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
January 2015
CONTENTS

Preface ........................................................................................................................................ v
List of Authors............................................................................................................................. xxvii

PART I.
INTRODUCTION

Towards a European Energy Union
Janez Kopač.......................................................................................................................... 3

Energy Community: The Way Forward
Walter Boltz and Gerhard Langeder......................................................................................... 11

1. Introduction ......................................................................................................................... 11
2. Legal Scope: Concentrate on Actually Delivering a True Single
   Pan-European Market ........................................................................................................ 11
   2.1. Enforcement .................................................................................................................. 11
   2.2. Cooperation between ACER and ECRB ................................................................. 12
   2.3. Cooperation between TSOs ....................................................................................... 13
   2.4. Institutional Scope: Strengthening the Idea of 'Stick and Carrot' ......................... 13
   2.5. Realistic Policy Making ............................................................................................ 13
   2.6. Institutional Strengthening ....................................................................................... 14
   2.7. Stick and Carrot .......................................................................................................... 15
   2.8. Geographic Scope: Enlarging the Borders of the Energy
       Community and Making it a Broader Foreign Policy Instrument ......................... 15
       2.8.1. Enlarging the Borders ....................................................................................... 15
       2.8.2. Energy and Foreign Policy ............................................................................. 16
   2.9. Investment Challenge: Is a Single
       Pan-European Market Guaranteed? .................................................................... 17
   2.10. A Fast-Track Mode for Investments ....................................................................... 17
   2.11. Enforcement, Again and Again ............................................................................... 18
   2.12. Risk Mitigation ......................................................................................................... 18
3. Conclusions and Outlook........................................................................................................ 18
   3.1. Focus of Short-Term Proposals .............................................................................. 20
   3.2. Focus of Long-Term Proposals .............................................................................. 21
   3.3. Final Remarks............................................................................................................ 21
PART II.
REGULATORY ASPECTS OF THE ENERGY COMMUNITY

The Disputes Settlement System of the Energy Community: Testing its Effectiveness
Rozeta Karova ....................................... 25

1. Introduction ........................................ 25
2. The Energy Community ............................. 26
   2.1. Exporting the EU Energy Acquis to Third Countries ...... 26
   2.2. The Energy Community Law .......................... 27
   2.3. Institutional Structure of the Energy Community ......... 30
3. Dispute Settlement Procedure in the Energy Community ........................................... 32
   3.1. Two Stages: Preliminary Procedure and Decision-Making by the Ministerial Council .......... 33
   3.2. Homogeneity of Interpretation .......................... 37
   3.3. Does the Energy Community Treaty Create a New Legal Order? . . . 42
4. Enforcement Record in the Energy Community .............................................................. 46
   4.1. Non-Transposition Cases ............................... 46
   4.2. Non-Implementation Cases .............................. 51
   4.3. Analysis of the Infringement Cases ....................... 57
5. Strengths and Limits of the Energy Community Dispute Settlement Regime: The Path of Improvement ................................................................. 60
   5.1. Lack of an Energy Community Court .................... 61
   5.2. Lack of Effective Sanctions ............................. 65
6. Conclusion ............................................ 66

Energy Community Law Enforcement
Josefine Kuhlmann ..................................... 69

1. Introduction ........................................ 69
2. Dispute Settlement Procedure .......................... 70
   2.1. Preliminary Procedure ................................. 70
   2.2. Procedure before the Ministerial Council .................. 71
   2.3. Procedure against the European Union and its Member States .. 73
3. Scope of Dispute Settlement Decisions ...................... 77
4. Excursus: Article 7 of the Treaty on European Union .......... 78
5. Status Quo of Energy Community Dispute Settlement Cases ....... 82
6. Appraisal of Energy Community Law Enforcement ................ 83
Enforcement of State Aid Rules in the Energy Community: Going Beyond Formal Compliance
Marco Botta ........................................................................................................... 89
1. Introduction: State Aid Rules in the Energy Community .................. 89
2. Structure and Objectives ................................................................................. 93
3. Enforcement of State Aid Rules in the Electricity Sector in the EU ... 94
4. State Aid Enforcement in the Contracting Parties of the Energy 
Community ........................................................................................................ 99
5. Conclusions and Policy Recommendations ................................................ 106

