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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 and in the Energy Community Regulatory Board (Vienna, Austria, 12 December 2024, and Athens, Greece, 10 December 2024)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on Union's behalf in the Ministerial Council of the Energy Community in connection with a number of acts, which are envisaged for adoption by this body on 12 December 2024 at its meeting in Vienna, Austria. Prior to that meeting, on 11 December 2024, the Permanent High Level Group of the Energy Community ('PHLG') will meet, also in Vienna, in order to discuss and endorse the items for adoption at the Ministerial Council.

In addition, this proposal concerns the decision establishing the position to be taken on Union's behalf in the Energy Community Regulatory Board ('ECRB') which is expected to adopt an important revision of its Rules of Procedure, including as regards decision making and voting rules. The ECRB will meet on 10 December 2024 in Athens, Greece.

Finally, this proposal includes, for information, several items placed on the agenda of the Ministerial Council, 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 ('EnCT') 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 Energy Community Treaty entered into force on 1 July 2006. The European Union is a party to it.² The EnCT refers to the nine non-EU Parties as 'Contracting Parties'.

2.2. The Ministerial Council, the PHLG and the ECRB

The Ministerial Council ensures that the objectives set out in the EnCT are attained. It consists of one representative of each Contracting Party and two representatives of the EU. Pursuant to Article 47 EnCT, 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 EnCT, the Ministerial Council may act only if two third of the Parties are represented. Abstentions in a vote do not count as votes cast.

Simple majority vote applies to the envisaged acts listed below under Section 2.3 point 1 (Article 91(1)(a) EnCT). Unanimity vote by all Parties applies with respect to the envisaged act listed below under Section 2.3. point 2 (Article 32 (3) of the Energy Community Rules of Procedure on dispute settlement under the EnCT). Two-third majority of the votes cast, including a positive vote of the EU, applies to the envisaged act under Section 2.3 point 3 (Article 83 of the Energy Community Procedures for the establishment and implementation of budget, auditing and inspection; Articles 83, 86 and 87 EnCT).

The PHLG is a subsidiary body of the Ministerial Council. Pursuant to Article 53(a) EnCT, it prepares the work of the Ministerial Council, including its agenda and acts to be adopted by the Ministerial Council. The PHLG consists of one representative of each Contracting Party and two representatives of the EU. The EU has one vote. Pursuant to Article 78 EnCT, the

¹ OJ L198 of 20.7.2006, p. 18.

² OJ L198 of 20.7.2006, p. 15.

PHLG may act only if two third of the Parties is represented. Abstentions in a vote do not count as votes cast.

The ECRB is an institution of the Energy Community. Pursuant to Article 58 EnCT, the ECRB advises the Ministerial Council or the PHLG on the details of statutory, technical and regulatory matters, issues Recommendations in case of cross-border disputes between regulators, takes Measures, if so empowered by the Ministerial Council and adopts Procedural Acts. The ECRB is composed of one representative of the energy regulator of each Contracting Party and the EU which is represented by the European Commission. As regards the envisaged Procedural Act under Section 2.3 below, the ECRB acts by a two-third majority of the votes cast, including a positive vote of the EU (Articles 83 86 and 87 EnCT).

2.3. The envisaged acts of the Ministerial Council and the ECRB

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:

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

- (a) Decision 2024/.../MC-EnC on the failure of Albania to comply with the Energy Community Treaty in Case ECS-5/24;
- (b) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-6/24;
- (c) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-7/24;
- (d) Decision 2024/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-8/24;
- (e) Decision 2024/.../MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-9/24;
- (f) Decision 2024/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-10/24;
- (g) Decision 2024/.../MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-11/24;
- (h) Decision 2024/.../MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-12/24;
- (i) Decision 2024/.../MC-EnC on the failure of Ukraine to comply with the Energy Community Treaty in Case ECS-13/24.
- (j) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-14/24;
- (k) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-15/24;
- (l) Decision 2024/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-16/24;

* 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.

