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THE ENERGY COMMUNITY AS A MECHANISM OF LEGAL TRANSITION AND EUROPEAN INTEGRATION IN THE WESTERN BALKANS

I. INTRODUCTION

In Europe, the events of 1989 triggered radical change in the formerly socialist states of Central and Eastern Europe. The collapse of communist government in resulted in the establishment of new states, many of which gained independence as former components of larger federations. Within this context of political fragmentation, the legal regulation of economic relations emerged as a major field of contestation. Often, transition from centralized planning to the 'free market' was proclaimed in law but frustrated in practice by vested interests, while the injustices of 'shock therapy' and oligarchic capitalism fed nostalgia for the old order. Some of the newly independent democracies joined the European Union, while others remain on the outside. The transitions of the legal systems of these reoriented states have in some cases been unpredictable and incomplete.

According to Dahrendorf, the 'controlled transformation of illiberal states into liberal ones' is 'initiated from above', and '[a]lthough the effects of transitions may be revolutionary, the thread of continuity never is broken completely'.[1] The energy sectors of the transition states have illustrated this tension between revolutionary change and stubborn continuity. The legacy model of state-owned energy monopolies as major employers, providing heavily subsidizing but often heavily polluting energy, has long outlasted the communists who established it. In Central and Eastern Europe, this model has been challenged by a competing model based on a social market economy, competition, disaggregation, higher environmental standards and a greater role for renewable energy. This is the model promoted by the Energy Community, a treaty organization under which post-Communist States in Eastern Europe and the Caucasus have committed to implement the EU's energy *acquis communautaire* in their domestic law. However, that energy *acquis* is itself undergoing major change as the EU strives to lead the world toward climate neutrality. Convergence with the EU *acquis* has aptly been described as a 'moving target for systemic legal adjustment of Balkan countries'.[2]

This paper analyses the Energy Community as a mechanism for the comprehensive transition of energy law within its Western Balkan Contracting Parties and, simultaneously, as a complementary mechanism for the integration of these states into the EU. Section 2 outlines the overlapping energy transitions in successive waves of EU legislation, targeting market liberalization, integration and, increasingly, decarbonization. Section 3 introduces the Energy Community and its Contracting Parties. Section 4 discusses the Energy Community's legal framework and the challenges faced by Contracting Parties in implementing the energy

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[1] Dahrendorf R, 'Transitions: Politics. Economics, and Liberty' (1990) 13 Washington Quarterly 134.
[2] Gordana Gasmi, 'Legal and Political Coordination of National Systems with European System: View from the Western Balkans Region' (2009) 2009 Revista de Drept Public (ns) 1, 13.

acquis. Section 5 focuses on the additional challenge of aligning the Energy Community with the EU's latest initiatives to strengthen its response to climate change, the Energy Union legislative package and the European Green Deal. Section 6 comments on the potential of the Energy Community as a distinct but complementary process to EU accession negotiations, while Section 7 concludes.

II. OVERLAPPING ENERGY TRANSITIONS IN THE EU

Regarding the energy sector, the EU *acquis* has certainly presented a 'moving target' for Western Balkans nations. The EU competence to regulate energy is based on Article 194 of the Treaty on the Functioning of the European Union (TFEU). Article 194(1) sets the aims of EU energy policy as ensuring a functioning energy market, ensuring security of supply, promoting energy efficiency and the development of new and renewable forms of energy, and promoting interconnection of energy networks. EU Member States nevertheless retain the right to determine their own energy mix.[3] A suite of legislation to achieve the Article 194 aims, known as the Third Energy Package, included *inter alia* directives on the gas and electricity internal markets (including requirements for the 'unbundling' of infrastructure from energy production and supply),[4] regulations on access to energy networks (including rules for the cross-border exchange of electricity),[5] a regulation for trans-EU energy networks (so-called Projects of Common Interest) and the first directives on renewable energy and energy efficiency.[6] Broadly, the Third Energy Package targeted the liberalisation and European integration of Member State energy sectors. Catching up to the Third Energy Package can be considered the 'first energy transition' of the Energy Community, and remains a significant challenge.

The Energy Community's 'second energy transition', which is also ongoing in the EU, is focused on decarbonization (which, given the EU's dependence on imported fossil fuels, has a major energy security co-benefit). This transition is about integrating with the EU's legal framework for responding to climate change. The EU has long aspired to lead in global climate diplomacy, both in crafting alliances for ambitious outcomes and by the strength of its own example.[7] This has resulted in a dynamic of iterative feedback between EU and international law: The UN Framework Convention on Climate Change (agreed in 1992; in force in 1994), which signalled the need to address the climate problem; the Kyoto Protocol (1997; 2005), which set quantified and binding emission reduction targets for developed Parties including the EU, and also established international market mechanisms; and the Paris Agreement (2015; 2016), which established a process for climate action applicable to all Parties and centred on the communication of progressively more ambitious Nationally Determined Contributions (NDCs). In addition to the renewable and energy efficiency directives, the Emissions Trading Scheme Directive[8] and the Effort Sharing Decision[9] were key elements of the legal framework for achieving the EU's 2020 climate and energy targets.