Competition Law Enforcement in the Contracting Parties of the Energy 
Community: Current Challenges and Future Perspectives
Alexandr Svetlicinii .................................................................................................. 111
1. Introduction: Energy Community and Acquis Communautaire 
on Competition .................................................................................................. 111
2. Albania: Antitrust Enforcement as a Supplement to Sector-Specific 
Regulation ......................................................................................................... 115
3. Bosnia and Herzegovina: Antitrust Enforcement against Regulatory 
Acts of State Institutions .............................................................................. 117
4. Kosovo: Lack of Transparency and Technical Capacity of the NCA ...... 121
5. Macedonia: Enforcement Focus on Exploitative Abuses of Dominant 
Position ............................................................................................................ 123
6. Moldova: Reconciling Competition Enforcement and Regulation 
in the Energy Markets .................................................................................. 126
7. Montenegro: Legislation Overhaul and Enforcement Start-Up ........ 130
9. Conclusion: Challenges and Perspectives for Antitrust Enforcement 
in the EnC Energy Markets .......................................................................... 135

Unbundling and Privatisation of the State-Owned Vertically Integrated 
Companies in the Energy Community
Mira Todorovic Symeonides ................................................................................. 139
1. Introduction ...................................................................................................... 139
2. Electricity Market Liberalisation and Establishment of the EnC ....... 140
  2.1. Liberalisation of the Electricity Markets .................................................. 140
3. Formation of the EnC ..................................................................................... 141
  3.1. Reasoning of the EC for Proposing the EnC ........................................... 142
  3.2. Reasoning of the SEE Countries for Accepting the EC ....................... 142
  3.3. Comments to the Transposing of the Acquis ......................................... 143
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.</td>
<td>CPs Obligation to Implement Unbundling of VIC</td>
<td>144</td>
</tr>
<tr>
<td>4.1</td>
<td>What Does Unbundling Mean?</td>
<td>144</td>
</tr>
<tr>
<td>4.1.1</td>
<td>Ownership Unbundling Model</td>
<td>146</td>
</tr>
<tr>
<td>4.1.2</td>
<td>Independent System Operator Model</td>
<td>147</td>
</tr>
<tr>
<td>4.1.3</td>
<td>Independent Transmission Operator Model</td>
<td>147</td>
</tr>
<tr>
<td>4.2</td>
<td>Obligation of Unbundling under the Treaty</td>
<td>148</td>
</tr>
<tr>
<td>5.</td>
<td>Progress in Six CPs of Unbundling of the EnC</td>
<td>148</td>
</tr>
<tr>
<td>5.1</td>
<td>Albania</td>
<td>149</td>
</tr>
<tr>
<td>5.2</td>
<td>Bosnia and Herzegovina</td>
<td>151</td>
</tr>
<tr>
<td>5.3</td>
<td>Macedonia</td>
<td>152</td>
</tr>
<tr>
<td>5.4</td>
<td>Montenegro</td>
<td>153</td>
</tr>
<tr>
<td>5.5</td>
<td>Serbia</td>
<td>154</td>
</tr>
<tr>
<td>5.6</td>
<td>Ukraine</td>
<td>156</td>
</tr>
<tr>
<td>6.</td>
<td>Role of the EnC and its Secretariat</td>
<td>159</td>
</tr>
<tr>
<td>6.1</td>
<td>Between the Commission and the Contracting Parties</td>
<td>159</td>
</tr>
<tr>
<td>6.2</td>
<td>EnC Activities regarding the Extension of the Acquis</td>
<td>160</td>
</tr>
<tr>
<td>7.</td>
<td>Conclusion</td>
<td>161</td>
</tr>
<tr>
<td></td>
<td>A New Dimension in the Legitimacy Debate: Network Codes in the Energy Community</td>
<td>163</td>
</tr>
<tr>
<td></td>
<td>Andreas Pointvogl</td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>Introduction</td>
<td>163</td>
</tr>
<tr>
<td>2.</td>
<td>The Legitimacy Debate</td>
<td>164</td>
</tr>
<tr>
<td>3.</td>
<td>Network Codes in the European Union</td>
<td>173</td>
</tr>
<tr>
<td>3.1</td>
<td>Why Network Codes?</td>
<td>173</td>
</tr>
<tr>
<td>3.2</td>
<td>The Network Code Development Process</td>
<td>176</td>
</tr>
<tr>
<td>4.</td>
<td>Network Codes in the Energy Community</td>
<td>179</td>
</tr>
<tr>
<td>5.</td>
<td>Legitimacy Implications</td>
<td>180</td>
</tr>
<tr>
<td>6.</td>
<td>Conclusion</td>
<td>184</td>
</tr>
<tr>
<td></td>
<td>The Concept of Interconnector in the Context of the Energy Community Treaty</td>
<td>185</td>
</tr>
<tr>
<td></td>
<td>Branimlava Lepotic Kovačević and Aleksandar Kovačević</td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>Introduction</td>
<td>185</td>
</tr>
<tr>
<td>2.</td>
<td>The Term 'Interconnector' in the EU Legislation</td>
<td>186</td>
</tr>
<tr>
<td>3.</td>
<td>Generating Plant as Interconnector in the Energy Community</td>
<td>187</td>
</tr>
<tr>
<td>4.</td>
<td>The Example of HPP Iron Gates</td>
<td>189</td>
</tr>
<tr>
<td>5.</td>
<td>Conclusion</td>
<td>191</td>
</tr>
<tr>
<td>6.</td>
<td>Implications</td>
<td>192</td>
</tr>
</tbody>
</table>
### The Energy Infrastructure Package and the New TEN-E Regulation: Scope and Impact on the Energy Community