- (m) Decision 2024/.../MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-17/24;
- (n) Decision 2024/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-18/24;
- (o) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-19/24;
- (p) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-20/24;
- (q) Decision 2024/.../MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-21/24;
- (r) Decision 2024/.../MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-22/24;
- (s) Decision 2024/.../MC-EnC on the failure of Albania to comply with the Energy Community Treaty in Case ECS-23/24;
- (t) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-24/24;
- (u) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-25/24;
- (v) Decision 2024/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-26/24;
- (w) Decision 2024/.../MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-27/24;
- (x) Decision 2024/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-28/24;
- (y) Decision 2024/.../MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-29/24;
- (z) Decision 2024/.../MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-2/21.

Appointment of the Members of the Advisory Committee in accordance with Article 32 (3) of the rules under Procedural Act No 2008/01/MC-EnC on the Rules of Procedure for the Dispute Settlement as amended by Procedural Act 2015/04/MC-EnC;

2.1. Decision 2024/XX/MC-EnC on Financial Discharge of the Director of the Secretariat of the Energy Community

The present proposal for a Decision under Article 218(9) TFEU also concerns the position to be taken on the Union's behalf with respect to the following envisaged act of the **ECRB**, set out in Annex 2 to the proposed Council Decision:

Procedural Act 2024/01/ECRB-EnC amending and replacing the Procedural Act 2007/01/ECRB-EnC amending Internal Rules of Procedure as amended.

The purpose of the envisaged acts of the Ministerial Council and ECRB is essentially to ensure and facilitate the achievement of the objectives of the EnCT and the functioning of the Energy Community Secretariat and the ECRB.

2.2. Other items on the Ministerial Council 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 several items on the agenda of the Ministerial Council for voting, pursuant to Article 80 EnCT by the Contracting Parties only:

- (1) Decision 2024/.../MC-EnC on the establishment of the list of Projects of Energy Community Interest;
- (2) Recommendation R/2024/.../MC-EnC on accelerating the deployment of renewable energy projects and implementing the energy efficiency first principle.

Furthermore, the Ministerial Council will:

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

The Commission intends to support the adoption of those items.

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

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

Pursuant to Article 91(1)(a) EnCT, the Ministerial Council may determine, by simple majority, the existence of a breach by a Party of obligations related to Title II of EnCT, 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 EnCT.³

- (1) Cases concerning breaches of obligations related to the Energy Community Electricity Integration Package

Nine draft Decisions related to the transposition of the Energy Community Electricity Integration Package⁴ by all nine Contracting Parties are submitted to the Ministerial Council for adoption:

- (a) Decision 2024/.../MC-EnC on the failure of Albania to comply with the Energy Community Treaty in Case ECS-5/24;
- (b) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-6/24;
- (c) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-7/24;
- (d) Decision 2024/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-8/24;
- (e) Decision 2024/.../MC-EnC on the failure of the Republic of Moldova to comply with the Energy Community Treaty in Case ECS-9/24;

³ 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.

⁴ Directive (EU) 2019/944 and Regulation (EU) 2019/941 as well as Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485.

- (f) Decision 2024/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-10/24;
- (g) Decision 2024/.../MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-11/24;
- (h) Decision 2024/.../MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-12/24;
- (i) Decision 2024/.../MC-EnC on the failure of Ukraine to comply with the Energy Community Treaty in Case ECS-13/24.

By Decision 2021/13/MC-EnC of 30 November 2021⁵ and Decision 2022/03/MC-EnC of 15 December 2022⁶, the Ministerial Council adapted to and adopted in the Energy Community a package of legal acts comprising the latest European Union's electricity market acquis, hereinafter referred to as the Electricity Integration Package ('EIP'). In relation to the EIP, the Ministerial Council also adopted the Procedural Act 2022/01/MC-EnC on fostering regional energy market integration.

The EIP aims to make the markets fit to deliver on cost-efficient clean energy transition while ensuring secure and affordable electricity supply to the citizens. Pursuant to Article 2 of Ministerial Council Decision 2021/13/MC-EnC and Article 2 of Decision 2022/03/MC-EnC, the Contracting Parties were obliged to transpose the EIP into national legislation by 31 December 2023.

