THE ENERGY COMMUNITY OF SOUTH EAST EUROPE HAS ANOTHER EEA BEEN BORN?

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1. INTRODUCTION

In June 2002 the South East Europe Electricity Regulation Forum (SEEERF) agreed on 'the creation of a competitive regional electricity market in South Eastern Europe (SEE) based on the rules currently in force and being developed in the European Union and integrated within the European Union's Internal Electricity Market'[1]. Another four years later, on 1 July 2006, the Treaty establishing the Energy Community (TEnC or 'the Treaty')[2] entered into force. It outreaches the SEEERF's intention by creating an integrated market in electricity *and* natural gas in SEE. Time and again the Energy Community has been compared to the European Coal and Steal Community because of their alleged similar historical importance in uniting countries that used to wage war against each other.

As the most important step the SEE parties to the Energy Community[3] are implementing relevant legal acts of the *acquis communautaire* as defined in the Treaty. Furthermore, a single mechanism for the operation of network energy markets and a single energy market within the SEE region shall be established. Questions remain about how to extend the EU's internal market or parts of it. The issues connected to this expansion appear somewhat similar to those identified in relation between the EU and the European Free Trade Association (EFTA) countries associated in the European Economic Area (EEA). Whereas the EEA Agreement[4] and relevant literature provide ample information about how to deal with issues such as effective remedies, the adaptation of European Community (EC or 'Community') legal acts, the role of the European Court of Justice (ECJ) and its interpretation monopoly, the Energy Community, more than two years after its establishment, has attracted little academic attention despite many open legal questions that have to be examined.

Another similarity of the two organisations, are their implications for the EU's neighbourhood policy. During the first years of the EEA opinions were legion presenting the EEA concept as a replacement for full EU membership not only for the EFTA states but also for the now new EU member states.[5] With the EU currently at odds with the Lisbon Treaty ratification and searching for new forms of association with its neighbouring countries the Energy Community has to be considered as

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[1] Item 1 of European Commission DG for Energy and Transport, *Conclusions of the First South East Europe Electricity Regulation Forum (SEEERF)*, (TREN/C2/CA D(2002) 10787, 28 June 2002). The participants of this forum were the representatives of the countries of South East Europe (Croatia, Bosnia and Herzegovina, FR Yugoslavia, Former Yugoslav Republic of Macedonia (FYROM), Greece, Albania, Bulgaria, Romania), the European Commission, the international donor community, the region's national energy regulators, the region's national transmission system operators, the Stability Pact, ETSO, CEER, UCTE, Eurelectric, United Nations Mission in Kosovo (UNMIK), and others.

[2] Treaty establishing the Energy Community, OJ L198, 20 July 2006, 18.

[3] Albania, Bulgaria, Bosnia and Herzegovina, Croatia, FYROM, Montenegro, Romania, Serbia, and UNMIK.

[4] Agreement on the European Economic Area (EEA Agreement), OJ L1, 3 January 1994, 3 (http://www.efta.int/content/legal-texts/eea/).

[5] See e.g. Marise Cremona, "The 'Dynamic and Homogenous' EEA: Byzantine Structures and Variable Geometry," *European Law Review* 19 (1994): 508 and Steve Peers, "An ever closer waiting room? The case for Eastern European accession to the European Economic Area," *CMLRev* 32 (1995): 211.

an alternative to full membership – not for its current parties but for the countries outside of the Internal Market and unsatisfied with the instruments of the European Neighbourhood Policy (ENP).

This paper will, as a starting point, describe the Treaty and its most important provisions. In a next step, open questions concerning the Treaty are going to be outlined together with possible approaches referring to similar issues found in relations between the EU and the EFTA within the EEA. In a final step, a brief assessment on how the Energy Community could develop within the EU's external relations regime will be followed by a terse conclusion.