Olaf Däuper and Christian Thole .............................................. 195

1. Introduction ................................................................. 195
2. Infrastructure Package: Content and Objectives ....................... 196
3. Legal Framework and the Legislative Process ......................... 197
4. TEN-E Regulation ......................................................... 197
   4.1. Priority Corridors and Areas ..................................... 198
   4.2. Projects of Common Interest .................................... 199
      4.2.1. Regulatory Aspects ......................................... 199
      4.2.1.1. Criteria and Characteristics .............................. 199
      4.2.1.2. Determining Projects ..................................... 200
      4.2.1.3. Acceleration of the Permit Granting Process ........... 201
      4.2.2. Financing the PCIs ........................................... 201
      4.2.2.1. The High-Risk Incentives by National Regulatory Authorities ........................................ 202
      4.2.2.2. Cross-Border Cost Allocation ............................. 202
      4.2.2.3. Grants via Union Financial Assistance and CEF ...... 204
6. Projects Involving Non-EU Members ..................................... 205
7. The Implementation of the TEN-E Regulation in the Energy Community ......................................................... 207
8. Conclusion ................................................................. 208

### The Access Exemptions Regime for the Trans Adriatic Pipeline: Regulatory Cooperation and the Role of the Energy Community

Ioanna Mersinia ................................................................. 211

1. Introduction ................................................................. 211
   1.1. Description of the Project and the Procedure of the Exemption Application .................................. 211
   2.1. The Regulatory Framework for Third Party Access ............... 213
   2.2. Scope and Duration of the Exemption from TPA/the Commission’s Requested Amendments ...................... 215
   2.3. The Amendments Requested by the European Commission concerning the Initial Capacity, FORWARD Flow (Article 32 of the Gas Directive): the Final Joint Opinion .......................... 216
3. The Role of the Energy Community: Opinion 1/2013 – Applicable Legal Framework and Amendments Requested ......................................................... 218

4. Cooperation between Member States and Contracting Parties of the Energy Community: the Role of the National Regulatory Authorities and the International Dimension of TAP .................................................. 222

5. Current Status of the Project and Milestones of the Implementation Plan .................................................. 224

6. Conclusion .................................................. 226

The Trans Atlantic Pipeline Project: How Exemptions Lead to Tailor-Made Regulatory Regimes
Leigh Hancher .................................................. 229

