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PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be adopted 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 (Belgrade, Serbia, 29 and 30 November 2021)

Delegations will find attached document COM(2021) 690 final.

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2021/0362 (NLE)
SENSITIVE*

Proposal for a

COUNCIL DECISION

**on the position to be adopted 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 (Belgrade, Serbia, 29 and 30 November 2021)**

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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 29 and 30 November 2021.

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., points 1, 2, 3, 5 (Art. 100 ECT), 7 (Art. 88 ECT) and point 9 (Art. 92 (1) ECT).

Simple majority vote applies with respect to the envisaged acts listed below under Section 2.3 point 6 (Art. 79), 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 act under Section 2.3 point 4.

As regards the envisaged act listed below under Section 2.4, the Ministerial Council adopts the Decision by consensus.

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 [...]'.

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

¹ OJ L198 of 20.7.2006, p. 15.

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 2021/.../MC-EnC amending Article 20 and 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*;
- (2) Decision 2021/.../MC-EnC amending Annex I to the Treaty Establishing the Energy Community and incorporating Directive (EU) 2019/944 and Regulation (EU) 2019/941 in the Energy Community *acquis*;
- (3) Decision 2021/.../MC-EnC amending Annex I to the Treaty establishing the Energy Community and adapting and implementing Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply;
- (4) Procedural Act 2021/05/MC-EnC amending Procedural Act of the Ministerial Council 2008/02/MC-EnC of 11 December 2008 on the Establishment of Security of Supply Group;
- (5) Decision 2021/.../MC-EnC adapting and implementing Commission Regulation (EU) 2019/2146 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;
- (6) Decision 2021/.../MC-EnC amending Decision No 2015/09/MC-EnC on the implementation of Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure;
- (7) Procedural Act on the adoption of the Budget of the Energy Community for the period 2022-2023;
- (8) Decisions under Article 91(1) ECT establishing the existence of a breach of the ECT in the following cases:
 - (a) Decision 2021/02/MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-5/17;
 - (b) Decision 2021/04/MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-7/18;
 - (c) Decision 2021/03/MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-10/18;
 - (d) Decision 2021/05/MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-3/21;
 - (e) Decision 2021/06/MC-EnC on the failure of Ukraine to comply with the Energy Community Treaty in Case ECS-4/21;
 - (f) Decision 2021/07/MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-22/21;

- (g) Decision 2021/08/MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-23/21;
 - (h) Decision 2021/09/MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-24/21.
- (9) Decisions under Article 92(1) ECT:
- (a) Decision 2021/12/C-EnC on establishing a serious and persistent breach against Serbia under Art. 92(1) of the Treaty in Case ECS-10/17 and in Case ECS-13/17;
 - (b) Decision 2021/13/MC-EnC on establishing a serious and persistent breach against Ukraine under Art. 92(1) of the Treaty in Case ECS-1/18.

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 2021/.../PHLG-EnC amending Decision No 2013/01/PHLG-EnC of 23 October 2013 on the incorporation of Commission Regulation (EU) No 838/2010 in the Energy Community *acquis*.

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:

- General Policy Guidelines on a Decarbonisation Roadmap for the Contracting Parties of the Energy Community;
- The Annual Report on the activities of the Energy Community;
- Decision 2021/1/MC-EnC on Financial Discharge of the Director of the Secretariat of the Energy Community (EnCS).

On behalf of the European Union, the Commission intends to support the adoption of those items subject to prior endorsement by the Council.²

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

3.1. Envisaged acts of the Ministerial Council

- 3.1.1. Decision 2021/.../MC-EnC amending Article 20 and 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)*

² As regards the General Policy Guidelines on a Decarbonisation Roadmap for the Contracting Parties of the Energy Community, the Council already adopted a positive decision on 28/29 September 2021, see Doc. 11791/21.

This envisaged legislative package consists of measures that aim to adopt and adapt within the Energy Community the following five EU legal acts in view of establishing the 2030 framework for the nine non-EU Contracting Parties of the Energy Community:

- Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources,
- Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency,
- Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action,
- Commission Delegated Regulation (EU) 2020/1044 of 8 May 2020 supplementing Regulation (EU) 2018/1999 of the European Parliament and of the Council with regard to values for global warming potentials and the inventory guidelines and with regard to the Union inventory system,
- Commission Implementing Regulation (EU) 2020/1208 of 7 August 2020 on structure, format, submission processes and review of information reported by Member States pursuant to Regulation (EU) 2018/1999.

