

TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY  
represented by the Presidency and the Vice-Presidency of the Energy Community

**In case ECS-13/24, the Secretariat of the Energy Community  
Against  
Ukraine, the**

ADVISORY COMMITTEE,

composed of

Rajko Pirnat, Nikola Radovanovic, Helmut Schmitt von Sydow, Verica Trstenjak, and  
Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 and by Procedural Act No 2022/03/MC-EnC of the Ministerial Council of the Energy Community of 15 December 2022 on amending Procedural Act 2008/01/MC-EnC ('Dispute Settlement Rules 2022'),

acting unanimously,

gives the following

OPINION

**I. Procedure**

By e-mail dated 6 June 2024 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-13/24 against Ukraine. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Ukraine by **failing to adopt and apply** the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944<sup>1</sup> and Regulation (EU) 2019/941<sup>2</sup>, as adapted and adopted by Decision 2021/13/MC-EnC, as well as with Regulation (EU) 2019/942<sup>3</sup>, Regulation (EU) 2019/943<sup>4</sup>, Regulation (EU) 2015/1222<sup>5</sup>, Regulation (EU)

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<sup>1</sup> 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.

<sup>2</sup> Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, OJ L 158, 14.6.2019, p. 1.

<sup>3</sup> Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, OJ L 158, 14.6.2019, p. 22.

<sup>4</sup> 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.

<sup>5</sup> Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24.

2016/1719<sup>6</sup>, Regulation (EU) 2017/2195<sup>7</sup>, Regulation (EU) 2017/2196<sup>8</sup>, Regulation (EU) 2017/1485<sup>9</sup>, as adapted and adopted by Decision 2022/03/MC-EnC, by 31 December 2023, and by **failing to forthwith inform or notify those measures** to the Secretariat, fails to comply with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

Ukraine replied to the Reasoned Request by letter of 16 August 2024.

Pursuant to Article 32 (4) Dispute Settlement Rules 2022 the Advisory Committee has to conduct a public hearing before giving its opinion. According to Article 8 (1) Rules of Procedure of the Energy Community Advisory Committee as amended (RoP) such a public hearing shall take place unless both parties to the case agree that it can be dispensed with. The Secretariat agreed that a public hearing could be dispensed with according to Article 8 (1) RoP in its e-mail from 13 August 2024. In its letter of 16 August 2024 Ukraine declared that a public hearing is not necessary.

## II. Provisions allegedly violated by the Contracting Party concerned

Article 6 of the Treaty reads:

*The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.*

Article 89 of the Treaty reads:

*The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.*

Article 1 of the Dispute Settlement Rules 2022 reads:

*These rules specify the procedure to be followed in cases of failure by a Party [...] to comply with a Treaty obligation or to implement a Decision or Procedural Act addressed to it within the required period (hereinafter "Energy Community law") [...]*

Article 3 paragraph 1 of the Dispute Settlement Rules 2022 reads:

*A Party fails to comply with its obligations under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law.*

Article 2 of the Ministerial Council Decision 2021/13/MC-EnC of 30 November 2021 reads:

*1. Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944 and Regulation (EU) 2019/941 by 31 December 2023.*

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<sup>6</sup> Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation, OJ L 259, 27.9.2016, p. 42.

<sup>7</sup> Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, OJ L 312, 28.11.2017, p. 6.

<sup>8</sup> Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration, OJ L 312, 28.11.2017, p. 54.

<sup>9</sup> Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation, OJ L 220, 25.8.2017, p. 1.

*2. Upon transposition, Contracting Parties shall immediately inform the Energy Community Secretariat thereof and communicate to the Energy Community Secretariat the text of the provisions of national law which they adopt in the field covered by this Decision.*

Article 2 of the Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022 reads:

*(1) Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation [EU] 2017/2195, Regulation (EU) 2017/2196 and Regulation (EU) 2017/1485 by 31 December 2023.*

*(2) Each Contracting Party shall notify the Energy Community Secretariat of completed transposition by sending the text of the provisions of national law which they adopt in the field covered by this Decision and of any subsequent changes within two weeks following the adoption of such measures.*

### III. Legal Assessment

According to Article 32 (1) Dispute Settlement Rules 2022, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. On the basis of this provision, the Advisory Committee assessed the Reasoned Request and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

The Reasoned Request of the Secretariat alleges that by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944 and Regulation (EU) 2019/941, as adapted and adopted by Decision 2021/13/MC-EnC, as well as with 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, as adapted and adopted by Decision 2022/03/MC-EnC, by 31 December 2023, and by failing to forthwith inform or notify those measures to the Secretariat, Ukraine fails to comply with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

In its reply of 16 August 2024 to the Reasoned Request according to Article 31 (1) Dispute Settlement Rules 2022, Ukraine admitted that it has not yet adopted the necessary laws, regulations and administrative provisions necessary to comply with the legal acts mentioned in paragraph two of this opinion. Ukraine stated that the relevant legislative amendments were drafted and completion of the necessary governmental procedures is expected in autumn 2024.

Based on the reply to the Reasoned Request and the procedural documents provided by the Energy Community Secretariat and the arguments presented therein, it is undisputed that Ukraine did not **adopt and apply** the laws, regulations and administrative provisions necessary to comply with legal acts mentioned in paragraph two of this opinion. It has to be noted that – in the absence of any legal effect - draft legislation cannot be considered as a measure necessary to comply with a Decision of the Ministerial Council (to that effect see Court of Justice of the European Union in Case C-648/13 *Commission v Poland*, ECLI:EU:C:2016:490, paras. 129-132).

Therefore, it is undisputable that Ukraine did not bring into force the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944 and Regulation (EU) 2019/941 by 31 December 2023 as required by Ministerial Council Decision 2021/13/MC-

EnC. It is also undisputable that Ukraine did not bring into force the laws, regulations and administrative provisions necessary to comply with Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196 and Regulation (EU) 2017/1485 by 31 December 2023 as required by Ministerial Council Decision 2022/03/MC-EnC.

Based on the available documentation, the Advisory Committee finds that the request is well-founded.

#### **IV. Conclusions**

The Advisory Committee considers that

**Ukraine** by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944 and Regulation (EU) 2019/941, as adapted and adopted by Decision 2021/13/MC-EnC, as well as with 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, as adapted and adopted by Decision 2022/03/MC-EnC, by 31 December 2023, and by failing to forthwith inform or notify those measures to the Secretariat, **failed to comply** with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

Done in Vienna on 24 November 2024

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President