2. THE ENERGY COMMUNITY OF SOUTH EAST EUROPE

The founding process of the Energy Community started in June 2002 in Athens where the SEEERF held its first meeting. The 'Athens Memorandum 2002'[6] signed later that year provided for the establishment of an integrated regional electricity market and its integration into the EU's Internal Electricity Market. Only one year later, in December 2003, the 'Athens Memorandum 2003'[7] was signed, which deals with the establishment of an integrated regional *energy* market including also natural gas. The most important milestone to date in this so-called 'Athens Process' is the establishment of the Energy Community, which was strongly endorsed by the Council as part of the Thessaloniki Agenda[8] (recital 4 TEnC) and by the Stability Pact for South Eastern Europe[9] (recital 6 TEnC). The TEnC was signed in October 2005 by the European Community together with Albania, Bosnia and Herzegovina, Bulgaria, Croatia, FYROM, Montenegro, Romania, Serbia, and UNMIK and came into force on 1 July 2006.

The Energy Community's task is the creation of a legal and economic framework with regard to the electricity and gas sectors falling within the scope of the Electricity Directive (2003/54/EC) and the Gas Directive (2003/55/EC). Consequently, these two directives, together with twelve other acts of Community secondary legislation on energy, environment, and renewables are to be implemented by the contracting parties (Article 3(a) and Title III TEnC). Parts of EC primary legislation are included into the Treaty itself by similar phrased provisions (e.g. Articles 18 and 19 TEnC on competition protecting trade of network energy between the parties)[10]. Additionally, the implementation of several 'Generally Applicable Standards of the European Community' as defined in Articles 21 through 23 shall enable technical functioning of energy transmission and provision.[11]

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[6] Memorandum of Understanding (MoU) on the Regional Electricity Market in South East Europe and its Integration into the European Union Internal Electricity Market, Athens 2002 (http://www.energy-community.org/pls/portal/docs/36296.PDF).

[7] MoU on the Regional Energy Market in South East Europe and its Integration into the European Community Internal Energy Market, Athens 2003 (http://www.energy-community.org/pls/portal/docs/36297.PDF).

[8] General Affairs and External Relations Council, *2518th Council meeting – External Relations* (Luxembourg, 10369/03 (Presse 166), 16 June 2003, 19).

[9] See www.stabilitypact.org. The Stability Pact of SEE was founded in 1999 after the end of the Yugoslav wars. Its objectives were the promotion of peace, democracy, human rights, the rule of law and economic prosperity through regional co-operation and integration into European and transatlantic structures. In February 2008 the Regional Co-operation Council (www.rcc.int), a regionally owned framework, took over the tasks of the Stability Pact focusing on issues determined by the regional actors.

[10] Reaffirming their provenance, Article 18 TEnC resorts to criteria established with Articles 81, 82 and 87 TEC to evaluate practices contrary to the competition rules stipulated.

[11] http://www.energy-community.org/pls/portal/docs/89929.PDF.

The Ministerial Council of the Energy Community may decide upon the implementation of further European Community legal acts by unanimity and even extend the scope of the Treaty to other energy products, carriers, or network infrastructures (Article 100 TEnC). The European Commission acts as a co-ordinator regarding the partial extension of the *acquis communautaire* and the Internal Market (Article 4 TEnC). Any amendments to the part of the *acquis* to be introduced into the national laws of the SEE parties shall be implemented 'in line with the evolution of European Community law' (Article 25 TEnC), which is also what the EEA aims at[12]. Pursuant to Articles 3(a), 5 and 24 TEnC, however, the extension of the *acquis communautaire* is to be subject to adaptations to both the institutional framework of the Energy Community and the specific national situations of the parties. The TEnC does not elucidate the scope of or possibilities for such an adaptation; but drawing on the relevant provisions of the EEA Agreement might shed some light on this issue (see section 3.).