This proposal is in line with the General Policy Guidelines on 2030 Targets for the Contracting Parties adopted by the Energy Community Ministerial Council in 2018³. These Guidelines represent the political consensus on the establishment of three distinct 2030 energy and climate targets for energy efficiency, the contribution of renewable energy sources, and the reduction of greenhouse gas emissions, as well as the political intention to include these targets in the Energy Community legal framework through the adaptation of the amended Energy Efficiency Directive, Renewable Energy Directive and new Governance Regulation ('the legislative package')⁴.

Although the analytical work launched by the Commission to underpin the setting of the three targets is still ongoing, it is necessary that the Contracting Parties start implementing other relevant provisions of the 2030 energy and climate framework without further due. Therefore, the proposed legislative package does not include yet the figures for the future 2030 energy and climate targets. Provisions in the Governance Regulation, Energy Efficiency Directive and Renewable Energy Directive, which do not depend on the energy and climate targets, will be adopted as they are but adjusted in terms of their timelines to reflect the fact that they become part of the Energy Community *acquis* at a later point in time. Provisions which are directly related to energy and climate targets for the nine Contracting Parties as a whole will be adopted with provisional adaptations until the targets are established. The 2030 energy and

³ Conclusions of the 16th Ministerial Council: https://www.energy-community.org/dam/jcr:5823a9ef-c3f3-4a07-8834-89de78716b68/Conclusions_16thMC_112018.pdf

⁴ General Policy Guidelines on the 2030 targets for the Contracting Parties of the Energy Community: https://www.energy-community.org/dam/jcr:a70ca2dc-6043-4dbd-8cca-84b755efc71d/PG_2030_Targets_112018.pdf

climate targets for the nine Contracting Parties would be proposed for adoption in a second step in 2022, once the modelling study is completed. Until then, the Contracting Parties will use their existing or forthcoming domestic energy and climate targets, such as those included in their Nationally Determined Contributions or more ambitious as agreed at national level, to commence the implementation of the 2030 legislation and inclusion as first step in their draft National Energy and Climate Plans. These will be replaced by more appropriate levels of ambition as soon as they are politically agreed.

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

3.1.2. Decision 2021/.../MC-EnC amending Annex I to the Treaty Establishing the Energy Community and incorporating Directive (EU) 2019/944 and Regulation (EU) 2019/941 in the Energy Community acquis

The challenges of the European Green Deal require a harmonised electricity market design for the entire Europe in order to ensure the required level of security of supply and efficiency while decarbonisation the electricity supply. The Contracting Parties of the Energy Community committed themselves to implement the relevant EU energy acquis and are currently working on defining energy and climate targets for 2030. For the Contracting Parties, and in particular those directly connected to EU Member States it is therefore important to make their electricity markets fit to this new reality and ensure enhanced regional cooperation to integrate wind and sun cost efficiently.

Also, the Energy Community acquis currently includes only the Electricity Directive 2009/72/EC, meaning that there is a considerable regulatory gap between the Energy Community Contracting Parties and the EU.

Therefore, the Commission proposed to the Ministerial Council of the Energy Community to incorporate the Electricity Directive (EU) 2019/944 and Risk-Preparedness Regulation (EU) 2019/941 in the Energy Community acquis. The new rules will make the Contracting Parties' electricity markets more flexible, more consumer oriented and more decentralized, while mitigating more efficiently risks of electricity security of supply.

In this context, an adaptation should be made in paragraph 2 of Article 4 of the Annex to the Commission Decision of 24.9.2021 on a proposal to be submitted by the Commission to the Ministerial Council of the Energy Community for a Decision of that Council amending Annex I to the ECT and incorporating Directive (EU) 2019/944 and Regulation (EU) 2019/941 in the Energy Community acquis⁵. The year "1996" in the definitions (42) on 'small isolated system' and (43) on 'small connected system' should not be replaced by the year "2006". This amendment should be removed from paragraph 2 of Article 4 of the Annex to the Commission Decision of 24.9.2021 on a proposal to be submitted by the Commission to the Ministerial Council of the Energy Community for a Decision of that Council amending Annex I to the ECT and incorporating Directive (EU) 2019/944 and Regulation (EU) 2019/941 in the Energy Community acquis.