On 22 January 2024, the Energy Community Secretariat ('ECS') sent Opening Letters to all nine Contracting Parties informing them that the ECS may open dispute settlement procedures for non-compliance with the EnCT, and in particular the transposition obligations stemming from Decisions 2021/13/MC-EnC and 2022/03/MC-EnC.

On 31 January and 20 February 2024, Serbia, Moldova and Kosovo*, respectively, informed the ECS about the preparation of national legal acts and that these acts were still at drafting stage.

The ECS did not receive any reply from Albania, Bosnia and Herzegovina, Georgia, Montenegro, North Macedonia and Ukraine.

On this basis, the ECS submitted, on 29 May 2024, Reasoned Requests to the Ministerial Council against Albania in Case ECS-5/24, Bosnia and Herzegovina in Case ECS-6/24, Georgia in Case ECS-7/24, Kosovo* in Case ECS-8/24, Republic of Moldova in Case ECS-9/24, Montenegro in Case ECS-10/24, North Macedonia in Case ECS-11/24, Serbia in Case ECS-12/24 and Ukraine in Case ECS-13/24, where it concluded that these Contracting Parties had failed to comply with the obligation to adopt and implement the laws, regulations and administrative provisions necessary to comply with Decisions 2021/13/MC-EnC and 2022/03/MC-EnC by 31 December 2023, pursuant to Article 2 of each respective Decision.

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

⁵ Decision 2021/13/MC-EnC of 30 November 2021 adapting and adopting Directive (EU) 2019/944 and Regulation (EU) 2019/941.

⁶ Decision 2022/03/MC-EnC of 15 December 2022¹⁰ adopted, and in its Articles 3 to 10 adapted Regulation (EU) 2019/942, 11 Regulation (EU) 2019/943, 12 as well as the Network Codes and Guidelines on forward capacity allocation (FCA), capacity allocation and congestion management (CACM), electricity balancing (EBGL), system operation (SOGL) and the Emergency Restoration Network Code (ERNC), 13 and further adapted Directive (EU) 2019/944 and Regulation (EU) 2019/941 (in Article 11) Decisions 2021/13/MC-EnC and 2022/03/MC-EnC also amended the list of acts included in the acquis communautaire on energy in Annex I to the Treaty.

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 obligations related to Council Directive 2009/119/EC
Five draft Decisions related to the transposition of the Council Directive 2009/119/EC⁷ on oil stocks by five Contracting Parties are submitted to the Ministerial Council for adoption:

- (a) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-14/24;
- (b) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-15/24;
- (c) Decision 2024/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-16/24;
- (d) Decision 2024/.../MC-EnC on the failure of the Republic of Moldova to comply with the Energy Community Treaty in Case ECS-17/24;
- (e) Decision 2024/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-18/24.

With regard to those cases, in 2012 the Energy Community incorporated in its acquis communautaire the Council Directive 2009/119/EC by Decision 2012/03/MC-EnC of the Ministerial Council imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products. Pursuant to Article 1 of Decision 2012/03/MC-EnC, the Contracting Parties were under an obligation to transpose and implement Directive 2009/119/EC by 1 January 2023.

Bosnia and Herzegovina, Georgia, Kosovo*, Republic of Moldova and Montenegro did not adopt the necessary national legislation to transpose Directive 2009/119/EC before this deadline.

On 2 February 2024, the ECS sent Opening Letters to the five Contracting Parties, informing them that in the absence of information contesting the ECS's preliminary conclusions, the ECS would submit a Reasoned Request to the Ministerial Council for failure to meet the obligations stemming from Decision 2012/03/MC-EnC.

Bosnia and Herzegovina, Montenegro, Moldova and Georgia replied and informed the ECS about their ongoing transposition efforts. However, the information provided by these Contracting Parties did not remove the concerns raised by the ECS in its letter of 2 February 2024. Kosovo* did not provide any reply to the ECS.

To date, the ECS has only received draft legislation from Montenegro and the Republic of Moldova.

