

# 1 Unity and Flexibility in the future of the European Union: the challenge of enhanced cooperation

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## Enhanced cooperation and energy<sup>(\*)</sup>

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### 1. Background

The Treaty of Amsterdam established the procedure of Enhanced Cooperation, incorporating its legal regime from the angle of both the TEU and the TEC. Neither the Single Act nor the Treaty of Maastricht makes reference to Enhanced Cooperation.<sup>46</sup>

This political/institutional strategy is classified under extensive doctrine as “differentiated integration”<sup>47</sup>. It is integration defined as leaving open to Member States the possibility of activating procedures and mechanisms, and providing a regulatory system applicable only to those Member States who so decide<sup>48</sup>, although in its final arrangement open to all those states who may subsequently decide to join to the said procedure and specific measures.

The flexibility denotes the desire of the EU, in its integrationist ambitions, not to disregard the particular circumstances and needs of certain Member States, although without losing sight of the Community interest. Some of the measures reflecting that approach are the asymmetric timetables for the implementation of certain policies, the special derogations, and the financial support during periods of transition towards the membership of some Member States.<sup>49</sup>

The measures adopted within the framework of Enhanced Cooperation do not form part of the *acquis* of the European Union and the obligations deriving from those measures may only be required of the Member States participating in that mechanism<sup>50</sup>.

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(\*) My thanks to José Sierra for the very valuable reflection on this subject, and to Martha Gómez Jaramillo for her contribution to this work.

<sup>46</sup> The Treaty of Rome of 1957 included a provision known as the “Benelux Clause” which would open the door to differentiated formulas of integration in a specified matter, in this case political order and economic and commercial objectives.

“*The provisions of this Treaty shall not impede the existence and perfectioning of the regional unions between Belgium and Luxembourg, as well as between Belgium, Luxembourg and the Netherlands to the extent that the objectives of the said regional unions may not be achieved by the application of this Treaty.*” (Art. 306, TEC, 25th March 1957).

<sup>47</sup> Grant, Charles. “Can variable geometry save EU enlargement?” in CER Bulletin, n. 44. October – November 2005. Available online at [http://www.cer.org.uk/articles/44\\_grant.html](http://www.cer.org.uk/articles/44_grant.html).

<sup>48</sup> Good examples of the said differentiated integration are the process of constitution of the Monetary Economic Union or the adoption of the Schengen Agreement.

<sup>49</sup> CREMONA Marise. “Flexibility Models: External Policy and the European Economic Constitution”. In the book: *Constitutional Change in the EU*. Hart Publishing, 2000 ISBN 1 84113-103-2.

<sup>50</sup> Enhanced Cooperation did not form part of the initial mandate of the Intergovernmental Conference (IGC), preliminary to the Treaty of Nice, and it was the European Council of Feira of 20<sup>th</sup> June 2000 which formally incorporated it as part of its deliberations and work.

In accordance with Grainmé Burca, the intention when analysing articles 42 (2), 94 and 95 of Treaty of the European Union is to consider what type of differentiation has been permitted over the years, recognising the different needs and individual demands of the Member States<sup>51</sup>.

## 2. Energy and Enhanced Cooperation

Energy is present in the founding European agreement. It is a central issue in two of the three founding treaties. The ideas of overcoming “age-old rivalries” and of “creating a de facto solidarity” contained in the Schuman Declaration<sup>52</sup> also refer to overcoming historical conflicts over the coal, iron and steel resources of the Ruhr, Saarland and Alsace, giving rise to a specific regulatory framework on the signing of the Treaty establishing the European Steel and Coal Community<sup>53</sup>. Article 6 of the Treaty incorporates an important legal innovation in conventional international law as it explicitly attributes internal and international legal personality to an international organisation –and the founder of a transnational community– when it states, “*the Community shall enjoy the juridical capacity necessary for the exercise of its functions and to attain its objectives*”, the new text classifying itself as “the start of a new international praxis”.

Within a short space of time the ECSC Treaty produced notable economic and commercial results, allowing the signatory countries to extend the thrust of the initial understanding to other areas of economic and social activity. The concrete result was the signing, a few years later, of two treaties, one of general character for the creation of a European common market (the Treaty establishing the European Economic Community), and the other, clearly concerning energy, the EURATOM Treaty, by which it was sought to advance the peaceful development of nuclear energy in the continent of Europe. The industry was still incipient but was demonstrating noteworthy development capacities in the service of economic life in the countries most advanced in that respect, particularly the United States, that had launched an important initiative in the field, receiving a clear political impulse with the programme “*Atoms for Peace*” presented by General Eisenhower to the United Nations in 1953, and which brought about new atomic legislation in August 1954. The EURATOM Treaty established a common European policy for the supply of uranium, as well as a common market in that area, with strict compliance with the very demanding security rules of that technological field. Also, the regulatory conditions were established for the creation of joint undertakings, an extensive Research and Development Programme and dissemination of technological knowledge, and the European Agency for nuclear supply (EURATOM Agency) was created for the aforesaid purposes.

The principal aims of the EURATOM Treaty can be readily deduced from a reading of its preamble, and they acquire greater dimension when read retrospectively: “*to contribute, through the establishment of the necessary conditions for the creation and rapid growth of nuclear industries, to the elevation of living standards in the Member States and the development of exchanges with other countries*”. A central aspect of the EURATOM Treaty, from the perspective of legal and international co-operation, is article 2h which authorises the new

<sup>51</sup> From the notion of differentiation it can be gathered that “*different cases require different treatment.*” This principle which in some way legitimises discrimination of treatment within the EU must be subject to specified limits of time and scope, as will be seen in the development of the concept of Enhanced Cooperation in the Treaties signed until now. BÚRCA DE GRÁINNE. “*Differentiation within the core? The case of the Internal Market*” In the book: Constitutional Change in the EU. Hart Publishing. 2000 ISBN 1 84113-103-2.

<sup>52</sup> Extract from the declaration of the proposal launched by Robert Schuman, French Foreign Minister, which gave rise to the creation of the European Economic Community: “*The French Government proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification. This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent. In this way, there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.*”

<sup>53</sup> The ECSC Treaty, signed in Paris in 1951, joins France, Germany, Italy and the Benelux Countries in a Community that has as its object the creation of a common market and to guarantee the freedom of movement of coal and steel and free access to the sources of production. In addition, it creates a common High Authority with faculties for the supervision of the aforesaid market, respect for the rules of competition and transparency of prices.

Community to establish the appropriate relationships with other countries and international organisations, and Chapter X of the Second Title on “External Relations”.

Thus, at the first stage of Community founding premise we encounter two foundational treaties that in detailed fashion deal with two energy sectors of particular importance. Sectors that correspond to two essential primary sources: coal and nuclear energy. To a large extent, the ECSC Treaty, further to other essential considerations of a historical nature such as its material, specific and concrete contribution to peace and economic stability in the continent, provided for the regulation of a common market of coal, iron and steel, and the development of an energy “of the present” central to the economic development in the Fifties and Sixties in the last century of the signatory states to the agreement. If the ECSC Treaty regulated the “energy of the present” and the established coal and steel bases “sub specie” of an incipient Community industry policy, the EURATOM Treaty looked to provide the basis for the creation and supervision of the “energy of the future.”

Apart from a detailed common policy for the supply of uranium, base material for electricity production by way of nuclear reactor, it is clear that there was not articulated –which in my judgement would have been a necessary and coherent corollary of the above– in the TEC a common energy policy. And neither did such a policy prosper on the occasion of the Single European Act nor in the subsequent reforms of an institutional character.