With the adoption of the Paris Agreement, it became necessary to substantially update the EU's legislative framework in order to achieve an accelerated transition to clean energy. The Energy Union legislative package was fully adopted in the EU prior to the 2019 European

[3] TFEU Art. 194.2.
[4] Directive 2009/72/EC (electricity); Directive 2009/73/EC (gas).
[5] Regulation (EC) No 714/2009 electricity); Regulation (EC) No 715/2009 (gas).
[6] Directive 2009/28/EC (renewables); Directive 2012/27/EU (energy efficiency).
[7] Walker H and Biedenkopf K, 'The Historical Evolution of EU Climate Leadership and Four Scenarios for Its Future' in Stephen Minas and Vassilis Ntousas (eds), *EU Climate Diplomacy: Politics, Law and Negotiations* (Routledge 2018).
[8] Directive 2003/87/EC.
[9] Decision No 406/2009/EC.

Parliament elections. The package includes the revised Renewable Energy Directive, the revised Energy Efficiency Directive, the Energy Performance of Buildings Directive, the Directive of Common Rules for the Internal Market for Electricity, the Regulation on Risk-Preparedness in the Electricity Sector, the Regulation on the Internal Market for Electricity, and the Regulation on the Governance of the Energy Union and Climate Action (Governance Regulation). Collectively, these acts aim for simultaneous progress across the five 'dimensions' of the Energy Union: energy security; internal energy market; energy efficiency; decarbonization; and research, innovation and competitiveness. This legislative package is therefore a key means of achieving domestically the EU's 2030 emission reduction target of at least forty per cent from 1990 levels, as communicated in the EU Nationally Determined Contribution under the Paris Agreement, as well as the 32 per cent renewable energy share and the 32.5 per cent improve in energy efficiency – targets finalized by the European Council in 2018.

The Governance Regulation is crucial to achieving these targets, which it aims to do by streamlining national planning processes and bringing together energy and climate change planning. Each EU Member State is required to submit an integrated National Energy and Climate Plan (NECP) covering 10-year periods to the European Commission.[10] The Regulation contains quite detailed guidance on the content required in each NECP,[11] as well as for national objectives, targets and contributions across the Energy Union's five dimensions. Member States must additionally list policies and measures to achieve their objectives.[12] The Commission is empowered to review draft NECPs and recommend changes.[13] Every two years beginning in 2023, each Member State must submit a progress report to the Commission.[14]

In addition to the Energy Union package, the new European Commission appointed in 2019 has introduced a further package of measures, the European Green Deal, with an aim of preparing the EU to achieve climate neutrality in 2050.[15] Keeping up with the 'moving target' that is the EU energy *acquis* is a major test of the Energy Community Contracting Parties' ability and willingness to pursue European integration.

III. THE ENERGY COMMUNITY

The context of the Energy Community's creation was the broader transition of Eastern European states from socialist republics (mostly as constituent entities of larger federations) to independent, democratic states. By the early 2000s, the newly enlarged EU targeted the legal harmonization of these states as a mechanism to modernize and liberalize their energy sectors while at the same time strengthening EU energy security. This agenda was set by the June 2003 European Council, meeting in Thessaloniki, which adopted an agenda 'to further strengthen the privileged relations between the European Union and the Western Balkans and in which the European Union encouraged the countries of the region to adopt a legally binding South-East Europe energy market agreement'.[16] The Energy Community was envisioned as a mechanism for regulatory convergence to EU standards, to enable

[10] Governance Regulation, Art. 3.1.
[11] Ibid, Art. 3.2-3.3.
[12] Ibid, Art. 7.
[13] Ibid, Art. 9. For the results of the first review process, see https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/governance-energy-union/national-energy-climate-plans
[14] Ibid, Art. 17.
[15] European Commission, Communication: The European Green Deal, Brussels, 11.12.2019 COM(2019) 640 final.
[16] Energy Community Treaty, Preamble.

Contracting Parties to gradually integrate their energy markets into the EU single market for energy (independent of any concurrent EU accession negotiation).[17]

The Treaty Establishing the Energy Community was signed in 2005 and entered into force the following year. Its parties were the EU and the following non-EU members (known as Energy Community Contracting Parties): Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Kosovo,[18] Montenegro, North Macedonia, Romania and Serbia. Bulgaria, Romania and Croatia each ceased to be Contracting Parties when they joined the EU, while Moldova and Ukraine became Contracting Parties in 2010 and Georgia joined the Energy Community in 2016. The eastward expansion of the Energy Community was consistent with the Council of the EU's conclusion that the 'Energy Community should be promoted as a framework for energy relationships with countries in the Western Balkans, Eastern Europe and other neighbouring countries willing and able to implement the relevant EU *acquis*'.[19] Of the Contracting Parties, Montenegro and Serbia are currently negotiated accession to the EU, while as of February 2020 Albania and North Macedonia are waiting for the European Council to agree to open accession negotiations.