On that basis, on 12 July 2024 the ECS submitted Reasoned Requests to the Ministerial Council against Bosnia and Herzegovina in Case ECS-14/24, Georgia in Case ECS-15/24, Kosovo* in Case ECS-16/24, Republic of Moldova in Case ECS-17/24 and Montenegro in Case ECS-18/24, where it concluded that these Contracting Parties failed to adopt the laws,

⁷ Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, OJ L 265, 9.10.2009, p. 9.

regulations and administrative provisions necessary to comply with Decision 2012/03/MC-EnC.

In all the above 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.

(3) Cases concerning breaches of obligations related to Regulation (EU) 2017/1938 and Regulation (EU) 2022/1032

Four draft Decisions related to the transposition of Regulation (EU) 2017/1938⁸ concerning measures to safeguard the security of gas supply ('Regulation (EU) 2017/1938') and Regulation (EU) 2022/1032⁹ amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage ('Regulation (EU) 2022/1032'), respectively, by four Contracting Parties are submitted to the Ministerial Council for adoption:

- (a) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-19/24;
- (b) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-20/24;
- (c) Decision 2024/.../MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-21/24;
- (d) Decision 2024/.../MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-22/24.

By Decision 2021/15/MC-EnC of 30 November 2021, the Ministerial Council incorporated in the Energy Community *acquis communautaire* the Regulation (EU) 2017/1938. Following the war of aggression against Ukraine, the EU adopted Regulation (EU) 2022/1032 which was subsequently incorporated in the Energy Community *acquis communautaire* by Decision 2022/01/MC-EnC of the Ministerial Council of 30 September 2022. Both Regulations foster the security of supply in the Energy Community, which constitutes one of the key objectives of the Energy Community Treaty.

Pursuant to Articles 2(1) and 2(2) of Ministerial Council Decisions 2021/15/MC-EnC and 2022/01/MC-EnC, the Contracting Parties were under the obligation to bring into force the laws, regulations and administrative provisions necessary to comply with Regulation (EU) 2017/1938 as amended by Regulation (EU) 2022/1032 and to inform the ECS by 1 October 2022.

Bosnia and Herzegovina, North Macedonia and Serbia did not adopt before that deadline the necessary national measures transposing Regulation (EU) 2017/1938 as amended.

⁸ Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010, OJ L 280, 28.10.2017, p. 1.

⁹ Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage, OJ L 173, 30.6.2022, p. 17.

Georgia was not obliged to transpose Regulation (EU) 2022/1032 by that deadline, because it is not directly connected to the interconnected gas system of any other Contracting Party. It did not, however, adopt the necessary national acts to Regulation (EU) 2017/1938.

On 3 February 2023, the ECS transmitted to Serbia a detailed assessment of the required legislative national amendments to comply with the obligation to transpose Regulation (EU) 2017/1938 as amended by Regulation (EU) 2022/1032. This was followed by another letter from the ECS dated 4 October 2023.

On 28 May 2024, the ECS informed by letter Bosnia and Herzegovina, Georgia and North Macedonia that based on the information available at the time, they had not yet complied with the requirement to transpose the SoS Regulation as amended by the Storage Regulation.

Furthermore, the ECS did not received any information from the above four Contracting Parties that they have adopted the necessary measures to comply with the respective Regulations.

On that basis, the ECS submitted, on 12 July 2024, Reasoned Requests to the Ministerial Council against Bosnia and Herzegovina in Case ECS-19/24, Georgia in Case ECS-20/24, North Macedonia in Case ECS-21/24 and Serbia in Case ECS-22/24, where it concluded that these Contracting Parties failed to comply with the obligation to adopt the necessary laws, regulations and administrative provisions and to inform the ECS accordingly.

In all the above 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.

