Russia, Algeria and Libya).

The energy components of the APs are political commitments only and are phrased in diplomatic terms. The AP drawn up for Azerbaijan is often singled out because unlike most others, it is heavily biased towards 'security-of-supply' issues and security of energy transit networks as well as regional cooperation, as opposed

113. *The Commission adopts new rules to prevent and deal with gas supply crises*, IP/09/1153, Brussels, 16 July 2009.

114. Global Energy Efficiency and Renewable Energy Fund, ACP-EU Energy Facility, Energy cooperation with the developing countries, Euro-Mediterranean cooperation, Black Sea Synergy, Global partnership for sustainable development, Thematic programme for the environment and the sustainable management of natural resources, including energy, Convention on Nuclear Safety. See <http://europa.eu/scadplus/leg/en/s14006.htm>.

to market governance. In its 2006 'non-paper' on adding a thematic dimension to the ENP,¹¹⁵ the Commission identified a number of neighbouring countries as energy transit countries: Morocco, Tunisia, Southern Caucasus, Ukraine, Moldova and Belarus. In addition Egypt and Azerbaijan (both ENP countries with an Action Plan) are identified as having a dual role as producer and transit countries. Beyond these initial steps however, no further concrete action has been taken. There has been some progress but on many of the more important issues there are still major obstacles.

Meanwhile, a unilateral approach on the part of the member states to secure their energy supply remains the rule, and bilateral deals between separate EU states and external energy suppliers continue to prevail over a specific EU approach. These separate bilateral approaches, sometimes even antagonistic, **directly undermine the development of a comprehensive energy policy at European level, as well as a common European foreign policy**.

Bilateral deals between separate EU states and external energy suppliers continue to prevail over a specific EU approach

In this context, it is worth mentioning the **crisis in the relation between the European Union and Russia** as illustrated by the early refusal of the EU to launch the negotiation of a new 'Partnership and Cooperation Agreement' with Russia, led by Poland¹¹⁶ then Lithuania and justified by energy concerns. These negotiations have finally started at the end of 2008, but very little progress has been achieved so far in the field of energy. The outcome of this negotiation on energy will have a particular bearing on the EU's ability to develop a coherent energy policy with a comprehensive external dimension in the future.

ii. Multilateral Initiatives. In addition to these bilateral initiatives several multilateral initiatives have been launched. The most significant of those are certainly the regional agreements, namely the Energy Charter Treaty¹¹⁷ (ECT) and the South

115. Communication from the Commission to the Council and the European Parliament on 'Strengthening the European Neighbourhood Policy', COM (2006) 726 final, Brussels 4 December 2006.

116. Germany has sparked anger in Poland and the Baltic States when it preferred to negotiate directly and bilaterally with Russia the building of a gasoduc (Nord Stream) going through the Baltic Sea (thereby avoiding those four countries).

117. Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects.

East European Energy Community Treaty¹¹⁸. Regional ties allow the implementation of long-term energy relations and the creation of wider ‘regulatory space’ for the further extension of EU’s internal market legislation, as well as the institutionalisation of regulatory, monitoring and enforcement mechanisms at intergovernmental level. In turn this allows the EU to ensure its own ‘security-of-supply’.

The Energy Charter Treaty. This multilateral Treaty is primarily concerned with market governance and market access issues for both supply and transit. Short-term ‘security-of-supply’ issues and the related requirement for solidarity between the Energy Charter Treaty parties receive little if no attention at all. Major suppliers to Europe are either not signatories or have not ratified the Charter. Attempts to strengthen its transit provisions through the adoption of a transit Protocol have so far failed – primarily due to Russian opposition. Indeed, Russia has now announced its intention to withdraw from the ECT.¹¹⁹ Longer term ‘security-of-supply’ issues are not dealt with at all. It is assumed that the overall focus on market accessibility is sufficient in this respect. Nevertheless, gradual recognition that more is needed is now apparent.

The South East European Energy Community Treaty: an Innovative Institutional Development. The Energy Community Treaty for South East Europe signed in 2005¹²⁰ is a concrete attempt to **extend the ‘European regulatory space’ for the internal market to non-EU countries**, under which they commit to adopt the internal market *acquis communautaire* (‘*acquis*’) for oil, gas and electricity. This Treaty is concluded for a period of 10 years from the date of entry into force. The Energy Community has established its own institutions.¹²¹

As regards the commitments undertaken by the Parties to the Energy Community, the Treaty establishes a three-tier structure (Article 3) which may be described

118. Council Decision 2006/500/EC of 29 May 2006 on the Conclusion by the European Community of the Energy Community Treaty.

119. On the 20th August 2009 the Russian Federation has officially informed the Depository that it did not intend to become a Contracting Party to the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA). In accordance with Article 45(3(a)) of the Energy Charter Treaty, such notification results in Russia’s termination of its provisional application of the ECT and the PEEREA upon expiration of 60 calendar days from the date on which the notification is received by the Depository.

120. Council Decision of 17 October 2005, 2005/905/EC.

121. Including a Council, a rotating presidency and a Secretariat, sharing responsibility with the Commission to monitor energy markets, as well as a Regulatory Board composing regulators from each Contracting Party and officials from the European Commission and a Forum bringing together all interested stakeholders from the industry, regulators, industry representative groups and consumers.

as the Treaty’s **concentric circles**. The first, inner-most circle addresses at present seven Contracting Parties alone.¹²² Under the Treaty, they have agreed to implement core parts of the EC ‘*acquis*’, both sector-specific and general. The Contracting Parties are also required to adopt development plans with a view to bringing their energy sectors in line with generally applicable standards of the EC. The second circle addresses the Contracting Parties as well as seven EU member states connected to the region, namely Austria, Bulgaria, Greece, Hungary, Italy, Romania and Slovenia. Finally, the third circle addresses the Contracting Parties as well as the entire European Community, e.g. all Parties. It provides for the free movement of network energy and allows for further measures to be taken with a view to creating a single energy market. Furthermore, it establishes an external energy trade policy and provides for a mechanism of mutual assistance between the Parties in the event of energy disruption.

The Treaty also provides for a **dispute settlement mechanism** in case of failure by a Party to comply with a Treaty obligation or to implement a Decision addressed to it within the required period. The dispute settlement rules further flesh out the right of private bodies to submit complaints to the Secretariat. This makes an important contribution to the enforcement of Energy Community law.

As regards longer term ‘security-of-supply’, the Energy Community Secretariat has recently proposed the establishment of an **Energy Community Gas Ring Group**¹²³ as a flexible and light organisation to deal with infrastructural issues. But its goals are modest: sharing information on the status of on-going and planned investment projects in networks and storage facilities and providing a forum to discuss investment options and priorities as regards interconnectors.

The South East European Energy Community Treaty is innovative in its institutional approach and works well in achieving the main goals that have been set for it e.g. that is extending internal market norms to partner countries. However, when

The South East Energy Community is innovative in its institutional approach and works well in extending internal market norms to partner countries

122. Albania, Bosnia and Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Montenegro, Serbia, and the United Nations Interim Administration Mission in Kosovo.

123. Cooperation on gas infrastructure investments – evolution of the Joint Gas Working Group, Concept Paper of the Energy Community Secretariat. Ref: 12PHLG/17/03/09 - Annex 10/02.03.2009.

dealing with external matters, its goals and as a result, the instruments available to it are **modest**. It is unlikely that it can function as an effective mechanism when it comes to facing large suppliers, or that it can avoid that its members are exposed to divide and rule tactics.

3.3.4. Infrastructures

i. Support Measures for Networks. General action to improve interconnection and interoperability of Europe's energy networks (internally and externally) is relatively recent but it is also restrictive in scope and coverage. It is however, legally possible under TEN-E for a cross-border oil pipeline or other infrastructure to apply for TEN-E status as long as it meets the criteria set down in the Treaty.¹²⁴ Currently, in the context of the SEER-II, the Commission is considering the adoption of a **new instrument to replace the TEN-E instrument** – the Energy Security and Infrastructure Instrument.

In addition to the current TEN-E priority projects, the SEER II of November 2008 identifies six additional priority energy infrastructure projects. These have led to several essentially *ad hoc* initiatives such as the Baltic Energy Market Interconnection Plan (BEIMP) designed to connect the Baltic States to wider EU Energy networks (as well as to Norway). These types of initiatives are usually realised through *ad hoc* institutional arrangements – e.g. in this case the constitution of a High Level Group mandated to draw up a non binding action plan.

