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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the EU-UK Specialised Committee on Energy established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, concerning the EU-UK electricity trading arrangements

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the EU-UK Specialised Committee on Energy (hereafter ‘Specialised Committee’) set up under the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (the ‘Trade and Cooperation Agreement’) in connection with the envisaged adoption of a Recommendation to each Party concerning their requests to transmission system operators (the ‘TSOs’) for electricity in view of preparing technical procedures for the efficient use of electricity interconnectors.

2. CONTEXT OF THE PROPOSAL

2.1. The EU-UK Trade and Cooperation Agreement

The Trade and Cooperation Agreement aims to establish cooperation between the EU and the UK *inter alia* in the area of energy. The Energy Title VIII of Heading One of Part Two (Trade, Transport, Fisheries and other Arrangements) includes commitments on trading over the electricity interconnectors. In particular, the Energy Title and Annex 29 to the Trade and Cooperation Agreement include provisions which aim at developing a new procedure for the allocation of capacity on electricity interconnectors at the day-ahead market timeframe. This new procedure is to be based on the model of ‘multi-region loose volume coupling’, within a specific timeframe. In addition, the Trade and Cooperation Agreement commits each Party to ensure the maximum level of capacity of electricity interconnectors is made available, while respecting the need to ensure secure system operation and most efficient use of systems.

The rules of the Trade and Cooperation Agreement have been in force since 1 January 2021.

2.2. The EU-UK Specialised Committee on Energy

The EU-UK Specialised Committee on Energy (the ‘Committee’), established by Article 8(1), point (1) of the Trade and Cooperation Agreement, addresses matters covered by Title VIII on Energy¹ of Heading One of Part Two (Trade, Transport, Fisheries and other Arrangements).

As provided by Article 8(4), points (a) and (c) of the Trade and Cooperation Agreement, the Committee has the power to monitor and review the implementation and ensure the proper functioning of the Trade and Cooperation Agreement in its area of competence. It has the power to adopt decisions, including any amendments, and recommendations in respect of all matters where the Trade and Cooperation Agreement so provides or for which the Partnership Council has delegated its powers to that Committee pursuant to Article 7(4), point (f) of the Trade and Cooperation Agreement. This power is further specified in Title VIII on Energy of Heading One of Part Two of the Trade and Cooperation Agreement, which provide that this specific Specialised Committee is, *inter alia*, tasked to provide recommendations, including on issues such as trading arrangements for the efficient use of interconnectors pursuant to Articles 311 to 313, Article 317 and Annex 29 to the Trade and Cooperation Agreement.

Article 8(7) of the Trade and Cooperation Agreement provides that Specialised Committees (including the one on Energy) are co-chaired by a representative of the Union and a representative of the United Kingdom. As provided for in Article 10(2) of the Trade and

¹ With the exception of Chapter 4 and Article 323 of the Trade and Cooperation Agreement, and of Annex 27 to the Trade and Cooperation Agreement.

Cooperation Agreement, the decisions and recommendations of a Committee are taken by mutual consent of the Parties.

2.3. The envisaged act of the Committee

The Committee is to adopt a Recommendation to the Parties regarding the development of the electricity trading arrangements as provided for under the Trade and Cooperation Agreement ('the envisaged act').

The Recommendation of the Committee addresses the Parties on two specific issues. First, it is to confirm, as its Recommendation to the Parties, the preliminary recommendation provided on 22 January 2021 by the Directorate-General for Energy and the UK Government's Department for Business, Energy and Industrial Strategy to the EU and UK TSOs for electricity. That preliminary recommendation was issued prior to the commencement of work by the Committee and invited the TSOs to start preparing technical procedures for the efficient use of electricity interconnectors. Second, the Recommendation, while recognising the work already undertaken by the TSOs, sets out a request for *additional* information to be provided by TSOs. This additional information will assist the Committee in discharging its obligations under Article 312(1) and Article 317(2) of the Trade and Cooperation Agreement, in particular it will help deciding on the manner in which the electricity trading arrangements could be developed in the most optimal way.

