

Preliminary Assessment of draft Procedural Act [2019/.../...] on the exchange of information and cooperation between the European Commission, the Secretariat and the Contracting Parties in the fields of compliance with Treaty obligations and the reciprocity mechanism

Summary

The proposed Procedural Act should focus on reciprocity only (ie only where the European Union is potentially concerned). By expanding its scope to the regular enforcement activities of the Secretariat in relation to non-compliant Contracting Parties outside the EU, the effectiveness of the rule of law in the Energy Community is at risk. The interference in State aid cases in particular jeopardizes independent and effective enforcement concerning e.g. coal-fired power plants in Kosovo*, Bosnia and Serbia, some of them financed by Chinese loans. In this respect, the proposal is likely to confuse and bias the purely legal enforcement procedures in the Energy Community with political interventions by the Commission, which follows a diplomatic rather than a legal rationale. If need be, the bilateral agreements with individual Contracting Parties are an appropriate framework for doing this. The Energy Community Treaty, on the other hand, has established a clear and well-balanced institutional framework with an independent Secretariat. It is also sectoral in nature, so that the Commission's proposal would de facto establish a separate competition and State aid regime in its relations with individual Contracting Parties for energy.

The Procedural Act, as proposed, is not in compliance with the Energy Community Treaty and other pieces of Energy Community legislation, which are binding on the European Union under the TFEU (Article 216). The draft also affects the institutional framework of the Energy Community Treaty within the meaning of Article 218(9) TFEU, discriminates against other Parties within the meaning of Article 7 of the Energy Community Treaty, and reduces the role of the Secretariat to an ancillary one in contravention to the role as "Guardian of the Treaty" assigned to it by the Treaty (Article 70, before and after amendments). This cannot be achieved by a piece of secondary legislation (a Procedural Act) but would require a fundamental revision of the Treaty itself.

The Procedural Act should be significantly narrowed in scope and brought in line with the Treaty and existing Energy Community enforcement rules. Under the current version of the Energy Community Treaty, it needs also to be proposed by the European Union instead of the Commission.

Legal Basis

At least before any Treaty changes take effect, a Procedural Act can only be proposed by a Party (such as the European Union) or the Secretariat, but not the European Commission (Articles 87, 82).

Title I General Provisions

Article 1(2) Purpose

The proposed Procedural Act goes beyond the draft reciprocity mechanism in Article 25' and significantly affects the institutional set-up of the Energy Community. It constitutes an "act supplementing or amending the institutional framework of the agreement" within the meaning of Article 218(9) TFEU. Based on the TFEU and as confirmed by established case law of the Court of Justice of the European Union, in a case where the institutional framework of the agreements is to be amended or supplemented, the procedure should follow the same procedure for the conclusion of an agreement, in which case the Council acts unanimously and the Parliament's consent is required.

The interpretation of the Treaty is up to the European Court of Justice (Article 94), or the Ministerial Council in a manner and procedure defined by the latter's Rules of Procedure. Interpretation is case-specific and cannot be subject to a blanket mandate to the European Commission.

Title II Matters related to compliance with obligations under the Treaty

The proposed Title does not focus on cooperation between the European Commission and the Secretariat within the framework of the draft reciprocity mechanism (Article 25') but applies generally to all cases of compliance assessment, i.e. also in situations purely limited to the implementation of Energy Community law by non-EU Contracting Parties. It should be strictly limited to the implementation of the reciprocity clause. As it stands, this Title changes the institutional set-up of the Energy Community and weakens independent and neutral enforcement of EU law in third countries covered by the Energy Community. It also runs counter to the existing Energy Community rules and is likely to create procedural confusion and ultimately inefficiency.

Article 2(1) Tasks of the Secretariat

The proposed deadlines contravene the existing deadlines stipulated by the Energy Community Dispute Settlement Rules of Procedure (DS-RoP), which envisage a minimum of five months for cases under Article 91 (which is needed to carry out the full procedure, including a hearing by and an opinion of the Advisory Committee of independent lawyers), and two months for cases under Article 92. The term "immediately" is not defined. Within the three-months deadline suggested, an orderly procedure cannot be carried out, and even less so in two weeks when assessment should concern competition and State aid cases. The DS-RoP envisages special rules for urgency, which are pending adoption. They would provide the correct framework for addressing cases requiring deviations from the normal procedure in exceptional and urgent cases only.

