

DRAFT

**PROCEDURAL ACT
OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY**

Procedural Act [2019/... /...] on the exchange of information and cooperation between the European Commission, the Secretariat and the Contracting Parties in the fields of compliance with Treaty obligations and the reciprocity mechanism

Commented [SJ1]: We were of the understanding that this PA shall regulate exchange of information only in relation to the reciprocity mechanism

The Ministerial Council of the Energy Community,

Having regard to the Treaty Establishing the Energy Community, and in particular Articles 4, [draft] 25' (6), 47(c), 67(d), 86 and 87 thereof,

Having regard to the proposal by the European Commission,

Whereas

(1) [...]

(2) [Reference to relevant substantive ECT provisions, for instance Articles 18, 19]

(3) [Given the particular complexity and sensitivity of State aid and competition law issues, specific rules are appropriate in this respect]

HAS ADOPTED THIS PROCEDURAL ACT:

**Title I
General Provisions**

Article 1

Purpose

(1) These rules specify the exchange of information and cooperation between the European Commission, the Secretariat and the Contracting Parties as regards compliance with Treaty obligations including with the reciprocity mechanism under [draft] Article 25' of the Treaty.

(2) As a consequence these rules also adjust and harmonise existing rules and procedures concerning the application and interpretation of Treaty obligations.

Commented [SJ2]: Seems to be a very broad purpose and goes way beyond Para. 1. As noted above, we were of the understanding that this PA shall regulate exchange of information only in relation to the reciprocity mechanism

Title II
Matters related to compliance with obligations under the Treaty

Article 2

Tasks of the Secretariat

(1) The Secretariat shall submit any reasoned request for decision by the Ministerial Council under Articles 91 and 92 of the Treaty immediately and in any case at least 3 months before the envisaged Ministerial Council, including as regards non-compliance by a Contracting Party or the EU with obligations under [draft] Article 25' of the Treaty.

Commented [SJ3]: Timeline is different from the one established under the DSR

(2) In case of potential non-compliance by a Contracting Party with Treaty obligations, or in case of potential non-compliance by the EU with Treaty obligations under [draft] Article 25', the Secretariat shall inform the European Commission already at an early stage of the process and without delay about:

Commented [SJ4]: The definition is needed, as it is a very broad concept

(a) upcoming reasoned requests for decisions by the Ministerial Council pursuant to Articles 91 and 92 of the Treaty;

Commented [SJ5]: Please kindly elaborate the meaning

(b) substantive complaints from private bodies pursuant to Article 90 (1) of the Treaty; the Secretariat shall also provide a preliminary assessment of the complaint together with a summary; the European Commission may define, in consultation with the Secretariat, a template for receiving this information

Commented [SJ6]: Does this include all complaints under Article 90 (1)?

(c) substantive concerns of the Secretariat based on any other information brought to the attention of the Secretariat or its own investigations and findings. The Secretariat shall also provide a preliminary assessment of the concern together with a summary. The European Commission may define, in consultation with the Secretariat, a template for receiving this information.

Commented [SJ7]: The confidentiality requirements are missing

(3) The Secretariat shall communicate the information referred to in paragraphs 1 and 2 above to the European Commission directly and without the need for the Commission to ask for access to the file.

Commented [SJ8]: Shall be specified that these provisions relate only to those cases where the relevant mutual rights and obligations are concerned, as referred to in paragraph 25(1).1

(4) The Secretariat shall consult ex-ante the European Commission without delay on any new or updated guidance, policy document or draft replies to referrals from Contracting Parties or Courts and opinions given by the Secretariat pursuant to Article 2 of the Rules of procedure on dispute settlement.

Commented [SJ9]: Seems to be in conflict with Art. 70 of the Treaty, prohibiting the Secretariat from seeking instructions from the parties.

Furthermore, even if the abovementioned article were not an issue, such provision would probably result in long delays in terms of communication between the CPs and the Secretariat

(5) The Secretariat shall ensure strict confidentiality in respect of communication with the public and abstain from any public statement on its views on the legality of the national measure in question, including from any relevant exchange of views with the authorities in the concerned Contracting Party, until when the Ministerial Council has taken a decision on the matter.