1. Introduction .................................................. 229

2. The Project .................................................. 230

3. The Joint Opinion in Brief .................................................. 231

4. Initial Capacity and TPA .................................................. 232

5. The ‘TAP Tariff’ .................................................. 233

6. The Legal Basis for the Exemption .................................................. 234

7. The Substantive Criteria for Exemption .................................................. 236

8. TAP as a ‘Major New’ Interconnector .................................................. 237

9. The Investment must Enhance Competition in Gas Supply and Enhance Security of Supply .................................................. 238

  9.1. Enhancement of Competition .................................................. 238

  9.2. Greece .................................................. 238

  9.3. Italy .................................................. 239

  9.4. Albania .................................................. 240

  9.5. Short-Term Products .................................................. 241

10. Security of Supply .................................................. 241

  10.1. Greece .................................................. 242

  10.2. Italy .................................................. 243

  10.3. Albania .................................................. 243

11. The Level of Risk .................................................. 245

12. Separation of Ownership .................................................. 247

13. Charges Levied on Users .................................................. 247

14. The Exemption must not be Detrimental to Competition, the Internal Market in Natural Gas, or the Regulated System .................................................. 248

15. Conclusion .................................................. 250
The Trans Adriatic Pipeline: A Use Case of the *Acquis Communautaire* on Energy

Christopher Bremme and Julia Sack .................................. 253

1. The TAP Project ................................................. 253
2. Legal Framework for TAP’s Exemption ............................. 255
   2.1. European Union ........................................ 255
   2.2. Energy Community ..................................... 257
3. Conditions for an Exemption under Article 36 Gas Directive .... 259
4. Exemption in the Case of TAP .................................... 260
   4.1. Procedure ............................................. 260
   4.2. Assessment of the Exemption Conditions ...................... 260
      4.2.1. Major New Gas Infrastructure ..................... 260
      4.2.1.1. TAP as an Interconnector ...................... 261
      4.2.1.2. TAP as a Major Infrastructure Project .......... 262
      4.2.2. Enhancement of Security of Supply .................. 262
      4.2.3. Enhancement of Competition ....................... 264
      4.2.4. Level of Risk Attached to the Investment .......... 266
      4.2.5. Legal Unbundling .................................. 267
      4.2.6. Charges for the Use of the Infrastructure ........... 267
      4.2.7. Competition and Infrastructure .................... 268
   4.3. Effect of the Commission’s Decision and the Secretariat’s Opinion ........................................... 269

Regulatory Aspects behind a Realisation of the South Stream

Nijaz Dizdarevic .................................................. 271

1. Introduction ..................................................... 271
2. The South Stream ............................................... 272
   2.1. Background ............................................. 272
   2.2. Main Partners .......................................... 273
   2.3. Start and History of Development ......................... 274
   2.4. The Intergovernmental Agreements ......................... 275
   2.5. The Energy Community Secretariat’s Views ................ 276
   2.6. Acceleration of the South Stream Project Activities .... 277
   2.7. The Southern Gas Corridor ................................ 277
3. The Commission .................................................. 279
   3.1. Background ............................................. 279
   3.2. Current Status .......................................... 280
   3.3. Identified Grievances .................................... 280
   3.4. Next Steps ............................................. 281
   3.5. The Third Package ...................................... 282
   3.6. Preferential Access to the South Stream .................. 283
<table>
<thead>
<tr>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.7. The Court of Justice Case C-17/03</td>
</tr>
<tr>
<td>3.8. Russia’s Views</td>
</tr>
<tr>
<td>3.8.1. The Common Interest and National Importance of the South Stream</td>
</tr>
<tr>
<td>3.8.2. The Renegotiation of the Intergovernmental Agreements</td>
</tr>
<tr>
<td>3.8.3. The Treatment of the South Stream in the Third Package</td>
</tr>
<tr>
<td>4. Implementation of the EU Legislation and Gazprom</td>
</tr>
<tr>
<td>4.1. Background</td>
</tr>
<tr>
<td>4.2. The EU Internal Energy Market Rules</td>
</tr>
<tr>
<td>4.3. The EU Competition Law</td>
</tr>
<tr>
<td>4.3.1. President/Government of Russia</td>
</tr>
<tr>
<td>5. Main Open Issues in the Pricing of Gas Supplies</td>
</tr>
<tr>
<td>5.1. Background</td>
</tr>
<tr>
<td>5.2. The Revision of Gas Prices</td>
</tr>
<tr>
<td>5.3. The ‘Take-or-Pay’ Clause</td>
</tr>
<tr>
<td>5.4. The Oil-Indexation of the Gas Prices</td>
</tr>
<tr>
<td>6. Price Differences in the Sale of Russia’s Natural Gas</td>
</tr>
<tr>
<td>6.1. Background</td>
</tr>
<tr>
<td>6.2. The Russian Four-Tier Pricing System</td>
</tr>
<tr>
<td>6.3. The EU Information Exchange Mechanism</td>
</tr>
<tr>
<td>6.4. February 2013 Release of Data</td>
</tr>
<tr>
<td>7. Cases of Moldova and Ukraine</td>
</tr>
<tr>
<td>7.1. Case of Moldova</td>
</tr>
<tr>
<td>7.2. Case of Ukraine</td>
</tr>
<tr>
<td>8. Conclusion</td>
</tr>
</tbody>
</table>

