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2022/0415 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Ministerial Council of the Energy Community and in the Permanent High Level Group of the Energy Community (14-15 December 2022, Vienna, Austria)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be adopted on the Union's behalf in the Ministerial Council of the Energy Community ('Ministerial Council') and in the Permanent High Level Group ('PHLG') of the Energy Community in connection with a number of acts, which these two bodies envisage adopting on 14 and 15 December 2022.

2. CONTEXT OF THE PROPOSAL

2.1. The Energy Community Treaty

The Energy Community Treaty ('ECT') aims to create a stable regulatory and market framework and a single regulatory space for trade in network energy by implementing agreed parts of the EU *acquis* on energy in the non-EU Parties. The agreement entered into force on 1 July 2006. The European Union is a party to the ECT.¹ The ECT refers to the nine non-EU Parties as 'Contracting Parties'.

2.2. The Ministerial Council and the PHLG of the Energy Community

The Ministerial Council ensures that the objectives set out in the ECT are attained. It provides general policy guidelines, takes Measures and adopts Procedural Acts. Each Party has one vote and the Ministerial Council acts by different voting rules depending on the subject matter. The EU is one of the ten Parties and has one vote, also depending on the subject matter concerned.

Unanimity vote applies with respect to the envisaged acts listed below under Section 2.3. point 9 (Art. 92(1) ECT).

Simple majority vote applies with respect to the envisaged acts listed below under Section 2.3 points 2, 3, 4 (Art. 79, 81 ECT), point 8 (Art. 91 (1) (a) ECT).

Two-third majority of the votes cast, including a positive vote of the European Union, applies to the envisaged acts under Section 2.3 points 1, 5, 6, 7 (Art. 83 86, 87 ECT).

The PHLG is an important subsidiary body of the Ministerial Council. It may, amongst other tasks, take Measures, if so empowered by the Ministerial Council. The EU is represented in the PHLG and has one vote.

Article 47 ECT provides: 'The Ministerial Council shall ensure that the objectives set out in this Treaty are attained. It shall: [...] (b) take Measures [...]'.¹

Simple majority vote applies with respect to the envisaged act to be voted by the Permanent High Level Group.

2.3. The envisaged acts of the Ministerial Council and the PHLG

The present proposal for a decision under Article 218(9) TFEU concerns the position to be adopted on the Union's behalf with respect to the following envisaged acts of the **Ministerial Council**:

- (1) Decision 2022/.../MC-EnC on the incorporation of Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485 in the Energy Community *acquis*, amending Annex I of the Energy

¹ OJ L198 of 20.7.2006, p. 15.

Community Treaty, and on the amendments of the MC Decisions No 2021/13/MC-EnC and No 2011/02/MC-EnC and for the adoption by the MC of a Procedural Act on Regional Energy Market integration;

- (2) Decision 2022/.../MC-EnC on amending Ministerial Council Decision No 2021/14/MC-EnC amending Annex I to the Treaty Establishing the Energy Community and incorporating Directive (EU) 2018/2001, Directive (EU) 2018/2002, Regulation (EU) 2018/1999, Delegated Regulation (EU) 2020/1044, and Implementing Regulation (EU) 2020/1208 in the Energy Community *acquis communautaire*;
- (3) Decision 2022/.../MC-EnC adapting and incorporating certain Delegated Regulations on energy-related products, introducing rescaled labels in the Energy Community *acquis communautaire* and repealing Delegated Regulations (EU) 1059/2010, (EU) 1060/2010, (EU) 1061/2010, (EU) 1062/2010, (EU) 874/2012, and Directive 96/60/EC;
- (4) Decision 2022/xx/MC-EnC amending Annex I to the Treaty establishing the Energy Community and incorporating Implementing Regulation (EU) 2018/2066, Implementing Regulation (EU) 2018/2067 and Directive 2003/87/EC in the Energy Community *acquis communautaire*;
- (5) Procedural Act 2022/.../MC-EnC amending budget implementation, staff regulations and recruitment rules;
- (6) Procedural Act 2022/.../MC-EnC amending Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty, as amended;
- (7) Procedural Act 2022/.../MC-EnC adopting the Secretariat's Organigramme;
- (8) Decisions under Article 91(1) ECT establishing the existence of a breach of the ECT in the following cases:
 - (a) Decision 2022/.../MC-EnC on the failure of Republic of North Macedonia to comply with the Energy Community Treaty in Case ECS-4/22;
 - (b) Decision 2022/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-5/22;
 - (c) Decision 2022/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-5/17.
- (9) Decisions under Article 92(1) ECT:
 - (a) Decision 2022/.../MC-EnC on the adoption of measures in response to serious and persistent breaches by Bosnia and Herzegovina under Article 92(1) of the Energy Community Treaty in Cases ECS-8/11S, ECS-2/13S and ECS-6/16S;
 - (b) Decision 2021/12/C-EnC on establishing a serious and persistent breach against Serbia under Art. 92(1) of the Treaty in Case ECS-10/17S and in Case ECS-13/17S.