The implementation of EC legislation shall attract investments in necessary energy infrastructure eventually leading to enhanced security of supply for the region and its neighbours, an improved environmental situation, and competition in the single regulatory space developed (Article 2 TEnC). The obligation to adopt parts of the *acquis* is politically deemed as a step further towards accession[13], but the TEnC itself determines that accession negotiations and the obligations deriving from the TEnC are to be kept strictly apart (Article 103). Member countries of the EU may be permitted as participants pursuant to Article 95 TEnC.[14] Hence, the Energy Community's stakeholders include not only the contracting parties, but also participants as well as observers and donors. Observers are third countries that may be accepted upon reasoned request (Article 96 TEnC). Until now observer status was granted to Georgia, Moldova, Norway, Turkey, and Ukraine. As another step further Article 100(iv) TEnC provides for the accession of third countries as parties. So far no enlargement has taken place, although Moldova and Ukraine already filed their applications for membership.

Title III of the TEnC (Article 29 through 39) is concerned with the 'creation of a single mechanism for the cross-border transmission and/or transportation' of gas and electricity[15], which explains its applicability to the territories of the neighbouring EU members. Austria, Greece[16], Hungary, Italy, and Slovenia by sharing their borders with the newly founded community are most directly affected by certain measures taken under the TEnC (Article 27). Provisions under this title further deal with

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[12] Marise Cremona, "The 'Dynamic and Homogenous' EEA: Byzantine Structures and Variable Geometry," *European Law Review* 19 (1994): 509.

[13] The member states of the Energy Community are either already EU members (Bulgaria, Romania) or were awarded candidate (Croatia, FYROM) or potential candidate status (Albania, Bosnia and Herzegovina, Kosovo under the UNSCR 1244, Montenegro and Serbia).

[14] Austria, Bulgaria, Czech Republic, France, Germany, Greece, Hungary, Italy, the Netherlands, Romania, Slovakia, Slovenia, and the United Kingdom are participants to the Energy Community. The legal status of Bulgaria and Romania changed from contracting party to participant following their accession to the EU in 2007.

[15] The physical necessity for cross border transmission and transportation was the resynchronization with UCTE (Union for the Co-ordination of Transmission of Electricity), which was completed on 10 October 2004 undoing the split into two zones in autumn 1991. Compare UCTE, *Annual Report 2004*, 6-11 (http://www.ucte.org/_library/annualreports/report_2004_3.pdf).

[16] By extending the Internal Energy Market to the Western Balkans, Greece will for the first time be connected to the continental energy market of the other EU members (Council of the European Union, *Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty*, OJ L 198, 20 July 2006, 15).

security of supply issues, the provision of energy to citizens (within the limits of public service obligations)[17], harmonisation (in terms of market design and mutual recognition of licenses), renewable energy sources and safeguard measures[18].

An even more far-reaching geographical applicability is stipulated in Title IV (Article 40 through 46 TEnC), which concerns the creation of a single energy market. It applies to all EU member countries and all SEE parties to the TEnC. The ultimate aim is a single market for network energies without internal barriers encompassing EU territory and the countries of the Western Balkans including the territory under the jurisdiction of UNMIK. The provisions concerning the internal energy market are similar to Articles 28 through 30 of the Treaty establishing the European Community (TEC).[19] The mutual assistance obligation (Articles 3(c) and 44 through 46 TEnC) stipulated is rather vague[20] but introduces the concept of solidarity into a region where countries used to fight rather than help and support each other. Albeit the TEnC had not entered into force then, assistance was already provided by FYROM to Albania during its electricity crisis in 2005.[21] The possible achievement of a common external energy trade policy as part of the single energy market to be developed is mentioned in Articles 3(c) TEnC. Article 43 TEnC specifies that external trade policy measures may be implemented to ensure basic environmental and safety standards. However, the EU itself does not pursue a common external energy trade policy.[22] Its energy relations with third countries are fragmentary and mostly regulated by different general agreements (e.g. Partnership and Cooperation Agreements) and by several bilateral or multilateral energy initiatives, like the EU Russia Energy Dialogue[23].

