

## Extending the Energy Community Treaty to include the rules on public procurement

(Recommendations of the study commissioned by the Energy Community Secretariat)

### Background

The Ministerial Council of the Energy Community<sup>1</sup>, on its 13<sup>th</sup> meeting held on 18 October 2015 adopted the General Policy Guideline which represented the political consensus reached concerning a Roadmap for Reform of the Energy Community. One of the topics was to discuss the proposals to implement the *EU public procurement acquis* in the Energy community.

Following the Report of the High Level Reflection Group<sup>2</sup> („An Energy Community for the Future“), the 41st PHLG discussed the extending the Energy Community Treaty to include the rules on public procurement. On that occasion, the PHLG took note of the following options for discussion:

- (1) Incorporation of the entire set of the EU rules on public procurement in the Energy Community Treaty; or
- (2) Incorporation the energy related parts of the EU rules on public procurement in the Energy Community Treaty; or
- (3) No incorporation of EU rules on public procurement in the Energy Community Treaty.

The PHLG called on the Commission and the Secretariat to propose a way forward already in 2016. Contracting Parties stressed that a new Directive shouldn't introduce new obligations that would shorten the deadlines for transposition of *acquis* in comparison to existing bilateral agreements.

In line with this, the Energy Community Secretariat (ECS) launched the study with the aim obtain competent assessment of the current status of the procurement laws and rules in the Contracting Parties, relevant for the activities imposed by the implementation of the, the compliance of these acts with the provisions of the relevant EU Directives in force as of 18 April 2016 and the efforts required to harmonize these acts with the provisions of the *acquis* including the associated costs and benefits from harmonization.

The study examined the following EU acts referring to Public Procurement [PP] and concessions, and their relevance for the purpose of the Treaty:

1. Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC ("**Classic Directive**")
2. Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ("**Utilities Directive**")
3. Directive 2014/23/EU on the award of concession contracts ("**Concession Directive**")

Given the importance of the Remedies Directives (Remedies Directives 89/665/EC and 92/13/EC) for the implementation of the public procurement (PP) Directives and the

<sup>1</sup> For more information, visit: [http://www.energy-community.org/portal/page/portal/ENC\\_HOME/ENERGY\\_COMMUNITY](http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY)

<sup>2</sup> For more information, visit: [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/ENERGY\\_COMMUNITY/Legal/HLRG](https://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/HLRG)

Concession Directive, the assessment and recommendations of the study covered relevant provisions of the remedies directives as well.

The final goal of the Energy Community is to identify and remove obstacles for market competition and market integration, stemming from the rules governing the public procurement in the network energy business (electricity and gas) and in particular those providing public services related to the network energy in the Contracting Parties.

The study was conducted by the consortium lead by ROCAS Law Firm with Bird&Bird and Planet.

## Findings and assessments

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The Consultant's general conclusions are:

- a) all CPs already have certain level of implementation of PP and concession rules, thus any legislative amendments would consist of their upgrade;
- b) harmonisation of these rules between the CPs (and eventually with the EU MSs) is important for development of competition from other CPs and the EU MSs and
- c) ensuring implementation of the Classic Directive (CD), Utilities Directive (UD) and Concession Directive (CoD) in practice may be even more important than mere legislative amendments.

There is a common understanding of the importance of the PP for functioning of the market and for obtaining quality services and goods at fair price.

However, the significance of the PP rules is often underestimated or misunderstood for the network energy market.

Almost all CPs have included the UD definition of contracting entities in their legislation. Some CPs produce lists of energy entities obliged to apply the PP procurements.

As for the exclusions and thresholds, in most CPs the situation is satisfactory: low thresholds and limited exclusions. Deadlines for the submission of the offers are too short in some CPs for the values above the UD thresholds. Two CPs apply domestic preferences principle, as a temporary measure for a limited period.

Most CPs should allow innovative techniques and instruments for the PP procedures. In some CPs the limitation of the in-house procurement exclusions is not properly understood and implemented. None of the CPs has introduced competitive procedure for granting support scheme for energy from renewable sources. The sustainability criteria, such as climate and environment protection, energy efficiency or social cohesion have yet to be introduced as evaluation criteria in some CPs.

Finally, the Consultant evaluated monitoring and remedies as the matters of crucial importance, in particular: whether the monitoring authority is independent or is part of the Government establishment; whether the initiation of the appeal procedure triggers the suspension of the PP procedure, whether there are both pre-judicial and judicial procedures; and what the deadlines for submission of the appeals are.

Six out of eight CPs have signed the Stabilisation and Association Agreement while Moldova and Ukraine have signed Association Agreements and DCFTA.

Five CPs have signed the World Trade Organisation Government Procurement Agreement (GPA).

