The Energy Community is nearing its tenth anniversary. It was established by way of a Treaty signed in October 2005 which entered into force in July 2006. It was originally designed as a framework for the extension of the acquis communautaire in energy, the environment, renewables and competition to the Contracting Parties to the Treaty. The idea was to create a single regulatory space for energy, diminish barriers to the establishment and functioning of a regional and subsequently a pan-European energy market, while at the same time securing energy supply, attracting investment, and addressing environmental concerns. Through a series of Ministerial Council Decisions, the Treaty was gradually extended to new areas and updated to keep in line with EU acquis developments. Most notably, the adoption of the Third Energy Package by the Energy Community was a major step forward, although admittedly not perfectly executed given the difficulties of implementing the requirements of the package in countries with very different energy markets and levels of development.

The institutions of the Energy Community established under the Treaty were the result of a compromise partially mimicking the structure of the EU. Decision-making powers, be they embodied in legally binding decisions or recommendations, are vested in the Ministerial Council. The work of the Ministerial Council is prepared and guided by the Permanent High Level Group made up of representatives from respective ministries on a more operational level. Although parallels between the Permanent High Level Group and the Committee of Permanent Representatives of the EU (COREPER) are often drawn, there is one unsurpassable difference, and that is that COREPER is not a decision-making body. The Energy Community Treaty, on the other hand, foresees this role for the Permanent High Level Group, if so decided by the Ministerial Council.

The Energy Community Regulatory Board (ECRB) represents national energy regulators and has, in many ways, became a forerunner and practical inspiration for what was later to become the Agency for the Cooperation of Energy Regulators ACER in the EU, while the Athens Electricity Forum and the Ljubljana Gas Forum replicated the Florence and Madrid Fora of the EU. These institutions were further expanded by the Belgrade Oil Forum and the Social Forum, thus creating various platforms for stakeholder discussions on energy topics in the region.

No court or forum for arbitration was foreseen under the Treaty, although these proposals were tabled during Treaty negotiations. Instead, the dispute resolution function is held by the Ministerial Council. The Secretariat, initially formed to provide administrative support to other institutions and to review and report on proper implementation of the obligations of the contracting parties to the Ministerial Council, has developed a more active role in

practice. The Secretariat has become the driving force and guardian of the Treaty itself. Initially, the Treaty included Albania, Bulgaria, Bosnia and Herzegovina (BiH), Croatia, Macedonia, Montenegro, Romania, Serbia, and the then United Nations Interim Administration Mission in Kosovo (now Kosovo1), on the one hand, and the EU on the other. Bulgaria, Romania, and Croatia successively became EU Member States after entering into the Treaty. The initial the Contracting Parties have a distinct EU perspective irrespective of where they are on their EU path. This equation changed substantially with the accession of Ukraine and Moldova, giving rise to the idea of a two-tiered Energy Community, which seems to be developing further with the potential full membership of Georgia.

It was most probably not intentional, but practice has demonstrated that there are serious differences between the initial signatories and the newcomers – both in their legislative frameworks, their regulatory culture, and above all, their technical reality. To be fully honest, the initial signatories were far away from being a flawlessly coherent group, but they were still speaking the same "Energy Community language". If a two-tier or multi-tier (with all due respect, countries the likes of Switzerland and Norway can't be placed in any of the two-tiers) system were to be established, it would carry the danger of gradual dispersion of the institutions of the Energy Community, as two or more groups of significantly differing members would have a less and less of a common agenda, and the whole process would inevitably become more cumbersome. In late 2013, the Ministerial Council established a High Level Reflection Group (HLRG) mandated to

assess the adequacy both of the institutional set up and of the working methods of the Energy Community. Comprised of reputable experts chaired by Mr. Jerzy Buzek, the HLRG submitted its ambitious reform agenda to the Ministerial Council in 2014, which responded by developing an implementation roadmap. The Secretariat and the Energy Community, from its end, produced an analytical paper portraying the possible implementation options, which was subject to public consultation together with the report of the HLRG. In a nutshell, the proposals covered five main areas of reform: additional measures for the creation of a pan-European single market through the widening of the acquis and better links between the EU and EC institutions, mechanisms for increasing investment flows, more funding, stronger enforcement, a two-tier membership with no geographical limitations, and increased transparency. Little, however, was proposed in terms of substantive changes to the institutional framework. Without a strong enough justification, the central point of this aspect of reforms was

placed on making the PHLG the "Energy Community's plenipotentiary, high-level and permanent collective decision-making body". It is interesting that the HLRG suggests that

the Ministerial Council is overburdened by numerous decisions which prevent it from dealing with strategic topics. On the other hand, the strategic issues of the Energy Community are incomparable to those of the EU, rather limited in scope, and fully dictated by the developments in the strategic and policy stances of the EU. What would the noble ministers actually be deliberating on in this vision of the HLRG? The answer is rather vague, to say the least.