Finally, there are currently **no taxation instruments of direct relevance to 'security-of-supply'**. The recently launched 'Infrastructure Package' of July 2009 effectively leaves funding decisions to the member states and the investors involved and merely requires co-ordination of information.

ii. Generation Plant, Gas Storage and LNG Facilities. The second Electricity and Gas Directives provide for a **limited level of harmonisation** of the conditions for authorising new facilities. It is noteworthy that while the second Electricity

124. Although TEN-E policy as such is limited to electricity and gas networks the inclusion of oil pipelines and possibly LNG terminals is now under active consideration.

Directive provides that refusals to grant authorisation must be notified to the Commission this requirement is not found in the second Gas Directive. Furthermore older instruments relating to notification of investments have proved weak – they are recognised as **outdated and incomplete** and it is for this reason that the Commission has proposed a new Regulation on infrastructure,¹²⁵ imposing extensive reporting obligations for new projects on both member states and stakeholders.

The entry into force of the Third Energy Internal Market Package will however provide for the **adoption of investment plans and enhanced technical co-ordination**, monitored by ACER, with the aim of improving competition and the completion of the internal market. These documents are however indicative of what has to be done – they will not be used to 'federalise' technical or reliability rules and make them mandatory for national regulators. The SEER-II suggests that the ACER (together with ENTSO-E) could take on new responsibilities in the future to promote R&D and innovation.

3.3.5. Solidarity

Although the SEER-II calls for an 'Energy Security and Solidarity Action Plan', the term 'solidarity' does not currently appear in secondary legislation, and is only introduced in a general context by the Lisbon Treaty.¹²⁶ Solidarity is neither a term nor a concept found in multilateral energy instruments. There is no legal obligation on the member states to provide mutual support to one another either in terms of short-term support in crisis measures or to cooperate on long-term investments in infrastructure. On the contrary, current secondary legislation on electricity and gas allows member states to relinquish their duties and obligations under these measures in the event of a sudden

There is no legal obligation on the member states to provide mutual support to one another

125. Proposal for a Council Regulation concerning the notification to the Commission of investment projects in energy infrastructure within the European Community and repealing Regulation (EC) No 736/96, COM (2009) 361 final.
126. The Lisbon Treaty will however add a new Article 1a: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

crisis.¹²⁷ The secondary legislation on ‘security-of-supply’ for gas, oil and electricity, reviewed above does not impose any binding positive duties – not even minimum obligations of sharing information or transparency commitments. The planned revisions should, if adopted, address this latter issue.

Related principles of coherence and consistency are also legally underdeveloped in the present Treaty framework. The notion of coherence is described as referring to internal cohesion – and at the level of institutional coordination within the EU – and the obligation on the institutions to cooperate on a procedural basis (Article 3 TEU). The principle of consistency in respect of ‘security-of-supply’ **should carry an obligation of result, e.g. that there are no contradictions in the external projection of strategies and policies.** However this latter principle is not anchored in the Treaty. Within the Second Pillar there is however an obligation on the Council to ensure the unity, consistency and effectiveness of action by the Union (Article 13 (3) TEU). Even under the Lisbon Treaty, member states have no concrete obligations beyond the general duty of loyal cooperation within the Union (Art 10 EC).

ASSESSMENT

Although the issue of ‘security-of-supply’ has regained Europe’s attention, it is fair to say that the Community rules developed to meet this objective are **far less developed** than the rules adopted in view of promoting the other two objectives. The measures adopted so far essentially focus on stocking requirements, without providing for common rules or mechanisms as regards the use of these stocks. Another set of rules imposes another minimum set of rules regarding the reliability of networks. Furthermore, despite the conclusion of various bilateral and multilateral treaties, **the Community has not succeeded in developing a unified approach to the large external suppliers of fossil fuels, such as Russia, Algeria and Arab States. It remains at the mercy of the divide-and-rule policies** which these suppliers may decide to pursue.

127. See for example Article 26 EC Directive 2003/55 and Article 24 of EC Directive 2003/54 on Safeguard measures.

IV. Preliminary Assessment: Have the Objectives been Achieved?

As we have seen in the preceding sections, **when considering the three key objectives in isolation**, 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, the ongoing attempts at progress to improve the existing legal framework of secondary legislation cannot be denied.

Nevertheless, when taken together, Community policy for achieving the three objectives remains both incoherent in its aims and insufficient in its results. Ambitious as its ‘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.** Internal/external security concepts are transnational – the recent Community drive to

When taken together, Community policy for achieving the three objectives remains both incoherent in its aims and insufficient in its results

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.

4.1. Benchmark 1 : in terms of Consistency

Although the current challenges urgently require greater consistency in balancing the three key objectives, this is by no means a novel development. 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. This was already confirmed nearly three decades ago, when the first European Energy Efficiency Directives were adopted in 1978 and 1982 as a reaction to the oil crisis – and before climate change was on Europe's political agenda. Furthermore, as this example shows, the three objectives will inevitably conflict. **A consistent approach should allow their mutual realisation**, even if prioritisation of any one of the three may vary at any point in time.

The current challenges urgently require greater consistency in balancing the three key objectives

Yet, it is apparent that the current institutional setting and the policy initiatives that have emerged from it, provides **little scope for real arbitrage between the three key objectives at Community level**. This is in part a **result of the patchwork structure** which a 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 implementing rules and regulations, and to justify these differences on the basis of national sustainability and national security goals. **Divergent**

Realising the internal market has systematically been prioritised and put forward as the panacea to pursue the three objectives

national regulation continues to frustrate the completion of internal market(s) and the objective of accessibility 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. In this regard, one may question the wisdom of a policy based on denying access for undertakings from third countries that do not reciprocate on market access in their own national systems. This is hardly likely to increase 'security-of-supply' from the very countries on which the Union is increasingly dependent.

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 product and uses which calls for specific rules, it has so far been addressed only by 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.

Energy relates to specific product and uses which calls for specific rules

An interesting paradox is that although the legal framework for reconciling competition and 'security-of-supply' objective is established and already available 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 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 communications on state aid and energy.¹²⁸ 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 international or even 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 is acting in isolation from its international

Energy sustainability is broader than a purely environmental concept

partners. Yet, energy sustainability is broader than a purely environmental concept, and in this respect the Community’s external competences for the environment are insufficient for developing an effective and credible energy sustainability policy both internally and externally. **Consistency is undermined by 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, **the European energy policy is essentially an internal market policy flanked by measures adopted in the context of the Community’s environmental policy, and without 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.

128. Nor could aid for energy objectives be included in a Block Exemption Regulation without further reform of the existing regulatory basis conferring powers on the Commission to exempt certain categories of aid.

4.2. Benchmark 2 : in terms 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? In so far 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 fragmentation of energy policy. 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** but 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.

Is the Union capable of meeting the challenges of securing the three objectives by 2020?

A further striking feature of many recent energy measures is their **declaratory or facilitative nature** – leaving the decision to take a particular action of 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 – reorienting 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

The Community toolbox is incomplete and inadequate

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*”.¹²⁹ 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. In so far as these initiatives are being realised, this is through *ad hoc* and informal instruments and organisations.

The key objective of a robust energy policy: moving sustainable energy sources economically and reliably over long distances

As such, all too often, and 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 location of energy production. Hydro-power, solar-power, wind-power, wave-power and saline power 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.

129. Green Paper - Towards a secure, sustainable and competitive european energy network, COM/2008/0782 final.

But the central question must not be ignored: where does initiative to take action lie in respect of 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 should prompt common action. Even in respect of 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.

4.3. Benchmark 3 : in terms of Credibility

While it is perhaps too early to conclude on the likelihood of the realisation of the ‘20-20-20’ strategy, the track record is hardly reassuring. Even in respect of 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 its 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. This perhaps surprising – as highlighted by the Commission in its sector inquiry into the electricity and gas sectors, there seemed to be sufficient distortions of competition for market players to complain about.¹³⁰

130. *Op. Cit.* 39.

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.

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 at 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.

The realisation of the internal market is not an end as such, but a means to an end

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

Energy policy has thus been pursued in a fragmented, “pixelised” manner

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.**

These policies are pursued at national level, with the inherent risks of divergence and contradictions

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 national level, with the inherent risks of divergence and contradictions.