The Contracting Parties have a combined population of over 67 million people (including over 42 million people in Ukraine alone).[20] Coal continues to be the largest energy source for the Contracting Parties, accounting for over 46 per cent of total installed electricity generation capacity.[21] Moreover, coal continues to be subsidized at a higher rate than renewables in the most coal-dependent Contracting Parties.[22] Despite the ongoing preponderance of coal, however, the Energy Community region has significant potential to expand its renewable sector. The International Renewable Energy Agency has reportedly found that Southeast Europe could create 50,000 additional jobs in the renewable sector and EUR 500 billion in additional GDP in the years to 2050.[23]

The multiple goals and interests served by the creation of the Energy Community are cited in the preamble of the EnC Treaty. These include: '[T]he need to strengthen co-operation amongst the states and nations of South East Europe and to foster the conditions for peace, stability and economic growth'; the creation of an 'integrated market in natural gas and electricity' among Parties, 'a stable regulatory and market framework capable of attracting investment in gas networks, power generation and transmission networks, so that all Parties have access to the stable and continuous gas and electricity supply that is essential for economic development and social stability', and 'a single regulatory space for trade in gas and electricity that is necessary to match the geographic extent of the concerned product markets'; recognition that several EU Member States 'are naturally integrated or directly affected by the functioning of the gas and electricity markets of the [neighbouring] Contracting Parties'; enhancing 'security of supply of the single regulatory space'; and

[17] Energy Community Treaty, Article 103.

[18] This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence.

[19] Council of the European Union, Follow up to the European Council of 22.05.2013; Review of Developments on the External Dimension of the EU Energy Policy, 17756/13, 12.12.2013, p. 8.

[20] Eurostat, 'Population on 1 January', https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00001&plugin=1

[21] Damir Miljević, Milka Mumović and Janez Kopač, 'Rocking the Boat: What is Keeping the Energy Community's Coal Sector Afloat? Analysis of Direct and Selected Hidden Subsidies to Coal Electricity Production in the Energy Community Contracting Parties', Energy Community Secretariat, June 2019, 5.

[22] BiH, Kosovo and Serbia. Ibid.

[23] Branislava Jovičić, 'IRENA: SEE region yet to realise full potential of energy transition', Balkan Green Energy News, 17 June 2019, https://balkangreenenergynews.com/irena-see-region-yet-to-realise-full-potential-of-energy-transition/

commitment to 'improving the environmental situation in relation to gas and electricity, related energy efficiency and renewable energy sources'.

The 'task' of the Energy Community, established in Article 2 of the EnC Treaty, is to 'organise the relations between the Parties and create a legal and economic framework in relation to Network Energy', in order to 'create a stable regulatory and market framework capable of attracting investment'; 'create a single regulatory space for trade in Network Energy'; 'enhance the security of supply of the single regulatory space by providing a stable investment climate'; 'improve the environmental situation in relation to Network Energy and related energy efficiency, foster the use of renewable energy, and set out the conditions for energy trade in the single regulatory space'; and 'develop Network Energy market competition on a broader geographic scale and exploit economies of scale'.[24] 'Network Energy' is defined to include the electricity and gas sectors,[25] and also includes oil since Ministerial Council Decision 2008/3/MC.

To achieve these purposes, the Energy Community engages in the following three activities: 'implementation by the Contracting Parties of the *acquis communautaire* on energy, environment, competition and renewables, … adapted to both the institutional framework of the Energy Community and the specific situation of each of the Contracting Parties'; 'the setting up of a specific regulatory framework permitting the efficient operation of Network Energy markets across the territories of the Contracting Parties and part of the territory of the European Community, and including the creation of a single mechanism for the cross-border transmission and/or transportation of Network Energy, and the supervision of unilateral safeguard measures'; and 'the creation for the Parties of a market in Network Energy without internal frontiers, … which may include the achievement of a common external energy trade policy'.[26]

The EU is the most powerful actor in the development of the Energy Community. Measures for the operation of energy markets across the Contracting Parties and neighbouring EU Member States can be proposed by the Commission, a Contracting Party or by the EnC Secretariat,[27] but can only be adopted by a two-thirds majority which includes the EU.[28] The same rule applies to the adoption of Procedural Acts, which 'regulate organizational, budgetary and transparency issues of the Energy Community'.[29] Measures for the creation of a single energy market may be proposed by any Party, but must be adopted by unanimity, including the EU.[30] Moreover, the EU is by far the largest funder of the Energy Community, contributing around 95 per cent of all funding from Parties (with the remaining five per cent contributed by Contracting Parties).[31] Additionally, the Council of the EU has decided that, regarding proposed EnC measures under Title III (regional energy markets covering Contracting Parties and neighbouring EU Member States) and Title IV (a single energy market including the EU and EnC contracting parties) of the EnC Treaty, the EU position 'shall not go beyond the *acquis communautaire*'.[32] This decision from outside the formal EnC legal order has applied a brake on the development of EnC law.