For all those reasons, there still has not exist, until the Treaty of Lisbon signature<sup>54</sup> in its currently drafted terms, a common energy policy in Europe. The regulation of that matter, with the stated exceptions, has been constructed on the measures and actions of subsidiary law: Regulations, Directives, Decisions and, from the perspective of “*soft law*”, by other non-binding acts such as Communications, Declarations, and Green Papers.

Even so, for the purposes of clarifying this analysis, we understand that from the point of view of Community law there is a distinction between two areas in relation to energy:

- i) energy-related policy, measures and acts; and
- ii) the internal energy market.

The Treaty of Lisbon establishes a new energy competence scheme and with it, the scope, extent, procedures and actions necessary for its exercise. Further, and essential for the purposes of that work, it institutes a new energy policy of which the internal market, security of supply, promotion of renewable energies and the development of networks are its principal pillars.

The Treaty of Lisbon delimits, in article 4 of the Treaty on the Functioning of the European Union (consolidated version),<sup>55</sup> the matters over which the Union shall have shared competences with the Member States<sup>56</sup>.

The shared competences of the Union and the Member States shall be applied to specified principal areas –as described in article 4 of the Treaty on the Functioning of the European Union (consolidated version)– including energy. In accordance with the said article, the possibility of use of the instrument of Enhanced Cooperation is further opened up in the areas of the environment, trans-European networks and also, in our opinion, the internal market, provided that it serves to reinforce, or to enforce proper compliance with, its principal objectives, that is, to “ensure its operation and realisation,” which constitutes de jure the connection between the Community energy policy and the aims of the internal market.

The Treaty of Lisbon<sup>57</sup> includes the concept of Enhanced Cooperation in Heading IV article 20 of the consolidated version of the Treaty of European Union<sup>58</sup>. Of the amendments that this regime observes in the new Treaty, it is emphasised that:

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<sup>54</sup> Treaty of Lisbon, 13th December 2007.

<sup>55</sup> Treaty on the Functioning of the European Union, consolidated version. Official Journal of the European Union, 9.5.2008. C 115/50.

<sup>56</sup> All that in agreement with article 2 part 2 of the same Treaty in which “*the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence.*”

<sup>57</sup> Treaty of Lisbon, which amended the Treaty of European Union and the Treaty establishing the European Union, signed in Lisbon on 13th December 2007. Amendments of the Treaty of European Union and the Treaty establishing the European Union await their process of ratification and final adoption.

<sup>58</sup> We recall that article 1 part 2 of the Treaty on the Functioning of the European Union establishes that the said Treaty, together with the Treaty of European Union, constitute the treaties on which the Union is founded. Those two Treaties, that have the same legal value, shall be assigned in its text with the expression “the Treaties”. Article 20 of the Treaty of European Union (consolidated version) replaces articles 27A to 27E, 40 to 40B and 43 to 45 TEU and the old 11 and 11A TEC.

1. Enhanced Cooperation is a mechanism applicable in the area of the non-exclusive competences of the Union, that is, capable of being sought provided it concerns defined matters, like shared competences of Member States and the Union, as defined in article 4 of the Treaty on the Functioning of the European Union (consolidated version).
2. In order to initiate the procedure, the application must be presented by a minimum of nine Member States, that is, a greater number of States than under the preceding system.
3. In the application, it must be justified that by means of the Enhanced Cooperation sought:
  - a) The objectives of the Union are being promoted.
  - b) The general Community interests are being promoted.
  - c) The process of integration is reinforced.
  - d) That the European Council has concluded, prior to its adoption, that this mechanism is absolutely necessary in order to achieve an objective that it has not been able to secure through ordinary means. In other words, that it is a “last resort” given that the objective pursued cannot be achieved within a reasonable period by the Union as a whole<sup>59</sup>.

We consider that the amendments contemplated in the Treaty of Lisbon<sup>60</sup> are thus substantial and strengthen the nature, content, objectives and possible use of this concept and procedure.

In effect, the extension of the application of Enhanced Cooperation to matters residing within the shared competences of the States and the Union makes it possible to extend that arrangement to areas that were previously vetoed from its application. Such may be the case of certain measures pertaining to the internal market in determined cases or its necessary connection with certain policies. The subject represents a theme central to the development of freedom of movement and the block of regulatory development extraordinarily relevant from the perspective of secondary or subsidiary law, particularly, for the purposes of our analysis, the public economic scope.

In the case of the Community regulations and the construction of its legal system regarding energy, this fact is not at all banal.

On the other hand, the need to justify in the application the above-mentioned requirements, especially the idea of materially reinforcing the process of integration, is an essential aspect<sup>61</sup>.

Articles 326 to 334 of the Treaty on the Functioning of the European Union establish certain criteria and lay down the mechanism of application of Enhanced Cooperation. Thus it is established that Enhanced Cooperation shall not prejudice the internal market, shall not impede exchanges between Member States or produce any type of discrimination.

Articles 329 to 333 on the Treaty on the Functioning of the European Union establish the procedure that the interested Member States must follow before the Community institutions for such purposes.

On establishing the scope of application of Enhanced Cooperation in the Treaty of Lisbon, it is necessary to analyse various articles of the new text and compare their content with the replaced articles in order to establish the scope of the said amendments.

First, the Treaty of Lisbon, at article 1, sets out the amendments **to the Treaty of the European Union, in which number 22 incorporates the following text:**

<sup>59</sup> This idea was clearly already present at the start of the construction process of the concept in the Treaty of Amsterdam, in the sense that as that instrument concerns at least the majority of the Member States, it does not affect the competences, rights, obligations and interests of the States that do not participate in it and may be opened permanently to the participation of all the Member States so long as they comply with the base decision and those taken within the specific framework of cooperation.

<sup>60</sup> Treaty of Lisbon, 13th December 2007.

<sup>61</sup> In accordance with Title I Article 2 of the Treaty on the Functioning of the European Union called “CATEGORIES AND AREAS OF UNION COMPETENCE”, “*when the treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.*”

The same article provides that “*when the Treaties confer on the Union a competence shared with the States..., the Member States may legislate and adopt legally binding acts in that area.*” However the article specifies that “*The Member States shall exercise their competence to the extent that the Union has not exercised its competence*” in a clear reference to the principle of subsidiarity.

“ENHANCED COOPERATION

«Article 10

1. Member States that wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 280 A to 280 I of the Treaty on the Functioning of the European Union.”

This article leads to two conclusions in respect of the delimitation of the scope of application of Enhanced Cooperation. First, the said article expressly replaces articles 27 A to 27 E, 40 to 40 B and 43 to 45, as well as articles 11 and 11 A of the Treaty establishing the European Community, included by the Treaty of Nice, with the implications that the said amendment engenders and which are specified below. Second, the article, in somewhat unfortunate wording in our opinion, fixes a rather ambiguous scope of application as article 10 establishes that “*Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties...*”

From the above text it is possible to conclude, under systematic interpretation criteria, that Enhanced Cooperation may not take place in competences exclusive to the Union, which would lead us to conclude that they are applicable to those matters contained in the Treaty itself as “*shared competences*”.

By that understanding, in the shared competences, as the name itself indicates, both the States and the Union enjoy powers to legislate to the extent that the Union has not exercised its own or when the Union has decided not to exercise its own.

Being clear on the above point, article 2C of the consolidated version of the Treaty on the Functioning of the Union provides, in express and precise fashion, what are the shared competences of the Union and the Member States, as follows:

“*Shared competences of the Union and the Member States shall apply in the following principal areas:*

**a) internal market;**

*b) social policy, for the aspects defined in this Treaty;*

*c) economic, social and territorial cohesion;*

*d) agriculture and fisheries, excluding the conservation of marine biological resources;*

**e) environment;**

*f) consumer protection;*

*g) transport;*

**h) trans-European networks;**

**i) energy;**

*j) area of freedom, security and justice;*

*k) common safety concerns in public health matters, for the aspects defined in this Treaty.”*

Within the shared competences of the Union and the Member States we find the internal market, the environment, trans-European networks and energy, all those aspects being directly connected with the energy policy set out in the new article of the Treaty of Lisbon on energy.

