

OPTIMIZING THE INTERNAL WORKFLOW RELATED TO SUPPORTING THE IMPLEMENTATION PROCESS

BACKGROUND

The current experience indicates the need to streamline and improve the work of the Secretariat aimed at providing assistance to Contracting Parties under Article 67 of the Treaty. Providing that assistance can be done in manifold ways, including the review of compliance of domestic legislation, the explanation and interpretation of the *acquis*, and reporting on the state of implementation. Ultimately, all these activities aim at supporting the Contracting Parties in achieving compliance with the Treaty. This goal is to be considered as one of the key tasks of the Secretariat under the Treaty, and therefore requires a maximum of professionalism in terms of both content and organization.

Striving for the best-possible result in a well-coordinated way involving all experts concerned is even more important given the fact that positions taken by the Secretariat play an ever increasing role in institutional meetings, before domestic and international courts and authorities and in the public debate. Cases in the recent past furthermore indicate that the Secretariat might be confronted with its earlier views and statements in the context of dispute settlement procedures. This calls not only for a well-founded reasoning of any positions taken by the Secretariat, but also for a certain caution in the statements made.

When it comes to assessing the compliance of national legislation with the Energy Community *acquis*, staff members from different units currently work on different legislative acts. The approach so far seems to be mainly unit-based, i.e. the analysis is made only within a unit following a sectoral approach (mostly gas and electricity). Thus, not all experts from the Secretariat have the possibility to comment which may exclude e.g. issues which are of principle legal nature or have certain specificities, e.g. from a regulatory perspective. In this area, it must also be noted that new spheres of activities are currently being considered (energy efficiency, RES), where cross-cutting and pooling of competences will certainly be important – this presupposes that there is a possibility for wider intervention of all experts available. As the experience in the recent past has shown, such streamlining also needs some degree of central coordination, as the approaches between units tend to differ, putting the homogeneity and consistency of the end product at risk.

The assessment of national legislation encompasses also the missions to the Contracting Parties and Observer countries. As a matter of fact, most of the missions to the Contracting Parties and Observer countries are directly linked to improving the legislative framework in the context of the Treaty implementation. Again, it must be ensured that the best and widest possible expertise is provided to the domestic authorities in the most efficient manner.

Secondly, the Secretariat has received questions for an explanation and/or interpretation of Energy Community law which inevitably arise within the Contracting Parties when implementing that law. Given that the ultimate interpreter of the Treaty is the Ministerial Council under Article

94, the Secretariat may refer such questions to that institution. In the large majority of cases, however, the questions are not so as to merit being dealt with on a ministerial level. In such cases, the Secretariat has answered and will continue to answer request for explanation/interpretation in a non-binding way as part of its assistance-providing function. Again, however, it is important that such requests are being dealt with in the most efficient way internally, providing for the best possible expertise and backed-up by a fully-fledged legal analysis.

The third activity which is relevant in connection with the evaluation of compliance of domestic legislation with the *acquis* is reporting. The Secretariat currently produces several implementation reports per year to different addressees (Ministerial Council, PHLG, Parliaments) and on different topics (overall vs specific reporting). Experience shows that the cooperation between the experts has taken place on an ad-hoc basis which has sometimes created a substantial amount of extra-work for the staff members involved in terms of coordination and harmonization. Overall consistency of the reports needs to be improved as well. In order to streamline the reporting process and to yield the full benefit of the entire expertise available in the Secretariat, report-writing requires the establishment of a standard routine and the clear allocation of responsibilities.

Furthermore, the assessment of domestic legislation, the comments and recommendations made in the office and on the spot during missions as well as the reports in their different versions need to be properly documented and archived. This is of particular importance as it has been already proven by practice that the official position of the Secretariat in the context of the legislative framework development has concrete practical implications. For instance, the Secretariat might be quoted during institutional meetings (PHLG and MC) or in the context of dispute settlement cases. Being able to retrieve the concrete statements made by the Secretariat's officials is important not only for the responsibility of the Secretariat from a legal perspective, but also from the point of view of its image. In addition, clarity in this respect will improve internal transparency and provide the basis for quick and proper decision making on the ground of all pertinent information. Consequently, there is a need for introducing clear rules on archiving the work in this aspect. This mainly concerns the internal archive scheme (N Drive).