[24] EnC Treaty, Art. 2.1.
[25] Ibid, Art. 2.2.
[26] Ibid, Art. 3.
[27] Ibid, Art. 82.
[28] Ibid, Art. 83.
[29] Ibid, Art. 86-87.
[30] Ibid, Art. 84-85.
[31] 'Annual Implementation Report', Energy Community Secretariat, 1 September 2018, p. 16.
[32] 2006/500/EC: Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty, Art. 4.

The Ministerial Council meets once a year.[33] Its presidency is rotated among the Contracting Parties, with an EU representative and another Contracting Party serving as vice-presidents.[34] In the Ministerial Council, as well as in the Permanent High Level Group and the Regulatory Board, acts are adopted by a simple majority of the votes cast in votes regarding the *acquis,*[35] and by a two-thirds majority including a positive EU vote in votes regarding the operation of energy markets.[36] The Ministerial Council is obliged to submit an annual report to the European Parliament and to the parliaments of Contracting Parties and EU Member State participants.[37] The Permanent High Level Group meets more regularly, generally four times a year, and is composed of senior officials from Contracting Party energy ministries, as well as two EU representatives.[38] The Group is responsible for preparing the work of the Ministerial Council and reporting to the Ministerial Council on progress toward the EnC objectives, *inter alia*.[39] The EnC Regulatory Board, based in Athens, is tasked to advise the Ministerial Council and Permanent High Level Group of the 'the details of statutory, technical and regulatory rules' regarding the electricity and gas markets, and is also empowered to make Recommendations for the resolution of cross-border disputes between national regulators, if so requested by a disputing party.[40]

The Energy Community Secretariat, based in Vienna, has a vital role in assisting and monitoring the implementation by Contracting Parties of their Energy Community obligations. The Implementation Partnerships agreed between the Secretariat and individual contracting parties provide for the Secretariat to be consulted on drafts of any relevant new legislation, enabling the Secretariat to 'monitor new rules in the Contracting Parties before their adoption'.[41] The Secretariat is responsible for launching infringement proceedings against Contracting Parties it believes are in breach of their obligations, although its powers in this area are far more constrained than the analogous competences of the European Commission.[42] The Secretariat has also acted as a policy entrepreneur, and in recent years consistently promoted a greater focus on climate change within the Energy Community's work. As will be seen, this effort has yielded significant initial results in the context of the 2030 Framework, but much remains to be done if the potential of the Energy Community to maximize its contribution to ambitious climate action is to be realized.

A further EnC body which may come to play a more significant role in future is the Parliamentary Plenum, which was established in 2015 and comprises representatives of Contracting Party parliaments and representatives of the European Parliament, meeting twice a year.[43] The Parliamentary Plenum has begun to issue joint reports and joint statements on

[33] Procedural Act 2006/01/MC-EnC of 17 November 2006 on adoption of internal Rules of Procedures of Ministerial Council of Energy Community as amended by Procedural Acts 2013/01/MC-EnC of 24 October 2013 and 2015/02/MC-EnC of 15 October 2015 amending Procedural Act of the Ministerial Council 2006/01/MC-EnC of 17 November 2006, IV.1.

[34] Ibid, III.

[35] EnC Treaty, Art. 80-81.

[36] Ibid, Art. 83.

[37] EnC Treaty, Art. 52.

[38] Procedural Act 2006/01/PHLG-EnC of 17 October 2006 on adoption of internal Rules of Procedure of the Permanent High Lever Group of Energy Community as amended by Procedural Acts 2013/01/ PHLG-EnC of 23 October 2013 and 2015/01/PHLG-EnC of 16 October 2015 amending Procedural Act of the Permanent High Level Group of 17 October 2006, II.

[39] EnC Treaty, Art. 53.

[40] Ibid, Art. 58.

[41] R Karova, 'The Disputes Settlement System of the Energy Community: Testing its Effectiveness' in D Buschle and K Talus (eds), *The Energy Community* (Cambridge University Press 2015) 25, 54.

[42] D Buschle, 'The enforcement of European energy law outside the European Union: Does the Energy Community live up to the expectations?' (2016) 6 European Energy Journal 26.

