



Towards a European Energy Community: A Policy Proposal

4 May 2010

Club de la Fondation Universitaire, Rue d'Egmont 11 - 1000 Bruxelles

12.00 – 13.00 pm: Walking lunch

13.00 – 13.15 pm: Welcome

13.15 – 13.45 pm: Introduction: presentation of Notre Europe's report and topics of discussions

13.45 – 15.00 pm: Session I: General comments on the report and main issues of interest

15.00 – 15.15 pm: Coffee break

15.15 – 16.15 pm: Session II: Compatibility of the project with existing EU structures

16.15 – 16.30 pm: Coffee break

16.30 – 17.15 pm: Session III: External dimension of the energy policy

17.15 – 17.30 pm: Coffee break

17.30 – 18.30 pm: Session IV: Treaty structure and elements

18.30 – 18.45 pm: Conclusions

19.30 pm: Dinner

Working methods:

- *one presentation by the authors of the report in introduction, followed by an interactive brainstorming session with notes taken*
- *informal and Chatham house rules*
- *anonymous meeting notes will be circulated afterwards*
- *working languages will be French and English*

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List of Participants to the Seminar

1. **Fabian Amtenbrink**, Chairman of the European Law Department; Erasmus School of Law of the Erasmus University Rotterdam
2. **Sami Andoura**, Research Fellow at *Notre Europe*
3. **Jean-Michel Glachant**, Director of Loyola de Palacio Chair in EU energy policy and Florence School of Regulation - RSCAS at EUI – Florence
4. **Inge Govaere**, Professor of European Law at Ghent University and Director of Studies, European Legal Studies Department, College of Europe
5. **Leigh Hancher**, Professor of European Law at the Tilburg University, Of Counsel at Allen & Overy
6. **Mahulena Hofmann**, Jean Monnet Professor at the Faculty of Law; University of Giessen in European Law and Transition Studies
7. **François Lévêque**, Professeur d'Economie ; Centre d'économie industrielle (Cerna) Mines ParisTech
8. **Michel Petite**, Of Counsel at Clifford Chance Paris and Former Director-General of the Legal Service of the European Commission;
9. **Paolo Ponzano**, Senior Fellow at the European University Institute
10. **Sacha Prechal**, Professor of European Law at the University of Utrecht
11. **Pippo Ranci**, Part-time Professor in the Florence School of Regulation
12. **Sinisa Rodin**, Jean Monnet Professor of European public law at the University of Zagreb
13. **Jean-Luc Sauron**, Maître des Requêtes au Conseil d'Etat, responsable de la cellule de veille européenne, Professeur associé à l'université Paris Dauphine
14. **Philippe de Schoutheete**, Former Permanent Representative to the EU for Belgium and Member of Notre Europe's Board of Directors
15. **Takis Tridimas**, Professor at the Centre for Commercial Law Studies, Queen Mary University of London; Advocate, Bar of Athens
16. **Csilla Végh**, Research Assistant at *Notre Europe*
17. **Marc van der Woude**, Advocate at Stibbe office in Brussels, Professor of Competition Law at the University of Rotterdam
18. **Jan Wouters**, Professor of International Law; Jean Monnet Chair EU and Global Governance; Director, Leuven Centre for Global Governance Studies
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Towards a European Energy Community: A Policy Proposal

Seminar organised by *Notre Europe* on the occasion of the publication of its report on the feasibility of a European Energy Community -

Brussels, 4th May 2010

SUMMARY OF THE MEETING

In order to develop the proposal of Jacques Delors for creating an Energy Community, the think tank *Notre Europe* published its report entitled “*Towards a European Energy Community: A Policy Proposal*”. This report is the culmination of the work of the Task Force of high-level European experts established by *Notre Europe* – with Leigh Hancker and Marc van der Woude as co-chairs and Sami Andoura as rapporteur – to study the feasibility of a European Energy Community.

The report puts forward a policy proposal for a genuine ‘*European Energy Community*’. It explains the rationale behind and what type of action is required to develop such an Energy Community, identifying both the substantive elements which it should ideally cover and the legal and institutional policy instruments which the EU has to achieve these substantive objectives. The report finally examines which model is best suited to that effect and proposes several recommendations.

In order to come to grips with these questions, in particular the institutional and legal issues, *Notre Europe* organised a brainstorming session on the 4th May 2010, in Brussels with the participation of high-level European energy and legal experts.

