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From: CZ Delegation
To: Trade Policy Committee (Experts - Services and Investment)

Subject: Council Decision regarding adoption of inter se agreement -
CZ comments

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CZ comments on the Council Decision regarding adoption of inter se agreement

Following the debate on the Trade Policy Committee – services and investment, which was held on 15 January 2025, the Czech Republic would like to take the opportunity to provide comments on the draft Proposal for a Decision of the European Parliament and of the Council on the adoption by the Union of the Agreement on the interpretation and application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States (“**Proposal for a Decision**” and “**the Agreement**”).

In this regard, we would like to reiterate our longstanding position and comments relating to challenges connected with the choice of the legal basis used in the Proposal for a Decision.

As we have already stated during the drafting session for the Agreement and during our bilateral meetings with the Commission Legal Service, the Czech Republic is of the view that Article 194 of the Treaty on the Functioning of the EU (“**TFEU**”) is not an adequate legal basis for the conclusion of the Agreement and the ordinary legislative procedure connected to it is not a correct legal procedure which should be followed in order to conclude the Agreement.

The subject of the Proposal for a Decision is an international agreement with binding obligations under international law, where the EU should be a contracting party besides its Member States. Article 218 TFEU establishes the constitutional procedures applicable in cases where the EU acts with the aim of becoming a contracting party to an international agreement and accepting obligations under international law. The choice of Article 194 TFEU challenges this regular procedure connected to the negotiation of international agreements and creates several procedural and constitutional obstacles and issues.

First of all, if the conclusion of the Agreement is to be based on Article 194 TFEU, the Agreement should be adopted in the form of a legal act on the basis of the ordinary legislative procedure.

As specifically set out in Article 289(1) TFEU, the ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. As set out in Article 289(3) TFEU, legal acts adopted by the legislative procedure are legislative acts, i.e., acts of a normative nature. However, the Proposal for a Decision does not contain any normative content. Its only purpose is to “adopt” the Agreement contained in its annex. In fact, its content replicates the non-legislative acts of the Council adopted pursuant to Article 218(5) TFEU. **The chosen procedure under Article 194 TFEU thus creates shadow procedures which have no basis in the Treaties.** Additionally, there is no clarity, what is the legal meaning of “adoption” of the international agreement, since current practice has worked only with the terms signing and conclusion of the international agreement.

As further set out in Article 296 third subparagraph TFEU, when considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question. **It follows from the above that other types of legal acts (i.e. acts other than legislative acts in the form of a regulation, directive or decision), such as international agreements, cannot be adopted under the ordinary legislative procedure provided for in Article 194 TFEU.**

Moreover, if the premise, that the Agreement provides solely an interpretation in which the Energy Charter Treaty should have always been read, is indeed correct, then it is hardly imaginable that this Agreement could be adopted in the form of a legislative act that possess no normative content.

Usage of Article 194 SFEU also brings the challenges to the Council's prerogatives to decide on the EU's external actions. If the Commission submits a legislative proposal based solely on Article 194 TFEU, then all amendments made in the Council must either be agreed upon by the Commission, or unanimity must be reached in the Council in the sense of Article 293(1) TFEU.

In contrast, Article 218 TFEU is based on a certain interinstitutional balance between the Commission (which initiates the process and represents the EU externally), the Council (which is responsible for the decision that the EU should be bound by international law), and the European Parliament (which must always be informed and may be asked for consent or to provide an opinion). Choosing the legal basis according to Article 218 TFEU is far more respectful of the Council's prerogatives to decide on the EU's external actions.

There cannot be doubt, that the Agreement is an external action of the EU, when the Agreement will clearly constitute a separate source of obligations under the public international law and is intended to be relevant for arbitration tribunals. If the Commission submits a recommendation under Article 218 TFEU, Member States can make amendments in the Council, for which a qualified majority vote suffices, derived from the substantive legal basis in Article 194 TFEU.

Given the above-mentioned reservations about the procedure for adopting a legislative act according to Article 194(2) TFEU, in our opinion, the most suitable solution appears to be the analogous use of Article 218 TFEU as the procedural legal basis for negotiating the Agreement. The substantive legal basis would be Article 194(2) and Article 207(3) and (4) first subparagraph TFEU, similarly as with the Energy Charter Treaty itself.

There are precedents from the past of inter se agreements based on Article 218 TFEU such as EU-FR agreement on taxes or EU-DK agreement on fisheries.

Therefore, the current Proposal for a Decision should be **rejected and the new procedural legal basis should be chosen under Article 218 TFEU** and the appropriate procedure for negotiation, signing and conclusion of international treaties on behalf of the EU should be respected, including the necessity of the currently missing Council's authorisation of the European Commission for the opening of the negotiations of the Agreement on behalf of the EU.

In the event that the Czech Republic's reservations regarding the legal basis of the Agreement and the Proposal for a Decision are not satisfactorily resolved, the Czech Republic is prepared to abstain from voting on this Proposal for a Decision or to vote against it following the development of the discussion in the Council. In the event that the Proposal for a Decision on the legal basis proposed by the Commission is nevertheless adopted, the Czech Republic is prepared to bring an action for annulment before the CJEU.

We remain at your disposal for any further questions and we reserve the right to rise any further comments following the development of discussions.