(4) Cases concerning breaches of obligations related to Directive (EU) 2018/2001

Seven draft Decisions related to the transposition of Directive (EU) 2018/2001¹⁰ on the promotion of the use of energy from renewable sources by seven Contracting Parties are submitted to the Ministerial Council for adoption:

- (a) Decision 2024/.../MC-EnC on the failure of Albania to comply with the Energy Community Treaty in Case ECS-23/24;
- (b) Decision 2024/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-24/24;
- (c) Decision 2024/.../MC-EnC on the failure of Georgia to comply with the Energy Community Treaty in Case ECS-25/24;
- (d) Decision 2024/.../MC-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-26/24;
- (e) Decision 2024/.../MC-EnC on the failure of Moldova to comply with the Energy Community Treaty in Case ECS-27/24;
- (f) Decision 2024/.../MC-EnC on the failure of Montenegro to comply with the Energy Community Treaty in Case ECS-28/24;

¹⁰ 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, OJ L 328, 21.12.2018, p. 82.

- (g) Decision 2024/.../MC-EnC on the failure of North Macedonia to comply with the Energy Community Treaty in Case ECS-29/24.

As part of the Clean Energy Package, the European Union adopted Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources ('Directive (EU) 2018/2001'), which was subsequently amended at EU level. Directive (EU) 2018/2001 was adapted to and adopted in the Energy Community by Ministerial Council Decision 2021/14/MC-EnC of 30 November 2021. This Decision was subsequently amended by Ministerial Council Decision 2022/02/MC-EnC.

Decision 2021/14/MC-EnC provided that each Contracting Party shall bring into force the laws, regulations, and administrative provisions to comply with Directive (EU) 2018/2001 by 31 December 2022. In particular, the Contracting Parties were under the obligation to transpose into their national legislation the provisions of the Directive regarding the mandatory minimum share of 14% for renewable energy within the final consumption of energy in the transport sector by 2030, including provisions on the sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels, and to notify the transposing measures to the ECS by the deadline of 31 December 2022.

The ECS has received no information from Albania, Bosnia and Herzegovina, Georgia, Kosovo*, the Republic of Moldova, Montenegro and North Macedonia indicating that these Contracting Parties have adopted and implemented national measures to comply with such obligations under RED II, nor is it in possession of any other information enabling it to conclude that such measures have been taken.

Furthermore, on 21 June 2024, the ECS sent letters to the seven Contracting Parties requesting to submit a copy of the legislation transposing Articles 25 to 31 of RED II or information as to the status of such transposition not later than 5 July 2024.

In their replies, Georgia, Kosovo*, the Republic of Moldova and Montenegro informed the ECS about their ongoing transposition efforts. The ECS did not receive a reply from Bosnia and Herzegovina, Albania and North Macedonia.

On that basis, the ECS submitted on 12 July 2024 Reasoned Requests to the Ministerial Council against Albania in Case ECS-23/24, Bosnia and Herzegovina in Case ECS-24/24, Georgia in Case ECS-25/24, Kosovo* in Case ECS-26/24, the Republic of Moldova in Case ECS-27/24, Montenegro in Case ECS-28/24 and North Macedonia in Case ECS-29/24, where it concluded that these Contracting Parties had failed to comply with the obligation to adopt the laws, regulations and administrative provisions necessary and to inform the ECS to comply with Decision 2021/14/MC-EnC within the deadline, pursuant to its Article 2(1) and (2).

In all the above 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.

- (5) Case concerning breaches of obligations related to Directive (EU) 2019/944 and Regulation (EU) 2019/943.

Finally, the following draft Decision related to non-compliance by Serbia with Directive (EU) 2019/944 on common rules for the internal market for electricity¹¹ and Regulation (EU) 2019/943¹² on the internal market for electricity is submitted to the Ministerial Council for adoption:

- (a) Decision 2024/.../MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-2/21.

As mentioned in point 3.1 (1) above, the Ministerial Council adapted to and adopted in the Energy Community Regulation (EU) 2019/943 ('Regulation (EU) 2019/943') and Directive (EU) 2019/944 ('Directive (EU) 2019/944') by Ministerial Council Decision 2022/03/MC-EnC and by Ministerial Council Decision 2021/13/MC-EnC as part of the EIP.