The main institution of the Energy Community is the Ministerial Council (MC; Article 47 through 52 TEnC) consisting of one representative of each SEE party and two of the European Community. It is *inter alia* responsible for general policy guidelines, the budget, and dispute settlement. In decision-making the MC is supported by the Permanent High Level Group (PHLG; Article 53 through 57 TEnC), which also consists of one representative of each SEE party and two of the European Community. The institutionalised co-operation between the European Community and the other

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[17] Article 32 TEnC authorises the Energy Community to adopt measures allowing for the universal provision of electricity, but not for gas. This limitation is also found when comparing the Gas Directive with the Electricity Directive, which obligea the EU member states to guarantee universal service to household customers only for electricity (Article 3 (3) Electricity Directive). Compare Christopher W. Jones, vol. 1 of *EU Energy Law* (Leuven: Claeys & Casteels, 2006), 234.

[18] The safeguard measures outlined in Articles 36 through 39 TEnC are modelled after Article 24 Electricity Directive and Article 26 Gas Directive. Together with these provisions the two directives (Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment and Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply) on safeguard measures are to be implemented by the parties of the Energy Community.

[19] Electricity, although not tangible, was considered as a good within the meaning of Article 28 TEC by the ECJ (Case C-393/92 *Municipality of Almelo v Energiebedrijf Ijsselmij* [1994] ECR I-1477) 'by virtue of its function as an energy source' (Opinion AG Fennelly in Case C-97/98 *Peter Jägerskiöld v Torolf Gustafsson* [1999] ECR I-7319, para 20). The same applies to gas, which consequently also comes under the provisions governing the free movement of goods.

[20] The MC is going to decide on the procedural act to be adopted pursuant to Article 46 TEnC on 11 December 2008.

[21] For a detailed discription see: http://www.energy-community.org/pls/portal/docs/36408.PDF.

[22] See, Javier Solana, "An External Policy to Serve Europe's Energy Interests, European Council," S160/06, 2006. The EU pursues three policy objectives in the field of energy: sustainability, security of supply and competitiveness, all of which to be achieved by internal and external policy measures. The EU's competences in the field of energy are, however, limited.

[23] http://ec.europa.eu/energy/international/bilateral_cooperation/russia/russia_en.htm.

parties adds to the unique character of the Energy Community which clearly distinguishes it from other Community initiatives in the energy sector.[24] The Regulatory Board (RB; Article 58 through 62 TEnC), which comprises of a number of regional energy regulators, prepares recommendations for the MC and the PHLG on regulatory, statutory and technical issues. Additional advice for the Energy Community is provided by the Gas and Electricity Fora (Article 63 through 66 TEnC) which are composed of interested stakeholders and modelled after the Madrid and Florence Fora[25]. The secretariat (Article 67 through 72 TEnC) of the Energy Community is situated in Vienna and is equipped with comprehensive competence *inter alia* in the dispute settlement procedure (Article 89 through 93 TEnC)[26].

Dispute settlement decisions lie within the sole responsibility of the MC. The pre-dispute settlement procedure is carried out by the Secretariat upon notification of a party or the RB or upon complaint by natural or legal private persons. After this preliminary procedure, the MC decides on (serious and persistent) breaches of obligations of the Treaty or of decisions addressed to the party. In case of serious and persistent breaches provision is made for the MC to impose sanctions for a determined period of time. The dispute settlement procedure does not provide for legal remedies for the parties concerned. Complaints or notifications against EU member states are forwarded to the European Commission, which may then initiate an infringement procedure pursuant to Article 226 TEC.

3. THE EEA CONCEPT FILLING THE GAPS OF THE TEnC?

Before discussing any of the issues addressed above and comparing them with similar provisions of the EEA Agreement, it shall shortly be explained why a comparison between the EEA and the Energy Community seems to be a promising idea. 'The objective of establishing a dynamic and homogenous European Economic Area[27], based on common rules and equal conditions of competition' determined in the preamble to the EEA Agreement, could also serve as a description of the Energy Community albeit limited to the electricity and gas sectors. Both treaties are agreements under international law, they are both forms of enhanced multilateralism, and they both deal with the enlargement of (parts of) the EC Internal Market. What makes them special is their strong and at the same time dynamic connection with the development of and changes in (parts of) European Community law. The notion of the EEA Agreement, however, is in many ways different to the TEnC as cooperation between the EFTA countries and the European Union is much more intense and covers many different policies. As a result, the TEnC and the EEA Agreement are based on different legal provisions. The former is based on 'Articles 47(2), 55, 83, 89, 95, 133 and 175, in conjunction with the first sentence of the first subparagraph of Article 300(2) and the second subparagraph of Article 300(3)'[28] TEC, whereas the latter is solely based on Article 310 TEC[29]. This distinction alone reveals the different purposes of the two agreements. The TEnC constitutes a sectoral agreement de-