In relation to the specific scope of the internal market, it must be pointed out additionally that articles 27 A to 27 E, 40 to 40 B and 43 to 45 TEU and 11 and 11 A TEC were substituted by the Treaty of Lisbon. The new Article 326 of the Treaty on the Functioning of the European Union indicates:

“*The Enhanced Cooperation will respect the Treaties and the Laws of the Union. **Enhanced Cooperation will not undermine the internal market or economic, social and territorial cohesion.** It shall not constitute a barrier or discrimination in trade between Member States, nor shall it distort competition between them.”*

This article, especially the underlined part, brings up a possible conflict in the interpretation of internal market. If until this point of the analysis we had reached the conclusion that the internal market formed part of the scope of application of Enhanced Cooperation, as this was the first of the shared competences set out in the above transcribed Article 2 A, how should we understand the provision set out in Article 326 of the Consolidated

Version of the Treaty on the Functioning of the European Union – Treaty of Lisbon when it indicates that such Cooperation shall not undermine the internal market?

In this respect we would apply an exegetic approach to the term *undermine*, which should be construed according to its exact meaning as “*to cause material or moral detriment*”. From this meaning it is not possible to deduce that Article 326 is expressly prohibiting the application of Enhanced Cooperation in the internal market, but that it is taking precautions against the use of that concept in circumstances that might have a direct and negative effect on the internal market.

Another possible way to interpret it could be to refer to the wording of the previous articles on Enhanced Cooperation included in the Treaty of Nice and that were expressly substituted by the articles of the current Treaty of Lisbon.

We should recall that section 2 of Article 14 provided that “*The internal market shall imply a space without interior frontiers in which the free circulation of goods, persons, services and capital shall be guaranteed under the provisions of the present Treaty.*”

As such, the panorama for the application of Enhanced Cooperation in any case changes the scope of the Treaty of Nice to that of the Treaty of Lisbon. The latter establishes the internal market as one of the issues to which it would be possible to apply Enhanced Cooperation providing that by doing so it is not undermined in the terms explained above, and all of this without prejudice to respecting the legal acquis of the community of which part of the regulations registered in the internal energy market form part.

## 2.1. Enhanced Cooperation and the Internal Energy Market

The Single European Act, as an original piece of Community legislation destined to guarantee the transition from a common market to an internal market, by affirming the disappearance of all internal frontiers and the unleashing of a vast process that would facilitate the convergence and approximation of regulations in numerous economic sectors on its way to opening up competitiveness, did not include the energy sector.

Thus, the energy issue was not contemplated “nominally” or “expressly” neither in the Single European Act itself, or in the Delors White Paper that set out the principles and bases for the development of the programme for liberalisation, although it was not a long wait until the community legislator became aware of the significance in form and expression of this gap and the simultaneous significance of the energy sector for the “effective creation of the internal market”. With this intention of integrating energy into the “concept of the single internal market”, the Communication of 1988<sup>62</sup> was approved, the objective of which was to identify the physical, legal and technical obstacles that had to be overcome in order to create the internal energy market and proceed with the designing of a set of coordinating community laws that, through the Directives, would bring the legislation of Member States closer together, with the purpose of constructing a market that is open to competitiveness in the electricity sector and in the field of natural gas. This path also responded to a progressive and to a certain extent, “varying” effort on the application of the national regulations for development, although “*de iure*”, all the States had to meet the objective for results set out in the liberalising directives of the energy sector.

The first directives were adopted during the nineties<sup>63</sup>, and the second, in the middle of the present decade.

### — *Internal market and liberalisation of competition*

The aims pursued with the creation of the electricity and gas markets are clearly identified in the first Recital of the new directives approved in 2009<sup>64</sup>.

<sup>62</sup> Internal market and industrial cooperation – Statute for the European Company – Internal Market White Paper, point 137 (memorandum from the Commission to Parliament, to the Council and to Management and Labour) COM(88) 320, June 1988.

<sup>63</sup> Directive 96/92/EC, OJEC L-27, of 30th January 1997, on the internal market of the electricity sector, and Directive 98/30/EC, OJEC L-204, of 21<sup>st</sup> July 1998, on liberalisation of the gas market.

<sup>64</sup> Directive 2009/72/EC of the European Parliament and of the Council, of 13th July 2009, concerning common rules for the internal electricity market and repealing Directive 2003/54/EC; and Directive 2009/73/EC of the European Parliament and of the Council, of 13<sup>th</sup> July 2009, concerning common rules for the internal natural gas market and repealing Directive 2003/55/EC. OJEU L-211, of 14th August 2009.

In effect, *“the improvement of efficiency, competitive prices, increased quality of service, greater competitiveness and a contribution to the security of supply and sustainability”*, are the objectives that are hoped to be reached by the effective achievement of the internal energy market, together with the paradigm associated with the liberalisation process in offering *“a real possibility of choice for all consumers within the European Union, to create new trade opportunities and to promote cross-border trade”*.

Directive 2003/54/EC identifies in particular three central spheres for ensuring the “creation of a market that is fully operative and competitive”, which are “access to the network, price-setting and the various degrees of opening the markets between the Member States”, and the real degree of application and compliance with competitive budgets<sup>65</sup>. Adding that *“for competition to function, network access must be non-discriminatory, transparent and fairly priced”*, and that *“in order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution system operator is of paramount importance”*.

The new Directive admits that *“the internal electricity [and natural gas] market has gradually been implemented throughout the whole Community”*, although there continue to be *“obstacles to the sale of electricity in conditions of equality”*, delimiting the evaluation criteria to two specific aspects: a) access to the network, indicating emphatically that *“there is still no non-discriminatory access”*; and b) in supervisory regulations, in respect of which the Directive underlines that there is no *“effectively equal level”* in each Member State.

Article 1 of the legal text specifies the purpose of the community legislator in “establishing common rules” in this economic sector, *“with the aim of improving and integrating competitive markets in electricity within the Community”*. With this objective, the rules are defined relating to the organisation and functioning of the electricity sector, access to the market, the obligations of universal service and the operation of networks, amongst other main issues.

In their very nature, the Directives are rules that pursue the coordination or approximation of legislation, but in this specific case, this legal nature is emphasised by endorsing the Community Directives as “common rules”, which means we can say that the basic material content of the rule referred to above must be projected uniformly in each of the legal codes of the Member States. This would require an equal, or at least equivalent, rate in the process of incorporating or inclusion of the European law into national legislation. The “graduality” of the transition process to the competence or liberalisation of the electricity sector must be matched with a similar rhythm in the Member States, without prejudice, to accommodating the conditions established in the last enlargement of the EC, in accordance with the provisions of the corresponding treaties for the membership of the last states associated with the European process. However, experience demonstrates that this legislative proposal has not been properly dealt with in the reality of the current conformation of the electricity and gas markets, given that there are still imbalances, asymmetry and insufficiencies in important aspects such as access and regulatory supervision.

This situation implies an unquestionable prejudice to the desired liberalization process, as it partially fails to meet the objectives pursued by the previous Directives, and thus slows down or unbalances the necessary competitive integration of markets. For this we would have to ask ourselves if it would be possible to activate other legal instruments that would enable some countries to advance at a faster pace in order to achieve the purposes of the integration of the energy field.

