

## **Comments on draft Procedural Act proposed by the EU Commission related to reciprocity under Energy Community Treaty by North Macedonia**

### Amendments to the Energy Community Treaty related to reciprocity

One of the main reasons for amending the Energy Community Treaty and ensuring a homogenous pan-European energy market as envisaged by the Treaty, besides improving the enforcement system was **introducing reciprocity among the Contracting Parties and the EU and its Member States**. This entailed the need to amend the Treaty in order to ensure that EU legislation incorporated in the Treaty under Title II of the Treaty can create implementation duties not only for Contracting Parties (including vis-à-vis Member States) but also **for the EU (and its Member States) vis-à-vis the Contracting Parties**.

The wording on the reciprocity clause proposed by the European Commission is still subject to negotiations. It was agreed however that such a clause should be included in Title II of the Treaty, together with a new Annex to the Treaty containing legal acts and selected provisions for which future measures creating mutual obligations under the amended Treaty could be adopted. The European Commission's proposal proposed a complicated procedure in which EU will have power to unilaterally determine both, when to enact and when to suspend mutual rights and obligations. For enacting such rights the EU will verify if certain Contracting Party sufficiently demonstrates the effective implementation and enforcement of its obligations under the Treaty, and if a Contracting Party is not implementing and enforcing effectively its obligations under the Treaty, it will suspend those rights.

The EU Commission for enacting and suspending the mutual rights and obligations will have to rely on the Secretariat's assessment - this is the only institution under the Energy Community Treaty tasked to "*review the proper implementation by the Parties of their obligations under the Treaty*".<sup>1</sup> Therefore, **the proposed Procedural Act should deal only with implementing the Article 25', i.e. the reciprocity article**. The information flow between the EU Commission, the Secretariat and the Contracting Party in question shall **only** be relevant in the context of the reciprocity mechanism.

However, on 17 September 2019, a draft Procedural Act 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*". As from the title, but even more from the provisions in the draft Procedural Act, it appears that the European Commission is proposing an act that covers topics beyond cooperation and exchange of information for the purpose of assessment related to ensuring reciprocity. The draft also affects the institutional framework of the Energy Community Treaty within the meaning of Article 218(9) TFEU and it discriminates against other Parties within the meaning of Article 7 of the Energy Community Treaty.

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<sup>1</sup> Article 67(b) of the Energy Community Treaty.

The Procedural Act shall focus on the information flows between the EU Commission and the Secretariat **only for the purpose of assessing whether certain rights and obligations shall be enabled towards the Contracting Party in question**, and should give EU Commission the right to request from the Secretariat information on:

- whether a dispute settlement case related to the rights and obligations that should be “switched-on” has been initiated,
- whether there is a complaint and potential infringement pending related to the rights and obligations that should be “switched-on”, or
- what the status of implementation and compliance with the specific provision of the *acquis* subject to reciprocity is.

In case the mutual rights and obligations have been “switched-on” but the Contracting Party is not sufficiently complying with its obligations under the Treaty in relation to that particular reciprocal right, the Secretariat should have the obligation to inform the EU Commission **only for the purpose of assessing whether certain rights and obligations shall be “switched-off” towards the Contracting Party in question**:

- if a dispute settlement case related to the rights and obligations that should be “switched-on” has been initiated,
- if the Secretariat based on a complaint or based on *ex officio* assessment finds out that the Contracting Party in question fails to comply with the rights and obligations that should be “switched-on” and intends to initiate dispute settlement case, or such failure to comply is to be reported in its implementation reports.

### Breaches of existing Energy Community rules

In both cases, when it comes to “switching-on” and “switching-off” the Dispute Settlement Rules (DSR) and the procedures / time limits envisaged therein shall apply. Article 7 of the draft Procedural Act simply giving precedence of this act over all other procedural rules is not in line with the principle of transparency, clarity and legal certainty.

By Article 2 of the draft Procedural Act, the Secretariat is required to “*submit any reasoned request for [dispute settlement decision] by the Ministerial Council **immediately** and in any case **at least 3 months before** the envisaged Ministerial Council, **including** as regards non-compliance by a Contracting Party or the EU with obligations under [draft] Article 25’ of the Treaty.*” **This is not in line with deadlines under the DSR**, which provide for preliminary procedure in Article 91 cases and a period of five months in order to enable the Advisory Committee to deliver its opinion, as well as for a period of two months in Article 92 cases. It takes away from the Contracting Parties to defend themselves and to be heard in infringement actions – one of the basic rights granted by international law and the Energy Community DSR which provide for “ample opportunity to be heard at all stages of the procedure”.

