

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

REASONED REQUEST

in Case ECS-13/24

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (hereinafter: “the Treaty”) and Article 11(3) of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter: “Dispute Settlement Rules”),¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

UKRAINE

is seeking a Decision from the Ministerial Council that

by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944² and Regulation (EU) 2019/941,³ as adapted and adopted by Decision 2021/13/MC-EnC, as well as with Regulation (EU) 2019/942,⁴ Regulation (EU) 2019/943,⁵ Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485,⁶ 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.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

¹ Procedural Act No 2015/04/MC-EnC of 16.10.2015.

² Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity.

³ Regulation (EU) 2019/941 of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC.

⁴ 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.

⁵ Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity.

⁶ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management; Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation; Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing; Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration; Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation.

1. Introduction

- (1) By Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, the Ministerial Council incorporated a package comprising the latest EU electricity *acquis* in the Energy Community, hereinafter referred to as the Electricity Integration Package.
- (2) Decision 2021/13/MC-EnC of 30 November 2021⁷ adapted and adopted Directive (EU) 2019/944⁸ and Regulation (EU) 2019/941.⁹ 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. Both Decisions entered in force on the day of their respective adoption.
- (3) As a Contracting Party to the Treaty, under Articles 2 of Ministerial Council Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, Ukraine was under an obligation to transpose Electricity Integration Package into national legislation by 31 December 2023.

2. Background

- (4) Following the adoption of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, the Secretariat initiated a number of activities to assist the Contracting Parties with the transposition of the Electricity Integration Package in a timely manner. Already in early February 2023, the Secretariat asked the PHLG members to share plans for transposition and to identify needs for support. It also followed up with regular meetings with the respective members of the Permanent High Level Group and requested updates on the progress of transposition. In addition to the annual Athens Electricity Forum, the Secretariat also organised a webinar and three workshops throughout 2023 to introduce the main objectives and novelties of the Electricity Integration Package. The Secretariat further introduced a new section on its webpage, clarifying and explaining the main obligations and timelines stemming from the Electricity Integration Package. Furthermore, the EU's TAIEX program provided support in the transposition to all Western Balkan 6 Contracting Parties by organizing a regional workshop in April 2023.
- (5) The Secretariat also facilitated the cooperation of all involved stakeholders and strengthened the cooperation with various EU institutions to enhance market integration. Focusing on the implementation of the CACM Regulation by the Contracting Parties in

⁷ ANNEX 1

⁸ Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity.

⁹ Regulation (EU) 2019/941 of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC.

¹⁰ ANNEX 2

¹¹ 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.

¹² Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity.

¹³ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management; Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation; Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing; Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration; Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation.

particular, a joint expert team within the Pentalateral Coordination Group was established to create a platform for discussion for all stakeholders.

- (6) The implementation of the Electricity Integration Package is of utmost importance for the further integration of Contracting Parties into the European Union's internal electricity market. Full harmonisation with the Energy Community acquis is a precondition for Ukrainian energy market stakeholders to join the EU's electricity market based on reciprocity, including the timely adherence to the single day-ahead (SDAC) or intraday market coupling (SIDC). In the absence of transposition by the Contracting Parties, the so-called MCP Integration Plan (on integrating market coupling operators of the Contracting Parties into the established European processes) could not be submitted as planned by 15 December 2023 and needed to be postponed by half a year. This, and any further delay is likely to affect the timely coupling of the Contracting Parties electricity markets with the European Unions'.
- (7) At its meeting on 22 March 2023, the Permanent High Level Group (PHLG) concluded that the Contracting Parties inform the Secretariat immediately of any bottlenecks and delays in transposing the Electricity Integration Package, and make the utmost use of all assistance available to them during 2023. On 20 June 2023, the PHLG took stock again of the state of transposition of the Electricity Integration Package and expressed its concern about the slow progress in several Contracting Parties, despite the technical assistance available. At its meeting on 13 December 2023, the PHLG again invited all Contracting Parties to intensify their efforts to transpose the Electricity Integration Package, as a key precondition for the integration into the EU internal electricity market.
- (8) On 14 December 2023, the Ministerial Council urged all Contracting Parties to finalize the complete transposition of the Electricity Integration Package with the help of the Secretariat in the first quarter of 2024. The Ministerial Council also took note of the Secretariat's announcement to launch infringement procedures for decision by the Ministerial Council in 2024 as a measure to accelerate the process of transposing the Electricity Integration Package. The PHLG concluded at its meeting on 18 March 2024 as follows: *"Delayed transposition [of the Electricity Integration Package] inevitably postpones the implementation of the Package, as illustrated by the postponed MCO Integration Plan. As transposition of the Package still lags behind in all Contracting Parties, the Secretariat will launch the infringement procedures as announced."*
- (9) To date, the Secretariat has not received information about adopted legislation transposing the Electricity Integration Package as required by Decisions 2021/13/MC-EnC and 2022/03/MC-EnC of the Ministerial Council.
- (10) On 22 January 2024, the Secretariat sent a letter¹⁴ to Ukraine informing the Ministry that the Secretariat may open dispute settlement procedures for non-compliance with the Treaty, and in particular, the obligations stemming from Decisions 2021/13/MC-EnC and 2022/03/MC-EnC.
- (11) The Secretariat did not receive a reply from Ukraine.
- (12) On that basis, the Secretariat decided to submit the present Reasoned Request to the Ministerial Council for decision.

