

Secretariat's proposal for the adoption of new acquis in 2015

The legal gap between EU and Energy Community Contracting Parties (EnC CPs) is widening. The basic reason is that already adopted acquis doesn't follow the changes agreed in EU and so EnC CPs implement sometimes already outdated directives and that the scope of the Energy Community acquis doesn't encompass some parts of a legal framework that are crucial to complete the existing legal framework.

Therefore the Energy Community Secretariat proposes PHLG to discuss and endorse the start of the adoption process of the following acquis in 2015:

- 1. Regulation 994/2010 on security of gas supply,**
- 2. Directive 2012/33/EC, which amends already adopted Directive 1999/32/EC on sulphur content of fuels,**
- 3. Directive 2014/52/EU on environmental impact assessment (replacing already adopted Directive 85/337/EEC which was in EU repealed long ago by Directive 2011/92/EU),**
- 4. Directive 2014/23/EU and 2014/25/EU on public procurement and concessions (only for the energy area),**
- 5. Decision on milestones of the implementation of Directive 2009/119/EC on Oil Stocks,**
- 6. first set of Network Codes**

JUSTIFICATION

1. Regulation (EU) 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC

- The main purpose of the Regulation is to introduce sufficiently harmonised security of gas supply standards taking into account Europe's growing import dependence of natural gas.
- Implementation of the Regulation reduces risks of unilaterally applied measures of one Member State (or, consequently, a Contracting Party) in increasingly interdependent internal gas market and fosters solidarity and integration in an emergency.
- Since the EU Member States and the Contracting Parties share the same infrastructures for gas supply, with adoption of the Regulation in the EnC legal framework, it is to expect a more effectively respond to the disruptions.
- The Regulation has repealed inefficient Directive 2004/67, which did not pass the 2009 security test (the Ukraine-Russian gas dispute). The EC 2014 report says that experience with the application of Regulation 994/2010 indicates clear improvements in the EU security of supply situation since 2009.
- The need to increase the level of the security of gas supply in the Energy Community and consequently in Europe has been repeatedly pointed out since 2011 at many Energy Community institutional meetings (MC, PHLG, Gas Fora). The newly established Security of

gas supply group discussed the topic in its meetings in 2013 and 2014 and recommended to the Contracting Parties to implement certain elements of the Regulation. In this context, a study on implementation of the Regulation in the Energy Community (finalised in 2013) was a point of departure for considerations.

- A common characteristic of all Contracting Parties is that, although they are not always connected with each other, each of them is connected at least with one of the EU Member States. Those interconnections are located on the same supply routes: one supply route is Ukraine-Slovakia-Hungary, the second one Ukraine-Hungary-Serbia-Bosnia and Herzegovina, and the third one Ukraine-Moldova-Romania-Bulgaria-the former Yugoslav Republic of Macedonia and Bulgaria-Greece-Turkey. Thus, Member States and the Contracting Parties share the same risks of security of gas supply and could mitigate such risks only under the common institutional and regulatory framework. Recently performed gas stress test recognised this fact as axiomatic when the EC invited the Energy Community to join this exercise.
- Whilst the result of the stress test report clearly shows that cooperation between the Member States and the Contracting Parties is vital for security of supply of gas, it also demonstrates that the Contracting Parties would need a more efficient tool to live up to the EU standards in security of supply and also to assist the EU to deliver the very same standards the Regulation is requesting.
- Contracting Parties would be required to transpose the requirements of the new Regulation in the course of next 4 years. They will have to define protected customers, responsible authorities for security of supply and to perform risk assessment which would show the bottlenecks in the system and propose risk mitigation actions. They will be required to coordinate with each other and neighbouring MS in an emergency or during preparation of preventive plans and to make their emergency plans transparent and as market oriented as possible.

2. Directive 2012/33/EU amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels

- The main purpose of the Directive is to keep track with the recent development regarding regulating the emissions of sulphur dioxide and particulate matter from ships using industrial fuels (heavy fuel oil and gas oil).
- Directive 2012/33/EU consists of a major overhaul of Directive 1999/32/EC as amended by Directive 2005/33/EC. Most of the articles of the Directive were amended by Directive 2012/33/EU.
- As pointed out in the preambles of the Directive, without the measures set out therein, emissions from shipping would soon have been higher than emissions from all land-based sources.
- Directive 1999/32/EC was already amended in 2005 in order to include marine fuels. This amendment, however, has not been incorporated in the Energy Community Treaty. This situation creates a disbalanced situation between EU Member States and Energy Community Contracting Parties, particularly with regard to countries having a coastal area.
- Including the 2012 amendment to the Directive in Energy Community law would create a level playing field between EU Member States and Contracting Parties.