I. Policy framework – The need for common energy-specific action on a European level

1.1. Lessons from the past – The ECSC and Euratom Treaties

When six European states decided in 1951 to integrate two key sectors of their economies to create a Community, their purpose was to replace conflict with cooperation and antagonism

with prosperity. Energy was one of these two key sectors, and almost sixty years later, energy is still at the top of the political and economic agenda. However, the rules that ensured equal access to common resources no longer exist.

The idea to revisit the merits of these past treaties and the structures which they established in the light of contemporary European energy issues seems to be a natural one given the importance of these treaties in the history of European construction. Nevertheless, some argue that, in fact, that ECSC was not an unmitigated success, although they acknowledge that certain aspects could still prove helpful. For one, it might be possible to borrow its structures for a new common energy policy, though certainly, there are gaps that would need to be filled and that, moreover, the elaboration of a flexible and open treaty appears necessary.

Euratom, on the other hand, is the only Community that is still in existence. What is clear is that nuclear issues have to be integrated with the common energy policy. Serious lessons have also to be drawn from the functioning of the Euratom treaty, its particular structures, and the functioning of the Euratom Supply Agency. However, Euratom has shortcomings as well. For example, in the field of shared competences, it was “frustrated” because of the opposition of member states.

A more radical critique argues that attempting to frame the contemporary energy debate in terms of these treaties is misleading because neither of these treaties would even be ratified in the Europe of today. Moreover, following the arduous process of the ratification of the Lisbon treaty, there is not any appetite in Europe for a new treaty whatsoever.

1.2. The specificity of energy

Both the specificity of energy as a policy area as well as the urgency to move forward on energy policy need to be better explained. It is important to emphasize the distinctiveness of energy: it is a very particular commodity which requires a multidisciplinary approach. Energy policy must not only be considered from an economic perspective in terms of liberalization and the consolidation of an internal market, but also from a political and environmental point of view, notably in terms of global issues like climate change

Thus, with regard to the special regime for energy, a link must be made with other key objectives of the EU (e.g. energy has an important role in monetary and economic objectives since energy prices have a direct effect on economic policy). Though energy is clearly a policy area that merits special attention, care must be taken in order to properly manage its interdependence with other exclusive policy areas.

Despite the specificity of energy, current EU policy remains extremely fragmented and is mostly derived from policies relating to the internal market, foreign and security policy, environmental policy, et cetera. That is, energy policy is usually formulated in terms of derogations, instead of being formulated as an end in itself. As stated, since energy is so intertwined with other dimensions and interacts with other policies, a more holistic approach

is needed. (e.g. we cannot address climate change policy if energy policy remains national). Furthermore, there are some technical areas that have to be handled in a broader context.

The report finds that the fragmentation of EU energy policy has become institutionalized to a such a degree that it is a true source of concern in terms of long-term prospects for confronting the myriad crises which Europe and the rest of the world face. Without a coherent, common policy in terms of energy, Europe does not have the tools it needs to respond to these crises.

1.3. EU governance of a common energy policy

From a tangible perspective, the report identifies the three main objectives (accessibility, sustainability, security-of-supply) that the EU is focusing on in terms of an energy policy. What remains problematic, however, is establishing how, if at all, these three objectives fit together.

Some argue that it is unnecessary to prioritize among these objectives, that, instead, what is needed for an energy policy at the EU level is a process that can dynamically adjust the focus of policy among the three main objectives in a consistent manner according to circumstances. For example, at the moment, security of supply is the most pressing policy concern, but this is not set in stone. In fact, the focus of policy might even change on a monthly basis. Thus, what is necessarily is quite simply a concrete political procedure to adjust the policy focus.

Though the EU is equipped with a rich range of institutions and instruments, concerns can be raised about the efficiency of its decision-making process. In spite of the urgent need to take concrete action, the decision-making procedure is such that taking rapid action is difficult. To make matters worse, if there is one sector where member states fail to respect their obligations, it is the energy sector. Therefore, a better and more efficient decision-making procedure and more power to act are necessary for the EU.

1.4. An Issue of Sovereignty

Concretely speaking, an energy policy itself consists of three broad points: 1) energy taxation 2) network regulation and 3) the choice of energy mix. The most contentious of these elements vis-à-vis a common energy policy is the choice of energy mix for the simple reason that as long as member states claim sovereignty over the energy mix, the implementation of a real energy policy will remain problematic.