The present proposal for a decision under Article 218(9) TFEU concerns the position to be adopted on the Union's behalf with respect to the following envisaged act of the **PHLG**:

Decision 2022/.../PHLG-EnC adapting and implementing Commission Regulation (EU) 2022/132 of 28 January 2022 amending Regulation (EC) No 1099/2008 of the European Parliament and of the Council, as regards the implementation of updates for the annual, monthly and short-term monthly energy statistics.

The purpose of the envisaged acts of the Ministerial Council and the PHLG (hereafter collectively referred to as ‘the envisaged acts’) is to facilitate the achievement of the objectives of the ECT and the functioning of the Energy Community Secretariat (ECS) in Vienna which, among other things, provides administrative support to the Ministerial Council.

2.4. Other items on the agenda

For the sake of completeness, it is noted that, in addition to the envisaged acts, there will be a number of other items for voting on the agenda of the meetings of the Ministerial Council and the PHLG:

- Annual Report on the Activities of the Energy Community;
- Decision 2022/.../MC-EnC on Financial Discharge of the Director of the Secretariat of the Energy Community.

On behalf of the European Union, the Commission intends to support the adoption of those items, subject to prior endorsement by the Council.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

3.1. Envisaged acts of the Ministerial Council

3.1.1. Decision 2022/.../MC-EnC on the incorporation of Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485 in the Energy Community acquis, amending Annex I of the Energy Community Treaty, and on the amendments of the MC Decisions No 2021/13/MC-EnC and No 2011/02/MC-EnC and Procedural Act 2022/.../MC-EnC on Regional Energy Market integration

Following the Ministerial Council in November 2021 and pending ECT amendments, the Commission has developed in close cooperation with the Contracting Parties, the ECS and the EU Member States alternative solutions within the framework of the current ECT in order to achieve progress on the integration of electricity markets, including through measures in the electricity field under relevant Title of the ECT.

On this basis, the Commission has tabled to the Energy Community a proposal for a Decision of the Ministerial Council to incorporate the following EU legal acts into Energy Community *acquis*:

- Regulation (EU) 2019/943 on the internal market for electricity²,
- Commission Regulation (EU) 2015/1222 on capacity allocation and congestion management³,
- Commission Regulation (EU) 2016/1719 on forward capacity allocation⁴,

² Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJL 158, 14.6.2019, p. 24-124

³ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJL 197, 25.7.2015, p. 24-72

- Commission Regulation (EU) 2017/2195 on electricity balancing⁵,
- Commission Regulation (EU) 2017/2196 on electricity emergency and restoration⁶,
- Commission Regulation (EU) 2017/1485 on electricity transmission system operation⁷
- Regulation (EU) 2019/942 on establishing a European Union Agency for the Cooperation of Energy Regulators⁸,

This proposal also includes an amendment of the following Ministerial Council Decisions, allowing an integrated electricity market between the Contracting Parties and the neighboring EU Member States: Decisions No 2021/13/MC-EnC⁹ and No 2011/02/MC-EnC¹⁰ on the incorporation of Directive (EU) 2019/944 on internal market for electricity¹¹ and Regulation (EU) 2019/941 on risk-preparedness¹² in the Energy Community *acquis* accordingly.