[24] Jörg Walendy, "Stabilität durchs Netz?" *Osteuropa* 54 (2004): 263.

[25] For details on the two fora, see http://ec.europa.eu/energy/gas/madrid/index_en.htm and http://ec.europa.eu/energy/electricity/florence/index_en.htm.

[26] The dispute settlement procedure is specified in the Procedural Act No. 2008/01/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty.

[27] Throughout the EEA Agreement emphasis is placed repeatedly on homogeneity.

[28] See Council of the European Union, fn 16.

[29] At that time Article 238 of the Treaty establishing the European Economic Community.

termined to develop a common energy market including the Union and its south eastern neighbours and is therefore limited to only a couple of policies. The EEA Agreement on the other hand established an extensive 'contractual association'[30].

Having roughly established their common and differencing features, we would like to ascertain that these two agreements are sufficiently similar to draw analogies between the TEnC and the EEA Agreement to better understand the first. But we stumble over several principles of EC and EEA law that cannot be ignored with homogeneity leading the way. Whereas homogeneity is a central element of the EEA Agreement, it is not mentioned in the TEnC. The implementation of several or even a myriad of EC legal acts into another legal system does not automatically guarantee the homogenous application and interpretation of those acts. Legislation in one sector is often dependent on legislation in several related fields. What is more, EC law is indivisibly connected to its underpinning principles like direct effect or primacy. *Norberg et al.*, however commenting on the EEA founding process, state 'that in practice it would not be possible in several areas to achieve equal treatment with the EC Member States in the internal market by concluding an agreement taking over the EC rules for a particular sector only'[31].

The Energy Community is confined to fourteen legal acts of secondary legislation concerning the energy sector and similar provisions to Articles 81, 82 and 87 TEC stipulating the EU's pivotal competition rules. Can these rules taken from the *sui generis* legal order of the EC have direct effect in the SEE countries? In other words, could a SEE country national invoke and rely on provisions of the *acquis* in proceedings before a national court? The only possibility for natural or legal private persons provided by the TEnC under the Dispute Settlement Procedure is a complaint with the Secretariat. This kind of remedy falls short of what is granted on EU level to EU citizens. However, before the *Van Gend en Loos*[32] case the protection of rights of individuals was also limited to a complaint with the Commission.[33] Whereas *Sevón* and *Johannson* easily applied the *Van Gend en Loos* reasoning to the EEA Agreement[34], a similar application to the TEnC seems hard to achieve. Despite the TEnC being a historic agreement with unique scope and content, its objectives do not come close to those of the TEC or the EEA Agreement. While the EEA Agreement repeatedly refers to its importance for and commitment to individuals, consumers, and economic operators[35], the preamble to the TEnC mentions citizens only in connection with public service obligations (recital 12 TEnC). Fittingly, reference to social issues within the scope of the Energy Community can only

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[30] The term and the scope of such an association is not determined in the TEC. Kirsten Schmalenbach ("Article 310" in *EUV EGV*, 3rd ed., ed. Christian Calliess and Matthias Ruffert (München: Beck, 2007) para 10) describes it as a contractual relation according to international law aiming at continuity and processual development, equipped with special institutions competent to regulate issues falling within the scope of the relevant agreement. This definition, however, could likewise apply to the TEnC.

[31] Sven Norberg et al., *The European Economic Area – EEA Law – A Commentary on the EEA Agreement* (Stockholm: Fritzes,1993), 53.

[32] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[33] Damian Chalmers et al., *European Union Law* (Cambridge: Cambridge University Press 2006), 366-67.

