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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 (Vienna, Austria, 14 December 2023)**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on behalf of the European Union in the Ministerial Council of the Energy Community in connection with a number of acts, which are envisaged for adoption by this body on 14 December 2023. Prior to that meeting, on 13 December 2023, the Permanent High Level of the Energy Community will meet in order to discuss and endorse the items for adoption at the Ministerial Council. It also includes, for information, items placed on the agendas of these two bodies, which do not fall within the scope of Article 218(9) TFEU.

2. CONTEXT OF THE PROPOSAL

2.1. The Energy Community Treaty

The Energy Community Treaty¹ ('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 Energy Community Treaty entered into force on 1 July 2006. The European Union is a party to it.² The ECT refers to the nine non-EU Parties as 'Contracting Parties'.

2.2. The Ministerial Council and the Permanent High Level Group of the Energy Community

The Ministerial Council ensures that the objectives set out in the ECT are attained. It consists of one representative of each Contracting Party and two representatives of the European Union. Pursuant to Article 47 ECT, it provides general policy guidelines, takes Measures (Decisions or Recommendations) 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, where applicable, depending on the subject matter concerned. Pursuant to Article 78 ECT, the Ministerial Council may act only if two third of the Parties are represented. Abstentions in a vote do not count as votes cast.

Unanimity vote by all Parties applies with respect to the envisaged acts listed below under Section 2.3. point 1 (Article 97 ECT) and Section 2.3. point 2 (Art. 100(i) and Article 100(iii) ECT).

Two-third majority of the votes cast, including a positive vote of the European Union, applies to the envisaged act under Section 2.3 point 3 (Article 66, 83 and Article 87 ECT).

Simple majority vote applies to the envisaged act under Section 2.3 point 4 (Article 91(1)(a) ECT). As regards to the envisaged act listed below under Section 2.4, the Ministerial Council adopts the Decision by simple majority vote of the votes cast (Article 81 ECT) or consensus.

The Permanent High Level Group ('PHLG') is a subsidiary body of the Ministerial Council. Pursuant to Article 53(a) ECT, the PHLG prepares the work of the Ministerial Council, including its agenda and acts to be adopted by the Ministerial Council. It consists of one

¹ OJ L198 of 20.7.2006, p. 18.

² OJ L198 of 20.7.2006, p. 15.

representative of each Contracting Party and two representatives of the European Union. The EU has one vote. Pursuant to Article 78 ECT, the PHLG may act only if two third of the Parties is represented. Abstentions in a vote do not count as votes cast.

2.3. The envisaged acts of the Ministerial Council

The present proposal for a Decision under Article 218(9) TFEU concerns the position to be taken on the Union's behalf with respect to the following envisaged acts of the Ministerial Council, set out in Annex 1 to the proposed Council Decision:

- (1) Decision 2023/.../MC-EnC amending Decision 2023/.../MC-EnC under Article 97 ECT on extending the duration of the Treaty establishing the Energy Community.
- (2) Decision 2023/.../MC-EnC amending Article 2(2) of the Treaty establishing the Energy Community.
- (3) Procedural Act 2023/.../MC-EnC on the seat of the Gas Forum of the Energy Community.
- (4) Decisions under Article 91(1)(a) ECT establishing the existence of a breach of the ECT in the following cases:
 - (a) Decision 2023/.../MC-EnC on the failure of the Republic of North Macedonia to comply with the Energy Community Treaty in Case ECS-7/21.
 - (b) Decision 2023/.../MC-EnC on the failure of Kosovo*³ to comply with the Energy Community Treaty in Case ECS-8/21.
 - (c) Decision 2023/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-9/21.
 - (d) Decision 2023/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-10/23.
 - (e) Decision 2023/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-11/23.
 - (f) Decision 2023/.../MC-EnC on the failure of the Republic of Moldova to comply with the Energy Community Treaty in Case ECS-12/23.
 - (g) Decision 2023/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-15/21.

