

EXPLANATORY NOTE PROPOSAL FOR A DECISION

on the implementation of Directive 2004/35/EU of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage as amended by Directive 2006/21/EC, 2009/31/EC and 2013/30/EU and amending Article 16 and Annex II of the Energy Community Treaty

1) CONTEXT OF THE PROPOSAL

General context

Article 16 of the Energy Community Treaty (hereinafter: “the Treaty”) refers to five pieces of the EU’s environmental *acquis*. Directive 2004/35/EC (hereinafter: “the ELD”) is not yet covered by the scope of Article 16 of the Treaty. Consequently, Contracting Parties do not yet have the obligation to transpose and implement the provisions of the ELD. The intention of the present proposal is to fill this gap.

Grounds for and objectives of the proposal

Annex III of the ELD covers activities listed in Annex I of Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, including installations in the field of Network Energy as defined in Article 2(2) of the Energy Community Treaty. The Industrial Emissions Directive (2010/75/EU), which replaced Directive 96/61/EC in the EU as of 7 January 2014 (as of 1 January 2016 for large combustion plants) forms part of the Energy Community *acquis* as of 2013. In order to put Member States and Contracting Parties on an equal footing, it would be necessary to extend the provisions of the ELD to operators in the Contracting Parties in the Energy Community, too.

In June 2014, a Report of the High Level Reflection Group (HLRG) chaired by MEP Buzek was published with the title “An Energy Community for the Future”.¹ This report identified the ELD as a piece of the environmental *acquis* the incorporation of which into the Energy Community is proposed for further consideration. The Energy Community Secretariat, at the 9th meeting of the Environmental Task Force on 3 June 2015 identified the ELD as belonging to the first group of the HLRG’s proposals (proposals associated with low implementation efforts).

The ELD is of particular relevance for installations operating in the Network Energy sector as those installations are often potent sources of airborne pollution. According to Article 2(d) of the Energy Community Treaty, one of its main goals is to improve the environmental situation in relation to Network Energy. According to recital 4 of the ELD, “[e]nvironmental damage also includes damage caused by airborne elements as far as they cause damage to water, land or protected species or natural habitats.”

¹ https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3178024/0633975AD9F97B9CE053C92FA8C06338.PDF

Furthermore, inclusion of the ELD would be highly important as a driver for implementing the “pollutant pays principle” in the Energy Community.

2) LEGAL ELEMENTS OF THE PROPOSAL

Existing provisions in the area of the proposal

Currently, the ELD is not included in the Energy Community’s environmental *acquis*. The proposal is intended to fill in this gap, as suggested by the High Level Reflection Group and supported by the Energy Community’s Work Programme 2016-2017 (endorsed by the Ministerial Council in October 2015).

Summary of the proposed action

The objective of the present proposal is to include the ELD in the Energy Community legal framework with relevance to installations in the field of Network Energy as defined in Article 2(2) of the Energy Community Treaty and with implementation timeframes that can safeguard the timely implementation of the Directive and at the same time taking into account the specific situation of the Contracting Parties.

Legal basis

The primary objective of the proposal is the protection and improvement of the environment. This proposal is therefore based on Articles 2(d), 16 and 25 of the Energy Community Treaty.

Choice of instruments

Proposed instruments: Decision of the Ministerial Council.

Other means would not be adequate for the following reasons: According to Article 76 of the Energy Community Treaty, “[m]easures may take the form of a Decision or a Recommendation. A Decision is legally binding in its entirety upon those to whom it is addressed. A Recommendation has no binding force. Parties shall use their best endeavours to carry out Recommendations.”

With its lack of capability to provide legal effects, a Recommendation would not be suitable to achieve the objectives of the present proposal and therefore a Decision remains the only applicable legal instrument.

3) ADDITIONAL INFORMATION

Simplification

The proposal provides for simplification of legislation and simplification of administrative procedures for public authorities in the Contracting Parties. Providing clearer rules and timeframes for the screening procedure would lead to significant improvements in such procedures.

Repeal of existing legislation

The adoption of the proposal will not lead to the repeal any existing legislation from the Energy Community environmental *acquis*.