Article 34(2) of the Electricity Regulation provides that Transmission System Operators ('TSOs') shall promote the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions, which requires constructive cooperation between neighbouring TSOs. This includes agreeing on a mechanism to determine the Net Transfer Capacity ('NTC') at the border. Article 16(4) stipulates that the maximum capacity of the interconnections shall be made available to market participants by way of predefined allocation procedures.

Articles 58(c) and 59(1), b) and u) of the Electricity Directive stipulate a duty of the national regulatory authority to take all reasonable measures to eliminate restrictions in electricity trade and to ensure compliance of TSOs with their obligations under Energy Community law, including as regards cross-border issues.

On 18 February 2021, KOSTT, a TSO based in Pristina/Kosovo*, submitted to the ECS a complaint against Serbia. The complainant alleged non-compliance by Serbia through its TSO JSC Elektromreza Srbije ('EMS') with the Energy Community electricity market rules.

Pursuant to Serbia's Energy Law, the procedure and manner of allocation of cross-border capacity is determined by the TSO in agreement with the neighbouring TSOs and approved by the national regulatory authority. At the interconnection lines between Niš and Kosova B, and between Kruševac and Podujeva, EMS and KOSTT have not agreed on how to evaluate or allocate cross-border capacity, nor has EMS assigned any value to the available interconnection capacity. As a result, EMS sets the NTC at zero. Consequently, market participants can only nominate capacity with KOSTT, but not with EMS, meaning no capacity is effectively available for trade.

In its complaint, KOSTT also argued that the undetermined NTCs and lack of capacity allocation on the interconnection lines mentioned above would lead to higher prices for cross-border capacity on other regional borders. This, in turn, would increase electricity prices for end-consumers in Kosovo* and neighbouring Southeast European countries and prevent KOSTT from collecting potential revenues from the congestion management mechanism on these interconnectors.

The European Federation of Energy Traders (EFET) raised the same concerns and stressed that this situation would affect both the competitiveness of the wholesale electricity markets and end-user prices throughout South East Europe.

¹¹ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019, p. 125.

¹² Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.6.2019, p. 54.

On 21 July 2022, the ECS sent an Opening Letter to Serbia in which it took its preliminary view that since commercial electricity capacity was not made available at the interconnection lines mentioned above due to its TSO's and its regulatory authority's lack of action, Serbia failed to comply with Articles 16 (3) and 12 of Regulation (EC) 714/2009 and Articles 36 and 37 of Directive 2009/72, as adapted to and adopted in the Energy Community. The reasons for referring to the 2009 Directive and Regulation was that at that time the Contracting Parties had still time until 31 December 2023 to transpose the EIP, and in particular Directive (EU) 2019/944 and Regulation (EU) 2019/943. Serbia was asked to submit its observations on the points of fact and law raised in the Opening Letter.

On 8 September 2022, Serbia replied to the ECS's Opening Letter alleging the lack of ECS's competence to address the issue identified in the Opening Letter and the lack of adverse economic effects. It also raised concerns about the status of KOSTT and its bidding zone.

Considering the Reply to the Opening Letter, the ECS submitted a Reasoned Opinion on 1 March 2023. Serbia was requested to rectify the breaches identified therein by 1 May 2023.

On 28 April 2023, Serbia provided a reply to the Reasoned Opinion. In this reply, Serbia essentially repeated its earlier arguments.

As Serbia has not rectified the breach identified, and in the absence of any further action by Serbia, the ECS submitted on 12 July 2024 a Reasoned Request to the Ministerial Council against Serbia in Case ECS-2/21. In this Reasoned Request the ECS addressed Serbia's arguments and concluded that the latter failed to comply with Directive (EU) 2019/944 and Regulation (EU) 2019/943, as adapted to and adopted in the Energy Community by Decision 2022/03/MC-EnC and the Decision 2021/13/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 Decision, 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.

3.2. Members of the Advisory Committee in accordance with Article 32 (3) of the rules under Procedural Act No 2008/01/MC-EnC on the Rules of Procedure for the Dispute Settlement as amended by Procedural Act 2015/04/MC-EnC and Procedural Act 2022/03/MC-EnC

The mandates of several current members of the Advisory Committee need to be prolonged until 31 December 2028, including Prof. Dr. Verica Trstenjak who will represent the EU in the Advisory Committee. New members and new alternate members need to be appointed replacing members that wish to cease their activity as members of the Advisory Committee.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the proposed prolongations and appointments.

