

DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

D/2011/02/MC-EnC: Decision on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty

The Ministerial Council of the Energy Community,

Having regard to the Treaty establishing the Energy Community ('the Treaty'), and in particular Articles 24, 25, 79 and 100(i) and (ii) thereof,

Having regard to the proposal from the European Commission,

Whereas:

1. Article 11 of the Treaty defines the '*acquis communautaire* on energy' as meaning: (i) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, (ii) Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and (iii) Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.
2. By Decision No 2007/06/MC-EnC of 18 December 2007, the Ministerial Council decided that the Contracting Parties were to implement Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks.
3. The above-mentioned pieces of European Union law have been amended and recast into four new acts and have been repealed with effect from 3 March 2011 and replaced by two new directives and two new regulations. It is appropriate to amend Article 11 of the Treaty accordingly.
4. The Energy Community should adapt its *acquis* on energy to the recent changes in the European Union law, taking into account its own institutional framework and the specific situation of each of its Contracting Parties.
5. By Recommendation No 2010/02/MC-EnC of 24 September 2010 on the implementation of amendments to the '*acquis communautaire* on energy', the Ministerial Council recommended that Contracting Parties should implement the *acquis* on energy defined in Article 11 of the Treaty, as amended and replaced by the above-mentioned pieces of European Union law.
6. With effect from 30 June 2011, the European Regulators Group for Electricity and Gas has ceased its activities, which have been taken over by the Agency for the Cooperation of Energy Regulators.
7. At its meetings on 29/06/2011 and 05/10/2011, the Permanent High Level Group finalised and endorsed this Decision,

HAS ADOPTED THIS DECISION:

Article 1

Amendments to Article 11 of the Energy Community Treaty ('The *acquis* on energy')

1. Article 11 of the Treaty establishing the Energy Community shall be replaced by the following text:

'The "acquis communautaire on energy", for the purpose of this Treaty, shall mean the acts listed in Annex I of this Treaty'.

2. Annex I shall be replaced by the following text:

'List of acts included in the "acquis communautaire on energy":

(1) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(2) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(3) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(4) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, as amended by Commission Decision 2010/685/EU of 10 November 2010, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(5) Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, as adopted by Decision No 2007/06/MC-EnC of the Ministerial Council of 18/12/2007.

(6) Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, as adopted by Decision No 2007/06/MC-EnC of the Ministerial Council of 18/12/2007.'

Article 2

Amendments to the rules of the Energy Community Treaty relating to the Regulatory Board

The second sentence of Article 59 of the Treaty establishing the Energy Community shall be replaced by the following text:

'The European Union shall be represented by the European Commission, assisted by one regulator of each Participant, and one representative of the Agency for the Cooperation of Energy Regulators.'

Article 3

Implementation of the energy *acquis*

1. Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation

(EC) No 714/2009 and Regulation (EC) No 715/2009, as adapted by this Decision, by 1 January 2015. They shall forthwith inform the Energy Community Secretariat thereof.

The Contracting Parties shall apply the measures referred to in the previous paragraph with effect from 1 January 2015 with the following exceptions:

- Article 11 of Directive 2009/72/EC, which they shall apply from 1 January 2017;
- Article 11 of Directive 2009/73/EC, which they shall apply from 1 January 2017.

2. The Contracting Parties shall communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by this Decision.

Article 4

General adaptations under Article 24 of the Energy Community Treaty

1. Save where otherwise stated in this Decision, the text of the acts referred to in Article 1 shall be adapted to the Energy Community as follows:

- (a) the term 'Member States' shall be replaced by 'Contracting Parties';¹
- (b) the term 'Community' shall be replaced by 'Energy Community';
- (c) references to EU law shall be replaced by references to the equivalent provisions under the Energy Community Treaty, if any, or shall not be applicable, as appropriate;
- (d) the term 'European Commission' shall be replaced by 'Energy Community Secretariat';
- (e) references to the Official Journal of the European Union shall be replaced by the expression 'a dedicated section of the website of the Energy Community';
- (f) references to the Agency for the Cooperation of Energy Regulators shall not be applicable;
- (g) references to the European Network for Transmission System Operators and to the establishment of network codes shall not be applicable;
- (h) references to the executive powers and reporting obligations of the European Commission under EU law shall not be applicable;
- (i) references to the Community-wide network development plan shall not be applicable;
- (j) the date '3 September 2009' shall read '6 October 2011'.