Finally, experience with respect to all activities related to energy policy within the Secretariat has shown that coordination between the different units is of key importance. This is closely linked to the fact that the great majority of all the Secretariat's fields of work and activities is of cross-cutting nature. Internal discussions at the Secretariat's retreat in January 2009 have shown that there is a need for improvement. In order to streamline cooperation and to support the Director in his responsibility for energy policy issues, an advisory group consisting of all staff members with tasks in this respect can be of help. Given the predominance of legal aspects and the potential interference with dispute settlement procedures, the group and the overall activities of the Secretariat in that respect shall be coordinated by the Legal Counsel, whose functions are by default of a horizontal nature.

In order to meet the requirements outlined above and to create certainty and transparency, the Director considers it necessary to adopt a Procedural Act of the Energy Community Secretariat as foreseen by Article 67(e) of the Treaty.

PROCEDURAL ACT OF THE ENERGY COMMUNITY SECRETARIAT

2009/2/ECS on certain aspects of the Secretariat's activities under Article 67 of the Treaty

The Energy Community Secretariat,

Having regard to the Treaty establishing the Energy Community, and in particular Article 67 thereof,

Given that supporting and reviewing the implementation of the acquis within the Contracting Parties rank among the key tasks of the Secretariat,

Determined to constantly improving the quality of these activities in organizing the workflows in the most efficient and beneficial way possible,

ADOPTS THE FOLLOWING PROCEDURAL ACT:

I. General

Article 1 Scope

(1) The present Procedural Act covers the following activities of the Secretariat in the area of energy policy

- compliance reviews of domestic legislation, including missions by Secretariat experts;
- interpretation of Energy Community law within the meaning of Article 1 of the Rules of Procedure for Dispute Settlement
- implementation reports,

including the procedures related thereto and aspects of internal organization ancillary to these activities.

(2) The ECRB is independent with regard to its activities and deliverables. The present Procedural Act therefore does not concern the activities mentioned under (1) to the extent they are carried out for and on behalf of the ECRB.

Article 2 Energy Policy Coordinator

The Legal Counsel is mandated to coordinate the Secretariat's activities as defined in Article 1.

Article 3 Energy Policy Coordination Group

(1) In line with the work program, the Secretariat shall define internal energy policy work priorities on unit level and, where necessary, on trans-unit level, for each half-year. To this end, the Director shall be supported by an internal energy policy coordination group.

(2) The energy policy coordination group shall consist of the Head of Units dealing with energy policy issues (members) and shall be chaired by the Legal Counsel. Members shall attend the meetings unless absent with valid excuse. All other energy policy experts may attend the meetings. Additional staff members may be invited by the chair.

(3) The energy policy coordination group shall make proposals to the Director as to defining work priorities and shall contribute to implementing and reviewing their accomplishment. It shall also streamline the work-flow within the Secretariat by enabling mutual exchange between units on current activities and the outcome of business trips and missions, as well establishing and facilitating cross-unit cooperation. Moreover, the energy policy coordination group shall serve as a platform for exchange of general information on legal, political and economic developments within the European Union and in the SEE region.

(4) The energy policy coordination group shall normally meet once every three months.

(5) The minutes of the meetings of the energy policy coordination group shall be submitted to the Director. The Director shall not be bound by the outcomes of the meetings. Upon his approval and following possible amendments, the minutes shall be filed and circulated among all staff members.

Article 4 External and Internal Communication

(1) As a matter of principle, official communication with the institutions of the Parties (including the European Commission) shall be made by the Director only, or the Legal Counsel, where the Director is absent. This concerns official proposals, positions, commitments or comments by the Secretariat, but excludes communication of a mere operational nature. In cases of doubt, staff members shall ask the Director or the Legal Counsel.

(2) All communication with third parties and international institutions other than operational communication, including all communication with the media, shall be made by the Director only, or the staff-members specifically mandated by him.

(3) All internal communication addressed to the Director in relation to requirements of this Procedural Act (e-mail etc.) shall be also copied to the Legal Counsel.

II. Compliance review of domestic legislation and interpretation of Energy Community law

Article 5 General aspects

(1) The Secretariat shall review compliance of domestic legislation with the Energy Community *acquis* upon request by the competent domestic authorities or on its own initiative.

(2) In principle, the Secretariat shall not draft legislation but comment on texts prepared by the competent domestic authorities. This shall not exclude assisting those authorities by making concrete proposals for individual provisions where such assistance is explicitly requested.

(3) Compliance review may relate to drafts or adopted versions of, inter alia,

- primary and secondary legislation
- acts by authorities such as regulatory or competition authorities

- any other measures within the meaning of Article 2(2) of the Rules of Procedure for Dispute Settlement.

(4) As a rule, compliance review shall be made of an English version of the piece of domestic legislation in question. Exceptionally, the Director may authorize review of non-English versions.