The Committee should adopt the envisaged act as soon as possible, either at its next meeting or by means of a written procedure set out in Annex I to the Trade and Cooperation Agreement, whichever is sooner.

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

3.1.1. *Recommendation confirming the preliminary recommendation provided by the Parties to TSOs to start preparing technical procedures on efficient use of electricity interconnectors*

On 22 January 2021, the Directorate-General for Energy of the European Commission and the Department for Business, Energy and Industrial Strategy of the UK Government provided a preliminary recommendation to their respective TSOs requesting them to start preparing technical procedures for the efficient use of electricity interconnectors. It was provided right after the Trade and Cooperation Agreement started to be provisionally applied by the Union and in advance of the commencement of work by the Committee. The preliminary recommendation enabled the TSOs in particular to immediately start preparing technical procedures for efficient use of electricity interconnectors at the day ahead stage.

That preliminary recommendation also provided the basis for the work of TSOs on other aspects of efficient use of electricity interconnectors, set out in Article 311(1) of the Trade and Cooperation Agreement, such as capacity calculation, congestion management or enhancing efficiency of trade over electricity interconnectors at other timeframes than day ahead, as and when appropriate. It therefore continues to be useful as a point of reference and guidance for further work of the TSOs although the priority work is clearly given to electricity trading at the day ahead timeframe.

Given that the Committee started operating in the course of 2021, it is now appropriate that it confirms the validity of that preliminary recommendation for further work of TSOs.

The position to be taken on behalf of the Union in the Committee is therefore proposed to be to support the adoption by the Committee, pursuant to Article 311(1) and (2), Article 312(1) and 317(2) of the Trade and Cooperation Agreement, of a Recommendation to each Party that

confirms as its Recommendation to the Parties the preliminary recommendation that the Parties provided to the TSOs on 22 January 2021, requesting to start preparing technical procedures for the efficient use of electricity interconnectors.

3.1.2. *Recommendation to the Parties concerning a request to the TSOs for additional information regarding the cost-benefit analysis and the outline proposals of technical procedures*

According to Article 312(1) of the Trade and Cooperation Agreement, the Committee, as a matter of priority, shall take the necessary steps to ensure that TSOs for electricity develop arrangements setting out technical procedures for capacity allocation and congestion management at the day ahead timeframe within a specific timeline set out in Part 2 of Annex 29 of the Trade and Cooperation Agreement. Pursuant to Article 317(2) of the Trade and Cooperation Agreement, the Committee may recommend that each Party requests its transmission system operators to prepare the technical procedures for the efficient use of electricity interconnectors.

Based on the preliminary recommendation issued by the Directorate-General for Energy of the European Commission and the Department for Business, Energy and Industrial Strategy of the UK Government on 22 January 2021, the TSOs of the Union and of the UK performed a cost-benefit analysis and prepared outline proposals as a first step in developing the technical procedures for the electricity trading arrangements between the Union and the UK.

The analysis, delivered on 26 April 2021 to the Commission, concluded that it is, in theory, possible to develop arrangements that would meet the conditions for multi-region loose volume coupling as set out in Annex 29 to the Trade and Cooperation Agreement (so-called ‘preliminary order book’ solution²). However, the EU and UK TSOs also concluded that this solution would not be desirable, as it would give rise to serious risks of market manipulation and market disruptions. ACER clearly confirmed these concerns in its opinion, shared with the Commission on 7 May 2021.

EU and UK TSOs analysed another solution for developing the electricity trading arrangements, the so-called ‘common order book’ solution.³ It would, however, require a change of Commission Regulation (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management (the ‘CACM-Regulation’).⁴ This suggested solution is based on the hypothesis that the current timeframe of procedural steps within the Single Day Ahead Market Coupling, as set out in the CACM-Regulation, could be changed in order to accommodate the trading parameters and processes of the UK.