Is it possible to conceive of a true common energy policy without transferring sovereignty away from member states to the EU level with regard to deciding the energy mix? This remains to be answered, however it is a moot point at the moment because within the current context of the EU, the pooling and the coordination of the energy mix are not yet politically

conceivable. The general question of how much sovereignty do member states really have also remains important to consider. Perhaps a dynamic and not necessarily a static loss of sovereignty needs to be considered in this regard.

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

2.1. All or some Member States?

One basic problem that the EU faces as a whole is that the very meaning of supranational is quite different today than in the past. From a practical perspective, it is inherently more difficult to coordinate the interest of member states in the context of 27 as opposed to 6 member states. Increased diversity, though certainly beneficial in many ways, presents a further obstacle to be overcome. For example, it would be difficult to express exactly what if any common interest between exists between states as diverse as Ireland and Cyprus.

Let us recall that the essential point is that EU member states must take action at the beginning of this new ‘industrial revolution.’ Every member state has a special interest in this even if they are different from each other (e.g. Italy – smart networking; Germany – new technologies, etc). This said, the challenges of a numerically greater and more diverse supranational Europe are important to highlight because of the increased difficulty of collective decision-making that these changes entail. Now, as defined in the Lisbon Treaty, energy is a shared competence. This definition obviously frames the energy policy discussion in particular way. For areas covered by the Treaty, member states face legal limits in terms of the action that they can take. However, for areas not covered by the Treaty, member states are free to act on their own.

What this means is that if some member states, in areas not established by the Treaty, wish to go beyond it and the *acquis*, they should be able to do so from a legal perspective. This certainly does not mean that states will go against the Treaty, but that instead they could and should pursue complementary policies.

Article 171 TFEU states that member states shall, in liaison with the European Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred in Article 170 TFEU (“setting up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of (...) energy infrastructures”). What this means is that cooperation among member states is possible, albeit under the supervision of the Commission.

Towards this end, it would likely be necessary to start with a small coalition of the willing. Of course such an agreement must be done in such a way that new members could eventually

join as well. Importantly, once a member state is convinced, it must have the opportunity to take part in this new form of cooperation.

The question of exactly which member states would be willing to take part in such a proposed Community from the outset is a question that naturally and immediately presents itself. Continuing along this line of reasoning, it is important to ask what the minimum number of states that would be necessary to go ahead would be. Similarly, since the involvement of large actors is necessary, the question of what is to be done if some of the larger member states are against joining merits serious consideration.

Additionally, it is sometimes argued that it is a mistake to think that the simple cooperation amongst a few countries will resolve everything. Even if all 27 member states have an interest to act, it is unlikely that all states will. It will therefore be necessary to compensate for those who ultimately do not act. Moreover, it is also a mistake, others argue, to think that cooperation between two or three countries having a common interest will be an “easy cooperation” and that an “easy” regional cooperation within Europe will be definitely extended to other countries or regions in the future. In light of these difficulties, the coherence of the initial initiative has to be ensured since it will serve as an example for the future and may expand, though not necessarily, towards the imagined final objective.

2.2. In or Outside the EU Framework?

The fundamental idea of the report is to “go for more Europe.” At the same time, the aim is to develop a system that does not undermine the existing structure. In analyzing possible paths towards a European Energy Community, it makes sense to consider whether a viable approach to its establishment would be through the creation of something like a fourth pillar (referring to the Maastricht Treaty) with rather cautious decision-making procedures.

However, since this approach would fall under the Lisbon Treaty (Article 194 of the TFEU), it is not wholly apparent whether this would be the optimum strategy. The creation of a new pillar constitutes, in a certain sense, a step backwards in EU integration and the creation of a special framework for energy could weaken European institutions instead of strengthening them. Moreover, national parliaments could lose their say whereas one of the innovations of the Lisbon Treaty was precisely the strengthening of the role of national parliaments. Such doubt begs the question: to what extent should the existing decision-making procedures be reformed.

With regards to the internal aspect, it appears to be extremely difficult to guarantee that a new system would remain coherent and interactive, and that it would not infringe upon the *acquis* on the internal market.

