



POLICY GUIDELINES

by the Energy Community Secretariat

on the application of the Energy Community *acquis* between the Contracting Parties and the European Union

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1. A regulatory gap in the Energy Community Single Energy Market

By extending European energy legislation to its Contracting Parties, the Energy Community creates a single pan-European energy market among its Parties. This single market is subject not only to two identical sets of rules applicable within the European Union and the Contracting Parties but also to a common provisions stipulated by the Treaty itself. The most relevant among those joint provisions are the prohibition of discrimination (Article 7 of the Treaty) as well as the free movement of energy across borders between Parties (Article 41 of the Treaty).

Maintaining barriers and treating interconnections, cross-border flows and cooperation differently between the Parties to the Treaty frustrate the very idea of a single market unifying 36 territories. This holds true regardless of whether the border to be crossed is situated between two Contracting Parties or an EU Member State and a Contracting Party.

In practice, cross-border flows, cross-border cooperation and cross-border infrastructure (interconnections) are both an every-day reality in and desirable for the pan-European single energy market established by the Energy Community. Cross-border trade of electricity and gas between Contracting Parties and EU Member States form part of regular market activities and are supposed to benefit from market opening, one of the key objectives shared by the European Union and the Energy Community. This has been reconfirmed by the Third Package, adopted within the Energy Community by Decision No 2011/02/MC-EnC.

Electricity cables and gas pipelines spanning the borders between European Union Member States and Contracting Parties form an integral part of the integrated pan-European infrastructure network and are supported by various Projects of Common Interest and Projects of Energy Community Interest. Likewise, cross-border capacity allocation takes place regardless of the geographical location of the interconnectors concerned. Finally, cross-border cooperation between governments, regulatory authorities and companies such as transmission system operators are wide-spread on a voluntary basis and are indispensable for the functioning of the market.

Through the adaptations made to the Third Package by Decision No 2011/02/MC-EnC, a situation was created where interconnectors are defined as transmission lines or pipelines crossing a border between Contracting Parties, whereas within the European Union, the corresponding definition covers interconnectors between Member States. This situation leaves a gap for interconnectors between Contracting Parties and the territory of the European Union. This does not only create a dividing line between the European Union on the one side and the Contracting Parties but also

jeopardizes the legal certainty for all stakeholder involved in such cross-border exchanges, not least investors.

The reason for the regulatory gap between Contracting Parties and the territory of the Member States is the limited scope for adaptations to incorporated EU *acquis* in the provisions of Title II of the Treaty as a legal basis. For future *acquis communautaire*, there is a certain risk that similar gaps occur. Examples for pieces of EU legislation potentially eligible for incorporation in the Energy Community include Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply, Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure, and Regulation (EU) No 543/2013 regarding the submission and publication of data in electricity markets. Furthermore, the Permanent High Level Group will incorporate Network Codes developed within the European Union on an ongoing basis, in accordance with its Procedural Act No 2012/01 PHLG-EnC on laying down the rules governing the adoption of Guidelines and Network Codes. These Network Codes will increase the intensity of cross-border cooperation and integration, including between EU Member States and Contracting Parties.

If the gap which occurred after the incorporation of the Third Package continues to apply, the dividing line between the two regulatory regimes will deepen. Following the same approach, for instance, with regard to Regulation (EU) No 994/2010 would not include cooperation between Member States and Contracting Parties in the context of emergency plans, or exclude interconnections between Member States and Contracting Parties from the procedure for enabling bi-directional capacity (reverse flows). This jeopardizes common security of supply within the Energy Community.

2. The High Level Reflection Group Report

The High Level Reflection Group proposes to consider *“interconnectors between EU Member States and Contracting Parties ... interconnectors regardless of whether they are interconnectors between Member States or between Contracting Parties.”* The problem occurs in the Group explains that as follows: *“One concrete example for the unsatisfactory results and problems caused by the lack of flexibility is the definition of “interconnectors” in the incorporation of the 3rd Package into Energy Community law. As it was (only) based on Title II, Member States are not covered, and the connection between Member States and their neighbouring Contracting Parties, as originally intended, is obstructed. This hinders the objective to achieve the true pan-European energy market envisaged in the Energy Community Treaty. Making more and better use of Title IV will allow for these problems to be avoided.”*

3. The Interpretation by the Ministerial Council of 23 September 2014

On 23 September 2014, the Ministerial Council of the Energy Community adopted an Interpretation under Article 94, as follows:

Article 1

In any legal act of the Energy Community incorporating European Union legislation, any reference to

- a. energy flows, imports and exports as well as commercial and balancing transactions;

- b. network capacity;
- c. existing or new gas and electricity infrastructure (including interconnections and interconnectors)

crossing borders, zones, entry-exit or control areas between Parties and integrating the Contracting Party/Contracting Parties with the EU internal energy market, shall be treated in the same way and be subject to the same provisions as the respective flows, imports, exports, transactions, capacities and infrastructure between Contracting Parties under Energy Community law.