2.4. Other items on the agenda

For the sake of completeness, it is noted that, in addition to the envisaged acts set out in Section 2.3., there will be an item on the agenda of the Ministerial Council, for voting, pursuant to Article 80 ECT, by the Contracting Parties only:

- (a) Decision 2023/6183/MC-EnC amending Annex I to the Treaty establishing the Energy Community to adapt to and adopt in the Energy Community Regulation (EU)

³ Kosovo (*) - This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ opinion on the Kosovo declaration of independence.

2022/869 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure.

Furthermore, the Ministerial Council will:

- (b) adopt the Annual Report on the activities of the Energy Community, submitted to it by the Energy Community Secretariat pursuant to Article 67 ECT.

The Commission intends to support the adoption of those items.

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

3.1. Decision 2023/.../MC-EnC on extending the duration of the Treaty establishing the Energy Community

The Treaty was signed on 25 October 2005 and entered into force on 1 July 2006, for an initial period of 10 years. Its duration was already extended for a period of ten years (until 2026) by the Ministerial Council in 2013.

It is proposed for the Ministerial Council to extend the Treaty duration for another 10 years (until 2036), pursuant to Article 97 ECT.

The Energy Community continues to provide an efficient framework for regional cooperation in the energy field and continues to serve its purpose in order to foster the integration of the energy markets between the European Union and the Contracting Parties. The legal framework for such integration has been recently strengthened notably with the adoption of the electricity sector integration package as well as of the Decarbonisation Roadmap and the Clean Energy Package. The commitments entered into by the Contracting Parties under this framework require an extensive implementation period, which will go well beyond 2026.

The position to be taken on behalf of the Union in the Ministerial Council should therefore be to approve the draft Decision on extending the duration of the Treaty establishing the Energy Community.

3.2. Decision 2023/.../MC-EnC amending Article 2(2) of the Treaty establishing the Energy Community

Regulation (EU) 347/2013 of 17 April 2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure⁴ was adapted to and adopted in the Energy Community by the Ministerial Council Decision 2015/09/MC-EnC of 16 October 2015. On 30 May 2022, the European Union adopted Regulation (EU) 2022/869 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure repealing Regulation (EU) 347/2013⁵, which recognises the expected increasing role of renewable and low-carbon hydrogen, including with regard to infrastructure. It further

⁴ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, 25.4.2013, p. 39).

⁵ Regulation (EU) 2022/869 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013 (OJ L 152, 3.6.2022, p. 45).

acknowledges the need for the development of carbon dioxide infrastructure to reduce the remaining yet unavoidable emissions of that gas, in the absence of reasonable alternatives.

Pursuant to Article 100(i) and Article 100(iii) ECT and in order to adapt to and adopt in the Energy Community Regulation (EU) 2022/869, the scope of 'Network Energy' set out in Article 2(2) ECT should be extended to include hydrogen and carbon dioxide sectors.

The position to be taken on behalf of the Union in the Ministerial Council should therefore be to approve the draft Decision on extending the scope of the Energy Community Treaty.

3.3. Procedural Act 2023/.../MC-EnC on the seat of the Gas Forum of the Energy Community

Pursuant to Procedural Act 2007/03/2/PHLG/EnC of 17 October 2007 on the seat of the Gas Forum the Gas Forum is to meet in Slovenia and to be set up in cooperation with the competent Slovenian authorities.

On 15 December 2022, the Ministerial Council recognised Ukraine's importance for Europe's energy security, as well as further integration with the European Union of its gas markets and systems, including for decarbonized gases and hydrogen.

The Slovenian authorities expressed solidarity with Ukraine and offered to cede the location the Gas Forum as from 2023.