For which reason, if the electricity energy market had developed uniformly and competitively over the past fifteen years, it would be unnecessary or irrelevant to put forward integrationist reforms in favour of competition based on principles and formulas of differentiation. At the same time, as is evident, the coordination of legislation admits varying degrees providing that the result foreseen in the rule is achieved and its objectives and basic content are respected. And within that basic content are some of the above indicated headings, which both the Community authorities and the very Rulings and Resolutions issued by the national regulators have stressed in their stage reports, in accordance with their legislation and internal interpretation. In particular, I feel that in the formation of organised markets, the strengthening of networks, the regulation of the new “energy solidarity” foreseen in Lisbon and intended for guaranteeing the security of energy supplies coming from outside of the Union, and in the measures promoting clean energy options as a point of interconnection

<sup>65</sup> See, amongst other, Communications, Declarations and Rulings of Jurisprudence: COM(2006) 851, Communication from the Commission “Sectorial Inquiry pursuant to Article 17 of the Regulation 1/2003 relating to the application of the rules on competition as laid down in Articles 81 and 82 of the Treaty”.



between the new energy policy and environmental policy, there could be spaces conditioned, from the aspect of rules and regulations, for advancing differentiated mechanisms of integration in the energy sector.

It is true, on the other hand, as we pointed out earlier, that the technique of differentiated integration that enables the figure of Enhanced Cooperation does not contemplate within its scope of application the rules that are found on the perimeter of the body of community law, although it is also expressed that Enhanced Cooperation should not be regulated “against the objectives of the internal market”.

On the other hand, while the principal element on which the reform of Directive 2009/72/EC is structure on the methods offered to the Member States<sup>66</sup> for opting for a model of the separation of accounts for electricity or gas activities or another less specific with regard to the intensity and scope of the separation of activities, but that, in any case, must guarantee the independent arrangements for transport, thus confirming a kind of differentiated integration within the “legislative approximation” established by the Directive, by making it possible for one group of States to organise a fundamental chapter of their market and electricity and gas structure in one way, and others to do so in a different way, we cannot, strictly speaking, talk here of assumptions that fit within the legal perimeter of Enhanced Cooperation.

However, other points in the reform of the electricity and gas sectors point at methods of international and inter-state cooperation within the internal energy market.

From the perspective of international cooperation, emphasis is put on the aspect of the security of supply.

Thus the Recital no. 25 of the Directive, after acknowledging “*the security of the energy supply constitutes an essential component of public security*”, states that “*additional safeguards are necessary regarding the preservation of the security of supply of energy to the Community to avoid any threats to public order and public security in the Community and the welfare of the citizens of the Union*”.

And therefore an assessment is required of the independence of operation of the infrastructures for electricity and gas, as well as the energy dependence of both the Community as a whole and of each of its Member States with regard to the energy supply from third countries and, together with this, to assess and consider “*the treatment of both domestic and foreign trade and investment in energy in a particular third country*”. In the light of this, the Directive indicates that, in certain circumstances, the Commission should submit recommendations to negotiate relevant agreements with third countries “*addressing the security of supply of energy to the Community or to include the necessary issues in other negotiations with those third countries*”.

It must not be forgotten that on several occasions, the Commission, Parliament and the Council have formulated and attempted to develop an energy policy that makes it possible to ensure the supply of those assets within the European scope. The strategy of security of supply oriented to provide an effective solution to the problem or at least to achieving a limitation of this risk, is still being developed and requires the necessary Community consensus.

On the other hand, while it is true that supply has to be guaranteed in the Union as a whole, due to the dependency on energy from the outside, this fact is neither uniform or homogenous because in some cases, dependency will exist and in others there will even be vulnerability in the supplies coming from countries outside of the Union.

Limiting ourselves to the issue of security of supply, this could be defined as “*the guarantee of the continuous, physical availability of energy products on the market at a price that is affordable for consumers*”.<sup>67</sup>

The Green Book on security of energy supply from 2000<sup>68</sup>, already reflected a paradoxical situation, since although in the European Union we found an interior market which was developing, but in legal and commercial terms it was the world’s largest, this was not accompanied by a coordination of the necessary measures to ensure the security of external supplies, whether for oil or natural gas, and even to accurately determine the

<sup>66</sup> See, amongst other aspects, the Recitals 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24, 26 and 29 of Directive 2009/72/EC, of the European Parliament and of the Council, of 13<sup>th</sup> July 2009.

<sup>67</sup> Commission Green Paper. “*Towards a European strategy for the security of energy supply.*” COM (2000) 769 final, and more recently, 8.3.2006, Green Paper “*A European Strategy for Sustainable, Competitive and Secure Energy*”.

<sup>68</sup> 29.11.2000 Green Book of the Commission “*Towards a European strategy for security of energy supply*”. COM (2000) 769 final- not published in the Official Journal.

strategy for securing and maintaining inventories of oil, and it is also revealed in the field of trans-European networks by the inadequacy of traffic capacity in many areas of the interior perimeter of the Union.

The aforementioned Green Book on energy policy from 2000 highlighted the structural weaknesses of the external energy supply of the European Union and its geopolitical, economic and social vulnerabilities. The energy on which the European economy is based comes mainly from fossil fuels, which account for 4/5 of its total consumption, with 2/3 of them being imported. This vulnerability will become more pronounced in the future, with energy imports that could rise up to 70% of global needs 30 years from now, or even up to 90% in the case of oil, unless appropriate measures are taken to curb, alleviate or redirect this trend<sup>69</sup>.

As evidenced, the European Commission reveals its awareness of the disparities that exist between government policies of the Member States in this regard, and underlines the difficulties that this situation can generate both for the construction of a common inner energy market, and for the safeguarding of security of supply<sup>70</sup>.

For all these reasons, the security of energy supply is expressed as one of the main issues of energy in Europe. Without autochthonous resources or the possibility of importing the energy products needed to meet demand requirements within the Union, we shall find a serious problem of internal dependence.

Therefore, as we have seen, legislators have been concerned in recent years, according to the analysis of the subject, with adopting certain rules limiting the risks in the medium and long term in this area. A sufficiently revealing, practical example of this situation is expressed by the crises in gas supply contracts between Russia and some European Union countries, either through transit fees by neighbouring countries to suppliers or in the Russian Federation itself, as in Ukraine, Georgia and Belarus. In these cases, Europe has normally acted by addressing the specific concerns of certain Member States, without having its own legal policy in this area, or arbitrating sufficient energy coordination measures, except in certainly exceptional situations, given the seriousness of the conflict and its duration. Therefore, it could be thought that this area is not only sensitive to the Union as a whole, but capable of triggering the mechanism of Enhanced Cooperation, by a group of countries, especially those adjacent territorially which are sufficiently integrated from the perspective of their networks or their strategic and commercial energy interests, and always from the perspective of promoting or safeguarding the community objectives of integration, in order to facilitate the functioning of markets and sectors in the face of risks to their safety, when they took notice that the actions of the European institutions in this area were insufficient to meet their most vital or urgent energy needs. For example, in cases of supply crises like the aforementioned, severe disruptions of supply which require the activation of mechanisms of “energy solidarity”, or lack of security of supply in the medium to long term.

Of course, the difficulty of developing this subject was evident in the context prior to the signing of the Treaty of Lisbon, in the absence of a common energy policy in the European Union. And although it is true that within the system of community sources, issues relating to the treatment of security of supply have, in the last few years, earned the attention of legislators through their development into norms of secondary

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<sup>69</sup> This issue has been addressed in the regulatory area of secondary legislation among other provisions through Directive 2004/67/EC of the Council, concerning measures to safeguard security of natural gas supply. In the Recitals of the Directive it is stressed that “*the Community gas market is being liberalized. Therefore, in regard to security of supply, any difficulty having the effect of reducing gas supply could cause serious disturbances in the economic activity of the Community; ... In view of the growth of the gas market in the Community, it is important to preserve the security of gas supply, especially for household customers*”. The legal basis for the Directive is Article 100 of the Constituent Treaty of the European Union.