**Persistent Energy Poverty in the Western Balkans**
Aleksandar Macura and Aleksandar Kovačević | 307

| 1. Background and History of Problem | 307 |
| 1.1. Defining the Energy Poverty | 308 |
| 1.2. Formation of a Deep Energy Poverty Problem during the 1990s | 309 |
| 2. EnCT as an Energy Poverty Eradication Platform | 312 |
| 2.1. Why is Energy Poverty Eradication so Critical for the EnCT? | 312 |
| 2.1.1. Economic Aggregate Demand and Local Employment | 313 |
| 2.1.2. Impact on Network Energy | 314 |
| 2.1.3. Impact on Electricity and Gas Markets | 315 |
| 2.1.4. Purchasing Power and Energy Investments | 316 |
| 2.2. Energy Poverty and Energy Efficiency Targets | 316 |
| 2.3. Energy Poverty and Renewable Energy Targets | 316 |
| 2.4. Energy Poverty and EnCT Environmental Obligations | 317 |
3. Energy Poverty Eradication Policy Failure ........................................ 317
   3.1. Energy Poverty Comprehensive Policy .................................. 318
   3.2. Mainstreaming of Energy Poverty ......................................... 318
   3.3. Insufficiency of Institutional Framework ................................. 319
   3.4. Role of the Donors .......................................................... 319
4. Conclusion .................................................................................. 319
5. Recommendations ........................................................................ 320

PART III.
SUSTAINABILITY ASPECTS OF THE ENERGY COMMUNITY

Environment in the Energy Community Contracting Parties: A Quest for the Holy Grail of Balance

Peter Vajda ................................................................. 323

1. Introduction .................................................................................. 323
   1.1. Economic and Environmental Situation in the Energy Community Contracting Parties ............................. 323
   1.2. The Energy Community Environmental Acquis ......................... 324
   1.3. Possible Problems with Implementation ................................. 326
2. Recent Developments in the Energy Community concerning Large Combustion Plants: A Participatory Process that could Bring Major Benefits ................................................................. 328
   2.1. The Study on the Need for Modernisation of Large Combustion Plants: Costs and Benefits of Emissions Abatement ................................................................. 328
   2.2. Potential Problems with the Findings of the Study and Possible Solutions through the Energy Community ................................................................. 330
   2.3. The Decisions of the Ministerial Council of 24 October 2013 331
3. The Role of Renewable Energy Sources and Energy Efficiency: Emission Reduction should be Thought of in a Broader Context ................................................................. 333
5. Concluding Remarks: Balance is the Key, but what do the Jedi have to do with Environmental Ambitions? 336

Energy Community Treaty and the EU Emissions Trading System: Evidence of an Unrecognised Policy Conflict

Stefan E. Weishaar and Sami Madani .................................................. 337

1. Introduction .................................................................................. 337
2. Policy Incongruity and Electricity Carbon Leakage .............................. 338
   2.1. EU ETS Policy ................................................................ 339
   2.2. Energy Policy .................................................................. 341

