

30 June 2015

Energy Community Secretariat response to the European Commission Public Consultation "Towards a new European Neighbourhood Policy"

1. Introduction

As an international organization based on the integration of neighbouring countries among themselves and with the EU, the Energy Community shares with the European Neighbourhood Policy (ENP) not only several members – the European Union as well as Moldova and Ukraine are Parties to the Treaty establishing the Energy Community, Armenia and Georgia are Observers – but also the ENP's very concept. The original purpose of the ENP was **closer economic integration of the EU with its neighbouring countries through sharing the internal market**. The Energy Community pursues the same goals. Looking back on ten years of our own experience, we are convinced that this objective can be achieved even under challenging geopolitical circumstances, that it should be at the core also of the revised ENP and that it is even worth being taken a decisive step further.

The Secretariat of the Energy Community participates in this consultation as the ENP – together with the European Union's enlargement policy and its external energy policy – constitutes **the policy framework in which the Energy Community operates**. As has been confirmed many times by virtually all EU institutions, other regional organizations and International Financial Institutions (IFIs), the Energy Community provides unique added value in the context of all these three policies. We are convinced that five facets of the Energy Community's design in particular are decisive for the strength of this organization, namely

- The fact that the Energy Community is based on the binding **commitment to implement legal rules** rather than pursuing a political and economic reform agenda supported "only" by capacity building, knowledge transfer or technical assistance as is the case e.g. of the Eastern Partnership or Euromed. Legal rules entail the possibility for measuring progress, private and public enforcement as well as an in-built evolution based on new legislative initiatives inside the European Union. The Secretariat recently made positive experiences in Ukraine also with linking legal commitments as "conditionalities" for financial support provided by IFIs.
- The fact that the Treaty establishing the Energy Community is **multilateral rather than bilateral** in nature. Through equal participation rights for (all) third countries in the management and development of the organization, a fair balance of power has been established which helps avoiding the pitfalls recently experienced by the EU's bilateral relations with countries as diverse as Russia or Switzerland.

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- The fact that the Energy Community features a set of **institutions** either political and working in the interest of the members (Ministerial Council, Permanent High Level Group), independent and working in the interest of the Community (the Secretariat) or expert-based (the Regulatory Board and the Fora). This institutional design builds on the EU's own experience. Complemented by **procedures** for the development and the enforcement of rules, they warrant the rule of law in the Energy Community.
- The fact that the Energy Community allows for the full integration of the participating third countries in the internal market on equal footing with EU Member States. This **externalization of the internal market** provides an incentive for participating countries to engage with the EU (besides the other incentives – potential EU accession, sharing a tested economic reform “software” and support by IFIs). That the European Union engaged in the Energy Community as a Party to the Treaty, assuming its own set of (enforceable) obligations, further reinforces the Energy Community's attractiveness in that respect.
- The fact that the Energy Community is not conceived as part of “fortress Europe” but is **open** to new members and observers as well as for cooperation with all interested stakeholders from in and outside its territories.

The Secretariat will respond to the questions raised in the present consultation against the background of its own experience and the lessons learned which it believes matter also for the ENP. Evidently, the purpose of our participation is not to convince the institutions in charge of the ENP to adopt the Energy Community's governance. Rather, the ENP as a framework policy concept should make more use of the potential organizations such as the Energy Community offer by **cooperating more intensely and more systematically in the future**. The fact that the Energy Community, though sectoral in nature, covers the one sector of our neighbours' economies and societies that matters most should make such cooperation all the more beneficial.

The Energy Community – as the ENP – is currently undergoing a **reform process** which is again based on lessons learned in the first ten years of its experience. A report by a High Level Reflection Group chaired by *Jerzy Buzek* forms the basis for that. In a nutshell, the recommendations made by that Group relate to increasing the flexibility of the EU rules exported to third countries subject to different historical, socio-economic and geopolitical conditions, to improve the enforcement system as a means to narrow the gap between the reform commitments and implementation in real terms, and to raise the attractiveness of membership in the Energy Community – and thus the further expansion of the EU's internal energy market – to potential strategic partners in a globalized energy world. We believe that the discussions and initiatives undertaken in the context of the Energy Community reform can be of great value also for an ENP for the future.

2. The questions raised in the public consultation paper

a. Lessons Learned and Questions on the Future Direction of ENP

i. Should the ENP be maintained? Should a single framework continue to cover both East and South?