[43] Procedural Act of the Ministerial Council PA/2015/05/MC-EnC.

topics such as renewables and energy efficiency.[44] Given the European Parliament's increasingly active and ambitious contribution to EU climate policy and diplomacy, the Parliamentary Plenum may be expected to exert positive pressure for more ambitious climate action by Contracting Parties. The Parliamentary Plenum is also a potential mechanism for increasing EnC information-sharing and cooperation with other relevant regions. In early 2019, a memorandum of understanding between the Energy Community Parliamentary Plenum and the Parliamentary Assembly of the Mediterranean was being drafted for adoption in December.[45]

IV. ENERGY COMMUNITY LAW

This section summarizes the *acquis communautaire* of the Energy Community, as well as progress towards implementation. This *acquis* largely comprises an earlier generation of EU energy, environmental and competition law. The scope of the *acquis communautaire* to be extended to the Energy Community is set out in Title II of the EnC Treaty. This body of law covers the topics of energy, environment, competition and renewables. The 'energy *acquis*' is set out in Annex I of the EnC Treaty. It includes the directives on the internal markets for electricity and for natural gas, the directives on the security of electricity and natural gas supply, and the regulations on common rules for the internal markets in electricity and in natural gas and on guidelines for trans-European energy infrastructure. Additionally, in 2018 the Ministerial Council decided to adapt and implement the Energy Labelling Regulation within EnC law.[46] The '*acquis* for renewables' consists of the 2009 Renewable Energy Directive.[47] Additionally, Title III of the EnC Treaty (which applies both to the Contracting Parties and to neighboring EU Member States, such as Greece and Bulgaria)[48] provides that the Energy Community 'may adopt Measures to foster development in the areas of renewable energy sources and energy efficiency, taking account of their advantages for security of supply, environment protection, social cohesion and regional development'.[49]
Environment-related obligations have grown significantly from the early days of the Energy Community. The 'environment *acquis*' includes directives on environmental impact assessments, sulphur content of fuels, reducing emissions from large combustion plants, liability for environmental damage, and assessment of the effects of certain plans and programmes on the environment, as well as certain provisions of the directives on the conservation of wild birds and on industrial emissions.[50] Within Energy Community law, these directives only apply to Network Energy.[51] The EnC Treaty also provides that 'the construction and operation of new generating plants shall comply with the *acquis communautaire* on environment'.[52] The timetable for the implementation of the environment *acquis* is given in Annex II of the EnC Treaty. The Large Combustion Plants Directive entered force for the Energy Community at the beginning of 2018 and requires fossil fuel

[44] Energy Community Parliamentary Plenum, Joint Report on Strengthening the Promotion of Energy from Renewable Sources in the Energy Community, Brussels, 19 February 2019; Energy Community Parliamentary Plenum, Joint Statement, 19 February 2019, Brussels.
[45] Meeting of Energy Community Parliamentary Plenum, Minutes, 19 February 2019, Brussels, par. 3.
[46] Decision of the Ministerial Council D/2018/3/MC-EnC, 29 November 2018.8
[47] EnC Treaty, Art. 20.
[48] Ibid, Art. 26.
[49] Ibid, Art 35.
[50] Ibid, Art. 16.
[51] Ibid, Art. 17.
[52] Ibid, Art. 15.

plants to reduce emissions from sulphur dioxide, nitrogen oxides and dust.[53] In addition, the Energy Community began to add climate law to its *acquis* with the Ministerial Council's 2016 Recommendation on preparing to implement the greenhouse gas emissions Monitoring Mechanism Regulation.[54]

Implementing this body of law has proved a significant burden for the Contracting Parties. As one energy law scholar observed, 'the difficulty in South-East Europe is that the EU's energy *acquis* is transmitted via the Energy Community into a region with limited support factors. For a host of historical and current reasons, the rule of law and the quality of public administration are very weak. It is difficult to see how the energy *acquis* can easily prosper in such a fragile environment'.[55] In its 2019 annual report, the EnC Secretariat rated the average for Contracting Party implementation of EnC commitments at 48 per cent.[56]

Indeed, the European Commission's 2011 assessment largely holds true today: 'Bridging the existing gap between theory (political commitments) and practice (full implementation of the Energy Community *acquis* and enforcement of the rules adopted) remains the main challenge, and the key question is how to prompt Contracting Parties in the region to apply and enforce the rules'.[57] In the absence of rigorous enforcement options, the question of what incentives or motivations Contracting Parties have to 'self-enforce' their EnC obligations is critically important. One might argue that EU accession candidates (four EnC Contracting Parties) have the prospect of eventual EU membership to motivate compliance.[58] Contracting Parties with no current prospect of EU membership might still be motivated to demonstrate their capacity for integration with the EU, with a view to future membership talks ('identification motive').[59]