¹⁴ ANNEX 3

II. Relevant Energy Community Law

(13) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “a Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party]”. A violation of Energy Community Law occurs if “[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law”.¹⁵

(14) 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 the Treaty.

(15) 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.

(16) Article 2 of Decision 2021/13/MC-EnC 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.

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.

(17) Article 2 of Decision 2022/03/MC-EnC 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 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.

(18) Article 11(3) of the Dispute Settlement Rules reads:

Where the Secretariat initiates a dispute settlement procedure on the grounds that a Party has failed to fulfil its obligation to notify measures transposing a Decision addressed to it within the deadline specified in that Decision, the Secretariat shall submit a reasoned request to the Ministerial Council without preliminary procedure.

¹⁵ Article 3(1) Dispute Settlement Procedures.

III. Legal Assessment

- (19) The present Reasoned Request concerns non-compliance of Ukraine 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 Articles 2 of the respective Decisions.
- (20) The Reasoned Request is based on Article 11(3) of the Dispute Settlement Rules in force. In October 2015, the Ministerial Council amended the Dispute Settlement Rules and abolished the preliminary procedure in dispute settlement proceedings for non-transposition, *i.e.* in cases where a Party has failed to fulfil its obligations to notify measures transposing a Decision addressed to it within the deadline specified in that Decision. Hence, in cases such as the one at issue, the Secretariat submits a Reasoned Request to the Ministerial Council directly, without performing a preliminary procedure.
- (21) According to the Treaty, Ukraine is under an obligation to implement, *i.e.* to transpose at national level and to apply, the *acquis communautaire* on electricity listed in Annex I of the Treaty, comprising the Electricity Integration Package, namely Directive (EU) 2019/944, Regulation (EU) 2019/941, Regulation (EU) 2019/943, Regulation (EU) 2019/942, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196 and Regulation (EU) 2017/1485, as adapted and adopted by Decisions 2021/13/MC-EnC and 2022/03/MC-EnC.
- (22) Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC require the Contracting Parties to bring into force the laws, regulations and administrative provisions necessary to comply with these pieces of *acquis communautaire* by 31 December 2023.
- (23) Article 6 of the Treaty imposes upon the Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty. Article 89 of the Treaty requires Parties to implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.
- (24) The time limit for Ukraine to take measures necessary to comply with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, and by consequence with Articles 6 and 89 of the Treaty, expired on 31 December 2023.
- (25) Despite numerous reminders and the assistance offered by the Secretariat and other stakeholders, Ukraine to date has not taken the measures necessary to comply with its obligations. At the date of submitting this Reasoned Request, Ukraine has not informed or notified the Secretariat of either new legislation, regulations or administrative provisions, or amendments to the existing legislation regulations or administrative provisions adopted transposing the Electricity Integration Package. In the absence of any legal effect, draft legislation not yet adopted and entered into force cannot be considered as a measure necessary to comply with a Decision of the Ministerial Council.¹⁶
- (26) Under these circumstances, the Secretariat considers that by failing to take the measures necessary to comply with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, Ukraine has failed to fulfil its obligations under these Decisions as well as Articles 6 and 89 of the Treaty.

¹⁶ See, to that effect, Court of Justice of the European Union in Case C-430/98 *Commission v Luxembourg*, ECLI:EU:C:1999:520, paras. 8-13, Case C-648/13 *Commission v Poland*, ECLI:EU:C:2016:490, paras. 129-132.

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community declare in accordance with Article 91(1)(a) of the Treaty that:

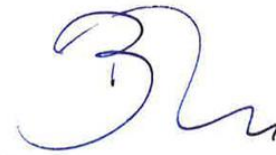
by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944 and Regulation (EU) 2019/941, as adapted and adopted by Decision 2021/13/MC-EnC, as well as with Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, 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.

On behalf of the Secretariat of the Energy Community,

Vienna, 29 May 2024

A handwritten signature in blue ink that reads "Artur Lorkowski".

Artur Lorkowski
Director

A handwritten signature in blue ink that reads "Dirk Buschle".

Dirk Buschle
Legal Counsel/Deputy Director

List of Annexes

- ANNEX 1 Decision 2021/13/MC-EnC
- ANNEX 2 Decision 2022/03/MC-EnC
- ANNEX 3 Letter of the Secretariat dated 22 January 2024