In this context, the Commission has also tabled to the Energy Community a proposal for a Procedural Act of the Ministerial Council on Regional Energy Market integration

This Procedural Act would, once adopted, be binding on the Contracting Parties and the EU alike and allow for mandating EU agencies (ACER) and bodies (ENTSO-E) with task on cross-border issues between the Contracting Parties and the EU Member States.

On behalf of the European Union, the Commission intends to support the adoption by the Ministerial Council of the Energy Community of the Decision and the Procedural Act.

3.1.2. Decision 2022/.../MC-EnC on amending Ministerial Council Decision No 2021/14/MC-EnC amending Annex I to the Treaty Establishing the Energy Community and incorporating Directive (EU) 2018/2001, Directive (EU) 2018/2002, Regulation (EU) 2018/1999, Delegated Regulation (EU) 2020/1044, and Implementing Regulation (EU) 2020/1208 in the Energy Community acquis communautaire;

In November 2021, the Ministerial Council of the Energy Community established the Energy Community legal framework for the 2030 energy efficiency, renewables and greenhouse gas emissions targets for the nine non-EU Contracting by adopting the key legislative acts stemming from the EU's Clean Energy for all Europeans package (2018 Energy Efficiency

⁴ Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation, OJL 259, 27.9.20156, p. 42-68

⁵ Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, OJL 312, 28.11.2017, p. 6-53

⁶ Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration, OJL 312, 28.11.2017

⁷ Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation, OJL 220, 25.8.2017, p. 1-120

⁸ Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators; OJL 158, 14.6.2019, p. 22-53

⁹ <https://www.energy-community.org/dam/jcr:3304cadf-c63b-433f-9636-79d9ec63b186/Decision%202021-13-MC-EnC.pdf>

¹⁰ https://www.energy-community.org/dam/jcr:a3205108-28f6-41aa-9e71-b62ede376cfa/Decision_2011_02_MC_3PA.pdf

¹¹ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity, OJL 158, 14.6.2019, p. 1252-199

¹² Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector, OJL 158, 14.6.2019, p. 1-21

Directive, 2018 Renewables Directive and the 2018 Governance Regulation). In these acts, the Ministerial Council did not specify the figures for the 2030 targets.

The Commission has tabled a proposal to the Energy Community setting the figures for each of the nine non-EU Contracting Parties. These figures were negotiated with the Contracting Parties in numerous bilateral and multilateral meetings before, during and after the Informal Ministerial Council meeting in July. They take into account the results of a modelling study completed by the Commission earlier this year as well as the Contracting Parties' own national targets and plans. They also respect the 2018 Policy Guidelines of the Ministerial Council which provide that the 2030 targets should '*represent an equal ambition for the Contracting Parties and take into account relevant socio-economic differences, technological developments and the Paris Agreement on Climate Change.*'

On behalf of the European Union, the Commission intends to support the adoption of the Decision.

3.1.3. Decision 2022/.../MC-EnC adapting and incorporating certain Delegated Regulations on energy-related products, introducing rescaled labels in the Energy Community acquis communautaire and repealing Delegated Regulations (EU) 1059/2010, (EU) 1060/2010, (EU) 1061/2010, (EU) 1062/2010, (EU) 874/2012, and Directive 96/60/EC

The Commission has tabled to the Energy Community a proposal to incorporate the following EU legal acts into the Energy Community *acquis*:

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- Delegated Regulation (EU) 2019/2013 on energy labelling of electronic displays¹³;
- Delegated Regulation (EU) 2019/2014 on energy labelling of households washing machines and households washer-dryers¹⁴;
- Delegated Regulation (EU) 2019/2015 on energy labelling of light sources¹⁵;
- Delegated Regulation (EU) 2019/2016 on energy labelling of refrigerating appliances¹⁶;
- Delegated Regulation (EU) 2019/2017 on energy labelling of household dishwashers¹⁷;

¹³ Commission Delegated Regulation (EU) 2019/2013 of 11 March 2019 supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of electronic display, OJL 315, 5.12.2019, p. 1-28

¹⁴ Commission Delegated Regulation (EU) 2019/2014 of 11 March 2019 supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of household washing machines and household washer-dryers, OJL 315, 5.12.2019, p. 29-67

¹⁵ Commission Delegated Regulation (EU) 2019/2015 of 11 March 2019 supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of light source, OJL 315, 5.12.2019, p. 68-101