2. The adaptations referred to in Articles 5 to 24 of this Decision shall apply in addition to the adaptations referred to in paragraph 1 of this Article.

3. Points (f) and (g) of Article 4(1) are without prejudice to potential participation by the Energy Community Contracting Parties in the work of these organisations, in accordance with Article 31 of Regulation (EC) N° 713/2009 and with the statutes and rules of procedure of ENTSO-E and ENTSO-G.

¹ Republic of Serbia issued a reserve on this provision (in Annex).

Article 5

Ad hoc adaptations concerning definitions

1. In Article 2(26) and (27) of Directive 2009/72/EC, the year '1996' shall read '2006'.
2. In Article 2(g) of Regulation (EC) No 714/2009 and in Article 2(33) of Directive 2009/73/EC, the date '4 August 2003' shall read '1 July 2007'.

Article 6

Ad hoc adaptations concerning measures on consumer protection

1. Article 3(16) of Directive 2009/72/EC and Article 3(12) of Directive 2009/73/EC shall not be applicable. Article 26 of this Decision shall apply.
2. In the second paragraph of point 2 of Annex I to Directive 2009/72/EC and of Annex I to Directive 2009/73/EC, the date '3 September 2012' shall read '1 January 2014'.

Article 7

Ad hoc adaptations concerning regional cooperation

1. In Article 6(1) of Directive 2009/72/EC, the third and fourth sentences shall be replaced by the following: 'Such regional cooperation shall concern cooperation in the geographical area defined under Title III of the Treaty establishing the Energy Community. It may cover other geographical areas.'
2. In Article 7(1) of Directive 2009/73/EC, the third and fourth sentences shall not be applicable.
3. Article 12 of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009 shall not be applicable. Article 25 of this Decision shall apply.

Article 8

Ad hoc adaptations concerning transmission system operators

1. The dates referred to in Directive 2009/72/EC and in Directive 2009/73/EC shall be adapted as follows:
 - in Article 9(1), '3 March 2012' shall read '1 June 2016';
 - in Article 9(4), '3 March 2013' shall read '1 June 2017'.
2. In point 1.5 of Annex I to Regulation (EC) No 715/2009, the date '1 July 2006' shall read '1 January 2010'.

Article 9

Ad hoc adaptations concerning the certification of transmission system operators

1. In Article 3(1) of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009:
 - the period mentioned in the first subparagraph ('two months') shall read 'four months';
 - the second subparagraph shall read as follows: 'When preparing the opinion referred to in the first subparagraph, the Secretariat shall request the Energy Community Regulatory Board to provide its opinion on the national regulatory authority's decision.';
 - the last sentence of the second subparagraph shall not apply.
2. In Article 3(6) of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009:

– the expression ‘the Commission shall take a decision’ shall read ‘the Secretariat shall issue an opinion’;

– the last sentence shall be replaced by the following three sentences: ‘The regulatory authority shall take the utmost account of that opinion. Where the final decision diverges from the Secretariat’s opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying its decision. Diverging decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion’.

Article 10

Ad hoc adaptations concerning certification in relation to third countries

1. When assessing whether granting certification will not put at risk the security of energy supply of the Energy Community (Article 11(3) of Directive 2009/72/EC and of Directive 2009/73/EC), the regulatory authority or other competent authority designated shall also take into account the rights and obligations resulting from association or trade agreements between the Contracting Party and the European Union.

2. When preparing its opinion under Article 11(6) of Directive 2009/72/EC and of Directive 2009/73/EC, the Secretariat shall request the views of the Energy Community Regulatory Board. When assessing the risk under Article 11(7) of the same Directives, the Secretariat shall also take account of the rights and obligations referred to in paragraph 1.