[34] Leif Sevón and Martin Johansson, "The protection of the rights of individuals under the EEA Agreement," *European Law Review* 24 (1999): 380.

[35] Together with several recitals in the preamble, part V of the EEA Agreement on horizontal provisions relevant to the four freedoms focuses on social policy, consumer protection and company law. The relevant Community *acquis* is stipulated in the corresponding annexes.

be found in a legally non-binding memorandum of understanding[36] on Social Issues in the Context of the Energy Community. Furthermore, there is no explicit reference to homogeneity in the TEnC. The commitment to develop the Energy Community's *acquis* 'in line with the evolution of European Community Law' (Article 25 TEnC) and to interpret terms and concepts taken from European Community law in conformity with the ECJ and the Court of First Instance (Article 94 TEnC) do not provide for the same kind and scope of homogeneity established on EEA level[37].

In the EEA homogeneity in the field of jurisdiction is ensured by the dispute settlement procedure with its institutional framework mirroring the ECJ (EFTA Court) and the European Commission (EFTA Surveillance Authority) and a system of exchange of information. The twin-pillar model avoids legal imbalance and most importantly ensures the homogenous application and uniform interpretation of Community law. In the field of legislation the EFTA countries are basically norm takers with only consultative competence. Immediately after the adoption of an EC legal act by the Council of the EU, the EEA Joint Committee is informed and must then 'take a decision concerning an amendment of an Annex […] as closely as possible to […] the corresponding new Community legislation'[38].

Most of EC secondary legislative acts and non-binding instruments are integrated into the EEA Agreement trough the reference technique used in the annexes. Horizontal adaptations probably concerning all legal acts are implemented pursuant to Protocol 1 On Horizontal Adaptations. Sectoral or specific adaptations for one or more EFTA states are included in the specific annexes. Several of the legal acts being part of the *acquis* of the Energy Community were also included in Annexes IV (Energy) or XX (Environment) of the EEA Agreement. Some of them were subject to adaptations according to EEA rules and can serve as models for adaptations pursuant to Article 24 TEnC. They are mostly limited to exchanging Community specific terms with the corresponding EEA terms (e.g. Annex IV item 22 (a) through (c)[39]). Country specific adaptations, which is also provided for within the scope of the TEnC ('adaptation to the specific situation of each of the Contracting Parties'), could assume the shape of e.g. item 19 of Annex XX[40].

Similar to Article 10 TEC and Article 3 of the EEA Agreement, the TEnC includes the principle of loyal cooperation (Article 6) stipulating the parties' obligations to actively work towards the fulfil-

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[36] MoU on Social Issues in the Context of the Energy Community (http://www.energy-community.org/pls/portal/docs/36242.PDF).

[37] See Roman Petrov, "Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries," *European Foreign Affairs Review* 13 (2008): 38.

[38] Article 102 (1) EEA Agreement.

[39] **32003 L 0054**: Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, p. 37).
The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:
(a) in Article 3(2), the words "provisions of the Treaty, in particular Article 86 thereof" shall read "provisions of the EEA Agreement and in particular Article 59 thereof";
(b) in Article 3(8), the words "The interests of the Community" shall read "The interests of the Contracting Parties";
(c) in Article 3(8), "Article 86 of the Treaty" shall read "Article 59 of the EEA Agreement".

[40] **32001 L 0080**: 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 (OJ L 309, 27.11.2001, p. 1) […]
At the time of incorporation of the Directive into the Agreement, Iceland and Liechtenstein do not have in operation any large combustion plants as defined in Article 1. These states will comply with the Directive if and when they put into operation such plants.

ment of and abstain from any measure capable of jeopardising the objectives of the Treaty. Article 10 TEC among others supported the ECJ's interpretation of the rule of primacy of Community law[41]. It comprises the contracting parties' obligation to withstand from applying any national rules running contrary to the objectives to be achieved by the applicable legislation and goes beyond the prohibition of behaviour contrary to the EC.[42] In the EEA this interpretation also applies pursuant to Article 6 EEA Agreement and is affirmed by the provisions of Protocol 35 on the implementation of EEA rules[43]. The reasoning behind the *Costa/ENEL* ruling was the ECJ's conviction that the Community had 'created its own legal system'. While the same holds true for the EEA[44], we must refrain from awarding this special status to the Energy Community despite its unique set-up and scope. Nevertheless, it was a courageous and clever move to found this Energy Community. Much more academic and practical work will have to be done to fully understand and evaluate its merit and the opportunities it provides, especially for the neighbouring countries as parties-to-be.