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We believe that a common and comprehensive policy framework setting out the key principles for the relations between the EU and its neighbours will be needed in the future as well. This should probably be broader rather than narrower and include enlargement countries as well as other countries currently not covered by the ENP such as the EFTA countries. Within this overarching framework, evidently differentiation is needed which could be both geographical or on substance/sectors. Based on recent experience with an eventually fruitless debate on replicating an Energy Community in the Mediterranean, the Secretariat would rather not support splitting the ENP into East and South but would advocate for differentiation within the existing framework.

ii. Should the current geographical scope be maintained? Should the ENP allow for more flexible ways of working with the neighbours of the neighbours? How can the EU, through the ENP framework, support its neighbours in their interactions with their own neighbours? What could be done better to ensure greater coherence between the ENP and the EU's relations with Russia, with partners in Central Asia, or in Africa, especially in the Sahel and in the Horn of Africa, and with the Gulf countries?

The Secretariat believes that overstretching the notion of the European neighbourhood may ultimately render the ENP too blurry a notion to still matter. While the appropriate definition of neighbourhood will always be questioned, specific links or ties with Europe should still matter. As is the case in the Energy Community (Title IV of the Treaty), the EU and its neighbours should have a (rather light) common governance which could also cover relations with the “neighbours of the neighbours” (such as Russia) or even other global actors such as China or the United States. Such a pan-European governance would contribute to ensuring coherence per se.

The relation with the “neighbours of the neighbours” could also be facilitated by a concept which emerged in the context of Energy Community reform under the label of “Associated Membership”. It would replace the current all-or-nothing approach by a more differentiated and tailored one. Associated Membership would allow interested, capable and strategically important countries to connect to the ENP without fulfilling all its requirements. Such a model may indeed be “tested” on a sectoral level, by e.g. discussing with countries in Eastern Europe (Armenia, Azerbaijan, Belarus, etc.) or in the Mediterranean a common minimum criteria to be fulfilled in order to be an Associated Member. The current negotiations between the Energy Community and Georgia are, to some extent, already characterized by this new approach.

iii. How could a more comprehensive approach with more active involvement by Member States give the policy greater weight? Would stronger co-ownership of the policy be preferred by partners?

In an ever-changing EU governance, better involvement of EU Member States matters. Shared ownership is a (positive) trend also experienced in the Energy Community.

iv. Are the Association Agreements and DCFTAs the right objective for all or should more tailor-made alternatives be developed, to reflect differing interests and ambitions of some partners?

Instead of a proliferation of more bilateral agreements, we would recommend to increasingly rely on multilateral agreements for the reasons outlined above. Instead of one common agreement covering all sectors, they could be limited to some key areas and sectors. For example, the Energy

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Community, as a tool of the ENP, could be broadened to cover infrastructure in general (incl telecommunications, transport etc.) and the associated markets.

As explained above, reflecting differing interests and ambitions of some partners is of utmost importance. In the context of multilateral agreements based on EU principles (such as the Energy Community), this can be achieved either through increased flexibility in adapting these principles and rules to the specific situations of the third countries (Cf. Article 24 of the Energy Community Treaty), and/or the introduction of “Associated Members” as proposed above.

v. Are the ENP Action Plans the right tool to deepen our partnerships? Are they too broad for some partners? Would the EU, would partners, benefit from a narrower focus and greater prioritisation?

We believe that without a minimum of joint principles and rules, action plans cannot tap their full potential, namely to structure and define the path from the status quo to an improved situation, which is best commonly agreed in normative terms.

vi. Is the approach [of monitoring through ENP Progress Reports] appropriate for all partners? Has it added value to the EU's relations with each of its partners? Can EU and/or partner interests be served by a lighter reporting mechanism? Should the reporting be modulated according to the level of engagement of the ENP partner concerned? How can we better communicate key elements?

The Energy Community develops an annual implementation report which may be taken into account as a reference document in the discussion about reforming the monitoring process. In our experience, monitoring is a key instrument for any further development and reform successes, both on domestic and inter-/supranational level. Monitoring works indeed best when it is objective, based on a number of fixed criteria/indicators and compares the performance of several partner countries. We would strongly advise against a lighter or politicized reporting mechanism as it would render this instrument ineffective.

vii. Can partnerships be focussed more explicitly on joint interests, in order to increase ownership on both sides? How should the ENP accommodate the differentiation that this would entail? Are new elements needed to support deeper cooperation in these or other fields?

As outlined above, we believe that multilateral, sectoral agreements based on sharing the (respective parts of the) internal market between the EU and the participating third countries provide the strongest and most successful framework for cooperation with our neighbours. The Energy Community provides a well-functioning model, especially if some shortcomings listed above are eliminated. The current ENP framework for sector cooperation e.g. in energy falls behind these standards for several reasons such as the lack of binding commitments on the side of the neighbouring countries as well as the EU.

We would propose to base the reform of the ENP on the pillars of a few sectoral communities for which the Energy Community can provide a blueprint. In such a case, a reformed ENP would develop into the (strategic) umbrella organization coordinating these communities and the EU's role in them.

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viii. What further work is necessary in the area [of visa liberalization], which is regarded as key by all ENP partners? How can the ENP further support the management of migration and help to draw the benefits of mobility?