⁵ C(2021) 7041 final

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

3.1.3. Decision 2021/.../MC-EnC amending Annex I to the Treaty establishing the Energy Community and adapting and implementing Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply

The EU has developed its framework for security of gas supplies over the years, starting with Directive 2004/67/EC that was later replaced and further elaborated by Regulation (EU) 994/2010 and then Regulation (EU) 2017/1938 that lays down the current framework for EU emergency preparedness and resilience to gas disruptions.

The Energy Community *acquis* currently includes only the first Directive 2004/67/EC, meaning that there is a considerable regulatory gap between the Energy Community Contracting Parties and the EU. In the perspective of Energy Community Contracting Parties successively integrating the EU energy market, it is important that Regulation (EU) 2017/1938 is incorporated into the Energy Community *acquis*.

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

3.1.4. Procedural Act 2021/3/MC-EnC amending Procedural Act of the Ministerial Council 2008/02/MC-EnC of 11 December 2008 on the Establishment of Security of Supply Group.

The ECS has tabled a draft Procedural Act amending the Procedural Act 2008/02/MC-EnC on the Establishments of Security of Supply Group. Such an amendment is needed because the 2008 Procedural Act refers to Energy Community *acquis*, namely Directive 2004/67/EC and Directive 2005/89/EC, which are intended to be replaced by new adapted versions of Regulation (EU) 2017/1938 and Regulation (EU) 2019/941 respectively (see proposed Decisions of the Ministerial Council referred to above in points 3.1.4 and 3.1.5.). It is necessary to adapt the composition and tasks of the Security of Supply Group to reflect this legislative development and extend the scope of the Group to electricity in addition to gas.

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

3.1.5. Decision 2020/.../MC-EnC adapting and implementing Commission Regulation (EU) 2019/2146 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 Commission identified several aspects of energy statistics collected under the Regulation (EC) 1099/2008 that needed to be updated and were subsequently modified at EU level in Regulation (EU) 2019/2146. Those changes concern notably greater disaggregation of the statistics on final energy consumption in industry, conceptual adjustments for natural gas trade definitions to improve consistency, rendering certain reporting items mandatory, and improving the timeliness of the monthly data collection for coal and electricity. For the purpose of adequate gathering of statistical data in the Energy Community Contracting

Parties, it is appropriate that Regulation (EU) 2019/2146 be therefore incorporated in the Energy Community acquis.

In 2020, the Commission adopted a proposal to the Ministerial Council of the Energy Community for an implementation within the Energy Community of Commission Regulation (EU) 2019/2146 amending Regulation (EC) No 1099/2008 (see ISC/2020/12276 and Commission Decision C(2020)8439). This Commission proposal was supported by the EU position adopted by the Council of the EU for the Ministerial Council in 2020. This proposal was, however, not adopted at the Ministerial Council, because Serbia disagreed on several substantial points and vetoed the Decision of the Ministerial Council. The present draft decision takes Serbia's concerns duly into account.

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

3.1.6. Decision 2021/.../MC-EnC amending Decision No 2015/09/MC-EnC of 16 October 2015 on the implementation of Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure

Within the EU, the European Commission adopted, on 15 December 2020, its proposal for a Regulation of the European Parliament and of the Council on Guidelines for trans-European energy infrastructure and repealing Regulation (EU) 347/2013. Negotiations at EU level with the co-legislators are still ongoing. Within the Energy Community, Regulation (EU) 347/2013 is part of the Energy Community acquis, and if no action is taken, in 2021 the Energy Community will have to launch the procedure to establish new lists of Projects of Energy Community Interest (PECIs) and Projects of Mutual Interest (PMIs) under the categories and criteria established under the Regulation (EU) 347/2013.

In the perspective of the need to align the Energy Community Contracting Parties' policies and legislation to the maximum extent possible to the EU Green Deal policy and with the related developments at EU level, it is important to adapt the Energy Community acquis and provide for a suspension of the establishment of new lists of PECIs and PMIs under the Regulation (EU) 347/2013, as adapted and adopted in the Energy Community, pending the adoption by the EU of a new Regulation repealing and replacing Regulation (EU) 347/2013, as well as its incorporation in the Energy Community acquis.