Fragmentation is also caused by 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.

Ad hoc approaches, minimum framework legislation, packaging and postponing, accommodating concessions and brokering political compromises

In conclusion, **although much has been achieved in the last decade, this 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.

PART II

MOVING TOWARDS A EUROPEAN ENERGY COMMUNITY

*“Peace cannot be safeguarded without the making of creative efforts
proportionate to the dangers which threaten it”*

Schuman Declaration of 9 May 1950

I. The Need for Common Action

Part I concluded that although ambitious, current European energy policy has so far not attained all its objectives and more importantly, that it suffers from structural deficiencies. 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. As such, Section I advocates that action must be undertaken at European level and European action should be energy-specific and result-oriented. Ambitions must be set at a higher level both in terms of substance and procedure. Section II addresses the menu of ingredients that a future ambitious European energy policy should pursue to achieve the three central objectives. Section III identifies and assesses the main institutional instruments which the Union and its member states need to achieve this menu of measures. Section IV examines what can be done to address the different elements of an ambitious European energy policy in a pragmatic but coherent way.

1.1. The Need for Action

The challenges which all societies face in the energy field are unique. In our modern societies, energy is indispensable for all industrial and social activity.

Comparable to that of agricultural products, energy is situated at the beginning of the production and supply chain. Without energy, there is no industry, no transport, no electronic communication and media, significantly less agricultural production and no adequate health care. Without energy there can be no common market. A society without an energy policy is quite simply an irresponsible society.

It is scarcity and precariousness which our societies face today

Obviously, the intensity of such a policy varies over time. There are fewer constraints and contingencies in times of abundance than there are in times of scarcity. It is scarcity and precariousness which our societies face today. For our energy we are dependent on fossil fuels in various forms. **These scarce resources are not only finite, but also coveted by many.** Despite increasing international competition for them, they are not necessarily allocated on the basis of market forces in the “*Smithian*” sense. A significant part of the **world’s supply and demand is controlled by authoritarian states** which are often driven by different strategic objectives and less pacific considerations than free trade and commerce.

Moreover, the **use of fossil fuels often causes environmental problems.** The CO₂, SO₂ and NO_x emissions resulting from their use pose serious threats to the globe as we know it today. All societies face that challenge and try to reduce energy consumption by putting in place energy-saving programmes and by encouraging the use of alternative energy sources. The climate problem thus raises a **technological challenge.** More needs to be done with less and better. Here again, one may doubt whether market forces can be sufficient to bring about the technological change that will allow us to maintain our present living standards without endangering life on our planet for future generations.¹³¹ States do not bank on these forces alone and increasingly pursue *voluntarist* or sometimes *dirigiste* type of policies.

131. According to a recent European Commission communication, the European Union should invest an extra 50 billion euros in low-carbon technologies over the next 10 years. This implies a tripling of annual investments (from 3 to 8 billion euros). Source: Press release IP/09/1431, 07/10/2009.

That said, the absolute and relative scarcity of current energy is not only a challenge, it is also **an opportunity.** Developing new technologies relying on new energy sources is likely to bring about a **new industrial revolution** of a magnitude comparable or superior to the societal changes resulting from new forms of communication. In one word, future generations would be freed from the present polluting constraints.

The challenges and opportunities which our societies face today **call for urgent, decisive and immediate action.** The need for action is therefore a fact. So is the finding that **more action is needed than simply relying on market forces.** The urgency of the situation requires public policies re-orienting societies to more sustainable, targeted and secure energy uses.

SOME KEY FIGURES

Fossil-fuel resources are becoming increasingly rare. Given proven resources, current technologies and the coming increase in consumption, the current extrapolated lifetimes are 40 to 50 years for oil, about 65 years for natural gas, and about 250 years for coal.¹

Fossil-fuel energy will continue to dominate the energy mix across the world (80%) and Europe (78%) during this same period. At a European level, oil (35,3%) and natural gas (25,7%) will remain the dominant resources, followed by coal (16,7%), renewable energies (12%) and nuclear energy (10,3%).²

At a global level, primary energy consumption is due to increase by 45% by 2030. The needs of developing countries alone will account for 87% of this rise, with China and India taking half.³ The European Union’s consumption will increase by 11%. Whereas the Union already imported 54% of its energy needs in 2006, its imports will reach 67% in 2030, with relatively 95% of its needs in oil and 84% in natural gas.⁴

1. World Energy Outlook 2008, IEA.
2. Trends to 2030 – European Energy and Transport, DG TREN, 2007.
3. *Op. Cit.* 1.
4. EU Energy and Transport in figures, DG TREN, 2009.

For further elements of information on energy facts and figures, please consult the background paper ‘EU Energy Facts and Figures’ on our website: <http://www.notre-europe.eu>

1.2. The Need for Action at European Level

A major issue at stake is **whether the structures existing at national level suffice** to meet these societal challenges and seize these opportunities, at least within a sufficiently rapid time span. It derives from the conclusion in Part I of the report that meeting the short-term as well as the long-term energy, climate and technological challenges can **hardly be conceived without extensive cooperation**, and without public guidance and intervention.

A European energy policy is primarily required to safeguard the present level of European integration

In so far as the European states are concerned, the present report submits that this public policy should and can only be a European policy, or at least a policy decided within the context of or compatible with the Union Treaties. This finding is not only based on the consideration that international cooperation, when addressing major challenges, is likely **to lead to faster**

and better results than national action, but also on the ground that in order to preserve our European way of living, as described in Article 3 TEU, a European energy policy is primarily required to safeguard the present level of European integration.

The core of this integration process concerns the establishment and functioning of the internal market. This large open space where individuals, goods, services and companies can freely circulate is the basis of Europe’s industrial activity. This market has created a situation of *de facto* economic interdependence for most if not all goods and services. As a result of the liberalisation process described in Part I, this interdependence increasingly applies to electricity and gas as well.

Preserving this welfare-creating Community ‘*acquis*’ is not only important as an end in itself, but also because it **underlies nearly all other Community policies**.

The development of diverging energy policies at **national level increases the risk of conflicting responses** and can therefore **undermine the effective functioning of the internal market**. This is not a minor risk, since energy is at the basis of any societal activity. A failure to adopt an effective common response to serious common threats jeopardises much of what Europeans have managed to achieve so far.

But Europe is not only a market. Article 3 TEU provides that the Union shall also **promote cohesion and solidarity** among its member states. Individual action in a field that is as fundamental as energy clashes with this Treaty objective. The impossibility for the Union to develop a common response to emergency situations affecting some of its members obviously raises the question of what Europe stands for. There is no point in pursuing European integration if some members are literally leaving others out in the cold.

What Europe stands for if some members are literally leaving others out in the cold?

Nor is there much point in pursuing far-reaching CO2 emission reduction policies if not all European countries commit to a similar level of effort. The **urgency of the transition to a low carbon economy is common to all European countries**: an effort of the few is not sufficient to guarantee robust results.

As regards the need for investment in energy transport networks and other infrastructure, no added value comes from competition between member states. **No country has an interest in financing alone the interconnections or the supply networks** connecting with other European or third-party countries – infrastructure which will serve several member states together.

Equally, the necessary **resources to develop research programmes** leading to new sources of energy are **too large for one member state to mobilise** – on the scale that the United States does, for example. Some projects, such as fundamental research into nuclear fusion, are simply inconceivable on a national scale, at least for the vast majority of European states.

A European energy policy needs a powerful external dimension

Last but not least, access to energy resources outside Europe is of strategic importance. So long as self-sufficient local energy production cannot be guaranteed, a European energy policy needs a powerful external dimension. Such energy-specific considerations are not new in Europe, and were to some extent at the core of the ECSC and Euratom Treaties, which in turn provided for specific tools or instruments. The main difference is that the energy picture of Europe has radically changed. Energy resources are now primarily located outside the Union and Europe is increasingly dependent over external sources for its energy supply.

Additionally, energy-related issues are highly political and are the source of international conflicts. In this context, Europe (and even more so, individual European states) is at risk of becoming more and more the **victim of power play or divide-and-rule policies of erratic suppliers**. This strategic element is a key feature that an ambitious European energy policy must embrace. The European Union will only be able to reap the full fruits of its internal energy market if its policy allows it to develop common answers to external threats.