Article 2(2) Tasks of the Secretariat

The first half of the first sentence goes beyond the draft reciprocity mechanism (Article 25'). A duty by the Secretariat to inform the European Commission (an institution of one Party, the European Union in all cases (including those against non-EU Contracting Parties), discriminates against other Contracting Parties (Article 7 of the Treaty). It also is not related to the extensive information and participation rights enjoyed by the European Commission under the existing DS-RoP.

Complaints by private bodies are protected by confidentiality and data protection rules. This confidentiality is key for the effectiveness of the Energy Community dispute resolution system. "Substantive" is not legal terminology. As a non-institution of the Energy Community, the European Commission receives the same information and enjoys the same access rights as other institutions of Parties.

Sharing with the European Commission "substantive concerns" of the Secretariat, "based on other information" "own investigations and findings" is even more intrusive of the Secretariat's activities related to enforcement in favour of only one Party. This forced sharing of information at a stage when the decision of whether or not to initiate a case has not yet been taken necessarily affects the independent legal assessment and decision-making by and within the Secretariat.

Article 2(3) Tasks of the Secretariat

The European Commission already enjoys access to the case file. The Secretariat adopted an effective and well-balanced Procedural Act on access to the case file with short deadlines for response. There is neither a reason for representatives of the European Commission not to follow this procedure, nor would it be in line with the principle of equal treatment between Parties.

Article 2(4) **Tasks of the Secretariat**

The cooperation between the Secretariat and Contracting Parties' institutions, as stipulated in Article 2 of the DS-RoP, is part of the assistance provided by the Secretariat under Article 67 of the Treaty. In order to come to efficient results beneficial for the improvement of a Contracting Party's implementation record, a bilateral set-up and an atmosphere of trust are key. The DS-RoP provide specifically the right to the Secretariat and a Party concerned to enter in bilateral negotiations, and based on those negotiations to settle a dispute settlement procedure. This is a procedure that has proven to be very successful for reaching compliance through assistance and bilateral negotiations. A consultation duty with the European Commission would prolong the process and deprive it of much of its effectiveness. Moreover, there is no link at all to reciprocity.

Article 2(5) **Tasks of the Secretariat**

The Secretariat does ensure confidentiality, namely each individual staff members in line with the Staff Regulations, and the institution in line with the DS-RoP and the Rules on Access to the Case File. Communication with the public, however, serves the purpose of transparency and public accountability. Public communication is part of the Secretariat's core tasks, and it is envisaged explicitly by the DS-RoP. For example, the initiation of a case has to be published (Article 12 DS-RoP), as well as the Reasoned Request (Article 29(5) DS-RoP). Communication on implementation cannot be prohibited, even by the Ministerial Council, under the independence rule of Article 70 of the Treaty. Moreover, there is no link at all to reciprocity.

Article 3(1) **Tasks of the European Commission**

The provisions, apparently mirroring the Secretariat's obligations under the previous Article, are void of any meaning, as the European Commission does not enforce Energy Community law against Contracting Parties (lit a). It is not listed in Articles 91 and 92 of the Treaty as initiator of dispute settlement cases, nor is it addressed by the DS-RoP. To the extent the European Commission may actually have something to inform about (lit b and c), the provisions using "may", hence at the full discretion of the subject to that provision (the European Commission) and thus not reflecting the "shall" provisions the draft puts on the Secretariat. Moreover, confidentiality requirements are only reflected on the side of the European Commission, but not on the Secretariat.