3. Directive 2011/92/EU as amended by Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment

- Directive 2011/92/EU codified Directive 85/337/EEC and its subsequent amendments into a single act. The Energy Community legal framework includes Directive 85/337/EEC as amended by Directive 2003/35/EC. No other amendments to the Directive are included.
- Directive 2014/52/EU amended Directive 2011/92/EU with the aim of simplifying the rules for assessing the potential effects of projects on the environment and paying greater attention to threats and challenges that have emerged since the original rules came into force some 25 years ago.
- The Secretariat, in its implementation reports of the past years, repeatedly pointed out that due to certain shortcomings in their environmental impact assessment procedures, Contracting Parties would need to ensure that the requirements of Directive 85/337/EEC are complied with in practice. Directive 2011/92/EU as amended by Directive 2014/52/EU provides clearer rules for a number of key aspects of environmental impact assessment (e.g. the screening procedure, the quality and the content of EIA reports) which could contribute to achieving that goal.
- The new amendment has a strong public participation dimension by requiring that the grounds for development consent decisions must be clear and more transparent for the public.
- In the case of Contracting Parties where transposition gaps remain in the case of Directive 85/337/EEC, incorporating Directive 2011/92/EU as amended by Directive 2014/52/EU in Energy Community law would provide a possibility for a one-step approach to bring domestic legislation in compliance with the most recent development of EU law.
- Transposition deadline in EU: **16 May 2017**, i.e. 3 years after entry into force – in the Energy Community, a similar approach would ensure that – provided that a decision takes place in the course of 2015 – Contracting Parties would be required to transpose the requirements of the new Directive by mid-2018, which would significantly contribute to closing the legislative gap between Member States and Contracting Parties. Such a decision would also entail a high level of ambition in the environmental domain by following suit with EU law within the period of 1 year.
- Contracting Parties that are at the same time EU candidates have to transpose the requirements of Directive 2011/92/EU as amended by Directive 2014/52/EU in the framework of their accession process.

4. Directive 2014/23/EU and Directive 2014/25/EU on public procurement and concessions (only for the energy area)

The proposal of the HLRG targeted currently applicable public procurement directives:

- Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and
- Directive 2014/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

In 2014 three new directives in the area of public procurement were adopted, repealing the cited directives, and adding new rules in the concession contracts. The scope of the new directives, particularly [Directives 2014/23/EU](#), 2014/24/EU are important to acknowledge market development in the sectors of public interests and to allow efficient competition while observing protection of public interest. The Directive 2014/25/EU is introduced to additionally clarify the unified principles and procedures for concession contracts.

The Directive 2004/17/EC will be repealed with effect from **18 April 2016** by the Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal service sectors (new so-called “Utility Directive”). The new Directive 2014/23/EU shall be transposed in national legislation also by 16 April 2016.

The most important aspects of the new directives is definition of bodies governed by the public law, definition of exclusive rights and special rights and contracts falling under the scope of concession contract.

Therefore, recalling that new directives will come in effect in 2016 and the procedural rules in the Energy Community, **it is recommended to extend the Treaty with the two new directives on public procurement**, including the adjustments thereof as may be necessary to enable not only transposition, but also implementation and enforcement by the Contracting Parties.

The EnC Treaty should extend to the public procurement rules defined in:

- 1) The Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC**
- 2) Directive 2014/23/EU of 26 February 2014 on the award of concession contracts**

In the energy sector, such public procurement rules will bring a level playing field not only in electricity and gas market in their final stage, *i.e.* trade in gas and electricity, but more important in the conditions governing entry of new players in the supply market on production side and harmonization of rules governing network businesses.

Directive 2014/23/EU on the award of concession contract additionally clarifies the unified principles and procedures with the aim to ensure transparency, equal treatment and legal certainty. Its transposition will undoubtedly contribute to ensuring long term security of supply and a level playing field for new entrants in the generation and network businesses

Consequently, taking into account the importance of public procurement rules for the transparency of the allocation of public finances, it is highly recommended to proceed with the broadening of the Treaty by including the public procurement rules as a further commitment for the Contracting Parties in transposing and implementing the EU *acquis*.

5. Oil stocks Directive 2009/119/EC - Draft MC Decision proposal concerning the implementation of the certain rules of Council in the Energy Community

The Ministerial Council Decision (D/2012/03/MC-EnC), under article 2, foresees that further relevant measures regarding the Directive's implementation would be proposed. On this basis, the Secretariat would like to suggest a draft MC Decision concerning the implementation of the certain rules of the Directive 2009/119/EC in the EnC:

- The CPs made a significant and firm commitment towards establishing emergency oil stocks no later than 1 January 2023.
- The remaining 8 years (1 January 2015 – 1 January 2023) to achieve full implementation of the Directive look like a substantial amount of time, but in fact it will require a very proactive approach by CPs in order to have in place all necessary elements for compliance with the Directive.
- The Secretariat assistance provided so far to all CPs has indicated that there is a lack of clear intermediate deadlines for progressing towards full compliance with the Directive. There

is not real progress in Albania, BiH, Moldova, Montenegro and Ukraine as a low priority has been given to the issue of emergency oil stockholding.

In concrete terms:

1. A deadline for establishing of a legislative framework which transposes the Directive would be required. Once it is established, concrete steps can begin toward fulfilling the final objective.
2. A concrete Action Plan by each CP would be required – which will lay out specific tasks to be achieved each year, setting key dates for main milestones which would serve as a basis for assessing progress.
3. Data collecting system will be required to successfully comply with the Directive.
4. In addition, the reporting system in establishing and developing the necessary quality and timeliness of data collection will be required.