Solidarity should be the guide in developing a European energy policy

In this respect, no added value can come from competition between member states vis-à-vis producer and transit countries. The European Union **cannot accept that the supply of energy to a single member state be compromised**. It must therefore ensure that solidarity can function and that no third country can reduce supply in a targeted manner. Solidarity, instead of competing claims of national sovereignty, should be the guide in developing a European energy policy.

A unified external front also offers the only match to other states, trading blocks and entities that the European states are dealing with for their energy supply. As a large trading block, Europe has indeed much to offer to suppliers of energy. A common energy policy also offers a sign of **strong political commitment for a project** that pools the destiny of its members, aiming for peace and prosperity, not only between those members but also with their strategic partners.

It follows from this overview that there is not only a practical need for action at European level, but that there are also compelling reasons why 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.

1.3. The Need for Energy-Specific Action

A unique challenge requires a unique response. An energy policy is not an environmental policy. It may contribute to meeting environmental standards, but it must also deal with issues, such as finiteness of energy resources, that are not necessarily linked to environmental issues. Any energy policy developed at European level should therefore duly address the specificities of energy. Energy is not just any other good, and raises in many respects complex issues. Short to medium-term elasticity of demand for energy products is almost non-existent. Consumers expect to be supplied upon request and do not have any alternatives. Another unique feature is the fact that energy consumption is not supposed to grow. Whereas growth is welcomed in nearly all other sectors of the economy, growth of energy consumption must be contained and targeted to specific energy sources. Energy markets must be stable or shrinking markets. This is because the non-renewable resources are finite.

Any energy policy should duly address the specificities of energy

But **renewable sources impose their own constraints**. Although scarcity should be no or less of a problem for some renewable energy sources, which an energy policy is supposed to foster, growth will be constrained by various factors, such as transport over grids and territorial limits. Renewable sources such as wind farms, solar energy parks, forestry and bio-ethanol production, are also space-consuming and, sometimes, polluting. It therefore remains utopian to imagine that societies will be freed from constraints within the foreseeable future. **Transport specificities also raise complex solidarity and allocation issues** which a European energy policy should address. Since renewable energy sources have territorial constraints, production should preferably be located in the optimal environment and transported to the place of consumption by reliable grids.

Consumers in one member state should be able to rely on supplies generated in other member states. Good functioning and **interdependent grids are a pre-condition for ensuring mutual trust.**

1.4. The Need for Effective Action

Disagreement rather concerns Member States' commitment to concrete obligations and results

A new ambitious energy policy cannot be just a matter of words. In the abstract most states will agree on what needs to be done to achieve the three objectives of an energy policy. Disagreement rather concerns their commitment to concrete obligations and results and the effectiveness of their action. Given the need for urgent action, Europe cannot afford itself the luxury of debates over doctrine: it must act effectively.

This implies in the first place that an energy policy should be anchored in an institutional framework which is able to pursue the three key objectives in parallel. This requires the **possibility of intervention alongside market forces** that can, where necessary, take supplementary or corrective action.

To find a right balance between centralised decision making and local solutions

Furthermore, the need to find a right balance between centralised decision making and local solutions is at stake. A coherent legal framework for implementing a future energy policy must include effective mechanisms to promote local production (and where possible, access to storage or energy) and consistent and credible approaches to enhance synergies between the various levels of governance, but also between the different energy sources (e.g. water/wind, etc.).

Effectiveness further requires that the policy – and the institutional machinery to realise it – should be **sufficiently flexible to review and shape the solutions** chosen at any given moment in time and to avoid technological or political lock-ins that could lead to suboptimal results in the longer term.

Effectiveness also requires that the energy policy is properly funded, with its own budget derived from revenues directly levied from the stakeholders that contribute to the decision-making. Loans, subsidies and guarantees must be available to support energy policy objectives, as opposed to the system of indirect administration applied at present. A common energy policy can be **successful only if it is financially independent on the receiving and expending side.**

Effectiveness also requires that the energy policy is properly funded

This also calls for the potential to **steer investments in R&D, production and transport capacity or strategic reserves**, in order to ensure an optimal and enduring compromise between the three objectives. In light of the urgent need for massive increased investment in infrastructure, along with new technologies and alternative energies, the Union must equip itself with an ambitious budget. The revision of the budget and the negotiation of the new financial perspectives of 2014-19 will be critical in that regard.

The common energy policy should also be credible. In that sense, effectiveness requires that such a policy cannot be a mere debating club where the members agree on obligations but fail to respect them. Commitment to a rule means a direct commitment to a result. **Decisions must be binding and enforceable.** Preferably, decisions and rules should be agreed upon in a manner as detailed as possible at EU level so as to avoid implementation and interpretation issues when they are applied. This model contrasts sharply with the methodology used at European level so far.

A policy cannot be a mere debating club where the members agree on obligations but fail to respect them

Non-compliance by individuals and undertakings should be **subject to financial sanctions**, comparable to those imposed today for antitrust violations. Similarly, non-compliance by states should also lead to financial sanctions. In addition, temporary exclusion from projects and, in case of persistent infringements, exclusion from decision-making bodies should be envisaged in the context of sanctions imposed by an independent court after proper debate.

Stakeholders should be closely associated with the decision-making process

Finally, the effectiveness of action implies acceptability. An additional guarantee for such commitment is involvement. Stakeholders should be closely associated with the decision-making process (producers, grid operators, researchers, distributors, importers) so that they are ready to support its objectives and are no longer able to rely on state support to block their implementation. The mix of central authority and decentralised administration should also contribute to the credibility of a common energy policy. Last but not least, the policy should be applied as closely as possible to the citizen.

II. The Content of a Common Energy Policy: Essentials and Desirables

This section designs a menu of suitable instruments which might be put in place to ensure the realisation of an efficient European energy policy. This menu of items derives from the analysis of the shortcomings of the current energy policy (Part I) and from the need for action identified in the previous section. This list is not static, and each item of the list can be further developed and refined. **An ambitious European energy policy should ideally consist of the following ‘menu’ of principal measures:**

- 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;
- The capability to intervene in the **price mechanism** where market forces fail to deliver socially acceptable results or threaten to undermine crucial investment decisions;
- The power to encourage **diversification of Europe’s energy portfolio** by stimulating innovation (R&D) and the use of renewable energy sources;
- The power to dispose of **independent and autonomous financial resources**, including the power to levy duties and taxes on certain goods and types of production;

- The power to effectively dispatch the use of **strategic reserves** and ensure that they reach the parts of Europe where these reserves are needed, as well as to guarantee equal access to resources and stocks for all players;
- The capacity to **project and secure Europe's goals on the international scene** and, where needed, to pre-empt supply deals concluded by private or public undertakings at national level.

Many of those measures are explicitly or implicitly embodied in Europe's existing and past energy Treaties. Those energy-specific Treaties provided a common approach to the energy transition issues of their time and have proved relatively successful. Although today's **challenges are new**, especially regarding the necessity to realise the **requisite transition to a low carbon energy economy**, the Euratom and ECSC Treaties provided not only useful precedents, but also a source of inspiration in fashioning basic principles for common action and suitable policy instruments.

2.1. Well-functioning Energy Internal Markets

All Europeans must be able to access to all forms of energy at reasonable and stable prices wherever they are in Europe. The **creation of a wide, contestable and liquid energy market** throughout Europe remains one of the best means to ensure that this objective can be achieved. Ensuring effective competition between various suppliers keeps prices under pressure and guarantees consumer choice – not just a choice based on price, but also the right to opt for sustainable energy forms in preference to “dirty” fuels. A good functioning liquid market also remains **the most direct means to ensure that energy supplies reach all regions of Europe**.

Europe's internal market also remains **a primary source of innovation**. Ensuring a large competitive European energy market offers the potential for a technological breakthrough and a diversified production portfolio. Market-based mechanisms can further be developed to meet environmental objectives.

The creation of effective networks of stakeholders with enforceable procedural rights and guarantees to participate in decision-making should also be considered. This could be done by setting up a consultative committee comparable to the ECSC consultative committee – an ‘Economic and Social Committee for Energy’ – to discuss and prepare new legislative initiatives. The consultation process should focus in particular on stakeholders such as energy producers, large energy users and consumer organisations that are formally not involved in the current system that mainly focuses on system operators and regulators. Formalising the consultation process would allow it to create consensus among stakeholders.