In our experience, free movement of persons and more specifically visa liberalization are clearly incentives to help neighbouring countries to cooperate more closely with the EU. How the migration in the EU can be best absorbed is not something we can provide advice on.

ix. How can the EU do more to support sustainable economic and social development in the ENP partner countries? How can we empower economically, politically and socially the younger generation? How to better promote sustainable employment? And how can these objectives be better linked to indispensable reforms in the fields of anti-corruption, judicial reform, governance and security, which are prerequisites for foreign direct investment?

There is obviously a multitude of experiences with and models for supporting sustainable economic development. We believe the Commission is right in focusing on the support of foreign direct investment which should as soon as possible replace a situation where many of our neighbours are fully dependent on public investment by IFIs. To achieve this, deep reforms are needed, which must include legislation, administrative and judicial practice alike. Institutions must be strengthened and investors must be given better legal certainty and protection. This discussion takes centre stage also in the current Energy Community reform process. The most notable shortcomings experienced in our organization's countries are corruption and the lack of independence of institutions as well as the lack of international dispute resolution mechanisms other than arbitration (which individuals and SMEs find unattractive). Both should be specifically addressed also in the course of the ENP reform. We propose, for instance, greater focus on judicial independence as well as the creation of a Neighbourhood Investment Court, and stand ready to share our concepts.

x. How should the ENP address conflicts and crises in the neighbourhood? Should CFSP and CSDP activities be better integrated in the ENP framework? Should it have a greater role in developing confidence-building measures and post-conflict actions as well as related state- and institution-building activities?

Should the ENP be given a strengthened focus on working with partners on the prevention of radicalisation, the fight against terrorism and organised crime?

Should security sector reform be given greater importance in the ENP?

The creation of wealth and sustainability through market reform and regional integration is at the core of preventing crises and radicalism. Besides this general spill-over effect of market-based integration agreements, each sector needs to develop its own tailor-made procedures and institutions to ensure stability. This is why the Energy Community puts a strong focus on ensuring the security of energy supply, again based on legal rules. Similar approaches could be taken within other sectoral communities.

xi. Is the multilateral dimension able to deliver further added value? Are these formats [Union for the Mediterranean (UfM) in the South and the Eastern Partnership (EaP) in the East] fit for purpose? How can their effectiveness be strengthened? Can we more effectively use other, more

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flexible frameworks? Can we better cooperate with other regional actors (Council of Europe, OSCE, League of Arab States, Organisation of the Islamic Conference, African Union)?

While multilateral regional cooperation lies at the core of the Energy Community's success, as outlined above, the UfM and the EaP have never tapped their full potential due to the lack of legally binding rules and common institutions. In the (Eastern) energy sectors, the Energy Community filled the gap to some extent. It should be promoted by and be made an integral part of a new ENP to include not only all EaP countries but also the UfM countries currently not covered. To this end, tailor-made solutions and an increased flexibility ("Associated Members", see above) should be permitted.

xii. How should the ENP further develop engagement with civil society in its widest sense? Can more be done to network different parts of the partner populations?

As part of its reform process, the Energy Community is currently revising its modus of cooperation with civil society. We believe that international policies and agreements cannot be treated as purely inter-governmental anymore, and that civil society as well as individuals and national parliaments must be given a greater role as true partners. This should include participation rights in all institutions and procedures. The Energy Community Secretariat is ready to share its experiences and approaches in this respect with the ENP.

b. Towards a Partnership with a Clearer Focus and More Tailored Cooperation

i. Should the EU gradually explore new relationship formats to satisfy the aspirations and choices of those who do not consider the Association Agreements as the final stage of political association and economic integration?

How should the EU take forward the tasking of the 2013 Eastern Partnership Summit in Vilnius of the long-term goal of a wider common area of economic prosperity based on WTO rules and sovereign choices throughout Europe and beyond?

Is there scope within the ENP for some kind of variable geometry, with different kinds of relationships for those partners that choose different levels of engagement?

In our work we are often confronted with the impact of EU "enlargement fatigue" on the motivation of neighbouring countries to reform their energy sectors. To the extent this fatigue cannot be overcome, we need to provide our neighbours frameworks and organizations which satisfy other essential interest for them. The Energy Community has evolved over the last ten years from an "EU accession waiting room" to a lasting community providing reform assistance and increased security of energy supply to its members. In the ongoing Energy Community reform process, we try to further foster this development. In our view, the ENP reform should start from the basis of which essential interest a new ENP can satisfy if the primary one (EU accession) moves further away or becomes less attractive than before.

As much as we believe in a wider common economic area, we have doubts that the WTO principles alone can ensure its coherence and ultimate success. In the energy sphere, the recent development of the Energy Charter process may be considered as counter evidence. It is probably

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fair to say that on and around the European continent, the EU integration model and its rules are the lead governance model.