Intersentia xvii
3. Case Studies
  3.1. Data and Underlying Assumptions
  3.2. Scenario Description and Results
4. Results and Discussion
5. Conclusion

Decarbonisation of Energy Systems: EU Reality Knocking on the Balkans' Doors
Piotr Trzaskowski

1. The European Energy Choices
  1.1. The Future of the Western Balkans is in the European Union
  1.2. Decarbonising the European Economy and Energy Sector
2. Decarbonisation as an Opportunity for the Balkans
  2.1. A New Paradigm of Pan-European Grid
  2.2. Special Role for Hydro Power Plants
  2.3. Solar Revolution behind the Corner
3. Risks of Wrong Investment Decisions in the Western Balkans
  3.1. Risk of Stranded Assets and Concept of 'Carbon Bubble'
  3.2. Growing Policy and Financial Risks for Balkan High-Carbon Investments
  3.3. Electricity Trade with Partners Betting on High-Carbon Energy
4. Conclusion

Capital Cities from South East Europe towards Sustainable Energy:
Network of Energy Efficient Capitals – A View by the German Technical Cooperation (GIZ)
Dubravka Bosnjak, Johannes Elle and Klaus Hoppe

1. The General Significance of Local Governments for the Implementation of Sustainable Energy Policies
2. Engagement of Cities and Municipalities in the Covenant of Mayors in South East Europe
3. From Initiative to the Network
  3.1. Capital Cities' Initiative
  3.2. Network of Energy Efficient Capital Cities in South East Europe
4. Conclusion
Improvement of Energy Efficiency Policies in South East Europe
Initiated through Impact-Orientated Planning and Monitoring

Armin Teskeredzic and Johannes Elle ................................. 381

1. Introduction .............................................................. 381
   1.1. Engagement of German Technical Cooperation in the Field
        of Energy Efficiency in South East Europe ...................... 382
   1.2. Setting an Entry Point to Support the Initiation of a Capacity
        Development Dynamic in the Partner Countries ............... 383

2. Making the Progress Measurable: Support for the Monitoring,
   Verification and Evaluation Methodology of the Energy
   2.1. Initial Situation .................................................... 384
   2.2. Approach ............................................................ 385
       2.2.1. Situation Analysis .............................................. 385
       2.2.2. Development of Bottom-Up Methodology ............... 385
       2.2.3. Development of Top-Down Methodology ............... 386
       2.2.4. Monitoring and Reporting .................................. 387
   2.3. Achievements ...................................................... 387

3. Measuring the Progress: Web-Based Monitoring and Verification
   Platforms (2013–2014) .................................................. 388
   3.1. Initial Situation .................................................... 388
   3.2. Approach ............................................................ 389

4. Benefits of the Joint Approaches in the Energy Community towards
   Energy Efficiency ....................................................... 390

5. Achievements, Outlook and Suggestions ............................. 392

Energy Efficiency versus New Generation Capacity: Would it be Enough
to 'Keep the Lights on?'