(5) Compliance review shall be as comprehensive and detailed as possible. Preferably, it shall be done on an article-by-article basis using the "Comment" function in Microsoft Word. This does not exclude additional comments of a general nature.

Article 6 Review Procedure

(1) Requests for reviewing the compliance of domestic legislation with the Energy Community *acquis* shall be made by the relevant Party or Observer to the Director in writing. Requests made towards other staff members shall be forwarded to the Director immediately. Contracting Parties and Observers shall be encouraged to submit all relevant legislation and other measures early enough at draft level and in English.

(2) The Legal Counsel shall coordinate the review. Depending on the subject-matter of the measure to be reviewed, the Legal Counsel asks the Head of Unit concerned to nominate an expert in charge of drafting the review. Where a measure covers more than one area of energy policy expertise, each Head of Unit concerned shall nominate one expert in charge of their respective part.

(3) The expert(s) in charge shall draft a first version of article-by-article comments on the act under review and shall submit it to the Legal Counsel and their Head(s) of Unit within a specified time.

(4) The Legal Counsel shall forward this first version at least to the Head of ECRB Section and any other experts whose field of expertise is touched upon by the measure under review. All experts involved shall be asked to comment, within a specified time, on the first version within their respective field of expertise. Upon consultation with the expert(s) in charge, the Legal Counsel shall incorporate, where appropriate, the comments received into the final version of the review. The final version shall be submitted to the Director.

(5) The Director, or a staff-member specifically mandated by him, sends the official position of the Secretariat to the Contracting Party or Observer concerned. In the absence of the Director, the Legal Counsel shall act in his place. All staff members shall be informed about the official position upon its submission to the Contracting Party or Observer concerned.

(6) Official positions shall bear the following visible disclaimer:

"The present review comprises the Secretariat's experts' initial, general and abstract comments on the provisions of the (draft) law. At this stage, it may not be complete or sufficiently detailed. Furthermore, compliance or non-compliance with the Energy Community *acquis* can only be fully appraised in the context of its implementation and application in practice. Consequently, the present review is without prejudice to any future concerns and will not prevent the Secretariat from taking further action if need be."

Article 7 Requests for explanation or interpretation of Energy Community law

(1) Requests for explanation or interpretation of certain provisions or principles of Energy Community law by public authorities of Contracting Parties or Observers shall be made to the Director in writing. Requests made towards other staff members shall be forwarded to the Director immediately.

(2) The Legal Counsel shall prepare the official position of the Secretariat and shall ask all experts whose field of expertise is touched upon by the provision or principle in question for comments. The Legal Counsel shall incorporate, where appropriate, the comments received into the final version of the interpretation. The final version shall be submitted to the Director.

(3) The Director, or a staff-member specifically mandated by him, sends the official position of the Secretariat to the authority making the request. In the absence of the Director, the Legal Counsel shall act in his place. Where appropriate, the interpretation shall also be submitted to the Parties, Observers and Institutions under the Treaty. All staff members shall be informed about the official position upon its submission.

(4) Upon consultation with the Legal Counsel, the Director may decide to refer a request for interpretation of Energy Community Treaty to the Ministerial Council under Article 94 of the Treaty.

(5) Explanations and interpretations by the Secretariat shall bear the following visible disclaimer:

“The present explanation/interpretation reflects the position of the Secretariat. It is not binding on the Parties to or Institutions established by the Treaty and is without prejudice to a legal assessment in the framework of a dispute under Article 90 of the Treaty. An authoritative interpretation of Energy Community law may only be provided by the Ministerial Council under Article 94 of the Treaty.”

Article 8 Missions to Contracting Parties and Observers

(1) The Director may decide to provide assistance by the Secretariat's experts to a Contracting Party or Observer by way of a mission upon request by a Contracting Party or Observer, or on the Secretariat's initiative.

(2) Requests for the provision of assistance by the Secretariat's experts by a Contracting Party or Observer by way of a mission shall be made to the Director in writing. Requests made towards other staff members shall be forwarded to the Director immediately.

(3) The request shall be accompanied by a detailed description of the purpose and objective of the mission, including, where possible, an agenda and a list of participants. Where any of these elements are missing, the Contracting Party or Observer in question shall be asked to provide it in due time.

(4) The Contracting Party or Observer in question shall be requested to submit a list of key questions including all legislation (draft or final) to the Secretariat in advance. They shall be assessed and replied in accordance with Articles 6 or 7.

(5) The Director shall approve or decline the request for a mission towards the Contracting Party or Observer in question.

(6) The expert concerned shall file a travel request in accordance with the relevant rules and practices. In the request, the expert shall clearly identify the purpose and objectives of the envisaged mission.