4. THE ENERGY COMMUNITY – ALTERNATIVE TO RU MEMBERSHIP?

One of the reasons for the establishment of the Energy Community was to foster regional cooperation between the countries of the Western Balkans. Destroyed by wars and to a large extend dependent on the international community, economic independence and at the same time regional interdependence was pivotal for the development of these war-ridden countries. Energy scarcity appearing in regular power outages was another central impediment to development. By integrating the energy markets of the SEE countries with the EU's Internal Energy Market investments in infrastructure should follow and eventually lead to more security of supply for all parties.

Despite these obvious advantages, the Energy Community strictly focuses on energy issues and leaves any kind of conditionality apart. There are neither carrots nor sticks but a partnership eventually leading to a single energy market. This is more than any other co-operation in the field of energy like e.g. the Baku Initiative[45], offers. Hence, it comes as no surprise that participation in this organisation is highly motivating and interesting for other countries in neighbouring regions. Of the four observers to the Energy Community Georgia, Moldova, Turkey, and Ukraine, two already filed their membership applications. Judging from today, membership in the Energy Community and simultaneously in the Internal Energy Market might be as close as they will (now or in the near future) get to integration with the EU. The main incentive of non EU member states to participate in the Energy Community is to belong to a huge market materialising economies of scale, investment incentives, productivity gains, and the opportunity to trade with energy importing countries; and all that without additional human rights, democracy or rule of law requirements.

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[41] Case C-6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 585 at 593.

[42] Stefan Griller, "Gesamtänderung durch das EWR Abkommen?" *ecolex* 3 (1992): 541-42.

[43] Its sole article reads: 'For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.'

[44] This was also held by the EFTA Court in Case E-9/97 *Erla María Sveinbjörnsdóttir v The Government of Iceland* (10 December 1998): 59.

[45] http://ec.europa.eu/external_relations/energy/baku_initiative/index.htm.

For the (potential) candidate countries of SEE the obligation to adopt the fourteen legal acts of the TEnC is yet only another step in the process of gradual integration into the EU structures[46]. For countries currently associated with the EU by its ENP it is much different. They do not belong to the group of (potential) candidate countries and for politicians in these countries it would be hard to sell to their electorate another implementation of EC legislation without any membership perspective.

From the EU's and its member states' perspectives access to Caspian natural resources is crucial and membership of Black Sea countries in the Energy Community would establish a wider Internal Energy Market with common rules and standards attracting (infrastructure) investment and competition; eventually leading to security of supply for all consumers.

5. CONCLUSION

Summing up we can clearly establish, that the Energy Community is no new European Economic Area. They are essential differences between their objectives, their institutions and their organisations. But as *Blockmans* rightly described, the Energy Community is just the beginning and cooperation in other fields could follow.[47] If the neighbouring countries, which applied for membership in the Energy Community, will follow and will make this organisation and the EU as a whole a bigger player in the field of energy will have to be seen. The Energy Community, however, leads the right way and has the potential to be more than just 'one of those EU initiatives'.

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[46] Cooperation in the field of energy is also stipulated in the Stabilisation and Association Agreements with the countries of the Western Balkans. See e.g. Article 101 of the *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part*, OJ L 26, 28 January 2005, 3.

[47] Steven Blockmans, "Consolidating the Enlargement Agenda for South Eastern Europe," in *Reconciling the Deepening and Widening of the European Union*, ed. Steven Blockmans and Sacha Prechal (The Hague: T.M.C. Asser Press, 2007), 80.

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