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

3.1.7. Procedural Act on the adoption of the Budget of the Energy Community for the period 2022-2023

The proposed Procedural Act provides for a budget of EUR 4.958.852 for 2022 and EUR 5.080.365 for 2023. These amounts correspond to an increase of 3,05% and 2,45% compared to 2021 and 2022 respectively. These increases will be financed by increasing the contributions of all the Contracting Parties and the European Union accordingly.

They are justified by inflation-related salary adjustments for the staff of the ECS and the activities and challenges that the Energy Community will have to face in promoting and

achieving its main objectives and policy goals. This includes in particular the European Green Deal and its implementation at Energy Community level.

The European Union contributes to the budget with the share of 94,78% of the overall budget, whereas the remaining part is financed by the nine non-EU Contracting Parties.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the Procedural Act on the adoption of the Budget of the Energy Community for the period 2022-2023 and contributions by the Parties to the budget.

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.⁶

- (a) Decision 2021/02/MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty 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 fulfill 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 practise.

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.

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.

The Advisory Committee of the Energy Community was asked on 7 June 2021 to issue an opinion which the Advisory Community has not done yet.

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.

(b) Decision 2021/04/MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-7/18

The Directive 2001/80/EC, as adopted and adapted by the Decision 2013/05/MC-EnC of the Ministerial Council, entered into force in the Energy Community on 31 December 2017 with regard to existing plants. Furthermore, Decision 2013/06/MC-EnC of the Ministerial Council incorporated Chapter III and Annex V of Directive 2010/75/EU with regard to new plants as of 1 January 2018. Both Directives require the limitation of emissions of certain pollutants (sulphur dioxide, nitrogen oxides and particulate matter) into the air from large combustion plants equal to or greater than a rated thermal input of 50 MW. These provisions are key to limit air pollution and it is expected that the implementation of these directives would result in major health and environmental benefits in the Contracting Parties. Contracting Parties were to align their national legislation with the provisions of these Directive by the above deadlines.

On 5 September 2018, the ECS sent an Opening Letter to the Republic of Moldova in accordance with Article 12 of the Rules of Procedure for Dispute Settlement. In this Opening Letter, the ECS noted that the Republic of Moldova has neither yet transposed, nor implemented the provisions of Directives 2001/80/EC and 2010/75/EU.

As a second step, on 19 February 2019, the ECS sent a Reasoned Opinion to the Republic of Moldova where the ECS concluded that the Republic of Moldova has failed to transpose and implement Directives 2001/80/EC and 2010/75/EU. The Republic of Moldova has been given the possibility until 19 April 2019 to comply of their own accord with the requirements of the ECT, or to justify their position.

On 3 September 2020, the ECS submitted a Reasoned Request to the Ministerial Council for a decision under Article 91 of the ECT.

The Advisory Committee of the Energy Community delivered its opinion on 25 January 2021, upholding the Reasoned Requests submitted by the ECS.

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-7/18.

(c) Decision 2021/03/MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-10/18

Article 18(1)(c) of the ECT contains a prohibition of State aid which according to Article 19 ECT also applies to public undertakings and undertakings, to which special or exclusive rights

have been granted. These provisions, together with Article 6 of the ECT, require the Contracting Parties to introduce a corresponding prohibition of State aid into their national legal systems and ensure its enforcement.

The ECS submitted to the Ministerial Council a Reasoned Request to declare a failure by Bosnia and Herzegovina to fulfil its obligations under Article 18 of the ECT since the ECS preliminarily found that the State Aid Council of Bosnia and Herzegovina wrongly decided that a guarantee issued by the Federation of Bosnia and Herzegovina in favour of the Export-Import Bank of China to secure a loan of the public utility company Elektroprivreda Bosne i Hercegovine for the Tuzla 7 project does not constitute State aid within the meaning of Article 18(1)(c) of the ECT. The ECS assessed the State Aid Council's decision in terms of its compliance with the definition of State aid under Article 107(1) TFEU, covering the following elements: (1) an undertaking is granted an advantage, (2) by the State or through State resources, (3) which favours certain undertakings or certain energy resources, (4) is liable to distort competition, and (5) may affect trade of network energy between the Contracting Parties. The ECS preliminarily concluded that the State Aid Council's decision does not comply with the definition of State aid and the public guarantee does constitute State aid. As the State Aid Council is a State body, its actions are attributable to Bosnia and Herzegovina which thereby fails to fulfil its obligations under Article 18 of the ECT, according to the ECS.

In the light of the facts and arguments set out in the Reasoned Request, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-10/18, 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.