(7) Upon completion of the mission, the expert concerned shall submit a comprehensive and detailed travel report in accordance with the template attached in Annex I to this Procedural Act to the Director and the Legal Counsel in advance. The Director may require a revision of the travel report. Once accepted, the travel report shall be filed in accordance with Articles 12 and 13, and be circulated to all staff members.

(8) This Article is without prejudice to the requirements established by the rules related to business travel approval and reimbursement.

III. Reporting

Article 9 Types of reports

As a principle, the Secretariat shall prepare and submit a yearly progress report to the Ministerial Council covering state of implementation of the *acquis* under the Energy Community Treaty. Besides, the Secretariat shall prepare and submit other reports as required by the Treaty, or requested by the competent institutions established under the Treaty, or on its own motion.

Article 10 Content of reports

(1) Implementation reports shall be as concise and clear as possible.

(2) As a general rule, reports shall include an executive summary, a depiction of the *acquis* in question, a regional perspective on implementation and a more detailed assessment for the concrete Contracting Party. In order to avoid lengthy documents, the latter may be attached to the main report. They shall describe the overall situation in each Contracting Party or Observer and contain a summary on the progress achieved within the period of time covered by the report.

(3) The concrete structure for each report shall be established by the experts involved well in advance.

Article 11 Report preparing procedure

(1) Implementation reports shall be prepared by the units in charge of the respective subject. The Heads of Units concerned shall nominate the experts in charge of preparing the respective parts of the report.

(2) Reports involving more than one unit shall be coordinated by the Legal Counsel. In doing so, the Legal Counsel shall make sure, *inter alia*, that the report is consistent and balanced in terms of content, style and form and that unnecessary duplication is avoided. Where necessary, the Legal Counsel may ask the experts involved to make amendments to, and further elaborate or shorten, their respective parts.

(3) Normally, the Legal Counsel shall informally send the first version of a report to the Contracting Party or Observer in question to receive feedback and missing information. The feedback shall be taken into account by the experts involved to the extent it is objectively justified, and be included in a second version.

(4) Upon compilation of the second version, the Legal Counsel shall ask energy policy experts of the Secretariat to comment, within a specified time. He/she shall incorporate, where appropriate, all comments received into the final report. The final version shall be submitted to the Director.

(5) The Director, or a staff-member specifically mandated by him, sends the report to the institution in question. In the absence of the Director, the Legal Counsel shall act in his place. All staff members shall be informed about the report upon its submission.

(6) Implementation reports shall bear the following visible disclaimer:

"The present report provides an account of the state of play of the implementation of the Energy Community *acquis* by the Contracting Parties. It is not meant as to define the Secretariat's final position on compliance of individual Contracting Parties."

IV. Filing and archiving

Article 12 General principles

(1) Within the scope of the present Procedural Act, the following documents shall be filed

- Agendas and minutes of the energy policy coordination group;
- Official requests for compliance review, explanation/interpretation, and, as the case may be, implementation reports;
- First versions, comments, final versions and official positions on compliance reviews;
- Mission reports;
- First versions, comments, final versions and official positions on explanations/interpretations of Energy Community law;
- First versions, second versions and final versions of implementation reports as well as any feedback received by Contracting Parties or Observers.

(2) Operational correspondence shall only be filed to the extent it is of relevance for the understanding of the final version of the document in question.

(3) Official positions by the Secretariat shall be clearly and easily recognisable.

(4) Filing shall be monitored by the Legal Counsel.

(5) Filing shall be made electronically on the N-Drive in accordance with the structure described in Article 11.

Article 13 N-Drive

(1) The N-Drive shall contain a folder on general issues as well as separate folders for each Contracting Party and Observer.

(2) Documents relating to energy policy coordination, interpretation of Energy Community law as well as implementation reports shall be saved under sub-folders in the folder on general issues.

(3) The folders on Contracting Parties and Observers shall contain subfolders on

- Legislation (in force/invalid/drafts)
- Compliance reviews
- Mission reports
- Energy strategies.

(4) The Director shall approve a template for the structure of the N-Drive upon consultation with the experts with respect to the energy policy documentation as in item 3 above and shall specify the responsibilities for its maintenance. Review on the implementation of the template shall be provided on a permanent basis.

(5) The Director shall issue additional rules on the confidentiality of certain categories of documents.

Article 14 Entry into force

This Procedural Act shall enter into force upon adoption.

For the Energy Community Secretariat

Slavtcho Neykov
Director



Done in Vienna on 30.09. 2009