¹⁶ Commission Delegated Regulation (EU) 2019/2016 of 11 March 2019 supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of refrigerating appliances; OJL 315, 5.12.2019, p. 102-133

¹⁷ Commission Delegated Regulation (EU) 2019/2017 of 11 March 2019 supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of household dishwashers, OJL 315, 5.12.2019, p. 134-154

- Regulation (EU) 2021/340 amending further Delegated Regulations (EU) 2019/2013, (EU) 2019/2014, (EU) 2019/2015, (EU) 2019/2016, (EU) 2019/2017 and (EU) 2019/2018 with regard to energy labelling requirements for electronic displays, household washing machines and household washer-dryers, light sources, refrigerating appliances, household dishwashers, and refrigerating appliances with a direct sales function¹⁸;

introducing rescaled labels in the Energy Community acquis communautaire and repealing Delegated Regulations (EU) 1059/2010, (EU) 1060/2010, (EU) 1061/2010, (EU) 1062/2010, (EU) 874/2012, and Directive 96/60/EC.

The new rules will ensure a harmonized and stable regulatory framework for the manufacturers, and, more importantly, increase transparency for all consumers thanks to same energy labelling scaling between the EU Member States and the Contracting Parties.

On behalf of the European Union, the Commission intends to support the adoption of the Decision.

3.1.4. Decision 2022/xx/MC-EnC amending Annex I to the Treaty establishing the Energy Community and incorporating Implementing Regulation (EU) 2018/2066, Implementing Regulation (EU) 2018/2067 and Directive 2003/87/EC in the Energy Community acquis communautaire

The Ministerial Council of November 2021 adopted the Decarbonisation Roadmap for the Contracting Parties, a political document outlining the sequence of adoption, transposition and implementation of decarbonisation-focused legislation in order to put the Contracting Parties on a path towards achieving 2030 and mid-century decarbonisation targets.

The immediate focus of the Decarbonisation Roadmap was on the Governance Regulation, the Renewables Directive, and the Energy Efficiency Directive. These three pieces of legislation were all adopted at the Energy Community Ministerial in November 2021, and the Commission has tabled a proposal to the Energy Community for setting the figures for each Contracting Party (see point 3.1.3 above).

The next step is the incorporation into the Energy Community acquis of more technical acts, which represent the necessary basis for the implementation of any carbon pricing policy that would also be suitable for an emissions trading system (ETS).

Therefore, in accordance with the Decarbonisation Roadmap, the Commission has tabled a proposal for the Ministerial Council to adopt measures related to monitoring, reporting and verification of emissions (MRV), as well as selected provisions of the EU ETS, which are necessary in order for the MRV legislation to make any sense for the Energy Contracting Parties. These do not involve carbon pricing.

On behalf of the European Union, the Commission intends to support the adoption of the Decision.

¹⁸ Commission Delegated Regulation (EU) 2021/340 of 17 December 2020 amending Delegated Regulations (EU) 2019/2013, (EU) 2019/2014, (EU) 2019/2015, (EU) 2019/2016, (EU) 2019/2017 and (EU) 2019/2018 with regard to energy labelling requirements for electronic displays, household washing machines and household washer-dryers, light sources, refrigerating appliances, household dishwashers, and refrigerating appliances with a direct sales function, OJL 68, 26.2.201, p. 62-107

3.1.5. Procedural Act 2022/.../MC-EnC amending budget implementation, staff regulations and recruitment rules;

The ECS has tabled, in close cooperation with the Commission, to the Energy Community a proposal for a Procedural Act of the Ministerial Council to amend:

- Procedural Act No 2006/03/MC-EnC on the adoption of Energy Community Procedures for the Establishment and Implementation of Budget, Auditing and Inspection;
- Procedural Act No 2009/04/MC-EnC, the Energy Community Staff Regulations of 18 December 2007 as amended by Procedural Act No 2009/04/MC-EnC; and
- Procedural Act No 2006/02/MC-EnC on the adoption of Rules for Recruitment, Working Conditions and Geographical Equilibrium of the Secretariat's Staff of the Energy Community, as amended by Procedural Act No 2016/01/MC-EnC.