Commented [SJ10]: In addition to routinely assessing the level of compliance with the acquis, the Secretariat has traditionally played a very important role by swiftly providing expert opinions and supporting with development of solutions and national measures for the problems the CP might have faced in relation to implementation of the acquis. This provision seems to deteriorate the position of the CPs and might require them to seek expensive legal services, resulting in wasted resources and time.

While implementing the acquis, the CP should know if its efforts are stillborn due to incorrect understanding of its obligations. Why should we wait for the MC decision if a dispute can be avoided altogether?

Article 3

Tasks of the European Commission

(1) In case of potential non-compliance by a Contracting Party with Treaty obligations, including as regards non-compliance with obligations under [draft] Article 25' of the Treaty, the European Commission

(a) shall inform the Secretariat without delay about upcoming reasoned requests for decisions by the Ministerial Council pursuant to Articles 91 and 92 of the Treaty ;

(b) may inform the Secretariat about substantive complaints submitted to the European Commission, subject to EU confidentiality requirements;

(c) may inform the Secretariat about substantive concerns of the Commission based on any other information brought to the attention of the Commission or its own investigations and findings, subject to EU confidentiality requirements.

(2) In accordance with [draft] Article 25' (3) of the Treaty, the European Commission shall inform all Contracting Parties and the Secretariat without delay about decisions of the EU to enact mutual rights and obligations defined in the decisions of the Ministerial Council pursuant to [draft] Article 25' (1) of the Treaty. The European Commission shall specify the Contracting Party concerned and the date when the mutual rights and obligations will be enacted.

(3) In accordance with [draft] Article 25' (4) of the Treaty, the European Commission shall inform all Contracting Parties and the Secretariat without delay about decisions of the EU to suspend mutual rights and obligations defined in the decisions of the Ministerial Council pursuant to [draft] Article 25' (1) of the Treaty. The European Commission shall specify the Contracting Party concerned and the date when the mutual rights and obligations will be suspended.

The European Commission shall give the Contracting Party concerned, the Presidency and the Secretariat advance notice of its proposals to the Council of the European Union to suspend mutual rights and obligations defined in the decisions of the Ministerial Council pursuant to [draft] Article 25' (1) of the Treaty. In accordance with [draft] Article 25' (4) of the Treaty such notification is not required in cases of urgency. For the purposes of [draft] Article 25' (4) of the Treaty and this Procedural Act, cases of urgency mean cases of serious material breach of the Treaty by a Contracting Party which may result in an irreparable damage in the near future.

Commented [SJ11]: Shall be specified that these provisions relate only to those cases where the relevant mutual rights and obligations are concerned, as referred to in paragraph 25(1).1

Commented [SJ12]: The definition is quite broad and subject to interpretation. Bearing in mind that in case of a dispute concerning meaning of urgency, there is no appeals body to review the case, such cases of urgency shall be defined in advance in an exhaustive manner

Title III

Specific rules for matters related to competition law and State aid

Article 4

Scope of this Title

The following specific rules shall apply in respect of compliance with Articles 18 and 19 of the Treaty. These rules shall be without prejudice to the general rules set out in Title II above, where applicable.

Article 5

Tasks of the Contracting Parties

(1) In accordance with [draft] Article 18 (3) of the Treaty, the Contracting Parties shall provide without undue delay the European Commission and the Secretariat with final decisions of their national authorities in the area of State aid.

(2) Upon request from the European Commission, the Contracting Parties shall provide the European Commission without undue delay and at the latest within 2 weeks, with all requested additional information concerning the State aid decision in question.

(3) The European Commission and the Secretariat shall treat the information received under paragraph (1) and (2) according to its confidentiality requirements for State aid notifications.

Commented [SJ13]: Shall be specified that these provisions relate only to those cases where the relevant mutual rights and obligations are concerned, as referred to in paragraph 25(1).1

Maybe it would be a better solution to provide the relevant decisions to the Secretariat, whereas the Secretariat would share it with other parties.

In addition, it should be made sure that Georgia is exempted from this provision, as per the terms of the AP

Commented [SJ14]: I think this time period might be too short for most of the CPs. In addition, it should be specified, that this period starts from the date of receipt of the official request

Commented [SJ15]: Shall be specified that these provisions relate only to those cases where the relevant mutual rights and obligations are concerned, as referred to in paragraph 25(1).1

Article 6

Tasks of the Secretariat

(1) The Secretariat shall circulate to the European Commission and among the Contracting Parties non-confidential summaries of State aid decisions communicated by a Contracting Party in accordance with [draft] Article 18 (3) of the Treaty.