In the assessment of TSOs, supported by the opinion of ACER, the common order book solution would also require, in addition to developing technical procedures and changes to the CACM-Regulation, a complex additional technical analysis of its feasibility and long

² Preliminary order book solution is a solution where, in order to minimise the impact on SDAC, the multi-region loose volume coupling will start earlier, using whatever order books have been received by e.g. 11:45 in the bordering bidding zones (and final order books from Great Britain). Market participants in EU bordering bidding zones are free to submit new orders or amend orders already submitted up until SDAC gate closure at 12:00 CET. GB gate closure would be at 11.45 CET. This implies no delay or change to SDAC process.

³ Common order book solution is a solution where the multi-region loose volume coupling starts at 12:00 which is the current gate closure time of the single day ahead market coupling (hereafter ‘SDAC’). This means that order books of market participants in Great Britain and in SDAC bordering bidding zones are complete and these are used in multi-region loose volume coupling. This means that the common order book solution would impact the current SDAC process.

⁴ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ L 197, 25.7.2015, p. 24).

implementation time going significantly beyond the original timeline set out in Annex 29 to the Trade and Cooperation Agreement, during which this solution would have to be tested and verified.

In light of these findings, discussed at the Committee meeting of 30 March 2022, the Commission and the UK Government consider it necessary to request the TSOs to analyse these results further and in greater detail. The Commission and the UK Government considered that a number of additional questions would need to be answered by the TSOs with regard to each option studied, before the Committee can recommend to the Parties the appropriate option for which the technical procedures should be developed at the day ahead timeframe. The Commission and the UK also noted that the timeline set out in Annex 29 to the Trade and Cooperation Agreement has not been met. However, the Committee should nevertheless discharge its obligations under Article 312(1) and Article 317(2) of the Trade and Cooperation Agreement.

The position to be taken on behalf of the Union in the Committee is therefore proposed to be to support the adoption by the Committee, pursuant to Article 312(1), Article 317(2) and Annex 29 to the Trade and Cooperation Agreement of a Recommendation to each Party to request its respective TSOs for electricity to provide the additional information, based on a list of questions that will be attached to the Recommendation, within 5 months of the date of the request made by each Party.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) establishes that *‘The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and 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.’* (emphasis added)

The concept of *‘acts having legal effects’* includes instruments that, although not having binding effect under international law, are *‘capable of decisively influencing the content of the legislation adopted by the EU legislature’*⁵.

4.1.2. Application to the present case

The EU-UK Specialised Committee on Energy is a body established by the EU-UK Trade and Cooperation Agreement.

The act which the Committee is called upon to adopt constitutes an act likely to have legal effects. It contributes to discharging the obligations agreed upon by the Parties in Article 312(1) and Article 317(2) of the Trade and Cooperation Agreement. Since the Committee Recommendation conditions and frames the development of electricity trading arrangements between the EU and the UK, it is capable of decisively influencing the content of or the way

⁵ 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.

in which the Union *acquis* is to be implemented, in particular Commission Regulation (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management.⁶

The envisaged act does not supplement or amend the institutional framework of the Trade and Cooperation 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 taken 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 act relate to the area of energy. Therefore, the substantive legal basis of the proposed decision is Article 194(1) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 194(1) TFEU, in conjunction with Article 218(9) TFEU.

⁶ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ L 197, 25.7.2015, p. 24).

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 29 April 2021, the Council adopted Decision (EU) 2021/689¹ on the conclusion of Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part² (the ‘Trade and Cooperation Agreement’). The Agreement has been applied provisionally as of 1 January 2021 and entered into force on 1 May 2021.
- (2) Pursuant to Article 8(4), point (c), of the Trade and Cooperation Agreement, the Specialised Committee on Energy (the ‘Committee’) may adopt decisions and recommendations in respect of all matters where the Trade and Cooperation Agreement or any supplementing Agreement so provides or for which the Partnership Council has delegated powers to it, on issues related to its area of competence. Pursuant to Article 10(2) of the Trade and Cooperation Agreement, a Committee is to adopt decisions and make recommendations by mutual consent.
- (3) Article 311(1) of the Trade and Cooperation Agreement requires each Party to ensure that capacity allocation and congestion management on electricity interconnectors is market based, transparent and non-discriminatory. The Parties should address, among others and as appropriate, capacity calculation, congestion management and trading arrangements for all relevant timeframes, including the day ahead timeframe. Pursuant to Article 311(1), point (f), in conjunction with Article 311(2) of the Trade and Cooperation Agreement, each Party is to ensure that capacity allocation and congestion management across electricity interconnectors is coordinated between the Union and UK transmission system operators (the ‘TSOs’) for all relevant timeframes

¹ Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ L 149, 30.4.2021, p.2).