Violeta Kogalniceanu ....................................................... 395

1. Introduction .............................................................. 395
2. How Much Energy Would We Need in 2020, 2025 and 2030? ...... 396
3. Energy Efficiency ......................................................... 398
   3.1. Where Are We with Energy Efficiency in the Community?
       Setting the Scene ...................................................... 398
   3.2. What are the Barriers to a More Energy Efficient Economy
       in the Energy Community? .......................................... 402
4. (Not) Understanding the Market for Energy Efficiency ............. 403
5. Low, Regulated Electricity Prices ..................................... 403
6. Public Budget Constraints .............................................. 404
7. (Not) Enabling Legal Framework ..................................... 405
   7.1. Energy Services and ESCO Development ...................... 405
7.2. Energy Efficiency in Public Procurement .......................................................... 406
7.3. Limited Public Awareness and Rather Weak Institutional Framework .................. 406
7.4. Insufficient Energy Consumption Data .............................................................. 407
9. Enabling Financing for Energy Efficiency .............................................................. 408
10. Regional Energy Efficiency Programmes ............................................................. 409
10.1. Regional Energy Efficiency Programme for the Western Balkans ....................... 409
10.1.1. Policy Dialogue Window ................................................................. 410
10.1.2. Credit Line Facility Window (WeBSEFF II) .......................................... 410
10.1.3. Direct Financing Facility Window (WeBSEDFF) ..................................... 410
10.2. Integrated Monitoring and Verification Platform for Energy Efficiency Action Plans Implementation .......................................................... 411
10.3. Energy Efficient Capital Cities: Strengthening the Role of Capital Cities in Promotion of Energy Efficiency .......................................................... 411
10.4. Investments – Show Cases in Contracting Parties: Energy Efficiency Investment Projects in the Public Sector ..................................................... 412
10.4.1. Rehabilitation of Public Buildings (Montenegro, Serbia) ............................. 412
10.4.2. Various Ways to Make Energy Efficiency Investments in the Public Sector (the former Yugoslav Republic of Macedonia) ........................................ 413
10.4.3. A Successful ESCO Story: HEP ESCO (Croatia) ..................................... 414
10.4.4. Energy Efficiency Agency and Fund (Moldova) ........................................ 415
10.4.5. Energy Audits in Buildings of the Public Sector (Kosovo*) ............................ 415
10.4.6. Municipal Energy Efficiency in Ukraine .................................................... 415
12. Energy Infrastructure Development ..................................................................... 417
13. Final Conclusions ................................................................................................. 420

PART IV. MEMBERSHIP OF THE ENERGY COMMUNITY

Energy Community and Energy Resource Rich Countries: An Introduction to the Topic
Kim Talus .............................................................................................................. 425

1. Introduction ........................................................................................................... 425
2. The Energy Community Treaty ............................................................................. 426
   2.1. Genesis and Rationale .................................................................................... 426
   2.2. Legislative Framework ................................................................................. 427
4.5. Incomplete Summary Review of Material Requirements .............. 469
   4.5.1. Summarised Tables ............................................. 470
   4.5.2. Cross and Horizontal Connections .............................. 475
   4.5.3. General Circumstances of Importance for
           Implementation of Material Obligations ..................... 478
5. Conclusion ........................................................................ 482
6. Recommendations ........................................................... 483

Applying the European Union’s ‘Energy Acquis’ in Eastern Neighbouring
Countries: The Cases of Ukraine and Moldova
Roman Petrov ................................................................. 485

1. Introduction ................................................................. 485
2. The External Dimension of the EU’s Energy Policy .................. 486
3. Scope of the EU ‘Energy Acquis’ to be Implemented via the Enc
   Framework ................................................................. 487
   3.1. Scope of the EU ‘Energy Acquis’ to be Implemented and
        Applied by the Eastern Neighbouring Countries .............. 488
   3.2. Application of Fundamental Principles of EU Law by the
        Eastern Neighbouring Countries ................................. 489
   3.3. Obligation of the Eastern Neighbouring Countries to Follow
        the EU ‘Dynamic Energy Acquis’ ................................. 489
   3.4. Obligation of the Eastern Neighbouring Countries to Follow
        Decisions of the EnC’s Institutions and Dispute Settlement .. 492
4. Implementation of the EU ‘Energy Acquis’ into the Legal System
   of Eastern Neighbouring Countries .................................... 493
   4.1. Constitutional Foundations of Application of the EU ‘Energy
        Acquis’ in Ukraine and Moldova .................................. 493
   4.2. Application and Implementation of the EU ‘Energy Acquis’
        in Forthcoming Association Agreements between the EU
        and Ukraine and the EU and Moldova ......................... 495
5. Conclusion ........................................................................ 497

PART V.
The Energy Community in an International Context

Energy Security and Intergovernmental Organisations
Richard Wheeler ............................................................... 501

1. Definitions of ‘Energy Security’ ......................................... 502
2. Organisations Dealing with Energy Security and Energy-Related Issues 503
   2.1. Global Governance Organisations Involved with Energy-Related
        Issues ................................................................. 505
2.2. Organisations Involved with the Economic Aspects of Energy Security ........................................ 506
2.3. Organisations Involved with the Physical Security Aspects of Energy Security ............................. 511
2.4. Organisations Involved with the Environmental Aspects of Energy Security .............................. 514
3. Concluding Observations ..................................... 517

