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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
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Subject:	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

Delegations will find attached document COM(2023) 794 final.

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Brussels, 13.12.2023
COM(2023) 794 final

2023/0467 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Ministerial Council of the Energy Community

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 Ministerial Council of the Energy Community in connection with a number of acts, in relation to the budget, Director and staff matters of the Energy Community.

2. CONTEXT OF THE PROPOSAL

2.1. The Energy Community Treaty

The Energy Community Treaty[1] ('ECT') aims to create a stable regulatory and market framework and a single regulatory space for trade in network energy by implementing the agreed parts of the EU acquis on energy in the non-EU Parties. The ECT entered into force on 1 July 2006. The European Union is a party to the ECT[2]. The ECT refers to the nine non-EU Parties as 'Contracting Parties'.

2.2. The Ministerial Council 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 of the Ministerial Council, pursuant to Article 88 ECT, applies to the envisaged act under Section 2.3, points 2 and 4. Two-third majority of the votes cast, including a positive vote of the European Union, pursuant to Articles 83 ECT, is required to adopt the envisaged act under Section 2.3, point 1, 5 and 6. Simple majority of the votes cast is required, pursuant to Articles 69 and 88, first sentence, to adopt the envisaged act set out under Section 2.3, point 3. Simple majority of the votes cast applies to the envisaged act under Section 2.3, point 7.

2.3. The envisaged act 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 the Annex to the proposed Council Decision:

(1) Procedural Act 2023/XX/MC-EnC on amending the Energy Community Staff Regulations of 18 December 2007 as amended by Procedural Act 2009/04/MC-EnC and Procedural Act 2022//02/MC-EnC, and amending Procedural Act 2006/02/MC-EnC on the adoption of Rules for Recruitment, Working Conditions and Geographical Equilibrium of the Secretariat's Staff of the Energy Community, as amended by Procedural Act 2016/01/MC-EnC and Procedural Act 2022/02/MC-EnC.

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1 OJ L198 of 20.7.2006, p. 18.

2 OJ L198 of 20.7.2006, p. 15.

(2) Procedural Act 2023/XX/MC-EnC on amending Procedural Act 2021/01/MC-EnC on the adoption of the Budget of the Energy Community for the years 2022-2023 and on the contributions by the Parties to the budget.

(3) Procedural Act 2023/XX/MC-EnC on amending Procedural Act 2021//02/MC-EnC on the appointment of the Director of the Energy Community Secretariat.

(4) Procedural Act 2023/XX/MC-EnC on the adoption of the Budget of the Energy Community for the years 2024-2025 and on the contributions by the Parties to the budget.

(5) Procedural Act 2023/XX/MC-EnC on adopting the Organigramme of the Energy Community Secretariat.

(6) Procedural Act 2023/XX/MC-EnC on amending Procedural Act 2006/03/MC-EnC on the adoption of Energy Community Procedures for the Establishment and Implementation of Budget, Auditing, and Inspection, as amended by Procedural Act No 2014/01/MC-EnC and Procedural Act 2022/02/MC-EnC.

(7) Decision 2023/XX/MC-EnC on the Financial Discharge of the Director of the Secretariat of the Energy Community.

The purpose of the envisaged acts of the Ministerial Council ('the envisaged acts') is to facilitate the achievement of the objectives of the ECT and the functioning of the Energy Community Secretariat (EnCS) in Vienna which, among others, provides administrative support to the Ministerial Council.

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

3.1. Envisaged acts of the Ministerial Council

3.1.1. Procedural Act 2023/XX/MC-ENC Procedural Act 2023/XX/MC-EnC amending the Energy Community Staff Regulations of 18 December 2007 as amended by Procedural Act No 2009/04/MC-EnC and Procedural Act No 2022/02/MC-EnC, and amending Procedural Act No 2006/02/MC-EnC on the adoption of Rules for Recruitment, Working Conditions and Geographical Equilibrium of the Secretariat's Staff of the Energy Community, as amended by Procedural Act No 2016/01/MC-EnC and Procedural Act No 2022/02/MC-EnC

The Procedural Act provides for the amendment of the Energy Community's Staff Regulations by clarifying in particular the rules applicable to the post of Director of the Energy Community Secretariat, rules applicable to the Staff of the Energy Community Secretariat, provisions on social benefits and staff-related arbitration proceedings. The rules applicable to the recruitment, working conditions and geographical equilibrium of the Staff of the Energy Community Secretariat should also be amended accordingly.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Ministerial Council Procedural Act amending the Energy Community Staff Regulations of 18 December 2007 and amending the Procedural Act on the Rules for Recruitment, Working Conditions and Geographical Equilibrium of the Secretariat's Staff of the Energy Community.