These amendments aim to improve the working methods of the ECS in respect of transparency, efficacy and accountability. They will notably ensure more clarity to the Energy Community's budgetary rules in a number of aspects such as the treatment of external funding for the Energy Community through grants and contracts, the annual work programme, the establishment plan and the organigram of the ECS, the transfer of appropriations the accounting function and internal control of budget implementation within the ECS as well as the tasks of the Budget Committee and external auditors. The Energy Community's Staff and Recruitment Regulations and Rules will be amended with respect to the mandate of the Director specifying a maximum of two terms with a period of five years each and defining the position of a Deputy Director.

On behalf of the European Union, the Commission intends to support the adoption of the Decision.

3.1.6. Procedural Act 2022/.../MC-EnC amending Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty, as amended;

The ECS has tabled, in close cooperation with the Commission, a proposal to the Energy Community to amend the Rules on Dispute Settlement as regards the Advisory Committee which consists of five high-level members and renders opinions on reasoned requests submitted by the ECS under Article 90 of the ECT. The proposed amendments will introduce a provision on their reimbursement and remuneration from the Energy Community budget.

Another amendment concerns the deadlines for submission of documents for adoption by the Ministerial Council. These amendments will allow more time for the EU and Contracting Parties to carry out their internal approval procedures ahead of institutional meetings.

On behalf of the European Union, the Commission intends to support the adoption of the Decision.

3.1.7. Procedural Act 2022/.../MC-EnC adopting the Secretariat's Organigramme

The ECS has tabled a proposal to the Ministerial Council to adopt a new ECS Organigramme, since the currently applicable Organigramme dates back to 2007 and should be updated.

The proposed new Organigramme aims to correspond to the needs of the Contracting Parties and the EU.

On behalf of the European Union, the Commission therefore intends to support the adoption of the Procedural Act.

3.1.8. Decisions under Article 91(1) ECT establishing the existence of a breach of the ECT in the following cases:

The dispute settlement proceedings are set out in Title III, Chapter 1, and Title IV, Chapter 1 of the Rules of Procedure on dispute settlement under the Treaty.¹⁹

- (a) Decision 2022/.../MC-EnC on the failure of Republic of North Macedonia to comply with the ECT in Case ECS-4/22;

Article 1 of the Ministerial Council Decision 2018/10/MC-EnC requires the Contracting Parties to transpose the REMIT Regulation by 29 November 2019 and to implement it by 29 May 2020. Article 1(3) requires the Contracting Parties to notify the ECS of the measures transposing the Decision, and any subsequent changes made to those measures, within two weeks following the adoption of such measures. Article 6 of the ECT imposes upon the Contracting Parties the general obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the ECT. Article 89 requires them to implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.

The time limit for North Macedonia to take measures to comply with the above mentioned obligations expired on 29 November 2019 but no such measures have been adopted to date, thus, on 14 July 2022 the ECS submitted a Reasoned Request to the Ministerial Council against the Republic of North Macedonia for failure to transpose the Regulation (EU) No 1227/2011 (REMIT Regulation) by 29 November 2019 and notify those measures to the ECS.

The Ministerial Council is requested to adopt a Decision declaring that by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency, as adapted and adopted by Ministerial Decision 2018/10/MC-EnC, by 29 November 2019, and by failing to forthwith notify those measures to the ECS, the Republic of North Macedonia failed to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 1(1) and (3) of Ministerial Council Decision 2018/10/MC-EnC.

The Advisory Committee of the Energy Community has not yet delivered its opinion.

In the light of the facts and arguments set out in the Reasoned Request, the position to be taken on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-4/22, provided that the Advisory Committee of the Energy Community timely delivers an opinion supporting the findings of the ECS, i.e. prior to the meeting of the Ministerial Council.

- (b) Decision 2022/.../MC-EnC on the failure of Kosovo* to comply with the ECT in Case ECS-5/22;

¹⁹ Procedural Act 2008/01/MC-EnC on Rules of Procedure for dispute settlement under Treaty as amended by Procedural Act 2015/04/MC-EnC of 16 October 2015 on amending Procedural Act 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for dispute settlement under the Treaty.

Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment was incorporated in the Energy Community by Ministerial Council Decision 2016/12/MC-EnC. Article 2 of this Decision envisages that Contracting Parties shall transpose the Directive 2014/52/EU by 1 January 2019 with the exception of the provisions referring to Directives not covered by Article 16 of the ECT and to communicate to the ECS the text of the main provisions of national law they adopt in the field covered by this Decision of the Ministerial Council.

Since the time limit for Kosovo* to take measures to comply with the above mentioned obligations expired on 1 January 2019 but no measures have been adopted to date on 14 July 2022, the ECS submitted a Reasoned Request to the Ministerial Council against Kosovo* for failing to transpose the Directive 2014/52/EU by 1 January 2019 and by this failing to comply with Articles 6 and 89 of the ECT as well as Article 2 of the Ministerial Council Decision 2016/12/MC-EnC.

The Ministerial Council is requested to adopt a Decision declaring that by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as adapted and adopted by Ministerial Decision 2016/12/MC-EnC, by 1 January 2019, and by failing to forthwith notify those measures to the ECS, Kosovo* failed to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 2 of Ministerial Council Decision Decision 2016/12/MC-EnC

The Advisory Committee of the Energy Community has not yet delivered its opinion.

In the light of the facts and arguments set out in the Reasoned Request, the position to be taken on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-5/22, provided that the Advisory Committee of the Energy Community timely delivers an opinion supporting the findings of the ECS, i.e. prior to the meeting of the Ministerial Council.

(c) Decision 2021/02/MC-EnC on the failure of Bosnia and Herzegovina to comply with the ECT in Case ECS-5/17;

On 16 January 2018, the ECS sent an Opening Letter to Bosnia and Herzegovina in accordance with Article 12 of the Rules of Procedure for Dispute Settlement. In this Opening Letter, the ECS took the preliminary view that Bosnia and Herzegovina failed to fulfil its obligations under the ECT:

- by failing to transpose the requirements of Article 26 paragraph 2 litera (d) of Electricity Directive 2009/72/EC requiring the establishment of a compliance officer and program in the Federation of Bosnia and Herzegovina in line with the deadline of 1 January 2015 foreseen by the acquis;
- by failing to transpose Article 26 of Directive 2009/72/EC on legal and functional unbundling of electricity distribution system operators in Republika Srpska in line with the same deadline; and
- by failing to adopt, within the prescribed time limit, the national measures to ensure legal and functional unbundling of Elektroprivreda BiH d.d. Sarajevo, Elektroprivreda HZHB d.d Mostar and Elektroprivreda BiH d.d. Sarajevo in practice.

As a second step, on 11 November 2020, the ECS sent a Reasoned Opinion to Bosnia and Herzegovina under Article 90 of the ECT for failing to transpose and implement the requirements for legal and functional unbundling in accordance with the requirements of

Article 26 of the Directive 2009/72/EC. Bosnia and Herzegovina was requested to rectify the issues of non-compliance with the ECT identified in the Reasoned Opinion within a time-limit of two months.

Since Bosnia and Herzegovina failed to rectify the breaches identified by the ECS related to unbundling of the distribution system operators in accordance with the requirements of Article 26 of the Directive 2009/72/EC, on 27 May 2021, the ECS submitted a Reasoned Request to the Ministerial Council in Case ECS-5/17.

This draft Decision was already included in the Ministerial Council agenda in 2021 but it was not adopted due to the missing opinion by the Advisory Committee of the Energy Community. The Advisory Committee was asked to issue an opinion on 7 June 2021 which it has not done yet. Therefore, this draft Decision is again included in the 2022 Ministerial Council agenda.

In the light of the facts and arguments set out in the Reasoned Request, the position to be taken on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-5/17, provided that the Advisory Committee of the Energy Community timely delivers an opinion supporting the findings of the ECS, i.e. prior to the meeting of the Ministerial Council.

3.1.10 Decisions under Article 92(1) ECT:

- (a) Decision 2022/.../MC-EnC on the adoption of measures in response to serious and persistent breaches by Bosnia and Herzegovina under Article 92(1) of the ECT in Cases ECS-8/11S, ECS-2/13S and ECS-6/16S;

The ECS is requesting the Ministerial Council to extend the measures imposed on Bosnia and Herzegovina by Article 2 of Decision 2015/10/MC-EnC in Cases ECS-8/11S, ECS-2/13S and ECS-6/16S for two years after the adoption of the Decision by the Ministerial Council in December.