As explained above, we indeed do believe that a variable geometry, e.g. through the introduction of “Associated Members” to multilateral agreements such as the Energy Community can make the European model more attractive than insisting on a “one size fits all” approach. This concept could include countries as diverse as Switzerland, Turkey, the Caucasus or the Mediterranean.

ii. Do you agree with the proposed areas of focus? If not, what alternative or additional priorities would you propose?

Which priorities do partners see in terms of their relations with the EU? Which sector or policy areas would they like to develop further? Which areas are less interesting for partners?

Does the ENP currently have the right tools to address the priorities on which you consider it should focus? How could sectoral dialogues contribute?

If not, what new tools could be helpful to deepen cooperation in these sectors?

How can the EU better support a focus on a limited number of key sectors, for partners that prefer this?

We very much support this line of thinking.

The Energy Community is the reference model for reforming and integrating energy markets and thus increasing sustainability and ensuring security of energy supply. Through a unique governance and the participation of the EU as a full member, the neighbouring countries participating became “shareholders” of (rather than “stakeholders in”) the internal energy market. EU rules on environment, energy efficiency, renewable energy etc. complement the market governance framework. The improvement of connectivity both in the Western Balkans and Eastern Europe is a priority focus in our work. For instance, the Energy Community created a project label (“Projects of Energy Community Interest”) which facilitates the building of electricity, gas and oil transport lines and even generation facilities. But participation in the Energy Community also creates spill-over effects for free trade, competition, stability, economic development, climate change combating, legal certainty, strengthening institutional capacities, fighting corruption etc.

In our view, it makes no sense if a new ENP would try to duplicate this approach (with softer instruments). We rather believe that the best way to strengthen the ENP in the future and make it matter in some if not all of those areas is to incorporate, expand and strengthen the Energy Community. This would arguably provide the greatest value with the smallest efforts. This approach could be complemented, if need be, by a small number of other communities in key sectors of the economy and society. As outlined above, the ENP would then grow into a role of a coordinating body for these sectoral communities.

iii. How to streamline Action Plans to adapt them better to individual country needs and priorities?

Is annual reporting needed for countries which do not choose to pursue closer political and economic integration?

How should the EU structure relations with countries that do not currently have Action Plans?

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How can the EU adapt the 'more for more' principle to a context in which certain partners do not choose closer integration, in order to create incentives for the respect of fundamental values and further key reforms?

How to assess progress against jointly agreed reform targets when a partner country experiences significant external pressure, for instance armed conflict or refugee flows?

How can the EU engage more effectively and respond more flexibly to developments in partner countries affected by conflict situations?

What tools would the EU need to respond more effectively to fast-changing developments in its neighbourhood?

Are the choice of sectors and mechanisms for delivery of EU financial support appropriate? How could its impact and visibility be enhanced?

On top of what was stated in response to the previous set of questions and earlier on, we would commend the approach of establishing multilateral communities based on the rule of law and administered by independent institutions also for providing the best possible combination between the financial support offered by the EU (and other IFIs) to the participating countries and measurable reform progress. Where the EU and IFIs have showed readiness to formulate implementation of the Energy Community *acquis communautaire* within a given timeframe as a specific conditionality for the disbursement of loans and grants, almost spectacular results have been achieved in the past. For instance, the Energy Community Secretariat cooperated with the World Bank and the IMF in the recent reform of the gas sector in Ukraine where due to smart conditionalities a Third Package compliant gas law was adopted only three months after its entry into force in the Energy Community. This happened against the background of a war in eastern Ukraine as well as the social problems associated with price increases. This experience suggests that a closer and better linkage of the ENP financial instruments with commitments of neighbourhood countries under sectoral agreements would be beneficial for all sides involved.

iv. What do partners seek in the ENP? How can it best accommodate their interests and aspirations?

Can ways of working be developed that are seen as more respectful by partners and demonstrate a partnership of equals? How should this impact on annual reporting ?

Can the structures of the ENP be made more cooperative, to underline the partners' own choices and to enable all civil society actors across partner countries to take part?

Can the ENP deliver benefits within a shorter timeframe, in order that the value of the policy can be more easily grasped by the public? What would this require from the EU? And from the partner country?

How can the EU financial support be recast in an investment rather than donor dynamic, in which the partner country's active role is clearer?

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How can EU Member States be involved more effectively in the design and implementation of the policy, including as concerns foreign policy and security related activities? How can the activities in EU Member States be better coordinated with the ENP?

The Energy Community Secretariat puts great hopes and expectations in the further development of the ENP into a general and comprehensive policy framework as a part of which the Energy Community could also better tap its full potential. We stand ready to cooperate and share our experience with the Commission, EU Member States and participating third countries in the entire course of the reform process and beyond.