When it comes to assessment by the EU on potential breaches of **competition or environmental *acquis*** provided that mutual rights and obligations are enabled, the EU Commission could again ask for compliance assessment to be performed by the Secretariat,

or in case it performs such assessment by itself (since based on the proposed amendments to Article 18 of the Treaty, the Contracting Parties would be required to send the final State aid decisions to the EU Commission as well), it should inform the Secretariat on its findings. Already giving right to one Party to the Treaty (that is the EU represented by the EU Commission) to assess compliance of other parties to the Treaty is as such problematic, because the DSR would require a decision on compliance to be adopted by the Ministerial Council.

Moreover, also in **competition and state aid cases**, completely setting aside the DSR procedural rules and timing provided for therein, the draft Procedural Act requires the Secretariat to “*provide information about the assessment of competition and State aid cases*” within “**at latest two weeks**” from the Commission’s request. Such provision denies the seriousness of assessing compliance with any provision under Energy Community law and even more assessment of compliance with competition and state aid *acquis*. Since the Commission will be receiving the national state aid decisions from the Contracting Parties as well, and because the purpose of its assessment would be related to “switching-on” and “switching-off” Contracting Parties by the EU, it would be logical if it performs such assessment (or screening within two weeks) and if it requires the Secretariat to assist and provide details related to the problem in question.

**The draft Procedural Act for the purpose of Article 25’ cannot and shall not set aside the whole procedure of the DSR including its timelines, and shall not take away the Contracting Parties their right to be heard in infringement actions by shortening the deadlines and time limits extensively.**

The proposed draft Procedural Act relates not only to exchange of information and cooperation between the European Commission, the Secretariat and the Contracting Parties in relation to the reciprocity mechanism, but also with obligatory exchange of information in relation to the “**compliance with Treaty obligations**”<sup>2</sup> in all cases “**including with the reciprocity mechanism under [draft] Article 25’ of the Treaty.**”<sup>3</sup> This obviously goes well beyond the scope necessary for ensuring reciprocity under the draft amendments to the Energy Community Treaty by Article 25’ and relates to all cases initiated under Article 91 and 92 of the Treaty irrespective of the reciprocity mechanism.<sup>4</sup> such **extension of the scope of the draft Procedural Act cannot be justified.**

**The proposed draft Procedural Act fails to cover any assessment required to “switch-on” and enabling mutual rights and obligations towards a Contracting Party, which is one of the few reasons for which the Contracting Parties are still negotiating Treaty amendments.**

Instead, it only focuses itself on infringements, non-compliance and potential breaches giving rise to “switching-off”.

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<sup>2</sup> See proposed title of the draft Procedural Act, as well as Title II.

<sup>3</sup> See Article 1(1) of the draft Procedural Act.

<sup>4</sup> See the limited acts and provisions proposed to be included in Annex to the Treaty giving right to reciprocity.

The draft Procedural Act contains an article that its provisions “*adjust and harmonise existing rules and procedures concerning the application and interpretation of Treaty obligations.*” Article 7 of the proposed draft Procedural Act is neither sufficient nor clear on what needs to be adjusted. The interpretation of the Treaty is up to the European Court of Justice or the Ministerial Council in a manner and procedure defined by the latter’s Rules of Procedure.

To this extent, the draft Procedural Act **is in conflict with Article 94 of the Treaty**, which imposes an obligation on harmonious interpretation to the Treaty institutions only of “*term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance.*”

#### Breaches of Article 70 of the Energy Community Treaty and of DSR

Article 2(4) of the draft Procedural Act imposing an obligation to the Secretariat to “**consult ex-ante the European Commission** without delay on any new or updated guidance, policy document or draft replies to referrals from Contracting Parties or Courts and opinions given by the Secretariat pursuant to Article 2 of the Rules of procedure on dispute settlement,” is in breach of Article 70 of the Treaty based on which the Secretariat **is not allowed to seek instruction from any Party (including the EU)**. Furthermore, information related to Article 2 of the DSR is not related with reciprocity under Article 25’ and such link should first be established.