With respect to the external aspect, questions and concerns loom as well. The EU has finally succeeded in enhancing its consistency and credibility on the international scene by creating one actor to represent itself and its member states. Complexity could be reintroduced on the

international scene if another Community is created with a strong external dimension. Thus, the EU has to be careful if it sets up such an institution with a supranational character for the EU risks losing credibility. Moreover, it would be very difficult for this new legal entity to first exist independently of the Union and then, at some indeterminate point in the future, to seamlessly integrate within the EU framework

Clearly, such reflexion generates important questions. If a new Community would be created, should it use current institutions? But, if not all member states participate at the outset of such a Community, how could current institutions be used? It is argued that the creation of a special framework for energy might actually weaken these institutions and not strengthen them. The use of the existing institutional framework raises the question of democracy. For example, the role of the European Parliament if only some member states are willing to participate is uncertain.

2.3. Scope of the Energy Community

It is essential that competences defined for a new European energy community be dynamic and forward-looking. The report overlooks the probability that the bordering lines among those who agree and do not agree are different on an issue-by-issue basis. This is very difficult to overcome and it can even be dangerous. On the other hand, it may be that the two solutions (all or some member states) are not at all mutually exclusive: the Energy Community should be focused around a few, specific items (only a few member states); and the common energy policy should deal with all 27.

2.4. Market approach versus Interventionism

Some legal concerns can be raised about a more interventionist approach to energy. For one, how would it interact with other policies such as liberalization? Is there any paradigm to follow with regards to state-led philosophies concerning the way that states deal with taxation, funds, etc. in the field of energy? The assessment of the behaviour or the failure of states in this field would strengthen the report.

The report expresses a preference for political control over market control. Such a preference could result in a division among member states: one group of countries with interventionist priorities and another opposing group with pro-market preferences. The outcome based on an approach that favours the market, however, could be different, some argue. For example, the question of energy mix, a difficult question to resolve politically, becomes less important in the context of a well functioning network. Sometimes thorny political issues can be resolved by just improving the functioning of the market.

III. Legal and technical comments on means for achieving a common European energy policy

3.1. Option 1: The new energy policy under the Lisbon Treaty

Some argue that the report does not offer an exhaustive analysis of Article 194 and the ways in which it can address energy policy and what it might offer in the future. Whether the elements enumerated in Article 194 are sufficient to develop a common energy policy is an unresolved question. Ultimately, it is necessary to determine if Article 194 is sufficient in terms of developing a common energy policy. If not, the idea of Community can be justified. Yet this, in turn, also begs the question of why the Community would work if Article 194 already does not?

In an incisive analysis on the new provisions of the Lisbon Treaty in the field of energy, François Lamoureux (the former Director General for Energy at the European Commission)¹ confirmed that the EU has regressed in the field of energy compared to these past Treaties (ECSC, Euratom).

Such valid critiques notwithstanding, the Lisbon Treaty does contain several institutional improvements, such as new decision-making procedures which could benefit the Union's energy policy. In addition, it explicitly acknowledges energy as a policy area for the first time since the ECSC and Euratom Treaties, and provides for a new legal basis for Union action in that field. Directives and Regulations can henceforth be adopted on the basis of Article 194 TFEU. However, the inclusion of a new energy Title in the Lisbon Treaty does not fundamentally change the existing division of competences between the Union and the member states on energy or climate change related issues, and can be seen as a mere codification of the existing practice in that area.

Some argue, however, that in fact the Lisbon Treaty is more than just a pure codification, that indeed, there is an added value of codification. It is important to emphasize that the EU, at least on some level, has a policy for energy and, consequently, has powers in that field.

3.2. Option 2: Differentiated Integration within the Union Structures: Enhanced Cooperation under Article 20 TEU

In general, it is important to understand the meaning of enhanced cooperation in order to see clearly whether or not it is a good thing. For instance, the role that the Commission and

¹ <http://www.societe-de-strategie.asso.fr/pdf/agir23txt3.pdf>

Council play in the launching of this type of cooperation, the difference between enhanced cooperation and Schengen-like agreements, etc. must be clearly defined.

From a legal perspective, the scope of Article 20 of the TEU on enhanced cooperation is unclear. It is not evident if it authorizes enhanced cooperation not assisted by EU institutions or not. Some would argue that there is perhaps no real interest among member states to build up enhanced cooperation outside the EU institutions, and that, instead, interest in moving forward lies within the procedural modalities of the EU. Among other concerns raised is the uncertainty regarding whether or not enhanced cooperation can be used to create an exclusive competence.