The creation of an
**‘Economic and Social
Committee for
Energy’**

It should also be envisaged to compel member states to provide **efficient remedies** against civil breaches of internal market rules by grid operators. Even so, to the extent that member states themselves are infringing the rules, these sanctions would be of limited use.

2.2. Well-functioning pan-European Energy Networks

A cornerstone of a modern and sustainable European energy policy must be well-functioning grid networks – **both within and outside of the Union**, as well-functioning grids and markets would benefit all Europeans, and their trading partners. In that regard, while the Third Energy Internal Market Package is an important step in the direction of the coordination of grid codes and investment plans, it fails to deliver a European-wide economic regulatory approach to networks. Coordination remains essentially technical and operational in nature and does not provide for compelling decisions on future investment. European energy markets will only work with **European-wide grids**. Maintaining regulatory divergences and a national focus in investment decisions is incompatible with this requirement.

European energy
markets will only
work with European-
wide grids

Similarly, well-functioning and **smart grids** are not only indispensable for the internal market, but are also essential to ensure reliable energy supplies,

including the integration of new sustainable energy forms within and into that market. Extending a reliable, open grid to third countries capable of supplying Europe with traditional and renewable sources of supply also contributes to that policy objective. Well-functioning grids that cover all parts of Europe also enable member states to assist each other by transporting supplies to the regions in need.

An EU energy policy should therefore ensure an optimal functioning of the grids, but also guarantee that the grids have a European-wide coverage and optimise links to external supplies and resources. The energy policy should further provide for the possibility **to appoint a European regulator and European grid agencies** that are able to take decisions that directly bind grid operators and grid users, including for investment-related matters. These improvements would significantly contribute to the integration of European energy markets and to making them work more efficiently.

2.3. Price Stabilisation Mechanisms

As with any capital-intensive industry, energy and in particular electricity production is cyclical in nature. High prices in periods of relative under-capacity allow the industry to invest in new capacity and compensate for low prices and losses incurred in times of relative over-capacity. Price fluctuations are sometimes hard to reconcile with the principle that energy should be available for all European citizens at affordable prices. Moreover this can act as a disincentive for future investment. Additionally, a predictable and stable carbon price is necessary in order to ensure investors commit to new projects.

The possibility to intervene in the price mechanism where market forces fail

A European energy policy should therefore allow the possibility to intervene in the price mechanism where market forces fail to deliver socially acceptable results or threaten to undermine crucial investment decisions. The possibility to activate, when necessary, **‘European price intervention mechanisms’**, such as price equalisation funds, in view of protecting exposed customers and to stabilise prices for the benefit of larger users or to provide suitable signals to investors, should therefore be considered.

2.4. Diversifying Europe’s Energy Portfolio by Stimulating Innovation

Intervention to guide market forces may be required to steer Europe’s energy supply sources towards a more diversified and sustainable portfolio. In coordinating and supervising the content of this portfolio, a European energy policy should encourage diversification of Europe’s energy portfolio by stimulating innovation (R&D) and the use of renewable energy sources, but also finding the right balance between local, regional, national and European solutions. These measures must also contribute to meeting the ‘security-of-supply’ objective. Diversifying the energy portfolio and developing new technologies will help to reduce the dependency on external energy supplies.

Encourage diversification of Europe’s energy portfolio by stimulating innovation (R&D) and the use of renewable energy sources

The availability of European wide R&D programmes supported by adequate funding facilities should be a predominant feature of a European energy policy. Possibly supplemented with input from the national regulatory or grid agencies, a European energy policy should have the competence **to promote fulfilment of the diversification and sustainability objectives**, either indirectly through financial incentives (see below) or, if needed, directly by intervening in national licensing programmes for new production facilities.

Although the focus of European energy policy should first and foremost be European, the support schemes should not necessarily be limited to European companies or European Union projects. **International cooperation** will be required in many fields, especially where the sheer size of the projects so requires (e.g. ITER) or where there are other objective reasons to cooperate. Stimulating the use of energy-efficient technologies in developing countries may be mutually beneficial for the receiving and the European countries. This applies for example in the field of solar energy.

2.5. Independent and Autonomous Financial Resources and Incentives

The possibility to address market deficiencies should not only benefit energy users but also energy producers and network operators. In order to avoid underinvestment and/or to steer investment decisions, producers and network operators should not only benefit from the price stabilisation measures referred to above, but should also have **access to advantageous financial instruments, such as long-term loans and credit facilities**, which could either be facilitated by existing institutions such as the European Investment Bank or by a newly created Energy Fund.

A European Energy Fund could play an important role in stimulating diversification as well as financing the energy transition

The advantage of such a Fund is that it could co-ordinate and supplement existing European financial instruments, thus ensuring that they are properly targeted at non-discriminatory investments which can benefit the Union as a whole. A **European Energy Fund** could also play an important role in stimulating diversification and cooperation as well as financing the energy transition. Through co-ordinating loans and subsidies to promote renewable energy production and related R&D, as well as transport 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 and perhaps also by income from congestion management on Europe's major grids. It could also be envisaged that fines imposed for violations of the competition and non-discrimination rules would benefit the Fund. Finally, the Fund could be fed by levies and custom duties on goods produced by environmentally unfriendly production methods, in so far as this is allowed under World Trade Organisation (WTO) rules. Other contributions, such as parts of the proceeds of CO2 auctions and licensing fees, could follow.

Additionally, energy transition inevitably requires **demand-side measures** aimed at reducing consumption, or at least the current forms of consumption. Demand-side measures can take various forms, from carbon taxation, to labelling provisions ensuring transparency of energy consumption, or requirements for buildings

(insulation), etc. Taxes may increase the energy prices and may therefore not be socially acceptable. The energy policy should therefore provide for support for weaker consumers.

This financial dimension of the energy policy implies the existence of **a legal basis to impose energy-related levies** on forms of energy production and on goods. An energy policy that does not have the possibility to rely directly on fiscal incentives and proceeds is necessarily incomplete.

2.6. Crisis Management and Strategic Reserves

Secure access to energy resources and reserves both internal and external to the Union will remain a major concern in the short as well as the long-term. Although the current Treaties impose a non-discrimination rule, this applies primarily to state conduct and, exceptionally, to dominant undertakings. Unlike Articles 3 and 4 ECSC that explicitly imposed equal access to sources of production, the current rules do not unambiguously guarantee that customers and/or purchasers of one member state will have equal access to the sources of supply or storage of another member state, as well as to external resources and the networks which can transport them.

A large European market implies that no preferential treatment should be granted to national entities or undertakings when it comes to accessing the production of energy, both from renewable and non-renewable sources, to transporting these energies and/or to benefiting from strategic and non-strategic reserves. Production and depletion strategies as well as strategic reserves should sustain the European market and not only national markets.

Production and depletion strategies as well as strategic reserves should sustain the European market and not only national markets

Even so, market forces and well-functioning grids have their limits in ensuring 'security-of-supply'. An energy policy should also dispose of efficient means to combat energy crises and must include the ability to detect and act on the dangers that may put Europe at risk. Such **early-warning mechanisms** would allow the author-

ities and the states concerned to address supply concerns before they become problematic.

Early-warning mechanisms will not however suffice to deal with real crises. Europe should dispose of **strategic reserves** and have the **capability to effectively dispatch those reserves** and ensure that they reach the parts of Europe where they are needed.

In the absence of real and effective internal solidarity mechanisms, Europe will continue to be prone to external pressure and divide-and-rule policies

The absence of effective protection measures shielding Europe (as opposed to its individual member states) from major supply interruptions further affects Europe’s credibility on the international scene. In the absence of real and effective internal solidarity mechanisms, Europe will continue to be prone to external pressure and divide-and-rule policies. A solid internal security policy is therefore a pre-condition to yielding credible power and influence on the international scene. **A European energy policy without solidarity is inefficient, expensive and lacks credibility in the long-term.**

2.7. Strengthening Europe’s Position on the International Scene

The external challenges faced by the European Union require it **to speak and act in unison on the international scene**, either in the context of maintaining good foreign relations or when confronting external suppliers. Whatever the internal rules on the division of powers may be, Europe and its member states will only be heard if the ranks are closed abroad. The Union must above all equip itself with a capacity to act collectively. This implies the capacity for Europe to project its objectives externally on the international stage, and to be represented in international organisations and have an established capacity to accept international obligations.