Strengthening the role and effectiveness of the ECRB, a higher level of cooperation between the ECRB and the ACER, building the future role of the Energy Community fora, and the involvement of Contracting Party's TSOs in the European Network of Transmission System Operations for Gas (ENTSOG) are all positive developments within the Energy Community. NIS perceives these proposals as a constructive contribution to the formation of an institutional framework capable of fostering the creation of a fully functioning pan-European energy market. While we support the business side of the process which is interested in increased transparency and opening further possibilities for our involvement as a company in the policy-making process alongside civil society organisations, we have reservations regarding proposals which are limitless in their scope and procedures which make decision-making processes more inefficient.

Contrary to the views of the majority, NIS has found that, despite possible inefficiencies, the Contracting Parties should be involved in a consultation process with the European Commission to highlight their national specificities before proposals on the extension of the acquis are made within the auspices of the Energy Community, and, if possible, even before proposals are tabled within the EU legislative process. Greater flexibility and a more realistic approach should be taken when considering the extension of and the tempo at which the environmental acquis should be implemented in the Contracting Parties.

This is because meeting the environmental requirements of the acquis are some of the most challenging and investment- intensive tasks put before the Contracting Parties on their EU path. The economies of the Contracting Parties are struggling in general and many are finding it hard to meet the existing environmental acquis of the Energy Community. Further to that, considering what is going on in the EU's oil & gas sector, the core sector in which NIS operates, it can be observed that the Oil Refining Fitness Check preliminary results show that the additional costs brought about by the implementation of (predominantly) environmental legislation in force has already amounted in 0.40 eurocents/bbl, and that further costs are in the pipeline with the application of the Industrial Emissions Directive. Thus, instead of setting extremely hard-to-meet targets and creating an environment where those requirements will almost certainly be breached, we suggest taking

small steps to achieve great feats. A legally non-binding recommendation of the Ministerial Council on the extension of the environmental acquis would be a signal in the right direction and could fully or partially be transformed into a legally binding decision when conditions are ripe enough.

The possibilities provided for in the Treaty for the establishment of a pan-European energy market, as well as external trade policy and security of supply has, thus far, been underutilised. This is even more so true with regard to creating territorially narrower, innovative mechanisms which would involve both Contracting Parties and EU Member States, given the limitations imposed by Council Decision 2006/500/ EC. Namely, extending the application of the existing acquis uniformly throughout the Contracting Parties is of paramount importance as it is a prerequisite for enabling the proper functioning of mechanisms, institutions, and rules that enable full market integration. But mere extension of the acquis in line with Title II of the Treaty creates a situation in which the (same or similar) rules are applicable in parallel in EU Member States and the Contracting Parties, while under Title IV they become a pan-European instrument,
contribute to homogeneity, and resolve potential issues related to interfaces between EU Member States and Contracting Parties. However, this should not preclude the possibility of introducing specific mechanisms that might be narrower in geographic scope, and include the Contracting Parties and some of the (bordering) Member States – an extremely useful possibility when trying to introduce mechanisms that are in line with, but not explicitly foreseen in the existing acquis. However, amendments to Council Decision 2006/500/EC would be necessary in order to ensure that obligations falling on Member States from the introduction of such mechanisms would have a sound legal basis and be enforceable. This approach would also resolve already existing practical issues such as the lack of equal treatment of interconnectors (be they between Member States or between Member States and Contracting Parties), which is in our view contrary to the basic spirit and purpose of the Treaty itself. To put it bluntly, had the Contracting Parties only wished to create a regional and not a pan-European market, albeit in line with the acquis, they wouldn’t have had the need to conclude a Treaty with the EU – they could have simply done it amongst themselves.

An example of a high-level, yet not fully elaborated proposal of the HLRG was the introduction of the basic freedoms of the EU in the Energy Community. Their full-fledged introduction would, in our view, be hard, if not impossible to enforce under the Energy Community framework. A gradual introduction of relevant elements of these freedoms seems much more sensible. For instance, the introduction of elements of the freedom of