The use of Article 20 TEU on enhanced cooperation is therefore a risky basis for the future operation of energy policy. Similarly, there are some points in articles 236-327 TFEU that are difficult to comply with and make enhanced cooperation difficult also in practice. (e.g. “enhanced cooperation must comply with the treaties, must not undermine the internal market, etc.”). In addition, Article 329 of the TFEU possibly excludes the possibility of using enhanced cooperation with regard to the external dimension of the energy policy.

In the end, the problem with enhanced cooperation is that it gives the impression that more preference is given to the uniformity of the system than to the creation of flexibility. Thus, the main advantage of the system is at the same time its biggest disadvantage: it provides a legal obligation to allow member states to join, but at the cost of flexibility. Additionally, it limits the possibilities of the objectives defined in the Treaty. Therefore, it does not help resolve the problem in the frame of the report because the extension of the competences does not work. It can be useful only on specific measures.

The more new member states join such a hypothetical cooperation, the more the process is slowed down by growing membership. One can envision that the inevitable outcome of such a cooperation would be that a core group of states will once again be obliged to move towards a new form of more flexible cooperation once a future impasse is reached.

Additionally, historical considerations suggest that enhanced cooperation might not be the best option for the EU to implement something new. For example, the conclusion of the Prüm Treaty would have been a perfect moment in time to use enhanced cooperation. Yet despite these ideal circumstances, it was not used because the minimum number of member states was not reached (there were not nine member states ready to participate).

A further problem with enhanced cooperation is that there is a blocking minority of countries in Europe against this type of cooperation. Enhanced cooperation engenders the feeling among some members states will that they will be left out of something. Thus, this minority of states is sufficient to preclude a qualified majority from being obtained in the Council.

Therefore, from an intellectual point of view, the second option i.e. enhanced cooperation has a lot of potential, but it is not likely to work for the aforementioned reasons (because it aims

to apply the currently existing competences to a group of member states and similarly does not allow for the extension of said competences).

3.3. Option 3: A new European energy treaty

Perhaps the optimum available legal option for achieving this European Energy Community would be the conclusion of a Treaty under the Union structure. However, not all member states may be willing at this stage to pool their energy policies under one common supranational structure. The conclusion of such a treaty would, nonetheless, avoid all sorts of complex questions regarding the scope of the Treaty and the potential relations between the participating and non-participating states.

An important issue to be addressed is the difference between “traité loi” and “traité cadre”. It is not possible to conclude a “traité cadre”, because energy policy has to be dynamic. It needs to be adjusted from time to time. Conventional type of treaties can be envisaged for the intermediate steps. A “traité loi” is not something to be considered. The basic approach of a “Traité cadre” is that the Community needs a sectoral approach to make further steps. Is this point of view still correct?

A further problem with these kinds of separate agreements is the so-called “lock effect”. They are hard to modify, so much care must be taken in their initial design. Moreover, separate agreements only make sense if they designate a kind of ideal target for the future, a supranational structure in this specific case. Finally, the system still has to be able to work when further countries join; therefore, decisions have to be taken by a qualified majority.

As regards the need for more stakeholder involvement and more direct regulation, the Meroni case law could be a problem (obstacle). A potential solution could be to take a look at the financial agencies supported by an institutional framework that the EU would like to create and which are supposed to have very strong normative power.

An Energy Protocol

Another possibility that merits attention is the signing of a Protocol (an “Energy Protocol”) which would be attached to the current treaties. This would be preferable to intergovernmental agreements because it has more consistency.

The protocol would be a good option to let member states that are willing to go ahead to do so. A further advantage of protocol is that it is part of the aforementioned holistic approach and could be the end target of the roadmap scenario.

From a political perspective, the extent to which such a protocol is achievable remains unclear, since it still means to go for more Europe. It is problematic in terms of

implementation because it still has to be signed by 27 member states and thus it too is uncertain to work in the short-term.

An additional legal option available to extend the competencies of the EU in a specific field, like energy, is Article 48 TEU on the amendment of the treaties in order to modify competences. It would offer complete integration but with the problem of requiring a unanimous vote.