3.1.2. Procedural Act 2023/XX/MC-EnC on amending Procedural Act No 2021/01/MC-EnC on the adoption of the Budget of the Energy Community for the years 2022-2023 and on the contributions by the Parties to the budget

The Procedural Act provides for the amendment of the Budget of the Energy Community for the years 2022-2023 in order to adjust the salary level of the Director, to bring it to a level commensurate with the responsibility carried and tasks executed under this budget, and reflect the adjusted full-time annual salary of the Director in the budget line 'Human Resources' and total expenditure 2022-2023. The adjustments to the salary do not increase the overall budget of the Energy Community for 2022-2023 nor do they increase the contribution of the European Union to that budget.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Ministerial Council Procedural Act on amending the Procedural Act No 2021/01/MC-EnC on the adoption of the Budget of the Energy Community for the years 2022-2023 and on the contributions by the Parties to the budget.

3.1.3. Procedural Act 2023/XX/MC-EnC on amending Procedural Act No 2021/02/MC-EnC on the appointment of the Director of the Energy Community Secretariat

The Procedural Act amends the terms of appointment of the Director of the Energy Community Secretariat in order to provide legal certainty as regards the duration of mandate of the present Director, the applicable salary under the current and next budget and the conditions of employment. The Presidency will be requested to issue an amended Act of Appointment on this basis.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Ministerial Council Procedural Act amending Procedural Act No 2021/02/MC-EnC on the appointment of the Director of the Energy Community Secretariat.

3.1.4. Procedural Act 2023/XX/MC-EnC on the adoption of the Budget of the Energy Community for the years 2024-2025 and on the contributions by the Parties to the budget

The Procedural Act provides for a budget of EUR 6.602.731 for 2024 and EUR 6.734.786 for 2025. These amounts correspond to an increase of 29,97% and 31,97% respectively as compared to 2023. 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 Energy Community Secretariat and the increased 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 draft Ministerial Council Procedural Act on the adoption of the Budget of the Energy Community for the period 2024-2025 and contributions by the Parties to the budget.

3.1.5. Procedural Act No 2023/XX/MC-EnC on adopting the Organigramme of the Energy Community Secretariat

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Ministerial Council Procedural Act on the adoption of the Organigramme of the Energy Community Secretariat.

3.1.6. Procedural Act No 2023/XX/MC-EnC on amending Procedural Act No 2006/03/MC-EnC on the adoption of Energy Community Procedures for the Establishment and Implementation of Budget, Auditing and Inspection, as amended by Procedural Act No 2014/01/MC-EnC and Procedural Act No 2022/02/MC-EnC

The Procedural Act aims to strengthen the empowerment to the Director of the Energy Community Secretariat to represent and act on behalf of the Energy Community towards banks, for the purpose of implementing the Energy Community budget and its routine operation in an effective way.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Ministerial Council Procedural Act on amending Procedural Act No 2006/03/MC-EnC on the adoption of Energy Community Procedures for the Establishment and Implementation of Budget, Auditing and Inspection.

3.1.7. Decision 2023/XX/MC-EnC on Financial Discharge of the Director of the Secretariat of the Energy Community

The Decision provides for the financial discharge for 2022 on the basis of the Audit Report for the year ended 31 December 2022, the auditors' statement of assurance and the Budget Committee Report.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Ministerial Council Decision on the Financial Discharge of the Director of the Secretariat of the Energy Community.

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) 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*'[3].

4.1.2. Application to the present case

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

[3] 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.

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 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 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 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.

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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) The Energy Community Treaty ('the Treaty') was concluded by the Union by Council Decision 2006/500/EC of 29 May 2006[4] 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 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 and the functioning of the Energy Community Secretariat in Vienna which, among others, provides administrative support to the Ministerial Council.

(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 is to approve the adoption of acts set out in the Annex to this Decision.

(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,

[4] OJ L198 of 20.7.2006, p. 15.

For the Council,

The President,