² OJ L 149, 30.4.2021, p. 10.

while such coordination is not to involve or imply participation of the latter in relevant Union procedures.

- (4) Article 312(1) of the Trade and Cooperation Agreement requires that for capacity allocation and congestion management at the day ahead stage, the Committee take, as a matter of priority, the necessary steps in accordance with Article 317 to ensure that TSOs for electricity develop arrangements setting out technical procedures for the day ahead timeframe.
- (5) On 22 January 2021, the Directorate-General for Energy of the European Commission and the Department for Business, Energy and Industrial Strategy of the UK Government provided a preliminary recommendation to the TSOs, in advance of the commencement of work by the Committee. Concerning capacity calculation and allocation for the day-ahead timeframe the preliminary recommendation invited TSOs to prepare a day-ahead target model based on the concept of “multi-region loose volume coupling” in accordance with Article 312(1), Article 317(2) and (3) and Annex 29 to the Trade and Cooperation Agreement. Concerning capacity calculation and allocation for timeframes *other* than the day ahead timeframe, the preliminary recommendation invited the TSOs of the Parties to jointly prepare a proposal for a timeline for developing the draft technical procedures.
- (6) Given that the Committee started its operations in the course of 2021, it is appropriate, pursuant to Article 317(2) of the Trade and Cooperation Agreement, that it now confirms the preliminary recommendation issued on 22 January 2021 as its Recommendation to the Parties, as provided by the Parties to the TSOs, requesting them to start preparing technical procedures for the efficient use of electricity interconnectors. The preliminary recommendation, once confirmed as Recommendation of the Committee, should continue to frame any further work of the TSOs in this regard.
- (7) Based on the preliminary recommendation of 22 January 2021, the TSOs of both Parties submitted to the Commission a cost-benefit analysis of the options for the development of the multi-region loose volume coupling as set out in Annex 29 to the Trade and Cooperation Agreement and an outline of the corresponding technical procedures. On 7 May 2021, the Agency for Cooperation of Energy Regulators submitted to the Commission its informal opinion on this analysis.
- (8) The Commission considered the result of the cost-benefit analysis and the opinion of the Agency for Cooperation of Energy Regulators against the requirements of the Trade and Cooperation Agreement and informed the Council of its preliminary views. It concluded that the results obtained by the TSOs need to be refined and further information is needed on all options analysed by them. The UK agreed with this conclusion at the meeting of the Committee on 30 March 2022.
- (9) It is therefore appropriate to support the adoption by the Committee of a Recommendation to the Parties concerning their request to the TSOs for additional information supplementing the cost-benefit analysis and the outline proposals for technical procedures in order to assist the Committee in discharging its obligations under Article 312(1) and Article 317(2) of the Trade and Cooperation Agreement. It is appropriate that the Union requests its TSOs to provide such further information within 5 months of the date of request.
- (10) The Committee is to adopt the Recommendation to each Party concerning their requests to TSOs for electricity in view of preparing technical procedures for the

efficient use of electricity interconnectors as soon as possible. The Committee is to adopt the Recommendation either during its next meeting, or by written procedure, whichever is sooner, following the completion of domestic procedures by each Party.

- (11) It is appropriate to establish the position to be taken on the Union's behalf in the Committee, as the Recommendation will be capable of decisively influencing the content of or the way in which the Union acquis is to be implemented, in particular Commission Regulation (EU) 2015/1222.³

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Specialised Committee on Energy shall be based on the draft act of that Committee attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President

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