The fall-back power to pre-empt commercial deals at national level

Closed ranks may further require that the European Union should have the fall-back power to pre-empt commercial deals at national level which may perhaps be beneficial to the parties to the deal, but not for European ‘security-of-supply’ as

a whole. The European Union should be in a position to block deals concluded by private and/or public undertakings and act (albeit on a temporary basis) as a single buyer when it comes to developing long-term supply relationships with foreign suppliers, in particular with state-controlled suppliers of authoritarian states. ‘Security-of-supply’ is too important an issue to be left to the discretion of select commercial interests.

This **does not mean that competition should be excluded** in relation to international purchasing markets. Market forces will continue to play a predominant role when negotiating deals with suppliers complying with market rules and market logic. They will also dictate how external supplies will be allocated once they have reached the internal energy market. In other ways too, where market forces can and should play a role, they will play that role.

Last but not least, the European Union needs to project the reach of the internal market beyond its borders. The possibility to earn a reasonable return on investment in a stable and prosperous environment will continue to attract private investment – both European and foreign investors and hence energy suppliers. Inward investment, export of new technologies and trade relations create a mutual interdependence that makes Europe less vulnerable to erratic external decision making. The ‘Multiple Partnership Initiatives’ developed so far to project the reach of the internal market beyond the borders of the Union, and exemplified by the South East European Energy Community Treaty, should therefore be encouraged and strengthened through co-ordination across the different initiatives.

To project the reach of the internal market beyond its borders

The South East European Energy Community Treaty is indeed an innovative approach to extending and deepening regional ties between the Union and neighbouring states and allows the creation of a wider ‘regulatory space’ for the further extension of the internal market legislation, and its regulation as well as providing for arrangements for solidarity and mutual external security among the Parties. As European integration deepens within the Union, this approach provides for mechanisms to gradually extend the relevant legislation and its applicability to the Parties to that Treaty. This **form of ‘institutionalised partnership’ could**

valuably be extended to other regions bordering the Union – co-opting Europe’s eastern and southern neighbours into a broader energy community. The European ‘*acquis*’ could both be preserved and extended under this method.

III. Ways and Means for Achieving a Common European Energy Policy

The following section will address the toolbox of various legal and institutional instruments amongst which the European Union and its member states may choose to deliver a European energy policy, and discuss how they can deal with the items listed on the menu in an effective manner. Some of these instruments will lead to suboptimal results. Compromises will have to be made as to the number of items on the menu that can be achieved and/or as to the effectiveness of the measures. Whatever option is chosen or compromise is struck, a certain number of questions will have to be addressed: should it extend to all or some member states, should it develop within or outside the Union structure, and finally important questions as regards the scope of the new energy policy.

3.1. Main Questions at Stake

3.1.1. All or Some Member States

A factor that has hindered radical Treaty amendment on energy concerns **the willingness to progress with the full group of member states**. This meant in effect that the member states which are the least willing to integrate or cooperate have determined the speed of the full group. This leads to a relative inertia that is

incompatible with the need for urgent action in the energy field, as described above.

The level of collective ambitions may differ from one state to another

It follows that it **should not be a requirement for all member states to embrace the new energy policy – at least not in the short-term**. The level of collective ambitions may differ from one state to another. The right for a group of member states to progress ahead of the others raises questions as to the rights of others to join or to oppose such selective progression. Depending on the option retained for selective progress, the less ambitious member states may impede the more ambitious member states in their common project.

3.1.2. In or Outside the Union Structures

However important energy is as a policy issue, **it interacts and will continue to interact with other policy areas** for each of its three objectives. When it comes to affordable access to energy, the two other energy objectives must be reconciled with the requirements of the internal market. Developing a sustainable energy policy cannot be imagined without coordination with environmental and R&D policies. The necessity to speak with a common voice on the international scene on energy-related matters may have wider policy implications which need to be coordinated with Europe’s existing foreign policies.

Still, **the need to make the new energy policy compatible with the existing structures does not mean that it should necessarily be locked into those structures**.

Member states that are determined to embrace a new energy policy may decide to set up an entirely new structure rather than build on the foundations of the

The heritage of the past will have to be reconciled with the ambitions of the future

existing Treaties. In this respect, the difficulty concerns the obligations and orientations to which the member states have already committed themselves within the structures set up by the Treaty on the European Union. The heritage of the past will have to be reconciled with the ambitions of the future.

3.1.3. The Scope of the Policy

The third difficulty concerns the scope of a common energy policy. Energy policy is a difficult concept to pin down, in particular since it tends to fluctuate over time. The ECSC and Euratom which applied to specific sources of energy (coal and nuclear) have been static. They have not been able to adapt to new sources of energy. Whatever route is chosen, the parameters of the energy policy must be defined in advance, perhaps in functional terms, since it will necessarily require a different mode of cooperation than the methods currently in place. The member states that adhere to any new plan, as well as those that do not, **need to know the extent to which this cooperation applies to them and its implications for related policy areas**.

3.2. Legal and Institutional Instruments

The main options at the EU’s disposal are the following: Option 1 – The New Energy Policy under the Lisbon Treaty ; Option 2 – Differentiated Integration within the Union Structures: Enhanced Cooperation and Others; Option 3 – A New European Energy Treaty ; and Option 4 – Functional and/or Regional Arrangements : Schengen(s) for Energy. This list of options is not exhaustive. **Each approach is not exclusive, but can rather be combined with others**, thus allowing for flexibility.

3.2.1. Option 1 – The New Energy Policy under the Lisbon Treaty

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.

The inclusion of a new energy Title in the Lisbon Treaty does not fundamentally change the existing division of competences

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 excludes majority voting in various policy areas

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 envi-

ronmental 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.

The High Representative will not have competence over all EU policies with an external dimension, most notably environment or energy

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

3.2.2. Option 2 – Differentiated Integration within the Union Structures: Enhanced Cooperation and Others

The Union Treaty acknowledges the political reality that the willingness to integrate and cooperate may differ throughout the Union and the reluctance of some member states should not prevent progress by others. Article 20 TEU lays down the rules for **such enhanced cooperation between the more ambitious members, making use of the institutional structures of the Union.**¹³²

The multitude of interests at stake, the growing complexity of decision-making and the diverging expectations concerning the future path of integration may indeed call for a higher degree of differentiated integration by a limited group of member states.

Article 20 TEU offers an institutional answer to the legal questions identified above. Enhanced cooperation is open at any time to all member states that wish to participate and does not exclude those who stay behind since they have the right to participate in its deliberations. It also has the merit of respecting the Union's single institutional framework, preserving the *'acquis'*, and allowing for coordination with other EU policies.

Article 20 TEU can be used under the following conditions:

- First, enhanced cooperation must be **limited to achieving the Treaty's existing policy** objectives.
- Second, the scope for cooperation is **limited to areas of shared competence** and cannot extend to Union's exclusive powers, such as competition policy.
- Third, as concerns the **procedural requirements**: the coalition of the willing should consist of at least nine member states and may only go ahead after having obtained the Council's authorisation, and has to make apparent that the policy objectives of Article 194 TFEU cannot be achieved by all member states: enhanced cooperation is therefore an option of last resort.
- Fourth, enhanced cooperation **cannot initially depart from the Treaty's**

decision-making procedures. Where the Treaty imposes unanimity, such as the matters listed in Article 194 (2) TFEU, the smaller group cannot envisage other voting rules. However, the Lisbon Treaty offers the possibility of using *"passerelles"* within enhanced cooperation (Article 333 TFEU), for those member states that might decide to use it in sectors where unanimity is required by the Treaty, in order to shift towards majority voting in their enhanced cooperation.

It follows that Article 20 TEU offers several advantages in comparison to the standard integration methods of the Lisbon Treaty.

Other options. Institutionally more limited (and probably more complex) is the possibility to seek further integration on the basis of secondary legislation. When adopting legislation under new Article 194 TFEU, the Union could **offer member states various implementation options and/or grant the more reluctant states derogations from certain obligations.** This would allow, within certain limits, the possibility for certain ambitious member states to adopt far-reaching measures. It should be noted that this tool consists of allowing member states different routes to reach a common objective. It is not an alternative to opt in's or opt out's, as envisaged at the level of primary Union law.