The proposed Procedural Act provides that the conditions allowing to start meetings of the Gas Forum in Ukraine shall be assessed by the Energy Community Secretariat in cooperation with the Presidency and the Vice-Presidency in due time before the envisaged date of the respective meeting of the Gas Forum. Until conditions allow for the Gas Forum to take place in Ukraine, it shall take place in Vienna, Austria.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the Procedural Act on the seat of the Gas Forum of the Energy Community.

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

Pursuant to Article 91(1)(a) ECT, the Ministerial Council may determine, by simple majority, the existence of a breach by a Party of obligations related to Title II of the Treaty, concerning the transposition and/or implementation of an act adopted by the Energy Community bodies. 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 ECT.⁶

(1) Cases concerning breaches of obligation under Directive 2001/80/EC:

⁶ 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.

Four Decisions related to implementation of Directive 2001/80/EC respectively by three Contracting Parties are submitted to the Ministerial Council for adoption:

- (a) Decision 2023/.../MC-EnC on the failure of the Republic of North Macedonia to comply with the Energy Community Treaty in Case ECS-7/21;
- (b) Decision 2023/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-8/21;
- (c) Decision 2023/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-9/21; and
- (d) Decision 2023/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-15/21.

With regard to the first three cases, on 24 October 2013, the Ministerial Council adopted Decision 2013/05/MC-EnC on the implementation of Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants ('Directive 2001/80/EC'). Decision 2013/05/MC-EnC provided the Contracting Parties with the possibility to define and implement a National Emission Reduction Plan ('NERP') as an instrument to reduce the total annual emissions of the pollutants covered by Directive 2001/80/EC from existing plants (sulphur dioxide, nitrogen oxides and dust). The Decision took effect in the Energy Community on 1 January 2018.

On 16 March 2021, the Energy Community Secretariat ('ECS') sent Opening Letters to the Republic of North Macedonia, Kosovo* and Bosnia and Herzegovina in accordance with Article 12(2) of the Rules of Procedure for Dispute Settlement to address the systematic and persistent non-compliance with the emission ceilings foreseen by the NERP for the reporting years 2018 and 2019, and the failure to apply effective and dissuasive penalties to ensure compliance in the coming years.

On 21 February 2022, the ECS submitted Reasoned Opinions to the Republic of North Macedonia, Kosovo* and Bosnia and Herzegovina, where it concluded that the latter had failed to comply with Articles 12 and 16 of the ECT in conjunction with Articles 4(3), 4(6) and 16 of Directive 2001/80/EC. These Contracting Parties had failed to comply with the emission ceilings (for sulphur dioxide and dust in the case of their respective large combustion plants) established by the NERPs for the 2018 and 2019 reporting years.

Consequently, on 13 July 2023, the ECS submitted Reasoned Requests to the Ministerial Council against the Republic of North Macedonia in Case ECS-7/21, Kosovo* in Case ECS-8/21 and Bosnia and Herzegovina in Case ECS-9/21.

With regard to the fourth case, on 24 October 2013, the Ministerial Council adopted Decision 2013/06/MC-EnC on the implementation of Chapter III, Annex V, and Article 72(3)(4) of Directive 2010/75/EU ('Decision 2013/06/MC-EnC') on industrial emissions.

On 14 October 2016, the Ministerial Council adopted Decision 2016/19/MC-EnC on authorising exemptions of listed plants from compliance with the emission limit values set by Directive 2001/80/EC, thereby complementing the opt-out rules stipulated in Article 4(4) of the Directive. This opt-out foresees a time-barred implementation alternative to comply with

the provisions of the directive. TPP Pljevlja in Montenegro, the only large combustion plant operating in that Contracting Party, was included in the list established by Decision 2016/19/MC-EnC.