Last but not least, even if such a development improves energy policy, there are still not any firm guarantees that policy would be better under a new treaty than the old one. Furthermore, another risk is the loss of “institutional memory”. Energy is present in the treaties (in secondary law and in the case law of the Court of Justice as well). Putting energy into a completely different framework could erase this institutional memory.

It is evident that if the project puts the *acquis communautaire* into danger, it should be stopped. In any case, it is not the intention of the report to damage the *acquis* or the institutional memory, but instead to facilitate their continued vigour.

3.4. Option 4: Functional and/or regional treaties or arrangements: Schengen(s) for energy

The interest of member states is to act in a block. If the member states wish to act in a block, it would be better not to do so in the context of all 27 states. In this light, the historical examples of the Schengen Agreement and the Prüm Treaty are instructive.

Some argue that the model of the Prüm Treaty has more potential in the case of energy than does the model of Schengen Treaty. To recapitulate, the Prüm Treaty was originally a mutual cooperative project among seven member states in the areas of Justice and Home Affairs. It was originally negotiated between Austria and Germany, and then subsequently five other member states joined.

Of note is that there is not much difference between the original text negotiated between the original two signatory states and the text signed by seven. The method applied was to negotiate between a few countries and then agree on the fundamental text. Future signatory states incorporated the text without important modifications. The Prüm Treaty allowed the move from two member states to seven and, finally, 27 without re-negotiating the founding text. However, it is essential to note that, at the time when the Treaty of Prüm was signed, there were no well-structured competences in the treaties.

In light of this, would it be possible to use the model of Prüm in the field of energy? The authors of the *Notre Europe* report studied the question and found that a major part of the competences in the field of energy are Union competences. There are some fields where regulation is considerable, namely in the field of energy networks. The existence of such competences diminishes the possibility that the Prüm could effectively be used as a template for an energy community, such as in the field of networks.

An Intergovernmental (i.e. International) Agreement

The other position is that a Schengen-like agreement would be a better solution than Prüm. The basic philosophy behind a Schengen-like solution is that it would first start outside the structures of the Union, but with the aim to be eventually integrated into the EU institutional framework. After a certain amount of time, the framework of such a coalition could shift from that of an international agreement towards incorporation into Union structures.

Such a solution might involve the “Europeanization” of the overall energy mix in a Schengen-club. Europeanization of the energy mix would address basic issues of sovereignty that, barring such an agreement, will continue to persist.

Some relevant legal questions that can be raised are as follows: What should the scope of the treaty be? Would the EU be one of the members? How the withdrawal from the core treaty would influence the right and obligations of the additional treaty? How would the new treaty relate to European law (e.g. Vienna convention on international treaties)?

An important factor in considering a separate agreement is the question of competences and whether or not the fact that energy is a shared competence implies that the EU has to participate in the agreement? If the competences have been exercised, the EU has to participate to in the agreement.

Is it then conceivable that the EU becomes a member of an international convention signed among member states? One concern that comes to mind immediately is that a traditional multilateral convention would risk hurting competition rules. Nevertheless, there are already some examples of such international conventions signed by the Community, such as the conventions in the Mediterranean Region and the Baltic Sea signed by both the Community and the member states (coastal states and the EU); or the convention on trans-boundary waterways and international lakes.

In terms of ensuring future compatibility with Union law for the purposes of future integration, a solution could be, for example, to conclude an international deal between member states and to insert the phrase e.g. “Union law has primacy”. This is a simple mechanism which will not constantly be in need of revision.

It remains to be clarified as well whether non-member states would be able to participate in a potential agreement. In terms of an agreement that includes non-member states, for instance, the association of non-member states could be based on the example of the three-fold approach of the Energy Charter Treaty (1. member states; 2. candidate countries; 3. third countries). The aim is to create solidarity amongst the three levels, but the basic problem of such an approach is that greater participation of non-member states exacerbates the problem of respecting the principal of solidarity.

The Energy Charter Treaty is more of a WTO-type approach and it is important to note that a potential new treaty would be independent from the Charter. The new treaty would focus on

the coordination of specific programmes (e.g. in the field of hydropower, etc) and on the implementation of concrete measures with a global approach.

