

The extension of the Treaty's duration – next steps

According to its Article 97, the Treaty establishing the Energy Community *"is concluded for a period of 10 years from the date of entry into force. The Ministerial Council, acting by unanimity, may decide to extend its duration. If no such decision is taken, the Treaty may continue to apply between those Parties who voted in favour of extension, provided that their number amounted to at least two thirds of the Parties to the Energy Community."*

The content of that provision may be summarized as follows: Any extension of the duration of the Treaty depends on a positive decision by the Ministerial Council. This decision must be supported by at least 2/3 of its members. In that case, the Parties not voting in favour will automatically exit the Energy Community by 1 July 2016. Continuation of the Treaty in its present membership composition requires a decision by unanimity. If, however, no 2/3 majority is achieved or if no draft decision is tabled on time for the Ministerial Council, the Energy Community will cease to exist.

In the past, many Parties of the Treaty have on several occasions reaffirmed their commitment and determination to continue membership in the Energy Community also post-2016. As far as the European Union is concerned, the European Commission, in a report of 2011, characterized the Energy Community as a *"success story"*. It considered *"that the progress made so far and the dynamic nature of the work carried out ... indicate that the Energy Community is called to extend its existence beyond 2016."*¹ Extension of the Energy Community was later prioritised by the Commission again.² The Council of the European Union, on 24 November 2011, also called for *"extending the Energy Community Treaty beyond the year 2016"*³.

Assuming that there is a general political consensus for continuation of the Energy Community beyond 2016, three scenarios are possible:

- a simple extension of the Treaty's duration by a Ministerial Council Decision;
- an extension of the Treaty's duration going hand in hand with amendments to the Treaty, that can be
 - only most necessary technical and editorial amendments or
 - improvement of the features, i.e. some substantial amendments to the Treaty.

Secretariat's view is that a simple extension may be considered the easiest way forward as it would avoid any discussion on the substance of the Treaty, such self-imposed limitation would also constitute a missed opportunity. Despite the success of the Treaty in general terms, the failure to achieve true and thorough reforms in the Contracting Parties has been and continues to be deplored by the institutions and by third parties. Many key expectations triggering the so-called Athens process – reform of market structure, cost-reflectivity of prices, creation of a favourable investment climate, regional integration, improvement of the environmental situation etc. – must still, seven years after the Treaty's entry into force – be considered unfulfilled. This failure can not only be explained by lack of will and ambition in the Contracting Parties and/or the institutions; it is also intrinsically linked to a non-adequacy of the institutional architecture of the Treaty. This concerns in particular the enforcement of the far-reaching commitments the Parties accepted under the Treaty. Unlike in the Agreement on the European Economic Area, the other multilateral treaty envisaging the implementation of EU *acquis communautaire* by non-EU countries, the enforcement mechanism falls short of the standards applicable within the

¹ Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC, 10.3.2011, COM(2011) 105 final.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on security of energy supply and international cooperation - The EU Energy Policy: Engaging with Partners beyond Our Borders, 7.9.2011, COM(2011) 539 final.

³ Council conclusions on strengthening the external dimension of the EU energy policy.

European Union. In 2011, the European Commission demanded that the Energy Community's *"regulatory scope should be progressively extended and combined with more effective implementation and enforcement."*⁴

One of the issues regarding the extension of the Treaty, indirectly related to potential amendments, is also the donation of the Republic of Austria, paying for the premises of the Secretariat in Vienna. Republic of Austria is asked to continue with the existing kind support also after 2016.

Secretariat identified a number of issues pertaining to governance under and substance of the Treaty where it believes an improvement is needed, namely:

- Lack of flexibility of the concept of 'network energy';
- Shortcomings in the competition and State aid *acquis* lacking procedural and institutional rules;
- Need to update the Title III (geographic scope, 3rd Energy Package);
- Lack of harmonization measures for market designs and prices;
- Making full use of the four fundamental freedoms of the internal market;
- Lack of possibility for participation of the Regulatory Board in ACER;
- Inadequacy of Treaty enforcement.

If the Energy Community is expected to live up to its full potential and to create a true pan-European community of shared laws and principles, a clearer vision for the coming years and decades is indispensable. Seven years after its entry into force and three years before its expiry marks the right moment to discuss how to increase the efficiency of this organisation, based on the experience made and the challenges ahead. This discussion, if so decided, should take place in an open fashion within the institutions of the Energy Community, timely and thoroughly, to make the Energy Community fit for the years and challenges to come.

⁴ Commission Communication: The EU Energy Policy: Engaging with Partners beyond Our Borders, 7.9.2011, COM(2011) 539 final.