The Third Energy Internal Market Package offers an example of alternative implementation measures to meet the unbundling requirements: member states may choose between full ownership unbundling, an independent system operator or independent transmission operator. Similarly, the First Energy Internal Market Package proposed various models and liberalisation phases to meet market opening requirements. In so far as Regulations are concerned, alternative implementation routes do not offer the possibility to differentiate between member states, since Regulations do not necessitate further implementation. But here, derogations could offer some relief.

However, this type of an option cannot be seen as a global answer to the challenges faced, but only as possibility to bring minimal improvements. Furthermore, using alternative implementation measures and derogations increases the risk of

Risk of aggravating the piecemeal approach and other shortcomings

132. Article 20 (ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC).

aggravating the piecemeal approach and other shortcomings identified in Part I of this report. Last but not least, it gives a disproportional say in defining the energy policy to the less willing member states.

3.2.3. Option 3 – A New European Energy Treaty

It creates a stronger and more coherent European energy regulatory space governed by credible institutions capable of delivering effective solutions

A more radical option is to develop a new energy-specific Treaty creating a real European Energy Community (e.g. fuel and network based) **in order to accommodate all elements of the menu in one single legal instrument.** A new legal and institutional framework would create a stronger and more coherent European energy regulatory space governed by credible institutions capable of delivering effective solutions. If all member states were committed to this cause, they could **amend the**

Lisbon Treaty so as to equip the Union with the capacity to deliver results on all items on the menu. It could be argued that the new Treaty could benefit from the alternative revision provisions set up by the Lisbon Treaty. An innovative feature of the Treaty is that it can be amended without convening an Intergovernmental Conference, which could make future amendment easier, taking the heat out of substantive debate and improving the chances of a favourable outcome.

However, **not all member states may be willing at this stage to pool their energy policies under a truly supranational structure.** Whereas the conclusion of a fully fledged Energy Treaty is attractive as an option to achieve the entire menu in an efficient manner, it is a complex one when it comes to addressing the three key legal questions.

The first issue concerns the relationship with the existing institutional framework. Where the Union enjoys exclusive competence and/or where it has exercised its powers, such as in the field of the internal market, member states are no longer free to conclude international treaties as they see fit, even if these treaties pursue objectives that are not incompatible with those pursued by the Union.

A solution to that condition might be **to place the new Treaty under the existing Union structure as was the case with the ECSC** under the “pre-Lisbon” Union and as still is the case with the Euratom Treaty. Such a Treaty could thus refill the institutional vacuum created by the expiry of the old ECSC Treaty in 2002. The new Treaty would resolve the relationship with the existing institutional framework by allowing the participating member states to rely on the existing institutional machinery. The EU Institutions would develop and apply the new energy policy for the participating member states. This would **allow the existing institutions to ensure consistency** between the more ambitious energy policy developed under the new Treaty, on the one hand, and the existing energy policy developed on the basis of Article 194 TFEU, and other Union policies, on the other.

To place the new Treaty under the existing Union structure as was the case with the ECSC

It could also be envisaged to **transform the Euratom Treaty into a new fully fledged Treaty.** But this route is less attractive and more cumbersome than filing the ECSC vacuum by a “fully fledged and opt-in” Energy Treaty. First, the Euratom Treaty is compulsory for all member states. Transforming this Treaty into such comprehensive Energy Treaty would therefore not only require the consent of all member states for the conclusion of that new Treaty, but would also compel all 27 member states to participate in that new Euratom Treaty. Second, it is unclear how the Euratom Treaty could be revised in its entirety. This has never been done before. Third, one may also question the expediency of completely revising the Euratom. If it is a success, then the member states might just as well modify the Lisbon Treaty so as to allow it to achieve all items on the menu in an efficient manner. By contrast, if it is a failure, the process of amendment **could unravel the existing fragile consensus on nuclear energy** and lead to the abolition of Euratom without its substitution by a modernised Treaty.

The second question that needs to be addressed concerns the **relations between those states that conclude the Treaty and those that do not.**

Following the example of the Monetary Union, some member states could opt in and/or others could opt out. The new rules do not necessarily have to bind all, but should be accessible to all. Similarly, the new Treaty would also specify the rights

The new rules do not necessarily have to bind all, but should be accessible to all

and obligations of the participating member states vis-à-vis those not participating. The fact that participation entails certain advantages, for example as regards shared access to natural resources or jointly developed technology, does not necessarily mean that these advantages will have to be extended, pursuant to the non-discrimination rules of Article 18 TFEU, to the member states that have not committed to the obligations which were necessary to achieve these results.

As open as possible so as to be flexible and receptive to new technological developments

The third issue relates to the **scope of the new Treaty**. This new Treaty could find its inspiration in the mechanism already put in place in 1951 by the Treaty of Paris. The major differences with the old ECSC would be twofold. First, the scope of the new Treaty should be different: it should be as open as possible so as to be flexible and receptive to new technological developments which will help to free Europe from the current energy constraints. This implies that the scope of the Treaty should not be made dependent on a static list of products and technologies.

Second, the new Treaty should have a **clear external dimension**. Europe's external power is not only required for 'security-of-supply' reasons, but more broadly to rally as many trading partners as possible to the cause of achieving an accessible, sustainable and secure energy policy on a peaceful basis. Last but not least, a special Court procedure might be envisaged so as to allow the institutions and/or member states to seek a ruling of the European Court of Justice on the precise scope of the new Treaty.

Other options are conceivable, but are likely to raise complex and insurmountable institutional questions. For example, **the creation of an entirely new institutional structure alongside the Union** structure would lead to costly and possibly ineffective duplications. Legally speaking the conclusion of a new Energy Treaty parallel to the Union Treaty would be tantamount to the conclusion of a mixed agreement involving national and Union competence. It would require the Union to become a member of the new Treaty. More importantly, one may wonder whether the European Court of Justice would approve the creation of such an alternative

structure. Since a new Energy Treaty would necessarily affect the internal market and other key provisions of Union law, its conclusion alongside the structures set up by the Union Treaty could be seen as affecting the constitutional foundations of the Union.¹³³

Finally, this approach does not take account of the political constraints. In a world governed by new forces and different geopolitical realities, many Europeans may be tempted to lower their ambitions in favour of short-term introspection and introverted defensiveness. This means that other instruments than large scale Treaty revisions should be envisaged to deliver effective results for as many possible items on the menu list.

3.2.4. Option 4 – Functional and/or Regional Arrangements : Schengen(s) for Energy

In order to avoid the legal complexities of concluding a 'fully fledged Energy Treaty', **groups of member states could decide to cooperate in certain areas on a functional and/or regional basis**. This option can be explored in various degrees of intensity. As a start, it can take the form of pragmatic and voluntary cooperation among some member states concerning certain specific issues, such as the creation of a joint trading platform, the adoption of common technical standards, the pooling of R&D funds and/or the coordination of investments. This cooperation could extend to some kind of joint implementation of Union rules.

But this functional/regional approach could also stretch further and lead to the conclusion of new partnerships or functional international Arrangements between some member states, following the experience of the Schengen method e.g. outside the structures of the Union but with the aim to be reintegrated once into the EU institutional framework. Such Arrangements could cover specific relevant topics of national energy policies and competences of the member states (where

New partnerships or functional international Arrangements between some member states, following the experience of the Schengen method

¹³³. Compare Opinion 1/91 concerning the conclusion of the EEA Treaty.

the European Union is not exclusively competent and/or not governed by Union law). In this respect, some or all member states could for example, envisage concluding a Network Treaty.

Obviously, these specific forms of cooperation between member states could be useful to achieve the measures listed on the menu, but their functional scope would in most cases remain relatively limited. Where this cooperation evolves into more intense forms of **supranational cooperation** allowing more items on the menu to be covered, answering the legal questions identified above becomes more difficult. In addition, as soon as the cooperation affects exclusive Union powers or secondary legislation, the Union will in one way or another need to be involved in the project, for the reasons discussed above.