However, the motivation of accession is not relevant to all Contracting Parties; while 'the Energy Community was originally conceived as a European Union pre-accession instrument',[60] it has since expanded to countries with no realistic hopes for EU accession. Otherwise, a State might comply with EnC obligations in order to achieve 'greater independence' from a 'regional in energy matters ('independence motive'), or because they expect economic gains from energy market integration [61] or from market reforms [62] ('economic motive'). Economic motivations are also behind 'conditionality' agreements of reforms in return for investments but, as the 2013-14 Ukraine crisis illustrated, 'conditionality can be dangerous where countries consider having other options'.[63] In fact,

[53] DIRECTIVE 2001/80/EC of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, adapted by Ministerial Council Decision 2013/05/MC-EnC of 24 October 2013 on the implementation of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

[54] Ministerial Council Recommendation 2016/02/MC-EnC on preparing for the implementation of Regulation (EU) 525/2013 on a mechanism for monitoring and reporting greenhouse gas emissions.

[55] Alan Riley, Deploying the Energy Incentive: Reinforcing EU Integration in South-East Europe, CEPS Policy Brief No 296 of 8 July 2013, cited in Buschle at 39-40.

[56] 'Annual Implementation Report', Energy Community Secretariat, 2019, 7.

[57] Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (COM(2011) 105 final) 10.3.2011, p. 5.

[58] See, e.g., Prange, H., Koutalakis, C., 2006. 'Smoothing' eastern enlargements through new modes of governance?. In: Schuppert, G.F. (Ed.), The Europeanisation of Governance. Nomos Verlagsgesellschaft, Baden-Baden, pp. 133–152.

[59] Prange-Gstohl H, 'Enlarging the EU's Internal Energy Market: Why Would Third Countries Accept EU Rule Export?' (2009) 37 Energy Policy 5296, 5297.

[60] Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (COM(2011) 105 final) 10.3.2011, p. 3.

[61] Prange-Gstohl, 'Enlarging the EU's Internal Energy Market', 5297.

[62] Buschle D, 'Exporting the Internal Market – Panacea or Nemesis for the European Neighbourhood Policy? Lessons from the Energy Community' (College of Europe 2014) EU Diplomacy Paper 02/2014, p. 17.

[63] Ibid, p. 22.

these motivations have been insufficient to produce overall compliance with the existing *acquis*, let alone more demanding future targets. Moreover, the motivations of Contracting Parties vary greatly. Identifying which motives (if any) predominate will be a matter of judgment for the European Commission, EnC Secretariat and others, taking into account the economic and geopolitical circumstances of each Contracting Party and the composition and priorities of its government.

V. THE CLEAN ENERGY TRANSITION WITHIN THE ENERGY COMMUNITY

Although the challenge of implementing the existing *acquis* remains, if the Energy Community is to achieve integration with EU law, it has become necessary for the Energy Community to also participate in the EU's current energy transition, which is driven by the challenge of climate change. The policy framework for this agenda was known as the 'Energy Union' during the Juncker Commission. Although originally a proposal focused on improving security of energy supply in response to the concerns of Central and Eastern European EU Member States,[64] the concept of an 'Energy Union' was broadened by the Juncker Commission into an all-encompassing framework for an integrated, technologically advanced and low-carbon EU energy market.[65] The Energy Community has been included in European Commission planning for the Energy Union since the earliest proposals.[66] The Energy Community began preparing to introduce elements of the Energy Union package even before their passage through the EU legislative process. In 2017, the Ministerial Council agreed to begin preparations to introduce 2030 targets and National Energy and Climate Plans for Contracting Parties. In the same year, the Energy Community established an Energy and Climate Committee to manage this process. In addition, an Energy and Climate Technical Working Group (TWG) began meeting in 2018. Group meetings are attended by Contracting Parties, the Secretariat and the European Commission, as well as experts from capacity-building organizations such as GIZ and from academia. The early meetings of the TWG featured detailed presentations on mechanisms for implementing the 2030 Framework within the Energy Community, as well as discussion of Contracting Party concerns and priorities, e.g. concerning job losses due to the phase-out of coal generation. In 2018, the Ministerial Council adopted General Policies Guidelines on 2030 targets for energy efficiency, renewable energy share and emission reduction. According to these guidelines, the legal mechanism for achieving the targets will be the adaptation of the recast Energy Efficiency Directive and Renewable Energy Directive, and the Energy Union Governance Regulation, into Energy Community law.

The EnC Secretariat has referred to the required shift to low-carbon energy as the Energy Community's second energy transition, following a first and incomplete transition from closed, socialist energy systems to integrated, marked-based systems.[67] This second transition will have to go beyond even the transposition of the Energy Union legislation, in order to address persistent divergences between the EU and Energy Community energy economies. The most glaring discrepancy is the absence of an emission trading system (ETS), or any other form of carbon pricing, in most Contracting Parties. The resulting price advantage

[64] Szulecki, K., et al. (2016). "Shaping the 'Energy Union': Between National Positions and Governance Innovation in EU Energy and Climate Policy". Climate Policy 16, 5, 548.