3.3. Decision 2024/XX/MC-EnC on the Financial Discharge of the Director of the Secretariat of the Energy Community

The proposed draft Decision provides for the financial discharge for 2023 on the basis of the Audit Report for the year ended 31 December 2023, 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 Decision on the Financial Discharge of the Director of the Secretariat of the Energy Community.

3.4. Procedural Act 2024/01/ECRB-EnC amending and replacing the Procedural Act 2019/01/ECRB-EnC on the Internal Rules of Procedure of the ECRB

The proposed amendments essentially aim to improve and clarify the working methods of the ECRB, notably in respect to internal organisation, working groups, work streams and voting modalities.

This is necessary because of ECRB's new regulatory roles and decision-making powers under the recent Energy Community Electricity Integration Package and notably Electricity Directive (EU) 2019/944 and Electricity Regulation (EU) 2019/943 (both as adapted to and adopted in the Energy Community; see in detail point 3.1. (1) above). These roles and powers resemble those of the European Union Agency for the Cooperation of Energy Regulators ('ACER') and apply in relation to the nine non-EU Contracting Parties and the market operators in their territories. At several points, inspiration was taken from ACER's internal Rules of Procedure.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the Procedural Act amending and replacing the Procedural Act on the Internal Rules of Procedure of the ECRB.

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*'¹³.

4.1.2. Application to the present case

The Ministerial Council and the ECRB are bodies set up by an agreement, namely the EnCT.

The acts which the Ministerial Council and the ECRB are called upon to adopt, constitute acts having legal effects. The envisaged acts will be binding under international law in accordance with Article 76 EnCT, pursuant to which a decision is legally binding upon those to whom it is addressed, and in accordance with Article 86 EnCT, pursuant to which a Procedural Act shall have binding force on the institutions of the Energy Community, and, if the Procedural Act so provides, on the Parties.

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.

¹³ 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 and they are not primarily of a fiscal nature. Therefore, the substantive legal basis of the proposed decision is Article 194(2) 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 and in the Energy Community Regulatory Board (Vienna, Austria, 12 December 2024, and Athens, Greece, 10 December 2024)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194(2), 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 2006¹⁴ 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) Pursuant to Articles 60 and 86 of the Treaty, the Regulatory Board shall adopt its internal rules of procedure by Procedural Act.
- (4) The Ministerial Council, during its 22nd session on 12 December 2024, is to adopt a number of acts set out in Annex 1 to this Decision, which fall under the scope of Article 218(9) TFEU and on which representatives of the Union are to vote.
- (5) The Regulatory Board, during its 59th session on 10 December 2024, is to adopt an act set out in Annex 2 to this Decision, which falls under the scope of Article 218 (9) TFEU and on which representatives of the Union are to vote.
- (6) The purpose of the envisaged acts is to facilitate the achievement of the objectives of the Treaty.
- (7) It is appropriate to establish the position to be taken on the Union's behalf in the Ministerial Council and the Regulatory Board regarding acts set out in Annexes 1 and 2, as the envisaged acts will have legal effects for the Union.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 22nd session of the Ministerial Council on 12 December 2024 regarding the issues falling under the scope of Article 218(9) TFEU is to approve the adoption of the acts set out in Annex 1 to this Decision.

¹⁴ OJ L198 of 20.7.2006, p. 15.

Article 2

The position to be taken on the Union's behalf in the 59th session of the Regulatory Board regarding the issues falling under the scope of Article 218(9) TFEU is to approve the adoption of the act set out in Annex 2 to this Decision.

Article 3

Minor changes may be agreed to the acts set out in Annexes 1 and 2 to this Decision, in the light of comments from the Energy Community Contracting Parties before or at the Ministerial Council or Regulatory Board meeting, by the Commission, without a further decision of the Council.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*