Institutional Building in Energy Regulation: Comparison between the Cases of the Energy Community and MEDREG
Veronica Lenzi .................................................. 519
1. Introduction ................................................. 519
2. Institutional Building in the EU External Energy Policy ............................................................. 521
3. Energy Community: Mechanisms and Rationale ........................................................................... 524
   3.1. Positive Outcomes: A Sound Legislative Framework ............................................................. 525
   3.2. Issues at Stake: From Theory to Practice ................................................................................... 526
4. MEDREG: Current Status and the Way Forward ............................................................................ 527
5. Energy Community: An Example for MEDREG ............................................................................ 531
6. Conclusion ......................................................... 536

Ernesto Bonafé and Florian Encke .................................. 539
1. Introduction ................................................. 539
2. Regulatory Scope: Transit as a Regional Aspect of the ECT ......................................................... 540
3. The Expansion of the ECT to the Middle East and North Africa ................................................... 544
4. Conclusion ......................................................... 548

The Energy Community, the Energy Charter Treaty and the Promotion of EU Energy Security
Rafael Leal-Arcas and Andrew Filis ................................. 551
1. Introduction ................................................. 551
2. Background to EU Energy Policy .......................................................... 552
   2.1. EU Energy Policy and its Complications ........................................................................... 552
   2.2. Contextualising EU Energy Security ....................................................................................... 556
      2.2.1. The Traditional EU Energy Position: Dependent and Undiversified ............................. 556
      2.2.2. Energy Security: Definitions ....................................................................................... 557
   2.3. The EU Energy Governance Framework ........................................................................... 558
      2.3.1. Pre-Lisbon Treaty ....................................................................................................... 558
      2.3.2. The Lisbon Treaty ....................................................................................................... 559

Intersentia xxiii
3. EU External Energy Relations .................................................. 560
  3.1. The BRIC Countries .................................................. 560
  3.2. The Euro–Mediterranean Partnership ............................. 564
  3.3. The Africa–EU Energy Partnership ................................. 566
  3.4. Persian Gulf–EU Partnerships ............................... 566
  4.1. The Energy Charter Treaty and its Relationship to the EU .... 568
  4.2. The Energy Community and its Relationship to the EU ....... 571
  5.2. Dispute Settlement in the Energy Community ............. 577
6. Certain Issues Relating to Concurrent Special Legal Regimes ................................................................. 579
  6.1. General Remarks ...................................................... 579
  6.2. Normative Conflicts and the EU Legal Order .............. 582
  6.3. Normative Conflicts and the Energy Charter Treaty .... 583
  6.4. Normative Conflicts and the Energy Community ......... 584
    6.5.1. Concurrent Jurisdictions .................................. 584
    6.5.2. ‘Inter Se’ Legal Agreements ................................ 587
7. Conclusion ........................................................................... 588

Analysis of the Term 'Transit' in Cross-Border Energy Transport: A Comparative Study of Regulatory Frameworks in the Eurasian Context
Gokce Mete ................................................................. 591
1. Introduction ................................................................. 591
2. GATT V ........................................................................... 594
  2.1. Transit-Related Definitions ...................................... 594
    2.1.1. Construction and Operation of Infrastructure .......... 594
    2.1.2. Tariffs, Fees and Other Charges .................... 595
    2.1.3. Impact on Non-Members .................................. 595
    2.1.4. Enforcement Mechanism and Remedies Available  ...... 595
    2.1.5. Treatment of Transit and Interruption of Transit Flows ... 596
    2.1.6. Capacity Allocation, Congestion Management
      Mechanisms and the Access Regime ..................... 597
3. The Energy Charter Treaty .................................................. 597
  3.1. Article 7 of the ECT .................................................. 597
    3.1.1. Definition of Transit ......................................... 597
    3.1.2. Non-Interruption of Transit ............................. 598
    3.1.3. Treatment of Transit ..................................... 598
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