The fact that there are shared competences does not prohibit the conclusion of agreements in fields where no defined competencies yet exist or where these competencies have not been exercised. Clearly, it is imperative that any potential solution respect the general rules of the treaty (e.g. non-discrimination). For this reason, a viable, interim solution would be to conclude regional and functional arrangements. These regional and functional arrangements can furthermore be supplemented by the use of intergovernmental agreements as well. In this way, instruments such as an Energy Fund, a Gas Purchasing Group, etc could be created. In accomplishing these things, it would be helpful to conduct a more in-depth analysis on internal market as such and also on Article 194 as a legal basis for energy policy.

These specific forms of cooperation could be useful to achieve certain important goals, but their functional scope would remain limited. Eventually, these solutions, if implemented, would evolve in such a way that questions of legal scope and of the involvement of the Union would need to be addressed.

3.5. Preliminary Assessment: The Need for a Roadmap

The ultimate goal of the proposal has to be clear: coming to an integrated policy within the EU structures. In this respect it appears necessary to launch a political initiative with a certain number of concrete propositions and steps by elaborating the possibility of a European Energy Community in the future and advancing a timetable for it. The elaboration of that kind of “roadmap” would give the impression that it is something concrete and feasible.

The proposed roadmap could begin with a purely national phase, then a second phase of shared competences and finally a third phase with a more supranational framework. Ultimately, of course, the roadmap should plan for the creation of a true European Energy Community.

In the end, we cannot speculate how member states will act. A new energy framework might trigger a new interpretation which would be enough to harm the existing structure, especially the supranational level (e.g. framework decisions under the third pillar). These are very sensitive times in Europe.

IV. Reflections on the content of a common energy policy and on the interim solutions proposed by the report to move forward a European Energy Community

4.1. The establishment of a Gas Purchasing Group

A priori, the establishment of a European Gas Purchasing Group would not be terribly difficult from a legal perspective and, in addition, has the potential to be a true common undertaking, a sort of European Gazprom, a purchasing interface to deal with external partners to the EU. In this instance, again, the question of EU versus national competence is not clearly defined, however.

A further important point of reflexion is why a specifically Gas Purchasing group is necessary. In the first place, the EU already has a purchasing entity for fissile materials and such an instrument could certainly be imagined for oil and as well as for other fuels. In the second place, gas is the fuel with the greatest concentration on the supply side, a fact exacerbated by the complete fragmentation of the European demand side. Thus, natural gas deserves special attention because very clearly such a situation is untenable in the long-term.

Moreover, a Gas Purchasing Group or Agency could be a tool in order to achieve favourable trade agreements. With regard to trade and purchasing agreements, it should be noted that the difference between them is that a trade agreement is a general frame while a purchasing agreement is a commercial act. The European Commission has *de jure* power with respect to trade agreements (single trade competence). However, it has to prove that it has *de facto* competence as well regarding trade agreements. It cannot do anything with exclusive competence, but it could work with a club of states. There already are regional gas purchasing agreements as well as regional policy arrangements. (e.g. Caspian purchasing agency). However, it is still unclear whether such arrangements have trade competence.

In order to be clear, concrete obligations and rights should be identified. The fact that a group of states would be able to purchase gas or oil would have important legal consequences which are difficult to anticipate. The elaboration of concrete steps would be necessary for a better understanding of the possible consequences.

However, it is problematic that the suggestion for a Gas Purchasing Group is most notably associated with France. Because France has not done much in the direction of common gas purchasing agreements in the past, it lacks credibility in this regard and thus its newfound support does not really provide a strong impulse towards the realization of this project. Moreover, in terms of practical, concrete considerations, a Gas Purchasing Group presents many obstacles that would render it very difficult to achieve.

What Role for the Energy Commissioner or High Representative?

Concerning the external dimension of the common energy policy, and in terms of representation, is it conceivable that the Commissioner for energy or the High Representative could receive a mandate to negotiate on behalf of the member states?

For instance, if the European Commissioner for energy were to go to Turkmenistan and receive an offer for cheap gas for the Nabucco project, the Commissioner would not have the authority to accept the offer without the unanimous consent of all 27 member states. What would happen if he only had a mandate from the few countries directly concerned by

Nabucco? What would happen if he had, on the one hand, a limited mandate from the 27 for international energy negotiations and, on the other, a much more developed mandate from some other EU countries to go beyond?

