

Background document

An Energy Community for the Future: Energy Community Treaty Amendments

Following the adoption of the High Level Reflection Group's Report "An Energy Community for the Future" on 11 June 2014, the Energy Community embarked on a path of reform. Since then, substantial reforms have been achieved - establishment of the Parliamentary Plenum, adoption of new acquis in the area of environment, strengthening the role of civil society, making existing institutions more efficient, improving effectiveness of dispute settlement, etc. These reforms were adopted by way of a procedural act of the Energy Community Ministerial Council. However, a number of reforms, primarily dealing with the creation of an EU/Energy Community level-playing field and better Treaty implementation, are yet to be adopted and are currently under negotiation. Some of these reforms require amendments to the Energy Community Treaty.

a. Why and how to create a level-playing field – closing the legal and regulatory gap

Until now, legislation in the Energy Community has been adopted under Title II of the Treaty, which allows for the adoption of legislation applicable to the Energy Community Contracting Parties only and excludes any obligations on EU Member States. This has created a number of obstacles e.g., Third Energy Package Network Codes¹ are not applicable on the borders between EU Member States and Contracting Parties. The removal of such barriers is a precondition for the creation of a truly integrated Energy Community energy market.

Another issue is that while network codes are directly applicable in the European Union, the current Energy Community set-up requires their subsequent transposition into national law. Given the dense and detailed technical content of regulations like network codes, any transposition by Contracting Parties in their national legal order risks destroying their systematic consistency and thus endangers the goals they pursue. Transposition also entails major delays.

Giving direct effect to Regulations also in the Energy Community (meaning they come into force following adoption by the Energy Community Ministerial Council upon a deadline mutually agreed) is the only way to make network codes equally effective for Contracting Parties and ensure homogeneity in the pan-European market. As was the case for some EU Member States upon their accession to the European Union, direct applicability may entail the need to amend national constitutions.

An additional concern is the time gap between legislation being adopted in the European Union

¹ Network Codes are technical rules regulating the operation of electricity networks and gas pipelines, i.e. rules on who may use such networks to transport energy across borders and under which conditions. These rules address aspects of network security and interconnection, as well as the access of persons other than the owners of the infrastructure ("third party access").

and the Energy Community, which sometimes results in major delays and outdated legislation being applicable in the Energy Community. New *acquis* is often complementary to the existing one, facilitating its application and bringing additional benefits at a relatively little implementation burden. A new provision in the Treaty could envisage that new *acquis* be earmarked for possible extension to the Contracting Parties already at the very beginning of the EU legislative procedure.

A completely new challenge is ensuring that one single institution has the competence on the territory of the whole internal energy market. Some pieces of the *acquis* simply cannot be implemented if not being under the responsibility of only one single institution. The first such example is identification and penalization of insider trading and market manipulation in wholesale energy markets. This is currently the task of ACER on the territory of EU, while no such body exists on the territory of Contracting Parties to the Energy Community Treaty. Practically it is not possible to establish a parallel institution to be responsible for the Contracting Parties only. Therefore, a new provision of the Treaty is needed to expand the competence of the EU institution over the entire Energy Community with a proper involvement of the authorities of the Contracting Parties.

b. Improving Treaty implementation in line with EU standards

In spite of the many successful reforms under the Energy Community framework, an implementation deficit still remains in terms of transposition and implementation of the *acquis* in certain areas. On a number of occasions, the existing dispute settlement system has failed to address serious and persistent breaches of Energy Community law. To improve the implementation of European law in and by the Contracting Parties, reform proposals currently being discussed aim at following the EU model for enforcement as close as possible as only parallel obligations and enforcement standards can ensure a homogenous pan-European energy market as envisaged by the Treaty. This is also important in terms of equal treatment between Contracting Parties and EU Member States.

The European Union's enforcement model is characterized by direct applicability of regulations, centralized enforcement of competition and State aid law, judicial decision-making in infringement cases and a de-politicized sanction regime for cases of non-compliance based on financial penalties. However, the positions expressed by various Contracting Parties suggest that not every Contracting Party is prepared to accept these standards at this point in time. The Secretariat proposes those Contracting Parties who wish to take advantage of a full level playing field with the EU to be able to opt also for the EU's implementation and enforcement standards via a separate Annex to the Treaty.

c. Reflection of recent developments

The Treaty needs to be adapted to take into account developments that happened since the Treaty was designed some 12 years ago. One such example is the replacement of the Kyoto Protocol on climate change by the Paris Agreement. Another is that the Energy Community Treaty envisages only two Fora (gas and electricity), while four already function in practice. Widening of the scope of the work of the Energy Community also brought the need to expand the definition of so-called Network Energy etc.