(2) The Secretariat shall submit reasoned requests for decisions by the Ministerial Council under Articles 91 and 92 as regards non-compliance by a Contracting Party with Articles 18 and 19 of the Treaty immediately and in any case at least 4 months before the envisaged Ministerial Council.

(3) In case of potential non-compliance by a Contracting Party with obligations under Article 18 and Article 19 of the Treaty, the Secretariat shall inform the European Commission without delay about:

(a) upcoming reasoned requests for decisions by the Ministerial Council pursuant to Article 91 and 92 of the Treaty;

(b) substantive complaints from private bodies pursuant to Article 90 (1) of the Treaty; Secretariat shall also provide a preliminary assessment of the complaint together with a summary of it. The European Commission may define, in consultation with the Secretariat, a template for receiving this information;

(c) substantive concerns of the Secretariat based on any other information brought to the attention of the Secretariat or its own investigations and findings. The Secretariat shall also provide a preliminary assessment of the concern together with a summary. The European Commission may define, in consultation with the Secretariat, a template for receiving this information.

Commented [SJ16]: Timeline is different from the one established under the DSR

Commented [SJ17]: Does this include all complaints under Article 90 (1)?

Commented [SJ18]: Confidentiality requirements are missing

(4) The Secretariat shall communicate the information referred to in paragraphs 2 and 3 above to the European Commission directly and without the need for the Commission to ask for access to the file.

(5) The Secretariat shall ensure strict confidentiality in respect of communication with the public. The Secretariat shall abstain from any public statement on its views on the legality of the national measure in question under Article 18 and Article 19 of the Treaty, including from any relevant exchange of views with the authorities in the concerned Contracting Party, until when the Ministerial Council has taken a decision on the matter.

(6) If necessary, the Secretariat shall contact competition and State aid authorities in the concerned Contracting Party in order to obtain the necessary information for the assessment of the national measure in question under Article 18 and Article 19 of the Treaty, without expressing its opinion on the legality of the measure.

(7) Upon request from the European Commission, the Secretariat shall provide the European Commission without undue delay and at the latest within 2 weeks, with all requested additional information about the assessment of competition and State aid cases performed by the Secretariat.

(8) The Secretariat shall consult ex-ante the European Commission without delay on any new or updated guidance, policy document or draft replies to referrals from Contracting Parties or Courts and opinions given by the Secretariat pursuant to Article 2 of the Rules of procedure on dispute settlement related to competition or State aid law under Articles 18 and 19 of the Treaty.

Title IV Final provisions

Article 7

In the event of conflict between a provision of this Procedural Act and a provision of any of the Procedural Acts listed below, the provisions of this Procedural Act shall apply:

- (a) Rules of Procedure of 2015 on dispute settlement under the Treaty;
- (b) Rules of Procedure of 2015 of the Ministerial Council of the Energy Community;
- (c) Rules of Procedure of 2015 of the Permanent High Level Group of the Energy Community.

Commented [SJ19]: In addition to routinely assessing the level of compliance with the acquis, the Secretariat has traditionally played a very important role by swiftly providing expert opinions and supporting with development of solutions and national measures for the problems the CP might have faced in relation to implementation of the acquis. This provision seems to deteriorate the position of the CPs and might require them to seek expensive legal services, resulting in wasted resources and time.

While implementing the acquis, the CP should know if its efforts are stillborn due to incorrect understanding of its obligations. Why should we wait for the MC decision if a dispute can be avoided altogether?

Commented [SJ20]: Does this mean that the Secretariat would have to assess the case within such a short period of time?

Commented [SJ21]: Confidentiality requirements shall be added

Commented [SJ22]: Seems to be in conflict with Art. 70 of the Treaty, prohibiting the Secretariat from seeking instructions from the parties.

Furthermore, it seems that this will result in long delays in communications between CPs and the Secretariat. Once again, this provision seems to deteriorate the position of the CPs and might require them to seek expensive legal services, resulting in wasted resources and time

Commented [SJ23]: It must be better to avoid any conflict of provisions and bring this PA in compliance with the existing legal framework