Article 2(5) of the draft Procedural Act **prohibiting** the Secretariat to issue “*any public statement on its views on the legality of the national measure in question, including from any relevant exchange of views with the authorities in the concerned Contracting Party, until when the Ministerial Council has taken a decision on the matter*” **is in conflict with the DSR, transparency and legal certainty:**

- when the Secretariat initiates a case against a Contracting Party it has to do so on the basis of legal assessment and “*in response to alleged non-compliance*”<sup>5</sup> and to follow certain procedure including transparent publications based on the DSR such as:
  - Article 12 – initiation of a case has to be published;
  - Article 29(5) - reasoned request has to be published;
  - Article 31 – the Secretariat shall notify the world (Parties and Participants, the Regulatory Board, the Advisory Committee as well as persons and bodies participating in the preliminary procedure) about a reasoned request and any reply to it;
- The Secretariat has obligation to **communicate the documents** - Opening Letter, Reasoned Opinion, Reasoned Request – with the authorities of the Contracting Party in question;

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<sup>5</sup> Article 12(2) DSR of 2015.

- The Secretariat has right to **request information** at any stage of the preliminary procedure from any authority of the Contracting Party,<sup>6</sup> as this is the manner in which we as Contracting Parties are expressing our position on the case;
- The Secretariat has right **to enter in bilateral negotiations** with the Contracting Party and based on those negotiations it has the right to suspend and discontinue dispute settlement procedure at any time<sup>7</sup> - used extensively for the benefit of the Contracting Parties as **many of the cases are closed** and do not reach the Ministerial Council - the **Contracting Parties are assisted** by the Secretariat in reaching compliance exactly through such bilateral negotiations;
- Article 6(6) of the draft Procedural Act imposes prohibition to the Secretariat to express itself on the **legality of competition and State aid measures**, which would deny the rule of law within the Energy Community;
- The Secretariat in dispute settlement cases is a party to a case and participates to:
  - the Advisory Committee (Article 32(4) – a public hearing held in front of the Advisory Committee),
  - the Permanent High Level Group (Article 33(4) – the PHLG hears both parties, the Secretariat and the Contracting Party in question and decides on whether the reasoned request can be “A” point on the Ministerial Council agenda or not).

#### Lack of clarity and legal terminology

The draft Procedural Act contains unclear and not defined, not legal terminology and vague concepts such as:

- “*shall inform the European Commission **already at an early stage of the process***” without specifying which process it refers to;
- “**substantive complaints from private bodies**” – not clear what substantive means;
- the Secretariat shall communicate information to the EU Commission “**directly**” – unclear what directly and indirectly would be;
- “*without the need for the Commission to ask for access to the file*” – fails to respect the existing Procedural Act on access to the file,<sup>8</sup> but also fails to differentiate between a situation when access to the file is required and communicating information related to a case that has not been initiated at all;
- “**upcoming reasoned requests**” on which the EU Commission shall inform the Secretariat – unclear if this only covers cases where the EU as a Party intends to submit a reasoned request against a Contracting Party (which has never happened until now);

#### Conclusions

The draft Procedural Act envisaged under Article 25’ of the Treaty shall only be prepared and drafted for the sole purpose on ensuring that the EU is sufficiently informed to take the right decision on “switching-on” or “switching-off” certain rights and obligations towards one or more Contracting Parties. Such an act shall actually help the EU in making and informed and correct decision. Having the Secretariat as an independent institution under the Energy Community Treaty that is tasked to “*review the proper implementation by the Parties of their*

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<sup>6</sup> Article 16(1) DSR of 2015.

<sup>7</sup> Article 19 DSR of 2015.

<sup>8</sup> PA2018/06/ECS-EnG.

*obligations under this Treaty*” and which is already performing compliance assessment and acting under the well-established Dispute Settlement Rules already since 2008, should be beneficial and useful for the EU. The Procedural Act should only ensure that there is proper information flow between the Secretariat and the EU Commission for implementing Article 25’.

Instead, the draft Procedural Act is not improving such communication and is unjustifiably infringing the provisions of the Energy Community Treaty as well as completely disregards and conflicts the Dispute Settlement Rules and the rules of procedure of the PHLG and the Ministerial Council. Instead of amending them to the extent necessary (if at all necessary because those procedures function well and have been regularly updated), it only stipulates precedence of this draft rules over all the others without specifying any particular provision or procedure that requires adjustment.