Article 11

Ad hoc adaptations concerning the independent system operator

In Article 13(1) of Directive 2009/72/EC and in Article 14(1) of Directive 2009/73/EC, the expression ‘approval by the Commission’ shall read ‘the opinion of the Energy Community Secretariat’.

Article 12

Ad hoc adaptations concerning the inter-transmission system operator compensation mechanism

1. The following provisions in Article 13 of Regulation (EC) No 714/2009 shall not be applicable:

– The second subparagraph of Article 13(3);

– Paragraph 4.

2. The Energy Community shall endeavour to adopt as soon as possible Commission Regulation (EU) No 774/2010 of 2 September 2010 on laying down guidelines relating to inter-transmission system operator compensation and a common regulatory approach to transmission charging.

Article 13

Ad hoc adaptations concerning the tasks of distribution system operators

In Article 25(5) of Directive 2009/72/EC, the date ‘1 January 2002’ shall read ‘1 January 2006’.

Article 14

Ad hoc adaptations concerning the unbundling of accounts

In Article 31(3) of Directive 2009/72/EC and of Directive 2009/73/EC, the date '1 July 2007' shall read '1 January 2015'.

Article 15

Ad hoc adaptations concerning access to storage facilities

In Article 33(3) of Directive 2009/73/EC, the date '1 January 2005' shall read '1 January 2007'.

Article 16

Ad hoc adaptations concerning new interconnectors and infrastructure

1. In Article 17 of Regulation (EC) No 714/2009:

- the term 'Agency' shall read 'Energy Community Regulatory Board' throughout the Article;
- the first part of Article 17(1)(e) shall read 'since 1 July 2007,'.

2. In Article 36 of Directive 2009/73/EC, the word 'Agency' shall read 'Energy Community Regulatory Board' throughout the Article.

3. In Article 36(9) of Directive 2009/73/EC and in Article 17(8) of Regulation (EC) No 714/2009:

- in the first subparagraph, the expressions 'the Commission may take a decision requiring' and 'the Commission may take a decision requesting' shall read 'the Secretariat may issue an opinion inviting';
- the third subparagraph shall read 'The notifying bodies shall take the utmost account of a Secretariat opinion that recommends to amend or withdraw the exemption decision. Where the final decision diverges from the Secretariat's opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying its decision. Diverging decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion';
- in the fifth subparagraph: (a) the expression 'Commission's approval of' shall read 'Secretariat's opinion on'; and (b) the expression 'Commission decides' shall read 'Secretariat considers'.

Article 17

Ad hoc adaptations concerning market opening and reciprocity

1. In Article 33(1) of Directive 2009/72/EC and in Article 37 of Directive 2009/73/EC:

- subparagraph (a) shall not be applicable;
- the date '1 July 2004' shall read '1 January 2008';
- the date '1 July 2007' shall read '1 January 2015'.

2. Paragraph 1 of this Article shall apply without prejudice to special deadlines agreed in the Protocols of Accession to the Energy Community.

Article 18

Ad hoc adaptations concerning the regulatory authorities

1. In Articles 36 and 37 of Directive 2009/72/EC, 40 and 41 of Directive 2009/73/EC, 19 of Regulation (EC) No 714/2009 and 24 of Regulation (EC) No 715/2009, the term 'Agency' shall read 'Energy Community Regulatory Board'.

2. In Article 37(1)(d) and the third subparagraph of Article 37(2) of Directive 2009/72/EC and in Article 41(1)(d) and the third subparagraph of Article 41(2) of Directive 2009/73/EC, the reference to 'the Commission' is not applicable.

Article 19

Ad hoc adaptations concerning penalties

1. Article 22(1) of Regulation (EC) No 714/2009 and Article 27 of Regulation (EC) No 715/2009 shall read as follows: 'Contracting Parties shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that those provisions are implemented. The penalties provided for must be effective, proportionate and dissuasive. Contracting Parties shall notify these provisions to the Secretariat by 1 January 2015 and shall notify the Secretariat without delay of any subsequent amendment affecting them.'

2. Article 22(2) of Regulation (EC) No 714/2009 shall not be applicable.

Article 20

Ad hoc adaptations concerning the regulatory regime for cross-border issues

In Article 38(1) of Directive 2009/72/EC and in Article 42(1) of Directive 2009/73/EC, the expression 'Agency' shall read 'Energy Community Regulatory Board'.