The Commission subsequently promulgated Directive 2005/89/EC of the European Parliament and Council, concerning measures to safeguard security of electricity supply and infrastructure investment (text with EEE relevance), where it is provided that “*ensuring a high degree of security of electricity supply is a key objective for the proper functioning of the interior market (...) A competitive single market for electricity in the European Union (EU) requires policies on security of electricity supply which are transparent, non-discriminatory as well as compatible with the requirements of this market. The absence of such policies in various member States or the existence of significant differences between their policies would lead to distortions of competition*”. The legal basis of this Directive is Article 95 of the Constituent Treaty of the European Union.

<sup>70</sup> Following this same trend, Directive 2006/67/EC was published in 2006 by the Council, which required Member States to maintain minimum stocks of crude oil and/or petroleum products. Regarding cooperation between Member States in this respect, the Directive states that “*in principle, oil reserves can be established anywhere in the Community, so it is appropriate to facilitate the establishment of stocks outside national territory. In the case of stocks held at the disposal of another company or another organization/entity, more detailed rules are required in order to ensure availability and accessibility in the event of oil supply difficulties. (...) Since the objective of the proposed action, namely, maintaining a high level of security of oil supply in the Community through reliable and transparent mechanisms based on solidarity between Member States, meeting at the same time, internal market and competition rules, can be better achieved at a Community level, the Community may adopt measures, in accordance with the principle of subsidiarity contained in Article 5 of the Treaty*”. The legal basis for the Directive is Article 100 of the Constituent Treaty of the European Union.

legislation, sufficient progress was not possible in others due to the absence of formal legal remedies. With the adoption of the Treaty of Lisbon, which recognizes the security of supply, the guarantee of provisions and the strengthening of networks as main objectives and core content material of the new energy policy, this area was thus formally summoned and empowered to, satisfying the requirements of the procedure, be activated as Enhanced Cooperation. The call in the body of the enabling article itself of a European energy policy to energy “solidarity”, specifically designed to seek mechanisms which ensure security of supply or to avoid putting them at risk, reinforces, in our view, this interpretation.

The legal basis for carrying out a request for Enhanced Cooperation in this matter should be supported, in our judgement, by Articles 4.1 a), c) and f) as well as Article 194.1 b) of the Treaty of Lisbon (Treaty on the Functioning of the Union).

In any case we see how forecasts provided in a key norm for the construction of the internal energy market, such as Directive 2009 of the electricity sector, converge with the need to articulate core contents of a common energy policy, in its external dimension, such as the safety record of supply. We noted earlier that the Directive required the Commission to submit recommendations to negotiate this issue with third countries. One might wonder: what if only one group of States accepted the recommendations of the Commission under the legal umbrella of an interior market rules? Would it be possible to readdress the same legal approach, under the instrument of Enhanced Cooperation, in the context of the title of energy policy? We understand that, in principle, not many doubts should arise to house a positive answer to this question.

Another area where the imperatives of cooperation clearly emerge is that of the establishment and proper functioning of regional markets as a necessary intermediate step, due to the successful integration of networks and their regulation, of the internal energy market. The 2009 Directives mark this problem by linking the objectives of the market, the regulation of infrastructure, and the missions assigned to the regulatory authorities, “*they must be one of the main tasks of regulatory authorities, in close cooperation with the Agency when appropriate*”. Again the question arises when considering whether the way to the interior market does not allow the mobilizing of a sufficient degree of agreement or consensus between countries to enforce both the necessary – and balanced – development of regional markets, and its drive and supervision by national regulatory Authorities and the European Agency for Energy Cooperation. It would be interesting to once again expose the extent to which we would not find the legitimacy necessary to promote the same process in another way, such as that of the development of one of the objectives of European energy policy, namely the realization of the internal market, understanding that the momentum, at least by a certain number of community States, of regional markets is, in some cases, a positive and essential step to ensure real energy integration and, thus, the effective European energy space.

Indeed, in the last decade, certain energy regional geographical areas have taken shape within the European Union, understanding the word spaces in this case as both transnational areas comprising two or more countries or as intermediate markets between national markets and the internal energy market and, in principle, complementary to the objectives of the latter.

In this regard, on November 14<sup>th</sup>, 2001 the “*Protocol of cooperation between the Spanish and Portuguese Authorities for the creation of the Iberian electricity market*” was signed. Its second article established that the “*Iberian Market will ensure all agents established in both countries access to the Iberian Market Operator and interconnections with third countries, in terms of equality, freedom and bilateral contracting*”.

The international Agreement on the establishment of an Iberian power market between Spain and Portugal was published by the Ministry of Foreign Affairs and Cooperation on May 22<sup>nd</sup>, 2006 in the Official State Bulletin in its issue 121. The preamble states that the creation of the Iberian Market is one more step in the creation of the internal energy market as follows:

*“Convinced that the creation of an Iberian Electricity Market will be a milestone in the construction of the Interior Energy Market in the European Union and that it will accelerate the practical application of the provisions contained in the Directive”*

Another good example is the creation of so-called Nord Pool (Nordic Power Exchange) –common electricity market between Norway, Denmark, Sweden and Finland–, established in 1996 initially by Norway and Sweden with the aim of providing a space for electricity trade in the Nordic area as well as financial clearing

services. In 1998 it was joined by Denmark and Finland, and is currently a common space for exchange of electricity between the listed countries, which also supports the negotiation of emission certificates. The aim of concluding the Agreement that led to this market was to provide the above mentioned countries with the possibility of being assisted in the event of a demand for additional electricity above their own capacity, optimizing the use of electrical resources available, reducing local deficits, and maximizing costs<sup>71</sup>, among other topics. A regional electricity Market has also been constituted in Northern Ireland.

From the regulatory perspective, in the late nineties the works of cooperation between independent national Authorities with powers of regulation and supervision of energy markets also began to take institutional shape. Thus, ERGEG (European Regulator Group of Electricity and Gas) was constituted, which subsequently raised a progressive path towards integration of regional markets, promoting the establishment of seven regional electric markets and three regional gas markets. Each will have a regulator leader who will be responsible for its organization and development.

In the electrical sector, priorities were identified in areas such as the regulation of traffic congestion, interconnection of networks, or optimizing the capacity of the existing interconnections. In relation to gas markets priority issues included interoperability and interconnections.

On the other hand, Directives 2003/54/EC and 2003/55/EC require Member States to designate one or more agencies, in order to develop regulatory powers as Authorities independent from operators and, it could also be interpreted, from political forces and the Government. This continues the scheme and deepens into the forecasts made in this area by the first package of liberalization of gas and electricity. These agencies will be responsible in particular for the application of the rules of the new regulatory framework after its incorporation into national Law, especially monitoring of the market<sup>72</sup>.

The European Commission, in order to confer upon the regulatory cooperation and coordination with national Authorities an increased institutional status which facilitates the realization of the internal energy market, issued its Decision of November 11<sup>th</sup>, 2003 by means of which the European Regulator Group of Electricity and Gas (ERGEG) was established as its advisory body.

ERGEG encouraged, as was indicated before, the electricity and gas regional initiative in the spring of 2006, creating seven electric and three gas regions in Europe. In its Report of March 2007, ERGEG proceeds to verify the progress made on the initiative noting that it is necessary to consolidate regional markets, and in support of this initiative proposes the creation of ERI and GRI (Electricity Regional Initiative and Gas Regional Initiative). The creation of these markets must be coordinated according to the body, as a step towards the effective implementation of the common market.