This follows the Decision adopted by the Ministerial Council in 2020 (2020/02/MC-EnC of 29 December 2020) that extended the measures until the meeting of the Ministerial Council in end 2022.

The measures are: suspension of the right of Bosnia and Herzegovina to vote for Measures and Procedural Acts adopted under Chapter VI of Title V (Budgetary issues) and suspension of the application of its Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community for two years. Based on a report by the ECS, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2023.

In the light of the facts and arguments set out in the Request, the position to be taken on behalf of the Union in the Ministerial Council should be to approve the proposed extension of the measures adopted in response to serious and persistent breaches in Cases ECS-8/11S, ECS-2/13S and ECS-6/16S.

- (b) Decision 2021/12/C-EnC on establishing a serious and persistent breach against Serbia under Art. 92(1) of the ECT in Case ECS-10/17S and in Case ECS-13/17S.

This Decision is re-submitted because it was not adopted last year due to the lack of unanimity at the Ministerial Council.

Case ECS-10/17S concerns a breach of unbundling and certification rules of the Third Energy Package. Unbundling of TSOs constitutes one of the key concepts enshrined in the Third Energy Package. It requires the effective separation of activities of energy transmission from

production and supply interests. In case of certification of a TSO which is controlled by a person or persons from a third country or third countries, Article 11 of Directive 2009/73/EC 7 applies. Article 10 of Directive 2009/73/EC provides that before an undertaking is approved and designated as TSO, it needs to be certified. In order to be certified, the undertaking needs to comply with the unbundling requirements of the Third Energy Package, i.e. with Article 9 of Directive 2009/73/EC.

The Directive 2009/73/EC as well as the Regulation 715/2009 were incorporated in the Energy Community acquis by Decision 2011/02/MC-EnC of the Ministerial Council of 6 October 2011.

The ECS found that by certifying Yugorosgaz-Transport under the ISO-model, the Republic of Serbia has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC as well as Article 24 of Regulation 715/2009, as incorporated in the Energy Community.

In 2019, the Ministerial Council declared in its Decision 2019/02/MC-EnC that the Republic of Serbia failed to fulfil its obligations arising from Directive 2009/73/EC and Regulation 715/2009.

Case ECS-13/17S concerns the unjustified exclusion by Srbijagas of the Horgoš entry point from unrestricted and non-discriminatory third party access and from open capacity allocation procedures as required under Directive 2009/73/EC and Regulation 715/2009.

On 25 January 2021, the Advisory Committee of the Energy Community confirmed the ECS' position in the Reasoned Request that no valid ground for justification of such exclusion exists and therefore, Serbia violates Energy Community law.

On 30 April 2021, the Ministerial Council upheld the Reasoned Request submitted by the ECS and followed the opinion of the Advisory Committee by taking a decision by written procedure regarding the failure of Serbia to comply with its obligations under the ECT.

The Ministerial Council declared the existence of a breach by Serbia of Article 32 of Directive 2009/73/EC and Article 16 of Regulation 715/2009 and therefore of Articles 6, 10 and 11 of the ECT.

The Decision stipulates that Serbia shall take all appropriate measures to rectify the breach identified and ensure compliance with Energy Community law immediately.

On 24 September 2021, the ECS submitted a Request to the Ministerial Council in both Case ECS-10/17S and in Case ECS-13/17S pursuant to Article 92(1) of the ECT seeking a Decision from the Ministerial Council that the failure by the Republic of Serbia to implement Ministerial Council Decisions 2019/02/MC-EnC and 2021/1/MC-EnC and thus to rectify the breaches identified therein constitutes a serious and persistent breach within the meaning of Article 92(1) of the ECT.

The Ministerial Council is requested to declare that:

1. The failure by the Republic of Serbia to implement Ministerial Council Decisions - 2019/02/MC-EnC and 2021/01/MC-EnC and thus to rectify the breaches identified therein constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. The Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decisions 2019/02/MC-EnC and 2021/01/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2023.