Article 3(2) and (3) **Tasks of the European Commission**

This paragraphs actually relate to the switch-on and switch-off mechanisms in draft Article 25'and should form the core of the proposed Procedural Act. Since the Secretariat, and not the EU Commission, is tasked to "*review the proper implementation by the Parties of their obligations under the Treaty*" (Article 67), it would be very useful for the EU (through the Commission) to request information on whether the Contracting Party in question is implementing and enforcing effectively its obligations under the Treaty. It could also require information and assistance by the Secretariat related to assessment of potential breach of the competition and environmental *acquis* in case the particular rights and obligations are to be "switched-on" or "switched-off" only in the context of the reciprocity.

Title III **Specific rules for matters related to competition law and State aid**

To comply with competition law and State aid rules is one of the key duties of Contracting Parties (Articles 18 and 19). The obligation is not only one to harmonize competition and State aid rules with

those of the European Union's (as under bilateral agreements between Contracting Parties and the Union), but to apply it in each individual case. Unlike in the European Union, there is no central enforcement of competition and State aid rules. This is done by each Contracting Party's own authorities. As a consequence, competition and State aid law enforcement in the energy sectors in the Energy Community is notoriously weak. As a matter of fact, this weakness was and is one of the key obstacles to full implementation of the European acquis in the Contracting Parties and on creating equal conditions between them and the Member States.

A Contracting Party not or wrongly applying Articles 18 and 19 of the Treaty is in a state of non-compliance with its obligations under the Treaty, which the Secretariat can and has been bringing to the Ministerial Council under Articles 91 and 92 of the Treaty. In this sense, the Secretariat acts as the only effective line of defense against non-respecting competition and State aid rules. Cases are normally initiated upon complaints by individuals or NGOs. They include cases concerning state guarantees for the financing of new coal-fired power plants, often by Chinese investors, which are clearly not in line with the European decarbonization and investment agenda. The rules proposed by the draft Procedural Act weaken enforcement in the area of State aid and competition law rather than strengthening it, by confusing roles and procedures.

There is also no need to create a special regime for enforcement cases in State aid and competition, as they follow the same rules as other infringement cases in the Energy Community, and are often linked in the sense that a competition or State aid law infringement also violates the Third Energy Package rules. Draft Article 6(2)-(5) and (8) is without any additional value or justification, the comments made on Article 2 apply.

Article 5(1) Tasks of the Contracting Parties

This provision reflects the Commission's proposal for Treaty amendments (new paragraph 3 for in Article 18). If it were adopted, the paragraph does not any additional value.

Article 5(2) Tasks of the Contracting Parties

This provision confers obligations under the Energy Community Treaty towards an institution of one of the Parties (the European Commission), and a complementary right of the European Commission to receive unspecified information concerning State aid decision. This turns the institutional architecture of the Treaty completely up-side down. The institution charged with enforcement by the Treaty and the DS-RoP is the Secretariat, which actually is independent from Parties (unlike the European Commission, a non-Energy Community institution). The reason for which the European Commission would need and use this information is unclear, as it cannot follow up by enforcement action. It is probably for political purposes in the context of bilateral negotiations with individual Contracting Parties. If the European Commission wants to put obligations such as the ones envisaged on Contracting Parties, these bilateral agreements provide the correct framework.

Article 6(2) to (5), (8) Tasks of the Secretariat

See comments on draft Article 2(1) to (5)

Article 6(6) Tasks of the Secretariat

This Article largely overlaps with the existing DS-RoP and creates confusion on the applicable rules.

Article 6(7) Tasks of the Secretariat

The purpose of this draft provision is unclear, it is likely to confuse and bias the purely legal enforcement procedures under Article 91 by political meddling from the Commission. The appropriate

place is again the bilateral agreements with Contracting Parties. It also encroaches upon Article 70 of the Treaty, ensuring the independence by the Secretariat (also) in enforcement matters. As a matter of detail, serious assessments of competition and State aid cases cannot be performed within two weeks.

Title IV Final Provisions

A clause giving general preference to the draft Procedural Act over the existing legal framework of the Energy Community pertaining to enforcement is not implementable. The DS-RoP contain a system of very detailed procedural rules, which are likely to be superseded and affected by many of the provisions of the draft Procedural Act, given also the latter's vague and blurry language. This creates the need for interpretation and dispute in individual cases, and hence legal uncertainty running counter the very objective of Procedural Rules.