establishment would foster removing
obstacles to trade in the form of multiple incorporation requirements for suppliers/traders in various jurisdictions. Other proposals of the HLRG attempt to cover areas which are of indisputable importance: competition, state aid, and public procurement. However, the ultimate question is how much should the Energy Community as such be involved. Basic competition principles of the EU are enshrined in the Treaty, the Contracting Parties which have signed Association Agreements already established state aid notification mechanisms. Any duplication in this respect should be avoided, while public procurement rules are largely based on the principles of the EU. Full incorporation of these areas into the Energy Community framework in a legally binding way may actually limit the realisation of the Energy Community's main goals.
In the realm of creating a better investment climate and an environment with no obstacles to trade in energy, while respecting environmental, energy efficiency and other requirements, there is a notorious need for creating sustainable mechanisms.
In this sense, full respect of the EU VAT acquis and harmonised implementation by all the Contracting Parties is imperative, as it makes business operations of regional companies much less burdensome. Making more funding available from bilateral and multilateral instruments together with more support from international financing institutions and the EU is absolutely welcome, presuming things are kept simple and over-administration is avoided. Along this line of thought we found the proposal for the introduction of a mandatory, yet non-binding opinion of the Secretariat to potential donors to be a contradiction of sorts. Instead of developing a strong analysis of genuine and new support mechanisms or possibilities of using existing ones for funding both technical assistance projects and investments, this is where the proposals of the HLRG grow thin. The establishment of an Energy Community Risk Enhancement Facility (ECREF) was proposed to mitigate risks "such as breach of contract by public bodies, retroactive measures, discriminatory taxation, payment default by public entities", but it remained unclear how these and similar risks would be mitigated by co-financing grants (or any other actions by ECREF for that matter), which would, by the way, be executed by "piggybacking" on existing EU funds. Instead, emphasis should, at least in this phase, be placed on finding ways of utilising existing facilities. Such as the Connecting Europe Facility (CEF) for supporting Project of Energy Community
Interest.
On a final note, the area of enforcement and dispute settlement has often been portrayed as a weakness of the entire framework of the Energy Community.

For various reasons, a vast majority of the participants in public consultations supported amending the Treaty so as to create an obligation for the administrative and judicial institutions of the Contracting Parties to accept direct effect and precedence of the Energy Community rules over conflicting national rules, as well as state liability for noncompliance with EU law. We find that the assessment made in the analytical paper skilfully plays around these well-known and accepted concepts in the EU legal order which are, however, not applicable to the Energy Community in the manner described therein. It goes without saying that the primacy of the Treaty in establishing the Energy Community, as a ratified international agreement, is undisputable. However, this does not mean primacy of "Energy Community law" if this notion entails parts of the acquis which are replicated in the framework of the Treaty, given that the directives and regulations are not acts of the Energy Community, but of the EU. Hence, the acquis that is part of "Energy Community law" has no direct effect either. Even in the EU itself, regulations have direct vertical and horizontal effect, while directives can only have direct vertical effect if not transposed. Certain provisions of the Treaty can certainly have direct effect if sufficiently clearly defined and unconditional (e.g. Article 41.1 ). The same applies to decisions of the Ministerial Council of the Energy Community, but not to the parts of the acquis which they might be referring to. With respect to the concept of state liability, any individual suffering damage stemming from the non-performance of obligations that a State overtook by ratifying an international agreement could seek compensation if it can prove that the agreement conferred specific rights to it and that there is a causal link between the failure of the State to honour its obligation and the suffered damage. The same applies to the Decisions of the Ministerial Council. In sum, we encourage private enforcement of the Treaty and the application of the principles of primacy, direct effect, and state liability but only in their pure form, without twisted interpretation.

The political approach to sanctioning seems to be underestimated. In our view, the closer a Contracting Party is to EU membership the heavier the weight of this approach. Thus, keeping the current dispute resolution mechanism in place, instead of creating new dispute resolution institutions such as a court of arbitration, shouldn't be ruled out. Furthermore, the basic purpose of the Treaty, being the creation of a regional and pan-European market for network energy and not general investor relations, seems to be forgotten from time to time, leading to proposals such as establishing a regional investment court not limited to network energy. Although the current sanctioning framework is a potential weak spot of the general framework, it is hard not to identify the inherent lack of legitimacy for proposals that are a carbon copy of what exists in the EU. If we just consider the proposed

introduction of financial sanctions we clearly see that there is no valid parallel. Blocking of funds as an alternative doesn't seem to be a rational general solution either, except if targeted at funds related to the specific area to where there is lack of implementation. In this respect, upgrading the current dispute resolution mechanism seems to be the only sensible way forward, but profound elaboration on this is still missing.

NIS jsc takes the EU accession process seriously. To our knowledge, we are the only company in Serbia which has set up a special internal unit ("the EU Liaison Office"), within the Office of the CEO, responsible for dealing with EU related matters. As a company involved in the oil and gas sectors and in the process of transformation into an energy company, the EU rules and regulations which already are or shall become part of the Serbian legal framework primarily, but not
limited to, those in the field of energy, environment, and taxation have a huge impact on our business. Therefore, we have decided to take a proactive role and to analyse the effects of EU legislation on our business. In order to do this we developed an in-house modified SWOT methodology, followed by quantifications of costs and benefits stemming from the full implementation of the acquis. Everyone is aware that the accession process is not an overnight one, and without making unsolicited guesses on the date of Serbia's accession, one could say that it will take years, if not a full decade. In the meantime, the Energy Community exists, Serbia is a Contracting Party to it, and we as a company are obliged to function with the framework set up for its operation. Hence our interest in an efficient and effective Energy Community that seeks to meet the needs of the energy businesses, relinquish barriers and contribute to the formation of a truly regional and pan-European energy market. The reforms would, however, have to be tailored prudently and should not go beyond what is
necessary to achieve the common goals in order to assure that they don't turn into the exact opposite of what was intended.