The European Parliament in its Resolution on the perspectives for the internal gas and electricity market, July 10<sup>th</sup>, 2007, called for strengthening cooperation between national regulators at EU level, through an EU agency. The Commission welcomed this approach and concluded that it was necessary to establish an independent body which could make proposals to the Institutions and, in particular, the Commission, in relation to substantive decisions, and adopt regulatory measures on specific cases which were binding for third parties on detailed technical issues which were delegated on them.

Through the Third Package of Proposals of Energy Directives, the Commission raised the proposal of creating a Regulatory Agency to coordinate at the European level some basic aspects of the tasks which they develop nationally. Specifically, the proposal attributes powers to the Agency in four areas:

- a) Creating a framework for cooperation among national regulators.
- b) Monitoring the regulation on cooperation between transport networks operators.
- c) Resolving and arbitrating in cross-border problems or specific technical files.
- d) General advisory function.

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<sup>71</sup> The energy laws of each of these countries and those of the securities markets (Exchange Acts and Securities Trading Acts) allowed the consolidation of that market, controlled by the Norwegian Financial Supervisory Authority under the Exchange Act and Regulation 18/1997.

<sup>72</sup> In the year 2000 the European regulatory authorities existing at the time (United Kingdom, Ireland, Sweden, Finland, Holland, Belgium, Italy, Spain, Portugal and Norway) decided to create the Council of European Energy Regulators (CEER).

## 2.2. Enhanced Cooperation: Energy Policy and the Environment

One of the objectives of the energy Policy is the compatibility of its measures on the defence or protection of the environment, asserted among other legal goods, in the contents of the recognition of “sustainable development” as “value” and “principle” of the Union, to which other objectives, policies and actions must be subordinated.

It should be recalled that the Kyoto Protocol was signed by the European Union in April 1998 and approved by Council Decision 2002/358/EC of April 25<sup>th</sup>, 2002<sup>73</sup> *relative to the approval, on behalf of the European Community, of the Kyoto Protocol of the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments made therein.*

With its signature and approval, the European Union committed to reducing its aggregate anthropogenic emissions of greenhouse effect gases by 8% with respect to 1990 levels, a reduction that would occur over a period of 4 years: 2008-2012. Thus, the entire European Union, emitting source of 24.4% of greenhouse gases in the planet established a sharing of internal burdens<sup>74</sup> which distinguished between those countries whose emissions, calculated in tonnes of CO<sub>2</sub> per capita, were above European Union average, and those which met the environmental requirements.

The establishment of the Sixth Community Action Program on the Environment<sup>75</sup> defines Climate Change as a priority, and provides for the establishment of a system for the trading of greenhouse gas emissions covering the period from July 22<sup>nd</sup>, 2001 to July 21<sup>st</sup>, 2012.

Directive 2003/87/EC<sup>76</sup> establishes a system of tradable quotas. The system allocates “quotas” of greenhouse gas emissions to companies that will “contaminate” having as a maximum limit the level of rights granted. If they had surplus quota, that is, if their gas emissions did not reach the maximum level allotted, then the “clean” company could pass over the excess to another company. The right of emission is designed as a subjective right of financial content<sup>77</sup>. The National Allocation Plans<sup>78</sup> will determine the number of subjective rights to be issued in each time period.

Therefore, here we identify another issue of great importance for the development of the European energy sector in its relation to environmental protection. While the legal basis of this legislation block is part of the development of environmental policy, its specific implementation initiatives reach the energy sector and in particular the electricity sector. The emission trading mechanism is a normative reality in many Member States, to the point that some have internalized it as a cost in the economic transactions of their wholesale electricity markets<sup>79</sup>.

Another good example in this regard is presented by Joanne Scott<sup>80</sup> in relation to so-called “*Directives for integrated environmental authorization*”. These Directives<sup>81</sup> submit certain industrial and agricultural activities which have a high pollution potential to environmental authorization. Under these conditions, such approval

<sup>73</sup> Council Decision 2002/358/EC of April 25<sup>th</sup>, 2002 on the approval, on behalf of the European Community of the Kyoto Protocol of the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments made therein. Official Journal L 130, 15/05/2002 p. 0001 to 0003.

<sup>74</sup> Council of Environment Ministers of the EU, held in Luxembourg in June 1998.

<sup>75</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Sixth Environmental Action Program of the European Community ‘Environment 2010: the future is in our hands’ - VI Environmental Action Program COM/2001/0031 final.

<sup>76</sup> Directive 2003/87/EC of the European Parliament and Council, of October 13<sup>th</sup>, 2003 establishing a scheme for the trading of greenhouse gas emissions within the Community and amending Council Directive 96/61/EC.

<sup>77</sup> Directive 2003/87/EC: in art. 20, 1<sup>o</sup> says: “*The right of emission is designed as a subjective right to emit one equivalent tonne of carbon dioxide from a plant included in the scope of this Royal Decree-Law*”.

<sup>78</sup> National Allocation Plan for Emission Rights 2008-2012. Proposal of July 12<sup>th</sup>, 2006.

<sup>79</sup> The Communication from the Commission to the European Council and Parliament on prospects for the internal gas and electricity market, COM(2006) 841 final, clearly points out that “*price increases are due to very diverse causes, including elevated costs of primary fuel, the current need for investment and the expansion of environmental obligations, including the Community framework for emissions trading*”. Similarly, the Commission Communication of December 7<sup>th</sup>, 2005, COM/2005/0627 final.

<sup>80</sup> SCOTT Joanne. “Flexibility ‘proceduralization’ and Environmental Governance” in the book *Constitutional Change in the EU*. Pg 259 to 280. Hart Publishing.

<sup>81</sup> Directive 2008/1/EC of the European Parliament and Council of January 15<sup>th</sup>, 2008 concerning integrated pollution prevention and control. This rule amended Directive 96/61/EC of September 24<sup>th</sup>, 1996 on integrated pollution prevention and control *DO L 257 of 10.10.199*. The legal basis of the Directive is paragraph 1 of Article 175 of the Constituent Treaty of the European Union.

may be granted only upon meeting certain environmental requirements. These measures are intended to make business assume, in that context, efforts to prevent and reduce pollution for themselves<sup>82</sup>.

To be able to receive a permit, industrial or agricultural facilities must meet certain requirements regarding the implementation of appropriate measures for controlling and preventing pollution in some areas such as waste; efficient use of energy; prevention of environmental accidents –according to environmental principles contained in the European Treaty since the Single Act– and the limitation of their consequences; the adoption of measures so that, upon cessation of activities at the site in question, it is returned to a satisfactory state, i.e. the realization of the principle of “compensation for environmental damage at the source” (art. 174 of the ECT).

The emission limit or its equivalent established under the Directives mentioned is based on the principle of Best Available Techniques (BAT) without prescribing the use of any specific technique or technology, but taking into account their characteristics, geographical location and the environmental conditions of the location where the facility is established. According to Joanne Scott, this principle of best practices leaves a wide scope for Member States to discretionally determine how best to implement the Directive.

The concept of best practices allows substantial flexibility regarding the interpretation of its essential terms and content, which directly affects the implementation -also flexible- of the norms contained in the Directives. Therefore it could also be estimated to what extent –as in the trading of emissions- this field could be susceptible to incardination of the mechanism of Enhanced Cooperation, not in isolation, but in a new climate-energy legislative framework in which certain measures would be adopted by the EU, complementary and grouped by the Community objective of ensuring greater environmental protection from the industrial level, while at the same time promoting tools that combine market freedom, operating flexibility and environmental compatibility.

In this sense one can refer to promotion of energy efficiency and renewable and clean energy sources. This is an energy chapter which, as was stressed before, is one of the central pillars of EU energy policy following the Treaty of Lisbon.