Article 2

Where the Energy Community Regulatory Board is competent to take decisions under Energy Community *acquis* with regard to flows, import, export, transactions, capacities and infrastructure referred to in Article 1, before taking its decisions, the Board consults the Agency for the Cooperation of Energy Regulators, when the Agency is competent, with the aim of adopting coherent decisions.

On this occasion, the Ministerial Council stressed “*that the different treatment of interconnections, cross-border flows, transactions or network capacities, depending on whether the border to be crossed is situated between two Member States of the European Union, two Contracting Parties or an EU Member State and a Contracting Party, frustrates the very idea of an single regulatory space for Network Energy and leads to barriers of trade*”. It also recognised “*the limitation of the approach of adapting of new pieces of the EU *acquis* for the legal order of the Energy Community by a non-differentiated replacement of the term "Member States" by the term "Contracting Parties" in each and every case with regard to the aim to integrate the energy markets of the Contracting Parties with the EU internal energy market*”.

4. The Recommendation by the European Commission of 29 October 2014

Within the European Union, the European Commission adopted a Recommendation addressed to the EU Member States, the Agency for Cooperation of Energy Regulators and economic operators and to the Energy Community Regulatory Board, recognizing that the “*uniform treatment of cross-border flows, cross-border transactions and cross-border infrastructure (interconnections) between all Parties to the Energy Community Treaty is an important element of the single regulatory space for trade in gas and electricity and is an indispensable element to achieve the goals of the Energy Community. Moreover, the cooperation between the Energy Community Regulatory Board and the Agency for Cooperation of Energy Regulators with regard to its decisions, is necessary in order to facilitate the integration of the Contracting Parties with the EU internal energy market.*” The Recommendation reads as follows:

1. Member States, including the regulatory authorities they have to designate under the internal market legislation for gas and electricity, the Agency for Cooperation of Energy Regulators and economic operators are invited to cooperate with the national authorities and economic operators of the Contracting Parties to the Energy Community in the application of the EU internal market legislation for gas and electricity between the Contracting Parties and the EU Member States.
2. Member States, including the regulatory authorities they have to designate under the internal market legislation for gas and electricity, the Agency for Cooperation of Energy Regulators and economic operators are invited, when implementing the EU internal market legislation for gas and electricity, to apply any reference to:
 - (a) energy flows, imports and exports as well as commercial and balancing transactions;
 - (b) network capacity;

(c) existing or new gas and electricity infrastructure

crossing borders, zones, entry-exit or control areas between the Member States to the flows, imports, exports, transactions, capacities and infrastructure crossing borders between Contracting Parties and the EU Member States.

3. References in the EU internal market legislation for gas and electricity to cooperation and joint activities between national institutions, authorities and economic operators should be understood as including cooperation and joint activities between national institutions, authorities and economic operators of Member States and Contracting Parties.

4. Where the legal acts of the EU internal market legislation for gas and electricity refer to ‘impacts’ on one or more Member States, such reference should be understood also as an impact on Contracting Parties or on a Contracting Party and a Member State.

5. Where it is competent to take decisions under the EU internal energy market legislation for gas and electricity, the Agency for Cooperation of Energy Regulators is invited to cooperate with the Energy Community Regulatory Board, where the Board is competent under Energy Community *acquis*, with the aim to allow adopting coherent acts of the two bodies.

5. The Secretariat’s Policy Guidelines

The Secretariat recalls that in line with Article 94 and the Rules of Procedure of the Ministerial Council, the Ministerial Council’s Interpretation “*is binding on the Parties and institutions under the Treaty*”. The Secretariat welcomes the initiative of the European Commission in recommending measures aimed at bridging any occurring regulatory gaps between the territories of the European Union and the Contracting Parties as described above. While the Commission’s Recommendations 2 and 5 correspond to the Ministerial Council’s Interpretation, Recommendations 1, 3 and 4 introduce further important aspects of cross-border cooperation. For the sake of equal treatment of such cooperation also by the Contracting Parties, which have not been addressed by the Commission’s Recommendation, the Secretariat considers it appropriate to reflect them as follows:

1. Contracting Parties, including the regulatory authorities they have to designate under the internal market legislation for gas and electricity, and economic operators should cooperate with the national authorities and economic operators of the EU Member States in the application of the EU internal market legislation for gas and electricity between the Contracting Parties and the EU Member States.

2. References in the Energy Community *acquis communautaire* for gas and electricity to cooperation and joint activities between national institutions, authorities and economic operators should be understood as including cooperation and joint activities between national institutions, authorities and economic operators of Contracting Parties and Member States.

3. Where the Energy Community *acquis communautaire* for gas and electricity refers to ‘impacts’ on one or more Contracting Parties, such reference should be understood also as an impact on EU Member States or on a Contracting Party and a Member State.

Done in Vienna on 12 November 2014

For the Secretariat:

A handwritten signature in blue ink, appearing to read "James Lyall".

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(Director)