## Recommendations

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### **Option I** Incorporation of the entire EU rules on public procurement in the Energy Community Treaty;

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The best option is immediate, simultaneous and harmonised implementation of the PP Directives, particularly the Utilities Directive, in all CPs. The fact that some CPs have already planned such laws for adoption in 2017 and 2018 should help that the proposed implementation is within their legislative plans. Taking into account that other CPs have planned the gradual implementation of the 2004 PP Directives until 2021, these two procedures may be overlapping and bring additional complexity. Although there is no substantial discrepancies in the 2004 and 2014 PP Directives, as they both work on the exactly same legal basis and structure, the implementation plans should be carefully examined and coordinated in the EnC to ensure level playing field for all participants in any Contracting Party.

Cooperation and coordination between CPs is essential for the implementation of the PP rules in energy and could have an immediate impact on the liberalisation of the energy markets. It may include cooperation, exchange of information and networking between the relevant authorities of the CPs, such as energy regulatory authorities or procurement monitoring authorities. Development of a joint portal for energy procurements above certain threshold is one example of cooperation in implementation of PP rules in energy sector.

An Independent Remedies Authority on the Energy Community level would be necessary in any case to monitor the amendments to the respective PP regulation and their implementation in general and to provide respective recommendation or even initiate an infringement procedure.

### **Option II** Incorporation the energy related parts of EU rules on public procurement in the Energy Community Treaty

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The PP Directives were developed to work as a whole, providing the contracting entities range of possibilities as regards the procedure, techniques and instruments which would suite best the specific procedure. All the provisions are correlated, e.g. one type of procedure requires certain deadlines, which may be reduced in electronic submission is accepted. In addition to the Directives, in order to secure the implementation we also recommend the implementation of the Remedies Directives. Their harmonized and coordinated implementation would be of assistance for creating of a secure business climate providing comfort for economic entities from other CPs to participate.

Main obstacles addressed in the report should be removed through harmonization in regard to: main exclusions from application, low thresholds and short time limits, limited diversity of procedures, techniques and instruments applied in practice, broad exclusion in case of in-house contracts, broad grounds for the amendments of a PP agreement, insufficient remedies. Several additional issues are analysed and necessary amendments recommended such as promotion of environmental and other criteria; no prioritizing of domestic supplier; electronic self-declarations for bidders (ESPD); timing for fulfilment of other international obligations for harmonisation of PP rules (SAA, GPA and DCFA) and cooperation on the EnC level.

The report covers both PP directives (CD and UD) and CoD, however the Utilities Directive is directly relevant for energy market in the strict sense of this term. Since related public procurements are excluded from the application of the CD, the EnC may consider adoption of only the UD (supplemented by the provisions of the CD which are directly referred to by the UD).

In order to establish the necessary consistency in the implementation of public procurement rules in the Network Energy, establishment of a Single Independent Remedies Authority on the Energy Community level would also be in compliance with the general tendency to opt for alternative dispute resolution means.

### **Option III** No incorporation of EU rules on public procurement in the ECT

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Certain effect may be achieved by a soft law approach, i.e. through recommendation issued by the authorized body of the EnC to all CPs to implement the PP procedures to the selected energy related procurements. That would have the most immediate effect and, depending on other market conditions, might trigger some competition on national level.

As a minimum, it is recommended to establish a network of officials in charge for the PP in energy sector whose task would be to coordinate the implementation of the Directives and to report to an independent procurement authority.

However, for actual cross border competition attractive for new entrants, the Consultant finds it necessary to have simultaneous implementation based on reciprocity, coordination and harmonization, preferable with the focus on energy sector and within the EnC structure. Therefore, the soft law approach may be considered only as an intermediate (transitional) step.

### **Summary**

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Minimum forms of harmonization are:

- i) on the level of regulation (harmonisation of legislation) such as agreed EnC level thresholds, coordination of the procedures, issuing, collection and recognition of documents issued by other CP;
- ii) on the implementation level, such as providing one portal on which all energy procurements above certain threshold would be published; and
- iii) on monitoring level, through coordination of monitoring authorities in order to assist them in harmonisation of their practices; to review the complaints of energy operators from other CP participating in a cross-border energy procurement and to consult with the respective CP's authority or its contracting entity.

The Report recommends full harmonisation of all public procurement and concession rules, as provided in the respective Directives, on the EnC level. Such harmonisation would enhance cross-border competition, may automatically resolve the issues of reciprocity and close cooperation in procurement procedures.

In case of incorporation of the entirety of the PP directives, significant adaptations will be required, considering that the EnC CPs are not submitted to the legal framework of European institutions.

Such adaptations are proposed in the Consultant's Report, with necessary amendments to the national legislation for each CP.

The Secretariat submits this summary report to the PHLG for further consideration and discussion.