With such a proposal, establishing clear intermediate deadlines, the Secretariat is confident that CPs will make more active and measurable progress towards implementing the Directive by the end of 2022.

6. The possible Inclusion of gas related Network Codes in the Energy Community - justification

Network Codes are necessary supplements of Regulation (EC) 715/2009, that is to say executing acts of the 3rd Energy Package which enable its practical implementation. Up to this moment, three Network Codes for Gas have been approved, and the fourth one is in the last stage of approval process.

1) Commission Decision as of 24 August 2012 on amending Annex I to Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks

- The document is popularly referred as Congestion Management Procedures Guidelines or network code (NC CMP), although it is actually an amendment to Regulation (EC) No 715/2009, enforced on 1 October 2013.
- The Decision aims at harmonisation of congestion management procedures in different Member States. The provisions constitute a most effective way to maximising available capacities at all interconnection points in the EU.

- Crucial element for the Energy Community of this Decision is the notion of “interconnection point”. The other Network Codes refer to this definition when defining their scope of implementation. This is another reason why adoption of the Commission Decision on amending Annex I, in the Energy Community, with an adequately adapted definition of “interconnection point” is important.
- The adoption of the Decision will reduce a widening legal discrepancy in regards to the 3rd Energy package enabling integration of the markets (and not their separation at interfaces between MS and CP).
- Also, it will provide the Contracting Parties and their NRAs with an efficient tool to resolve occurrence of long-term contractual congestions by bringing unused capacity back to the market to be reallocated in the course of the regular allocation processes
- The provisions in this Decision need to be implemented during the time horizon spanning from 13 months to almost 4 years

2) Commission Regulation (EU) No 984/2013 as of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009

- Network Code on Capacity Allocation Mechanisms (NC CAM) establishes standardised capacity allocation mechanisms in gas transmission systems, based on an auction procedure for relevant interconnection points within Europe. It also defines the standard cross-border capacity products to be offered and allocated.
- NC CAM sets out how adjacent transmission system operators cooperate in order to facilitate capacity sales including capacity allocation platforms.
- The CAM code is of interest for the Contracting Parties as MSs started early implementation of the Code. It is important for the CPs to enable homogeneous capacity allocation procedures to provide legal certainty to business community (suppliers from inside and outside Europe) to flexibly use the existing transmission systems to ship their gas.
- Selective approach to implementation by the Contracting Parties can be applied – for example, Ukraine can progress faster in implementation of NC CAM as it aims to join relevant ACER GRI pilot projects.
- The provisions in this Decision need to be implemented in 2 years time

3) Commission Regulation (EU) No 312/2014 establishing a Network Code on Gas Balancing of Transmission Networks

- The Balancing Network Code was approved this year. However, TSOs from the Contracting Parties are more familiar with balancing than with congestion management or capacity allocation.
- In order to move towards greater market integration, Balancing NC facilitates gas trading across balancing zones thus contributing towards the development of market liquidity. The Balancing NC sets out harmonized rules on balancing which have the objective to give network users the certainty that they can manage their balance positions in different balancing zones throughout EU in an economically efficient and non-discriminative manner.
- The provisions in this Decision need to be implemented 1 year and half.

4) It is worth to consider here **Network Code on Interoperability and Data Exchange Rules** which adoption in the EU is expected in the first quarter of 2015. This Network Code stands at heart of cooperation between TSOs and would help very efficiently to set up the same rules on the interfaces between a MS and a Contracting Party. Interconnection Agreement is particularly important element defined by this Network Code, together with matching procedures. All those elements are crucial for the Contracting Parties (for example, for Ukraine - this is a main topic in all discussions on reverse flow from Poland, Slovakia and Hungary). Implementation of this Network Code also might help Moldova in establishing a reverse flow from Romania, and for sure will help Serbia in cooperation (and clarification of open issues) with Hungary. Bosnia and Herzegovina, as well as FYR of Macedonia, could also benefit from implementation of this Network Code.

Conclusion

Network Codes in the EU were not enforced immediately; they allow for a transitory period during which the TSOs and the NRAs also amend their national existing rules. Thus, if a PHLG decision were to be taken in 2015 to implement the Network Codes, it would ensure sufficient time to the Contracting Parties and their TSOs to be prepared for actual implementation of the Network Codes, i.e. leaving two or three years (or more if needed and if requested by the CPs) from approval of the Network Code to the deadline for its implementation. Further delay of decision on

the Network Codes implementation will only widen a gap between MS and CP TSOs, and will undermine their efforts to fully apply the Third package.

Transposing exclusively Directive 2009/73/EC and Regulation (EU) 715/2009 in the Contracting Parties, without EU-wide harmonised operational gas network rules – sanctioned within the Network Codes, a level playing field in EU MSs and the Contracting Parties will not be accomplished. This will for sure hamper future infrastructure investments and energy market integration.