The European Council of March 2007, in its Action Plan on energy, urged the establishment of a global coherent framework for renewable energy, on the basis of a proposal from the Commission in 2007 relative to a new comprehensive Directive on the use of renewable energy sources.

This Council proposal is summarized in the following conclusions:

- The determination of the overall national objectives of Member States in this subject matter.
- The design and approval of national action plans containing sectorial targets and the necessary measures to meet them; and
- The criteria and provisions established to ensure sustainable production and use of bio energy and to avoid conflicts between different uses of biomass (...)

In accordance with the above, in December 2008 the Commission approved the Directive on Renewable Energy on December 17<sup>th</sup>, 2008<sup>83</sup>, under which it seeks the promotion of alternative energy sources to help reduce climate change effects, and from this perspective, also aims to reduce the accused energy dependence which the European Union suffers<sup>84</sup>.

The new directive defines the goal that 20% of European electricity should be produced from renewable sources by 2020. Furthermore, Community legislation requires Member States to complete the previous target reducing emissions of carbon dioxide (CO<sub>2</sub>) by 20%; and increasing energy efficiency by 20%. In addition this

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<sup>82</sup> Integrated pollution prevention and control are related to industrial and agricultural activities as defined in Annex I of Directive 2008/1/EC (industries of energy activities, production and processing of metals, mineral industry, chemical industry, waste management, farming, etc.).

<sup>83</sup> Directive 2009/28/CE of the European Parliament and Council of April 23<sup>rd</sup>, 2009 on the promotion of the use of energy from renewable sources which amends and repeals Directives 2001/77/EC and 2003/30/EC (DOUE L-140, 5.6.2009). The legal basis of this Directive is the first paragraph of Article 175 of the Constituent Treaty of the European Union.

<sup>84</sup> Previously, among numerous other provisions, the European Commission adopted the Communication “Energy for the future: renewable energy sources”. This Communication was an expression of a White Book on the Community strategy and action plan. This text proposed a significant increase of the quota of renewable energy in gross inland energy consumption in the EU, marking the indicative target of 12%. In this same direction, Directive 2001/77/EC of September 27<sup>th</sup>, 2001 on the promotion of electricity produced from renewable energy sources on the electricity consumption of the European Union in 2010, setting a target of 22.1% at Community level.

Directive also sets action plans for a range of technologies, including bio energy (bio fuels and biomass) and solar energy, thermal and photovoltaic; mini-hydraulic, oceanic and wind energies. And it expresses the need to support the R&D actions of in this field<sup>85</sup>.

The new Directive states that in June 2010 each Member State should have a new National Allocation Plan (NAP) which details the methodologies to be followed in this field. The European Commission will evaluate these plans as well as the biannual progress reports that States should develop.

A key aspect of the Directive which provides flexibility and differentiation pathways in its implementation among Member States would be to determine precisely what should be the criterion for distribution of the 20% commitment assumed by the standard among Member States, stressing that *“different methods are currently evaluated, including modelling of the resource potential of each Member State, applying a flat-rate increase for all Member States, and modulating results in terms of GDP, in the interest of equity and cohesion. The conclusion is that an approach based on a uniform rate, modulated by GDP is the most appropriate, as it implies an common increase, which is fair and simple for all Member States. The result, being weighted by GDP, reflects the richness of the various Member States, and being modulated to take into account the rapid progress in the development of renewable energy, recognizes the role of «pioneers» as leaders in terms of development of renewable energy in Europe and also reflects an overall cap on the quota of renewable energies to be reached in 2020 by each Member State”*.

For all these reasons, this chapter also contains the possibility of contemplating a mechanism for voluntary cooperation among States to advance in the promotion of renewable energy development, taking into account the previous performance parameters defined in Community legislation, the objectives defined for 2020 and the admitted flexible possibilities for achieving them. Naturally, this raises quite a few legal uncertainties and practical difficulties such as how best to measure, in all areas, the environmental effort of each country, within a framework of coordination between various Member States, but it might be possible to regulate it, from a Community perspective.

### 2.3. Enhanced Cooperation in the Nuclear Field, and International Cooperation

In our original considerations we highlighted that the EURATOM Treaty is part of the foundations of the European Community. However, it is true that there is not a single assessment, shared by all Member States on the extent of the use of this type of energy technology in Europe, or of its level of policy and economic formulation or social acceptance.

Despite this, in recent years a number of industrialized countries are taking measures conducive to extending the service or design life of nuclear plants or to the preparation and proposal of a new program to build nuclear power plants. A recent Agreement signed between different States of the Union on this matter and sufficiently representative, is that adopted between France and Italy. One country with a clear implementation of this energy generation technology and another in a state of moratorium during recent decades.

Indeed, on February 24<sup>th</sup>, 2009 the Italian Republic and the French Republic concluded an Agreement on cooperation in the energy field, mainly for the development of various aspects, from research and development, and security of facilities, to the eventual contribution to the operational development of nuclear technology.

Both nations recognize that electricity produced by nuclear plants is a non-polluting source since it does not generate greenhouse gases, reduces dependence upon imported fossil fuels, and ensures electricity production at a competitive price and stable in the long term.

Additionally, the Agreement states the advantage of sharing reciprocal experiences especially from those government and private agencies from both nations responsible for the operation and control of nuclear power generation facilities.

This text states the desire to strengthen energy relations in the field of nuclear energy between the two countries in the institutional, industrial and commercial aspects, promoting the development of a real and

<sup>85</sup> For example, in the case of geothermal energy, they recommend studies to improve drilling technologies and systems which operate at a lower temperature, while in photovoltaic energy they suggest focusing on reducing costs of solar cells and increasing their efficiency and useful life.

effective opening for the development of industrial cooperation and trade and with respect for Community rules and national legislation of each order.

Thus, the parties agree to make a mutual and reciprocal opening of their energy markets within the European Union, with the aim of improving conditions of climate change and increasing the energy efficiency of both nations. The Agreement even provides for the possibility of adopting a formal commitment to undertake, in certain cases, a common position regarding the issue of nuclear energy in the European Union.

Even though in this case the mechanism of Enhanced Cooperation can obviously not be used due to lack of substantiation –let us imagine that there were nine signatory countries–, it is a clear example of cooperation between Member States in the field of energy, which is of utmost importance and deserves to be taken, in our opinion, in special consideration, more so when addressing the enforcement of some or several of the objectives that comprise the new EU energy policy instituted by the Treaty of Lisbon. Such may be the case that in order to be able to ensure security of supply, some countries may decide to use the procedure of Enhanced Cooperation, once the necessary means of consensus with the other European Union countries were exhausted, and with the required number of countries according to their current energy structure and their plans for future configuration.

Regarding the international cooperation mechanisms existing in the energy field so far, we consider it necessary to mention two of them in this work, for their special significance. On the one hand, the Treaty of the Energy Charter, which projects an attempt to create a meta-European energy policy, with no direct relation to the common stock; on the other, the creation of the European Energy Community in some of the Eastern countries, which does raise the material extrapolation of the common stock.

The Treaty of the Energy Charter seeks the creation, among other objectives, of a meta-European energy space, a kind of energy policy that goes beyond the limits of the Union, although the authors of the Charter do note that it is not their intention to establish such kind of policy scenarios. The truth, however, is that the European Community inspired the creation of this Agreement. It was proposed in its Ministry Council<sup>86</sup>. The text was drafted and was then discussed, analysed and approved by the other signatories.

Thus nominated for the purpose of creating a legal framework governing international energy relations in the areas described above<sup>87</sup>, the Treaty also aims to strengthen industrial and technological relations and ensure security of supply among the countries involved.