- (d) Decision 2021/05/MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-3/21

and

- (e) Decision 2021/06/MC-EnC on the failure of Ukraine to comply with the Energy Community Treaty in Case ECS-4/21

The Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (REMIT Regulation) was incorporated in the Energy Community acquis by Decision 2018/10/MC-EnC of the Ministerial Council of 29 November 2018.

Article 1(1) of the Decision 2018/10/MC-EnC requires the Contracting Parties to transpose the REMIT Regulation by 29 November 2019. In accordance with Article 1(2) of the Decision 2018/10/MC-EnC, the Contracting Parties were under an obligation to implement the REMIT Regulation by 29 May 2020.

Article 1(3) of the Decision 2018/10/MC-EnC requires the Contracting Parties to notify the ECS the measures transposing the Decision, and any subsequent changes made to those measures, within two weeks following the adoption of such measures. In transposing this

Decision, the Contracting Parties were obliged to task national regulatory authorities with the monitoring of and enforcing compliance with the Ministerial Council Decision.

Article 6 of the ECT imposes upon the Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty. Article 89 of the ECT requires Parties to implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.

On 26 March 2021, the ECS submitted Reasoned Requests to the Ministerial Council against Montenegro and against Ukraine because in its findings these Contracting Parties failed to transpose the Regulation (EU) No 1227/2011 by 29 November 2019 and failed to forthwith notify those measures to the ECS. The ECS considers that the Contracting Parties failed to comply with Articles 6 and 89 of the ECT as well as Article 1 of Decision 2018/10/MC-EnC. Under the Dispute Settlement Rules as amended in October 2015 (PA 2015/04/MC-EnC), the Ministerial Council abolished the preliminary procedure in dispute settlement proceedings for non-transposition. Hence, the ECS was entitled to submit Reasoned Requests to the Ministerial Council directly, without performing a preliminary procedure.

On 20 July 2021, the Advisory Committee rendered its opinion in Case ECS-3/21 and in Case-4/21 against Montenegro and against Ukraine upholding the Reasoned Requests.

In the light of the facts and arguments set out in the Reasoned Request, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the draft Ministerial Council decisions establishing the existence of a breach in Case ECS-3/21 and in Case ECS-4/21.

- (f) Decision 2021/07/MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-22/21

and

- (g) Decision 2021/08/MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-23/21

and

- (h) Decision 2021/09/MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-24/21

These draft Ministerial Council decisions concern non-compliance of the Republic of North Macedonia, Republic of Serbia and Republic of Moldova with the obligation to adopt and implement the laws and administrative provisions necessary to comply with Decision 2016/12/MC-EnC by 1 January 2019 pursuant to Article 2(1) thereof, and to forthwith notify those measures to the ECS within the deadline specified in that Decision.

In April 2014, the European Union adopted Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Directive 2014/52/EU was incorporated in the Energy Community acquis by Decision 2016/12/MC-EnC of the Ministerial Council adapting and implementing Directive 2011/92/EU of the European Parliament and of the Council, and amending the Treaty establishing the Energy Community. Article 2 of the Ministerial Council Decision 2016/12/MC-EnC reads:

„Without prejudice to Article 3, Contracting Parties shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2011/92/EU as amended by Directive 2014/52/EU by 1 January 2019 with the exception of the provisions referring to Directives not covered by Article 16 of the Treaty establishing the Energy Community. They shall forthwith inform the ECS thereof.

Contracting Parties shall communicate to the ECS the text of the main provisions of national law which they adopt in the field covered by this Decision.“

To date, the ECS has not received any national legislation by North Macedonia, Republic of Serbia, Republic of Moldova aiming to achieve compliance with Decision 2016/12/MC-EnC, and to transpose the provisions of Directive 2014/52/EU.

As a consequence, on 23 June 2021, the ECS submitted Reasoned Requests to the Ministerial Council against North Macedonia, Republic of Serbia, Republic of Moldova, which failed to transpose the Directive 2014/52/EU by 1 January 2019.

According to the ECS, these Contracting Parties failed to comply with Articles 6 and 89 of the ECT as well as Article 2 of Decision 2016/12/MC-EnC.

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

3.1.9. Decisions under Article 92(1) ECT

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

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/EC⁷ 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 715/2009⁸ 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

⁷ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

⁸ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005.

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.

