THE ENERGY COMMUNITY

A New Energy Governance System

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PREFACE
The Energy Community: Ten Years On

The Energy Community Treaty was signed on 25 October 2005 by the representatives of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, Montenegro, Romania, Serbia and the UN Interim Administration Mission in Kosovo, as well as the European Community. The reason for its creation seemed like a plain and simple deal at the time: attracting urgently needed private investment for energy sector reform and regional integration of energy markets. For the European institutions, however, establishing a new European community for the Balkan peninsula, a region which they could not save from war and disintegration, called for some kind of mythical superstructure transcending the economic rationale. The Energy Community has been immediately labelled as a new version of the 1950s Coal and Steel Community, the founding myth of post-war integration in Europe. Such Western European symbolism was all but lost on the governments of the participating Balkan countries. The interests leading them into the Energy Community were concrete and clearly defined: besides attracting foreign direct investment it was mainly the expectation of accelerating EU accession which convinced them to sign the Treaty. At the same time, they remained sceptical towards regional integration and underestimated the depth of reform required by full implementation of the acquis communautaire binding on them in their capacity as Contracting Parties.

Ten years, one global financial crisis and a growing enlargement fatigue later, not all the Contracting Parties’ expectations have come true. Private investment from Western companies has remained scarce. It is telling that the first major investment in power generation in decades in Serbia, the largest remaining Contracting Party in the Balkans, comes from a public investor from China. Other investments and privatisations were unsuccessful.

In the camp of the European institutions and international financial institutions, disillusion also held sway. As the Secretariat has been continuously noting in its annual implementation reports, transposition of the acquis on energy is well advanced while the degree of true implementation and market structure reform is not yet satisfactory. Among the main reasons for this are the low incomes of energy consumers in the Contracting Parties as well as the weakness of domestic institutions. Against this background, the basic
assumption underlying the Energy Community, namely that rules essentially designed for more developed EU countries are both adequate and sufficient to yield similar results regardless of the specific socio-economic framework of the respective target countries, was optimistic indeed. Moreover, regional market integration is also developing at a slow pace. The report submitted in 2014 by the High Level Reflection Group chaired by Jerzy Buzek recognised the problem and proposed, inter alia, more flexibility in adapting the EU acquis for the Energy Community, better incentives for true implementation and strengthening the Energy Community institutions and enforcement procedures.

With hindsight, the high expectations on both sides of the negotiation table could thus easily have developed into a big misunderstanding and ultimately into a seed of failure of the Energy Community. Yet the opposite occurred. All Contracting Parties keep reconfirming their adherence to the Treaty and the obligations it contains. Various institutions of the European Union have referred to the Energy Community as a success story and a model and reference for the organisation of external energy relations.

What are the main factors contributing to this success?

One main advantage of the Energy Community over other institutions dealing with energy governance is its reliance on legally binding obligations to be complied with, and an institutional set-up to stabilise and develop the legal framework. In this respect, the Energy Community indeed took over the essence of the Monnet model of European integration. An agreement based on binding legal rules is more transparent, neutral and fair than a political one based only on the exercise of power. Majority voting and the ‘one country, one vote’ in the Ministerial Council, for instance, at the same time protects the interests of small Contracting Parties and attests to the Energy Community’s design going way beyond the usual scope of intergovernmental agreements. Binding implementation obligations also create a yardstick for compliance of the Contracting Parties and thus for the performance of the organisation as a whole. In the Energy Community, compliance of the Contracting Parties is being verified annually by the Secretariat. Such monitoring is a precondition for any corrective action, including action initiated by civil society and investors.

Legally binding obligations can and must be enforced to remain credible. In its enforcement procedures, the shortcomings of the existing Energy Community become most obvious. Unlike the EU’s or the EEA’s, the Energy Community’s enforcement procedures remain essentially diplomatic in nature. Insisting on the same level of compliance as in these organisations, without providing similar mechanisms of enforcement, is paradoxical, and even more so because in many Contracting Parties national enforcement as a ‘first line of defence’ is weak. The lack of proper enforcement mechanisms has been deplored recently by both the European Council and the European Parliament. Improving it was one of the reasons for engaging in a reform of the Energy Community Treaty.
A second main factor for the Energy Community developing into a success story was a change in rationale some five years ago. In 2010 and 2011, Moldova and Ukraine acceded to the Treaty. Since then, pan-European security of supply replaced EU membership preparation as the main rationale of the Energy Community. While security of supply considerations were present already in 2005 – after all, the territory then covered by the Contracting Parties is known as the ‘Southern Corridor’ in energy terms – it had not taken centre stage until Ukraine joined and the subsequent disputes with Russia. With that country’s accession, the public perception of the Energy Community as an antechamber for EU accession changed profoundly. It also altered the indicators for measuring the success of the organisation: while attracting investment still remains an overriding goal of the Energy Community, it becomes evident that neighbours agreeing to the rule of European energy law and governance constitute an advantage in itself in the fight for energy security.

The narrative shift in 2010 and 2011 also perpetuated the Energy Community which hitherto was conceived as a transitory organisation. As the fight for energy security is not limited in time, neither are the interests of the participating countries in being members of the Energy Community. Looking even beyond the current crisis with Russia, it looks as if the challenges for Europe in a globalised energy world increase rather than diminish. The fact that other countries in our vicinity such as Georgia have declared their intention to join the Energy Community and thus comply with European values and laws is very encouraging in this respect. The 2014 report of Mr Buzek’s High Level Reflection Group even calls upon the Energy Community to declare strategic interest in specific strategically important countries and regions, without any geographical limitation.

The last factor for the Energy Community’s success after its first ten years of existence may well be the fact that the European Union decided – apparently rather late during the negotiations – to join the Energy Community as a Party. This added considerable weight to the process and laid the foundations for the largest integrated energy market in the world. And the EU’s membership in the Energy Community is not only symbolic: it is subject to actual commitments such as the respect for the free movement of energy, as well as to a potential pan-European energy market design and an external energy trade policy as envisaged by Title IV of the Treaty. In this dimension, the Energy Community transcends the linear logic of exporting EU law to third countries. Up to now, it has not played a major role in the everyday operations of the Energy Community. The High Level Reflection Group’s report as well as certain Contracting Parties request to use the potential of Title IV for pan-European energy policy more frequently and systematically. Currently, this is still made difficult by EU-internal legislation.
Most recently, the mutual ties between the Energy Community and the European Union have become most visible in the debate about a future Energy Union, one of the key priorities of the EU institutions. Depending on the viewpoint, the Energy Community is to become a pillar, a model or a nucleus for the Energy Union. Together with its own reform, this debate will also determine the immediate future of the Energy Community. It can contribute by seminal experience gained over the last ten years in reforming and integrating energy markets, experience which is also reflected in the contributions to this book. It very much looks like the Energy Community did not only outgrow its nursery in the Balkans but has grown into a valuable, indispensable element of European energy policy.

Dirk Buschle
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