

The European Energy Community – Dispute Settlement Procedure

The Treaty on the establishment of the European Energy Community

On July 1, 2006, the Treaty on the establishment of the European Energy Community (“EnC”) came into force. The contractual Parties are the EU, Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Moldavia, Montenegro, Serbia and the Ukraine. Georgia, Armenia, Norway and Turkey have observer status. Switzerland is not part of the EnC. With the Treaty founding the Energy Community, an integrated energy market for electricity and gas for the EU and the other Parties to the Treaty was established (“EnC-Treaty”).

It is the stated aim of the EnC, inter alia, to integrate Southeast Europe into the European internal energy market and to promote (European) transnational cooperation in the energy sector. With this in mind, private companies are to be encouraged to invest in the energy markets of the other contractual Parties of the EnC. Thus, the EnC aims at providing the requisite stable legal framework which is necessary in order to encourage investments in the energy sector within and outside the EU and to achieve a pan-European energy market.

The purpose and the bodies of the EnC

In order to achieve its goal, the EnC strives to implement a part of community law – i.e. the “communal vested rights” (*acquis communautaire*) – in all the contracting states. This applies to the areas of energy, the environment, competition and renewables.

Moreover, with the Treaty an energy market without internal frontiers between the contracting states was created in which customs duties and quantitative limitations of import and export of

energy and similar national (protective) measures of comparable effect are forbidden between the contracting Parties.

The EnC’s highest body is the *Ministerial Council* comprising one representative of each of the contracting Parties. The Ministerial Council is particularly important in settling disputes as it can rule to suspend the contracting States’ rights deriving from the EnC Treaty. The Ministerial Council is the only authority which decides on matters of breach by the Parties of the Treaty. Furthermore, it draws up general guidelines of the EnC and implements measures to realize the aims of the Treaty.

The EnC includes a *Regulatory Board* which functions mainly in an advisory capacity.

The permanent *Secretariat* in Vienna supports the other bodies of the Energy Community, inter alia administratively, and verifies whether the Treaty Parties properly fulfil their obligations.

The EnC’s dispute settlement procedure¹

Formal procedure

Title VIII of the EnC Treaty lists dispute settlement provisions whereby the Parties can enforce the obligations under the EnC Treaty. Only the Treaty member states may invoke this dispute settlement procedure. Individuals and companies may not (directly) invoke the EnC Treaty and its dispute settlement mechanisms as they are not – as stated above – parties to the Treaty.

A reasoned *request* whether a breach of the Treaty exists can be put to the Ministerial Council, the Secretariat or the Regulatory Board by each Party.

¹ See also, A. Quintavalla, The dispute settlement procedure in the Energy Community, *European Energy Journal*, Volume 5, Issue 1, February 2015.

Individuals and companies may only inform against non-fulfilment of an obligation under the Treaty to the Secretariat. The latter decides autonomously whether or not the alleged breach is to be submitted to the Ministerial Council for assessment.

Art. 91 EnC Treaty outlines three possible *breaches* for which an action may be filed by means of a request. The first category listed is a breach or failure to comply with the *acquis communautaire* by a Party. The second category pertains to breaches related to the (European) *energy network market*. Notably, the Parties can contest the lack of access to energy resources and the infringement on fair competition between the Parties. The third category relates to actions by Parties which are contrary to the creation of a *single energy market*.

Decisions made by the Ministerial Council are binding upon the non-compliant Parties and they are obliged to address and implement decisions addressed to them within the relevant period set.

If the Ministerial Council has determined that a breach of the Treaty exists, it may issue sanctions and suspend the rights of a Party by denying the non-compliant Party voting rights in EnC votes or explicitly exclude it from meetings (sessions) of the EnC. Depending on the breach, different quora of the Ministerial Council are needed for decision making and in every case sanctions are to be limited.

Preliminary procedure

Instead of taking a possible infringement directly to the Ministerial Council, a Party or the Regulatory Board may initiate dispute settlement procedures by notification of the Secretariat (Procedural Act. Nr. 2008/01/MC-EnC). The Secretariat assesses the submitted complaint and informs the allegedly non-compliant Party of the complaint by means of an “*opening letter*”. The concerned Party is requested to submit its observations within a specified time period (usually two months). The purpose of such preliminary procedure is to enable the Party concerned to comply with the Treaty or to explain its position.

The Secretariat may discontinue the preliminary procedure at any time if the Party concerned discontinues or bindingly declares willingness to terminate the alleged breach. The Secretariat may also discontinue the procedure if the Party accused of a breach can convincingly refute the accusations made by the initiating Party. Moreover, the Secretariat may call the Parties to informal discussions. However, it also has the option of submitting the matter to the Ministerial Council and thus request a (proper) ruling in the matter.

An advantage of the preliminary procedure as against the formal proceedings by the Ministerial Council is mainly that no requirements for substantiation are made to the Parties and some of the load is taken off the Ministerial Council.

Reform process

In October 2013, the Ministerial Council established the Energy Community High Level Reflection Group („**HLRG**“) with the task of making an independent assessment of the institutional structures and to submit suggestions for improvements of the effectiveness of dispute settlement.

In 2014, within the framework of its analysis of the Treaty, the HLRG particularly criticised the EnC’s weak enforcement mechanisms and the lack of weight of sanctions which would motivate compliance with the Treaty. Furthermore, the lack of effective judicial protection for individuals and companies was criticised as well. Thus the HLRG suggests amongst others the following reforms:

Court of Justice

The Ministerial Council which has the final say on breaches is a (non-expert) political institution. In view of the above, the HLRG came to the conclusion that, in the decision-making procedure for dispute settlement, the Ministerial Council should be replaced by a Court of Justice based on the EU model and the executive and investigative powers of the Secretariat should be strengthened.

Sanctions

Sanctions in case of breaches must be tightened in order to guarantee more effective protection and

to provide sufficient incentive to fulfil obligations under the EnC Treaty. According to the HLRG, such sanctions should follow political and financial models applied within the EU.

Protection of individuals and companies

In the view of the HLRG, a further major disadvantage is that no judicial protection of individuals and companies is provided under the dispute settlement procedure of the EnC Treaty. This is to be corrected, inter alia, by the introduction of a Court of Justice as mentioned above.

Switzerland and the EnC Treaty

As Switzerland is not a party to the EnC Treaty, it is not possible for EnC Parties to invest in the Swiss energy sector under protective effect of the Treaty.

Switzerland, for its part, could profit from the stable legal framework and market environment of the European Energy Community. As a Party on the level of the EnC Treaty, it could benefit, inter alia, from the strengthening of security of supply in Europe and from the competition in the European energy network market.

At present, though, Switzerland cannot participate in the European internal energy market. Since 2007, the EU is not pursuing ongoing negotiations for as long as institutional questions (such as the free movement of persons) have not been clarified.

GHR Energy and Natural Resources

Marc Grüninger (marcgrueninger@ghr.ch)
Dominique Gottret (dominiquegottret@ghr.ch)
Sophie Heer (sophieheer@ghr.ch)

GHR Rechtsanwälte AG

Bahnhofstrasse 64	Tavelweg 2
Postfach 3268	Postfach 162
CH-8021 Zürich	CH-3074 Bern Muri
T +41 (0)58 356 50 00	T +41 (0)58 356 50 50
F +41 (0)58 356 50 09	F +41 (0)58 356 50 59

www.ghr.ch

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