The ECS has submitted a Request to the Ministerial Council in both Case ECS-10/17 S and in Case ECS-13/17 S 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 Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decisions 2019/02/MC-EnC and 2021/1/MC-EnC in cooperation with the ECS, and shall report to the Ministerial Council in 2022 about the implementation measures taken.

The ECS is invited to monitor compliance of the measures taken by the Republic of Serbia with the Energy Community acquis. If the breaches have not been rectified by 1 July 2022, the ECS is invited to initiate a procedure for imposing measures under Article 92 of the ECT.

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-10/17 S and in Case ECS-13/17S.

- (b) Decision 2021/13/MC-EnC on establishing a serious and persistent breach against Ukraine under Art. 92(1) of the Treaty in Case ECS-1/18S

The Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency was incorporated in the Energy Community acquis by Decision 2015/08/MC-EnC of the Ministerial Council of 16 October 2015.

Article 1 of Decision 2015/08/MC-EnC requires the Contracting Parties to transpose the Directive 2012/27/EU in the national legal framework and to implement it as of 15 October 2017. Article 1 of Decision 2015/08/MC-EnC also requires the Contracting Parties to

communicate to the ECS the text of the main provisions of national law, which they adopt in the field covered by Decision 2015/08/MC-EnC. Article 6 of the ECT imposes upon the Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the ECT. Article 89 of the ECT requires Parties to implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.

The Ministerial Council Decision 2018/06/MC-EnC of 29 November 2018 established a failure by Ukraine to comply with the ECT by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2012/27/EU on energy efficiency by 15 October 2017. Ukraine thereby failed to comply with Articles 6 and 89 of the ECT as well as with Article 1 of Ministerial Council Decision 2015/08/MC-EnC. The Ministerial Council Decision invited Ukraine to rectify this failure by 1 July 2019 and to report regularly to the ECS and the Permanent High Level Group.

Since to that date Ukraine has not taken the measures necessary to comply with its obligations under Directive 2012/27/EU, as established in the Ministerial Council Decision 2018/06/MC-EnC, on 26 June 2020, the ECS submitted a Request to the Ministerial Council for a Decision determining the existence of a serious and persistent breach of the ECT by Ukraine within the meaning of Art. 92(1) of the ECT.

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 breach of the ECT in Case ECS-10/17 S and in Case in Case ECS-1/18S.

3.2. Envisaged act of the PHLG

Decision 2021/.../PHLG-EnC amending Decision No 2013/01/PHLG-EnC of 23 October 2013 on the incorporation of Commission Regulation (EU) No 838/2010 in the Energy Community acquis

With the proposed amendment of Decision No 2013/01/PHLG-EnC of 23 October 2013, Montenegro will be able to apply a higher maximum value of the annual average transmission charges paid by producers (“G-charges”) in line with Part B of the Annex to Regulation (EU) No 838/2010. Based on the assessment of the Energy Community Regulatory Board on G-charges in the Contracting Parties, the Energy Community Regulatory Board recommended to allow higher maximum G-charge values for Montenegro for reasons of equal treatment in an integrated pan-European electricity market.

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 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’⁹.

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.

⁹ 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.

4.3. Conclusion

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

Proposal for a

COUNCIL DECISION

on the position to be adopted 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 (Belgrade, Serbia, 29 and 30 November 2021)

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,

Whereas:

- (1) The Energy Community Treaty ('the Treaty') was concluded by the Union by Council Decision 2006/500/EC of 29 May 2006¹⁰ 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 19th session on 30 November 2021, is to adopt a number of acts listed in Annex I to this Decision.
- (4) The Permanent High Level Group, during its 62nd meeting on 29 November 2021, is to adopt the act listed in Annex II to this Decision.
- (5) Pursuant to Decision D/2011/02/MC-EnC, the Ministerial Council of the Energy Community has empowered the Permanent High Level Group of the Energy Community to adopt Network codes and guidelines which were adopted by the European Commission under the Third Energy Package.
- (6) 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.
- (7) 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.

¹⁰ OJ L198 of 20.7.2006, p. 15.

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on the Union's behalf in the 19th session of the Ministerial Council to be held in Belgrade, Serbia, on 30 November 2021 is set out in Annex I to this Decision.

Article 2

The position to be adopted on the Union's behalf in the 62nd meeting of the Permanent High Level Group to be held in Belgrade, Serbia on 29 November 2021 is set out in Annex II to this Decision.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President