On 20 April 2021, the ECS sent an Opening Letter to Montenegro, preliminarily concluding that Montenegro had failed to comply with the Directive's provisions on limited lifetime derogation whereby a plant subjected to Article 4(4) can only remain in operation if it does not operate more than 20,000 operational hours after 1 January 2018. Based on the provisions of Decision 2013/06/MC-EnC, the plant could also operate further if it complied with the stricter emission standards of the Industrial Emissions Directive. In the case of TPP Pljevlja, the ECS argues that none of these criteria were met. Following the expiry of the opt-out period in the course of the reporting year 2020, TPP Pljevlja had neither been put out of operation or continued its operation at emission limits applicable to a new plant under Directive 2010/75/EU.

According to the ECS, Montenegro failed to comply with Articles 12 and 16 of the ECT in conjunction with Article 4(4) of Directive 2001/80/EC. On this account, on 9 February 2023, the ECS submitted a Reasoned Opinion against Montenegro for its failure to comply with the limited lifetime derogation obligations in the case of TPP Plevlja. Furthermore, on 13 July 2023, the ECS submitted a Reasoned Request to the Ministerial Council in Case ECS-15/21, following the continuance of this breach.

In all the above four cases the Advisory Committee of the Energy Community has not yet delivered its opinion.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Decisions, 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.

(2) Cases concerning breaches of obligation under Directive 2004/35/EC

Three Decisions related to implementation of Directive 2004/35/EC respectively by three Contracting Parties are submitted to the Ministerial Council for adoption:

- (a) Decision 2023/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-10/23;
- (b) Decision 2023/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-11/23; and
- (c) Decision 2023/.../MC-EnC on the failure of the Republic of Moldova to comply with the Energy Community Treaty in Case ECS-12/23.

In April 2004, the European Union adopted Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage ('Directive 2004/35/EC'), which was adapted to and adopted in the Energy Community by Ministerial Decision 2016/14/MC-EnC of 14 October 2016. Pursuant to that Decision, the Contracting Parties were under an obligation to transpose and implement Directive 2004/35/EC and notify the ECS thereof by 1 January 2021.

In the light of the facts set out by the ECS, Bosnia and Herzegovina, Kosovo* and the Republic of Moldova failed to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive 2004/35/EC, also failing to comply with Articles 6, 12 and 89 of the ECT as well as Articles 3(1) and 3(2) of Ministerial Council Decision 2016/14/MC-EnC.

On 13 July 2023, the ECS submitted a Reasoned Request to the Ministerial Council against Bosnia and Herzegovina, Kosovo* and Republic of Moldova directly, without performing a preliminary procedure, in line with Article 11(3) of Procedural Act 2015/04/MC-EnC.

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

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Decisions, 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.

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.’*

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 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’⁷.

4.1.2. Application to the present case

The Ministerial Council is a body set up by an agreement, namely the Energy Community Treaty.

The acts which the Ministerial Council is called upon to adopt, constitute acts having legal effects. The envisaged acts will be binding under international law in accordance with Article 76 ECT, pursuant 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.

⁷ 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.

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 acts relate to 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.

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 (Vienna, Austria, 14 December 2023)

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) The Energy Community Treaty ('the Treaty') was concluded by the Union by Council Decision 2006/500/EC of 29 May 2006⁸ 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 21th session on 14 December 2023, is to adopt a number of acts listed in the Annex to this Decision, which fall under the scope of Article 218(9) TFEU and on which representatives of the Union are to vote.
- (4) The purpose of the envisaged acts is to facilitate the achievement of the objectives of the Treaty.
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the Ministerial Council regarding acts listed in the Annex, as the envisaged acts will have legal effects for the Union.

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be taken on the Union's behalf in the 21th session of the Ministerial Council to be held in Vienna, Austria, on 14 December 2023 regarding the issues falling under the scope of Article 218(9) TFEU is to approve the adoption of acts set out in the Annex to this Decision.

⁸ OJ L198 of 20.7.2006, p. 15.

2. Minor changes may be agreed to the acts set out in the Annex to this Decision, in the light of comments from the Energy Community Contracting Parties before or at the Ministerial Council, by the Commission, without a further decision of the Council.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President