ASSESSMENT

It follows from this analysis that the number of options to achieve all or at least the majority of items listed on the menu, in an effective and legally acceptable manner, is on balance relatively limited. The Lisbon Treaty (Option 1) will not fundamentally change the existing situation, unless it is amended to meet the new policy aims. It is not realistic to expect that this latter condition can be met in the short to medium-term. After the difficult episode of ratification of the Lisbon Treaty, member states and their citizens are not necessarily willing to embark upon yet another institutional adventure. Conversely, Article 20 TEU on enhanced cooperation (Option 2) by some member states offers many advantages in comparison to the standard integration methods of the Lisbon Treaty. **The farthest-reaching measure is the conclusion of a new Energy Treaty on a new energy policy (Option 3) enabling the participating member states to take efficient action on all items on the menu.** More modest measures, such as regional/functional forms of cooperation arrangements (Option 4) constitute middle-of-the-road options which may turn out to be effective on some specific policy items.

IV. What to do Now?

This final and concluding section will address what can be done to achieve a credible and effective European energy policy as described above, and **puts forward a policy proposal for an enhanced ‘European Energy Community’.**

4.1. 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 public policies re-orienting 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

This action must be European, energy-specific and result-oriented

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 this report in order to achieve that ultimate goal is **to develop a real European Energy Community that deals with all policy measures** discussed in the menu developed in Section II. 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.

A call for enhanced integration and the transfer of sovereignty to intervene in sensitive policy areas

This common project will inevitably call for enhanced integration and the transfer of sovereignty 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 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 the European 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 under 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 institu-

tions 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 to ensure that the **Energy Community is represented on the international scene by one supranational body** that will be the sole interlocutory 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.

Based on majority voting and not unanimity

All these advantages do not take away the fact that the creation of a new Energy Community under the Union structure will **unavoidably give rise to complex demarcation issues**, and notably the definition of the scope of the new Treaty vis-à-vis other Union Treaties, in particular the Lisbon Treaty (TFEU). 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 from the conclusion of Section III that the **best available legal option for achieving this European Energy Community is to conclude a new Treaty under the Union structure** (Option 3). Obviously, the conclusion of such 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. Not all member states and their people are necessarily willing to embark upon a yet another institutional adventure.

A “fully fledged and opt-in” Energy Treaty allowing the ambitious member states to embrace the common energy policy

These political constraints lead to the conclusion that a “fully fledged and opt-in” Energy Treaty allowing the 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. This neither means that the general measures developed under the current Union structure should not be improved for the benefit of all member states.

4.2. A Pragmatic Start

While it **may take some time before a European Energy Community is conceived**, negotiated, concluded and ratified, the existing system still has room for improvement. There is and will therefore remain a **pressing need to develop interim solutions**. Option 2 - Enhanced Cooperation under Article 20 TEU, and option 4 – Functional and/or Regional Arrangements – discussed above under Section III offer some possibilities to that effect. Functional cooperation could focus on some 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 waiting to get all of them on board, but without jeopardising more ambitious plans for a future Energy Community are the following: Strengthened cooperation for Energy Networks (4.2.1.), a Common Energy Fund for developing new Technologies (4.2.2.), and the Establishment of a European “Gas Purchasing Group” (4.2.3.).

4.2.1. Strengthened Cooperation for Energy Networks

The creation of a wide, contestable 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 the well functioning of grid networks – both within and external to 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 (see Section 2.2. in Part II).

Europe needs ‘smart cross border energy highways’ and the regulatory framework promoting them

In order to achieve that 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.

Groups of member states would cooperate in the framework of European Regional Energy Networks (EREN). Such EREN(s) would be **responsible for a wide range of issues**:

- coordinated regulation of trans-border exchanges of electricity and gas, in order to achieve the objectives of the internal markets;
- cooperation on investments, standards, routes and interconnections of regional energy networks;
- cooperation on access, transit and transportation to and through energy networks;
- external relations in respect of network operations, transit to the region and certification of foreign participants and owners in European networks;
- providing financial support (loans and subsidies) and coordination of European funding, possibly on the basis of network funds that will be

financed by means of regional network levies, and used to promote investment in the relevant regional market(s);

- coordination and supervision of common projects on research and development in grid related activities.

Further coordination of national regulators would also aim at:

- better enforcement of regulation ;
- issuing binding decisions to EU and non-EU members and making non EU members adopt its *'acquis'* on network regulation (as is the case under the South East European Energy Community) ;
- coordinating the safety and security of energy networks through technical operation for crisis management and 'security-of-supply' standardisation consultation on administrative and environmental procedures, as well as tariffs and terms of access, etc.

As regards the **institutional design**, the South East European Energy Community Treaty could be considered as a working model, and notably 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 role 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 a 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.

Pave the way for more structured and comprehensive supranational cooperation

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 way it proved successful and efficient in the United States. It may offer a coherent but supplementary regulatory space complementing the EU framework. With the right institutional design, it 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 centralised approach to cross-border interconnection issues and local initiatives on smart grids. Finally, it offers opportunities for enhancing external cooperation.

The basic "bricks" of European operators, in the way it proved successful and efficient in the United States

4.2.2. 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 but also regional and even local levels of governance could 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.

Creation of a common fund to promote investment on research on alternative energy sources among a coalition of member states

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 network, 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.

An innovative and useful instrument for cooperation in such projects is the **European Grouping of Territorial Cooperation**. The European Grouping of Territorial Cooperation (EGTC) is a new cooperation instrument¹³⁴ in order to facilitate and promote cross-border, transnational and interregional cooperation between its members. An EGTC is made up of member states, regional authorities, local authorities and/or bodies governed by public law. An EGTC can be entrusted with implementing cross-border cooperation projects with or without Community funding. An example of cooperation in the field of energy in the frame of EGTC is the *Ister-Granum* EGTC,¹³⁵ formed by 49 Hungarian and 36 Slovakian local governments with the aim to create a joint energy agency responsible for supporting

134. See Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European Grouping of Territorial Cooperation.

135. Source: <http://portal.cor.europa.eu/egtc/en-US/Projects/already/Pages/IsterGranum.aspx>.

conversion to renewable energy sources. The tasks of the energy agency include the preparation and management of projects assisting conversion together with all the necessary resources to educate the local population on the benefits of using renewable energy. The agency will have an independent legal personality with the EGTC as its owner.

4.2.3. The Establishment of a European “Gas Purchasing Group”

Functional and pragmatic differentiation could also take shape in the creation of a European “Gas Purchasing Group”,¹³⁶ in order to offer a real negotiating power vis-à-vis external suppliers, and particularly 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.¹³⁷

To offer a real negotiating power vis-à-vis external suppliers, and particularly Russia

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.

More ambitiously, some member states could also decide **to set up a purchasing agency themselves**. Here again, special authorisations would be needed from the Commission under Article 101 (3), 106 and 107 TFEU.

136. See the report of the ‘Prospective Group for Gas Security of the Strategic Analysis Center’ of the French government, ‘La sécurité gazière de l’Europe: de la dépendance à l’interdépendance’, Report supervised by Christian Stoffaës, Centre d’analyse stratégique, Paris, November 2009.

137. Article 103 empowers the Council to adopt such regulations or to delegate that task to the Commission.

Once this is achieved, a higher level of integration could be envisaged by creating a Gas Supply Agency

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, a higher level of integration could be envisaged by **creating a Gas Supply Agency**, inspired by the Euratom Supply Agency.

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 mechanism, reinforce solidarity within the EU, and finally advance the overall security-of-supply in Europe.

Conclusion - A Common Answer to Common Challenges

The concluding words of this report correspond to the introductory observations. If the member states are willing to sign up to the same level of common ambition as they had in 1951, they should embrace a common energy policy that consists for the very least of the following policy measures: (1) a well-functioning liquid European energy market supported by (2) state of the art integrated networks, (3) corrected by price stabilisation measures and (4) complemented by innovation policies that are sufficiently compelling and funded so as to optimise the chances that Europe will be the cradle of a new technological and societal breakthrough allowing citizens to enjoy sustainable, secure and affordable access to energy resources. Only a (5) strong and financially independent Community or Union, (6) speaking with one common voice on the international scene, can ensure that these objectives can be met and that, as long as this breakthrough has not occurred, (7) its member states can count on each other in times of shortages.

Unfortunately, an 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 that is 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. The member states just went through 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 Treaty under the Union structure. This new specialised Treaty 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 Union level in ensuring affordable access to secure and sustainable energy sources. Nor should it be a reason to prevent committed member states to conclude functional arrangements or to use 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.

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