[65] Pellerin-Carlin, T. (2017). "The European Energy Union", in: R. Leal-Arcas and J. Wouters (eds), Research Handbook on EU Energy Law and Policy. Edward Elgar, London, 67.

[66] Energy Union Package: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, European Commission, Brussels, 25.2.2015 COM(2015) 80 final, 7.

[67] 'Annual Implementation Report', Energy Community Secretariat, 1 September 2018, 7.

maintains a perverse incentive to keep coal-fired power generation going in the Energy Community, particularly as the carbon price of the EU ETS has dramatically increased in recent years. This problem is exacerbated by the ongoing subsidising of coal in the Energy Community.[68] Successful integration with the EU energy market will require carbon pricing, subsidy withdrawal and a host of other difficult measures.[69]

Finally, the Energy Community's climate transition will also require reform of the organisation's constituting instrument, the Energy Community Treaty. The Treaty was adopted when climate change was a lower priority in Europe and when the Kyoto Protocol did not require most Contracting Parties to achieve quantified emission reductions.[70] The sole reference to international climate law in the Energy Community Treaty remains Article 13, which provides: 'The Parties recognise the importance of the Kyoto Protocol. Each Contracting Party shall endeavour to accede to it'. This reference is obsolete, given the conclusion of the Kyoto Protocol's second commitment period in 2020 and the fact that every Contracting Party except Kosovo has accepted obligations under the 2015 Paris Agreement. The Treaty should be updated to recognise the central role of the Paris Agreement in organising global climate action. Further, 'recognis[ing] the importance' may have been sufficient for the Kyoto Protocol given that most Contracting Parties had no quantified obligations, but commitment to implementing NDCs and other, less differentiated Paris Agreement commitments would benefit from more than hortatory language.

VI. THE ENERGY COMMUNITY AS A PARALLEL TRACK TO EU ACCESSION NEGOTIATIONS

Membership of the Energy Community is distinct from, and does not automatically lead to, EU accession negotiations. This is most obviously illustrated by the fact that most Contracting Parties are not EU accession candidates. Moreover, for several Contracting Parties, opening accession negotiations is not on the EU's agenda. The Energy Community is therefore more immediately a mechanism for legal transition than for moving toward the endpoint of European integration represented by EU membership. Nevertheless, for the Western Balkan Contracting Parties which do have an EU accession perspective, successful implementation of the Energy Community *acquis* can be considered one indicator of progress towards accession of the relevant Contracting Parties.

Although the EU accession and Energy Community processes are separate, there are indications that they can be mutually reinforcing. The ongoing development of emissions trading in Montenegro is an example. Montenegro's EU accession negotiations began in 2012. In December 2018, negotiations opened on the 'environment and climate change' accession chapter.[71] In May 2019, the European Commission reported that '[c]onsiderable efforts are still needed to align with the EU climate *acquis*', while noting that '[e]he adoption of a climate change law, which will, among others, incorporate elements of the EU emissions trading system (ETS), the Effort Sharing Regulation and the monitoring and reporting mechanism (MMR), is still pending'.[72] By December 2019, Montenegro had adopted a Law

[68] Damir Miljević, Milka Mumović and Janez Kopač, 'Rocking the Boat: What is Keeping the Energy Community's Coal Sector Afloat? Analysis of Direct and Selected Hidden Subsidies to Coal Electricity Production in the Energy Community Contracting Parties', Energy Community Secretariat, June 2019.

[69] For a recent summary of proposals, see Dirk Buschle, et al, 'Supporting the Energy Transition in the Western Balkans', Policy Brief, Energy Community/Agora Energiewende, January 2020.

[70] Of the current Contracting Parties, only Ukraine had a quantified Kyoto target, while former Contracting Parties Bulgaria, Croatia and Romania also had obligations. See Kyoto Protocol (1997), Annex B.

[71] https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/montenegro_en

[72] European Commission, Montenegro 2019 Report, Brussels, 29.5.2019 SWD(2019) 217 final, 87.

on Protection from the Negative Impacts of Climate Change, which includes elements of an ETS. In February 2020, Montenegro introduced an additional regulation for greenhouse gas emissions, which *inter alia* set a minimum price for emission credits (€24/tCO2), designated the industrial and energy undertakings to participate in emissions trading, and prescribed a method for transferring credits. The Energy Community Secretariat noted that the adoption of this regulation 'was also one of the prerequisites for opening Chapter 27 of EU accession talks (on environment and climate change)'.[73] Montenegro has advanced further than any other Contracting Party in the development of emissions trading.