For one, this kind of a differentiated mandate assumes a complete and therefore improbable separation of interests. It is difficult to imagine that the Commissioner (or HR) would become an agent for two parties. There is a conflict of interest and it would put the Commission in a difficult position.

Such a mandate could prove difficult to justify from a legal perspective as well. The Commission has a general competence in this regard, but it negotiates each agreement on the basis of guidelines. If it does not have a mandate for a specific topic, it cannot negotiate because it cannot act without a mandate. The Commission can theoretically go beyond its mandate if it is certain that it will have a qualified majority in the Council, but if the Commission thinks that it will not reach such a majority in the Council, it cannot act.

4.2. A common Energy Fund, taxation and price stabilisation issues

Energy policy should allow for the possibility of intervention with respect to the price mechanism where market forces fail to deliver socially acceptable results or threaten to undermine crucial investment decisions. To this end, the creation of a common fund should be considered.

In this regard, would it be possible to share a tax, to set it and to add it to a fund? Are there any legal obstacles to do so? For instance, 10% of tax on oil could go to a mutual fund and participating states would use it together. With regard to these taxation issues, it remains to be seen if there any important legal obstacle if some member states would like to put money together.

Price fluctuations are sometimes hard to reconcile with the principle that energy should be available for all European citizens at affordable produces. However many doubts have been raised about the idea of price stabilisation, arguing that they never worked correctly in the past. Thus, the question of whether price stabilization is this a realistic consideration needs to be addressed. The price of gas has been highly volatile during recent years. For this reason, it is difficult to avoid the high politicization of prices.

4.3. The idea of European Regional Networks

The idea of strengthened cooperation on networks has potential. Indeed, networks are very good platforms to reach an agreement for they are good instruments to show that the EU is capable of action. Yet, the realization of truly European grids has yet to be achieved. This is an objective that necessitates a European-wide regulatory approach.

A technological revolution is already undergoing in the field of networks. Furthermore some platforms are also now available (the two ENTSOs could conduct research together) to advance in this area, though an industrial platform should be created in order to further the development of these networks.

A basic question to be addressed by the proposal is how to start it. Developing a political initiative on energy, based on concrete suggestions could be the first step. For instance, the idea of ERENs (European Regional Energy Networks) could be a good starting point since it is a pragmatic area. It would allow for member states to forge ahead without getting stuck on treaty issues in the short-term. It also is a potentially progressive solution, leading potentially in time to a treaty which would include all member states. It must be noted, however, that network-related competences are exercised on a Community level, which implies the participation of the EU.

V. Conclusion – Main questions and further steps

Main questions

1. Why energy is so special? The urgency to act has to be better emphasized in the report (with some examples). The fact that energy is different from other sectors needs to be stressed as well. Long-term projects are needed in the energy sector. At this stage, the EU has lost ambition and the negative implications of this should be warned against.
2. Question of labelling: Should it be called a Community or not? Is this not an old fashioned expression? Should it be a Protocol? How would this be integrated into EU structures?
3. Article 20 on enhanced cooperation does not create much enthusiasm. However, it is not an obstacle preventing something else from being done .
4. The idea of a roadmap is very interesting. The content of the roadmap should be defined. What should be the content? More forms of cooperation which entail more constraints? An ultimate aim should be defined as well: everything will finally converge under the EU structures. A timetable has to be fixed as well. Should criteria be fixed as well? What kind of criteria (political)?
5. External relations are a delicate issue. There are already existing problems with the “3 Cs” (consistency, credibility and capability), a fourth one should not be created: Complexity. This is not the intention of the proposal. The idea of a Protocol and the holistic approach is the right direction.
6. What do all these measures (Gas Purchasing Group, Energy Fund, etc.) exactly imply? Why can we not simply use Article 194? The concern of “proliferation of treaties” has also to be considered. Why do we think that Article 194 is not sufficient? Tools

offered by the Article are incomplete. The current system is made of suboptimal compromises for certain urgent issues.

7. The overall conclusion is that we want to make “more Europe,” not more conflict in Europe.

Further steps

Some next steps have already been identified. The idea is to have interactive projects and to launch interactive discussion on the specific topics (on networks for example), as well as to develop propositions on some concrete steps. *Notre Europe* is also aiming to engage a social debate and to raise ethical questions on connections between energy issues and society.

The difficulty of going ahead in today’s Europe should not mean that ambitious objectives cannot be fixed for the future.