The underlying Agreement is the search for a suitable trade-off between the infrastructure and energy resources found in some countries (former Soviet Union States)<sup>88</sup>, and the capabilities for technology and technical, regulatory and financial assistance –in addition to the political support corresponding to a context of political stability and economic prosperity– of European Union countries<sup>89</sup>. A sort of swap between security of supply and technological capacity which obviously needs to respect international legal order, the protection of investors and access to capitals, and an appropriate institutional framework.

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<sup>86</sup> The European Council celebrated in Dublin in 1990 proposed this international initiative. The Energy Charter was signed in December 1991 and the Treaty of the Charter, by 49 States, in December 2004.

<sup>87</sup> The Preamble of the Treaty of the Charter states that the basic concept of the Charter initiative is to catalyze economic growth through measures to liberalize investment and trade in energy.

<sup>88</sup> Since then, several initiatives and important Agreements have taken place between Russia and the European Union in the energy field. In this regard, among other documents and statements, the following are included:

- March 2009 EU-Russia Common Spaces. Progress Report 2008.
- 05/11/2008 Communication from the Commission to the Council. Review of EU-Russia relations. Brussels.
- March 2008 EU-Russia Common Spaces. Progress Report 2007.
- 2007-2013 Cross Border Cooperation Programmes.
- 11/05/2005 15<sup>th</sup> EU-Russia Summit. Moscow. Road Maps.
- 27/04/2004 Joint Statement on EU Enlargement and EU-Russia Relations.
- 27/04/2004 Protocol to the Partnership & Cooperation Agreement.
- 21/05/2003 National Indicative Programme. Russian Federation. 2004-2006.
- 18.09.2002 Commission Communication to the Council. Kaliningrad: Transit. Brussels.
- 17.01.2001 Commission Communication to the Council. The EU and Kaliningrad. Brussels.
- 27/12/2001 Country Strategy Paper 2002-2006. National Indicative Programme 2002-2003. Russian Federation.
- 28/11/1997 Collaboration and Cooperation Agreement of the European Communities and the Russian Federation.

<sup>89</sup> **Article 2 - Objective of the Treaty**

This Treaty establishes a legal framework to promote long-term cooperation in the energy field, based on achieving complementarities and mutual benefits, in accordance with the objectives and principles expressed in the Charter.



Article 2 very succinctly describes the purpose of the Treaty as a “*legal framework to promote long-term cooperation in the field of energy*”. Therefore, perhaps the most notable element is the concern for the permanence and stability of cooperation that will provide adequate legal and financial certainty to the agreements and investments that take place in the area.

Among other important aspects, environmental defence and protection are linked to measures for energy conservation and efficiency, the principles of “the polluter pays” and prevention are laid down and the internalization of environmental costs are promoted.

The contracting parties shall promote cooperation with relevant entities to:

- a) modernize the energy transport infrastructures necessary for the transit of energy materials and products,
- b) develop and exploit energy transport infrastructures that are located in the territory of more than one contracting party,
- c) adopt measures to reduce the effects of the supply disruption of energy materials and products,
- d) facilitate the interconnection of energy transport infrastructures.

The Treaty also provides for increasing access by the signatory countries which are least developed in terms of energy technologies according to commercial and non-discriminatory criteria, always respecting the protection of intellectual property rights. Technology transfer and access to new technologies are some of the most important aspects of the international Agreement, since the adequate development of energy activities (production, exploration, operation, etc.) requires sufficient technological knowledge to make those same activities more efficient, economically profitable and less environmentally damaging.

Furthermore, access to capital for the financing of trade in energy materials and products, and the investment in economic activities in the energy sector are being regulated in the multilateral Agreement. In this regard, a series of measures are established which are destined to protect the investment of both public and private Entities in any of the signatory States, so that such investments are not at the expense of political, legislative or other changes of similar nature. The Treaty does not affect national sovereignty of the signatory parties over energy resources.

The Treaty of the Energy Charter is an important effort in the field of international energy cooperation, in which the participation of community institutions, through the three Communities and the Member States, reveals itself as essential. As in other areas of application of these mechanisms of international energy cooperation, the chapters of security of supply, global defence of environmental protection in the geographic reference frameworks and the extension of the principles and techniques of the European energy market to other geographical areas, all stand out.

It should also be mentioned that this multilateral Agreement, the nature and objectives of which have been described above, has not yet been ratified by the Russian Federation and that the “static” scope of the estimates maintained by the articles of the Treaty and its Protocols for development, has been weighed, on several occasions by the doctrine, regarding Community legislation on the internal market which, nevertheless, has evolved through other legal instruments (the Second and Third Legislative Packages on the electricity and gas internal market), so that there could currently be a significant “regulatory asymmetry” or a need to adapt rules of certain chapters of the Charter Treaty with respect to the EU legislation on which, in many cases, it was based. On this issue we consider of particular interest the work of Andrey Konoplyanik, pointing out the imbalance existing between the *acquis communautaire* and certain parts of the contents of the Treaty, in its current version<sup>90</sup>.

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<sup>90</sup> See “A Common Russia-EU Energy Space: The New EU-Russia Partnership Agreement. *Acquis Communautaire and the Energy Charter*”. Journal of Energy & Natural Resources Law. Vol. 27, n° 2, May 2009. Andrey Konoplyanik.

The same approach could be used in the analysis of the so-called “Treaty on the Energy Community”, of smaller geographic scope and legislative ambition, but following a similar pattern in order to establish mechanisms for international energy cooperation between the EU and its Member States and third countries, affecting very important regulatory changes and specific designs of regional markets<sup>91</sup>.

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91 The European Council in Thessaloniki in June 2003 endorsed the Thessaloniki Agenda for the Western Balkans, with the objective of strengthening the privileged relations of the EU and the countries of this region. One of the objectives in that agenda was to extend the energy market of the European Union (hereinafter EU) to Southeast Europe.

Subsequently, through the Athens process, and the agreement protocols of Athens 2002 and 2003, the idea of integration of the regional energy market in this area was consolidated, under the design of a wider Internal Energy Market.

Similarly, the European Council at Copenhagen on December 2002 confirmed the European position regarding the Republic of Albania, Bosnia and Herzegovina, Serbia and Montenegro, as potential candidate States for EU membership. European Council at Thessaloniki on June 2003 approved the «Thessaloniki Agenda for the Western Balkans: moving towards European integration», oriented to further strengthen the privileged relations between the parties in various fields including that of energy.

The Treaty of the Energy Community created between the EU and some non-member countries in the region, an internal energy market, with mutual assistance, pointing out the interest of formulating a common foreign policy with respect to energy trade. The Treaty provides for the application of the common stock in the subjects of energy, environment, competition and renewable energies for some of the non-member countries in the region.

The parties which celebrated the Treaty are: the European Community (currently EU), the Republic of Albania, the Republic of Bulgaria, Bosnia and Herzegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, The Republic of Montenegro, Romania, the Republic of Serbia, the Interim Administration Mission of the United Nations in Kosovo, in accordance with Resolution 1244 of the Security Council of the United Nations. All of the above referred to as “*the Parties adhering*” to the text of the Treaty. As noted earlier the Treaty was signed on October 25<sup>th</sup>, 2005 within the framework of the so-called Athens Process, which currently comprises nine States in Southeast Europe (Romania, Bulgaria, Bosnia-Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Montenegro, Serbia, Albania and Kosovo. Turkey finally decided not to sign the Treaty, which came into effect on July 1<sup>st</sup>, 2006. Under this scenario, Norway, Moldova, Ukraine and Turkey itself (on the latter, the opposition of Cyprus exists due to reciprocity) participate as observers. Georgia also has manifested its interest in participating as an observer. The EU is represented by the Commission.