3. The Secretariat is invited to monitor compliance of the measures taken by the Republic of Serbia with the *acquis communautaire*. If the breaches have not been rectified by 1 July 2023, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

In the light of the facts and arguments set out in the Request of the ECS, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the decision determining the existence of a serious and persistent breaches in Case ECS-10/17S and in Case ECS-13/17S.

3.2. Envisaged act of the PHLG

Decision 2022/.../PHLG-EnC adapting and implementing Commission Regulation (EU) 2022/132 of 28 January 2022 amending Regulation (EC) No 1099/2008 of the European Parliament and of the Council, as regards the implementation of updates for the annual, monthly and short-term monthly energy statistics

In the area of energy statistics, the Commission adopted Regulation (EU) 2022/132 amending Regulation (EC) No 1099/2008 of the European Parliament and of the Council on energy statistics, as regards the implementation of updates for the annual, monthly and short-term monthly energy statistics²⁰. Regulation (EC) No 1099/2008, which is already part of the Energy Community's *acquis communautaire*, should be amended accordingly.

Therefore, the Commission has tabled a proposal for a decision of the PHLG to incorporate the Regulation (EU) 2022/132. The changes introduced by Regulation (EU) 2022/132 contribute to support the Energy Union and Green Deal by adopting new requirements to cover data gaps, such as decentralised electricity production by sector, breakdown of final energy consumption in services sector and for transport, non-energy use of renewables, hydrogen, energy storage (batteries), new data on electricity generation and capacities, detailed breakdown of solar PV data, details on heat pumps, energy consumption of data centres, improved timeliness of annual data and supply data to estimate energy balances and indicators six months after the year-end.

On behalf of the European Union, the Commission intends to support the adoption of the Decision.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) TFEU provides for decisions establishing ‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

The concept of ‘acts having legal effects’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do

²⁰ Commission Regulation (EU) 2022/132 of 28 January 2022 amending Regulation (EC) No 1099/2008 of the European Parliament and of the Council on energy statistics, as regards the implementation of updates for the annual, monthly and short-term monthly energy statistics (OJ L 20, 31.1.2022, p. 208-271).

not have a binding effect under international law, but that are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature’²¹.

4.1.2. Application to the present case

The Ministerial Council and the PHLG are bodies set up by an agreement, namely the Energy Community Treaty.

The acts which the Ministerial Council and the PHLG are called upon to adopt constitute acts having legal effects. The envisaged act will be binding under international law in accordance with Article 76 of the ECT, according to which a decision is legally binding upon those to whom it is addressed.

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged acts relate to energy.

Therefore, the substantive legal basis of the proposed decision is Article 194 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 194, in conjunction with Article 218(9) TFEU.

²¹ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Ministerial Council of the Energy Community and in the Permanent High Level Group of the Energy Community (14-15 December 2022, Vienna, Austria)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

- (1) The Energy Community Treaty ('the Treaty') was concluded by the Union by Council Decision 2006/500/EC of 29 May 2006²² and entered into force on 1 July 2006.
- (2) Pursuant to Articles 47 and 76 of the Treaty, the Ministerial Council may adopt measures taking the form of a Decision or a Recommendation.
- (3) The Ministerial Council, during its 20th session on 15 December 2022, is to adopt a number of acts listed in Annex I to this Decision.
- (4) The Permanent High Level Group, during its 66th meeting on 14th December 2022, is to adopt the act listed in Annex II to this Decision.
- (5) The purpose of the envisaged acts is to facilitate the achievement of the objectives of the Treaty and the functioning of the Energy Community Secretariat in Vienna which, among other things, provides administrative support to the Ministerial Council.
- (6) It is appropriate to establish the position to be adopted on the Union's behalf in the Ministerial Council and the Permanent High Level Group, as the envisaged acts will have legal effects for the Union.

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on the Union's behalf in the 20th session of the Ministerial Council to be held in Vienna, Austria, on 15 December 2022 is set out in Annex I to this Decision.

Article 2

The position to be adopted on the Union's behalf in the 66th meeting of the Permanent High Level Group to be held in Vienna, Austria, on 14 December 2022 is set out in Annex II to this Decision.

²² OJ L198 of 20.7.2006, p. 15.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*