The European Green Deal, proposed by the European Commission in 2050, is a further opportunity to strengthen the complementarity of Energy Community implementation and Western Balkan efforts toward EU accession. Notably, the The Commission's European Green Deal proposal also includes, as an action from 2020, a 'Green Agenda for the Western Balkans'.[74] No details of this agenda have been released at the time of writing, but its inclusion is a signal of recognition of the need to include the Western Balkans in the EU's push toward climate neutrality. The Energy Community and individual Contracting Parties should seek to help develop and actively participate in this green agenda.

The European Green Deal should also inject some urgency into the strengthening and implementation of the Energy Community *acquis*. In particular, this is because the Commission has warned that '[s]hould differences in levels of ambition worldwide persist, as the EU increases its climate ambition, the Commission will propose a carbon border adjustment mechanism, for selected sectors, to reduce the risk of carbon leakage'.[75] Such a border adjustment mechanism, to be proposed in 2021, 'would ensure that the price of imports reflect more accurately their carbon content'.[76] In its first response to the European Green Deal, the European Council noted the border adjustment mechanism proposal and commented that '[t]he climate neutrality objective needs to be achieved in a way that preserves the EU's competitiveness, including by developing effective measures to tackle carbon leakage in a WTO compatible way … Facilities in third countries need to adhere to the highest international environmental and safety standards'.[77] This is a clear signal that the economic model of price-competitive fossil fuel-generated power undercutting environmentally cleaner EU undertakings is not going to be tolerated in perpetuity.

VII. CONCLUSION

In late 2019, the EU accession process was thrown into confusion by France's 'veto' of the opening of accession negotiations with Albania and North Macedonia and accompanying call for the accession process to be redesigned. In February 2020, the European Commission responded with its proposal for a reformed accession process to provide a 'credible EU perspective for the Western Balkans'.[78] Regardless of the outcome of this debate, the uncertainty cast on the accession process arguably renders legal integration processes such as the Energy Community more necessary, rather than less. Until a compromise on accession reform is found and the political will to proceed with enlargement is rediscovered, it is vital that the practical work of the legal integration of the Western Balkans continues. The

[73] Energy Community Secretariat, 'Montenegro continues to take major steps to reduce GHG emissions as government approves cap and trade system for major emitters', 24 February 2020, https://energy-community.org/news/Energy-Community-News/2020/02/24.html

[74] Annex to the Communication on the European Green Deal Roadmap - Key actions, p 4.

[75] European Green Deal Communication, 2.1.1.

[76] Ibid.

[77] European Council meeting (12 December 2019) – Conclusions, par. 8.

[78] European Commission, Communication, Enhancing the accession process - A credible EU perspective for the Western Balkans, Brussels, 5.2.2020 COM(2020) 57 final.

alternative would risk unbridgeable divergences from an EU working towards climate neutrality. In this context, it is interesting to note that the Energy Community model of legal integration of the Western Balkans is being replicated in the transport sector, with the adoption of the Treaty establishing the Transport Community in 2017.[79]

From the perspective of the EU, the transition of Western Balkan energy sectors in the direction of EU integration is also a strategic imperative. At a time of competing projects of economic integration touching the same region, including China's Belt and Road Initiative, effective integration of the Western Balkans has taken on a new urgency. The European Commission's commitment to a 'Green Agenda for the Western Balkans' is a positive sign that the EU will strengthen its commitment. There is certainly scope for greater EU support for the Western Balkan energy transition. At a time when state-owned Chinese banks have been providing hundreds of millions of euros for new coal plants, the European Investment Bank's energy sector lending has accounted for only five per cent of its activity in the region.[80] The EIB states that it is 'actively seeking' Western Balkan renewable and energy efficiency projects.[81]

Legal transition requires both technocratic and normative components. Work such as building institutions and transposing legislation requires the development and application of technical expertise. At the same time, it is necessary to cultivate the normative base to underpin the structures of the transition, such as by strengthening the rule of law, establishing standards of conduct and encouraging an active civil society. The challenge is not just to transpose pieces of legislation, but to ground the region in the EU's normative approach to climate change and the clean energy transition. As one Montenegrin MP observed in the context of the Energy Community Parliamentary Plenum, '[e]nergy efficiency, environmental protection and climate changes policies are perhaps what brings the region closest together'.[82] If this is not yet entirely clear, there is still the potential to achieve greater convergence with the EU – and a more sustainable and developed regional economy – on the basis of cleaner energy.

[79] https://www.transport-community.org

[80] In comparison, energy accounts for fifteen per cent of EIB lending in the EU and 25 per cent outside the EU. 'The European Investment Bank in the Western Balkans', EIB, 2019, p. 8.

[81] Ibid.

[82] Vladimir Spasić, 'SEE parliamentarians prepare Joint Declaration on future of energy efficiency in Energy Community', Balkan Green Energy News, 21 February 2019, https://balkangreenenergynews.com/see-parliamentarians-prepare-joint-declaration-on-future-of-energy-efficiency-in-energy-community/