Article 21

Ad hoc adaptations concerning compliance with the Guidelines

Article 39 of Directive 2009/72/EC and Article 43 of Directive 2009/73/EC shall not be applicable.

Article 22

Ad hoc adaptations concerning safeguard measures

The second and third paragraphs of Article 42 of Directive 2009/72/EC and paragraphs 2 and 3 of Article 46 of Directive 2009/73/EC shall not be applicable. Articles 36 to 39 of the Energy Community Treaty shall apply.

Article 23

Ad hoc adaptations concerning measures to ensure a level playing field

In Article 43(2) of Directive 2009/72/EC and in Article 47(2) of Directive 2009/73/EC, the expression 'following the notification to and approval by the Commission' shall read 'following notification to the Secretariat, which shall issue an opinion'.

Article 24

Ad hoc adaptations concerning derogations

1. In Article 44 of Directive 2009/72/EC, paragraph 1 and the first sentence of paragraph 2 shall not be applicable.

2. In Article 48(2) of Directive 2009/73/EC:

– the expression ‘the Commission may request that’ shall read ‘the Secretariat shall issue an opinion, inviting, as the case may be,’;

– the second subparagraph shall not be applicable.

3. In Article 48(3) of Directive 2009/73/EC, the date ‘4 August 2003’ shall read ‘1 July 2006’.

4. Article 49 of Directive 2009/73/EC (‘Emergent and isolated markets’) and subparagraph (a) of the first paragraph and the second subparagraph of Article 30 of Regulation (EC) No 715/2009 shall not be applicable.

Article 25

Regional cooperation of transmission system operators

Transmission system operators shall promote operational arrangements in order to ensure the optimum management of the Energy Community network and shall promote the development of energy exchanges, the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions, paying due attention to the specific merits of implicit auctions for short-term allocations, and the integration of balancing and reserve power mechanisms.

Article 26

Energy consumer checklists

1. Contracting Parties shall ensure that electricity and gas suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklists established by the European Commission under the acts referred to in Article 1.

2. The checklists shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty.

Article 27

Guidelines

1. The Energy Community shall endeavour to apply the Guidelines adopted by the European Commission under Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

2. These Guidelines, which may need to be adapted to the institutional framework of the Energy Community, shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty.

3. The Permanent High Level Group shall adopt a Procedural Act on application of this article.

Article 28

Network codes

1. The Energy Community shall endeavour to apply the network codes developed at European Union level under the acts referred to in Article 1.

2. The relevant network codes shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty. Before taking a decision, the Permanent High Level Group shall seek the opinion of the Energy Community Regulatory Board.

3. The Permanent High Level Group shall adopt a procedural act on application of this Article.

Article 29

Decisions of the Energy Community Regulatory Board

1. Opinions and decisions of the Energy Community Regulatory Board in application of the acts referred to in Article 1, as adapted by this Decision, shall be adopted by a majority of its members, which must include a vote in favour by the European Union.

2. The annual report of the Energy Community Regulatory Board shall contain a summary of the opinions and decisions referred to in paragraph 1.

Article 30

General coordination by the Commission

1. The Secretariat shall provide the European Commission with all information necessary for it to perform its role of coordinator under Article 4 of the Energy Community Treaty.

2. In particular, the Secretariat shall provide the Commission with a draft of the opinions to be issued in application of the acts referred to in Article 1, as adapted by this Decision.

3. In order to avoid delays, working arrangements on implementation of this Article shall be agreed between the Secretariat and the European Commission at operational level.

Article 31

Reporting

1. The Secretariat shall monitor and review application of this Decision in the Contracting Parties.

2. The Secretariat shall submit an overall progress report to the Ministerial Council for the first time by 30 June 2012, and thereafter on an annual basis. The progress report shall reflect the progress made on creating a complete and fully operational internal market in electricity and gas and the obstacles that remain in this respect, including aspects of market dominance, market concentration, predatory or anti-competitive behaviour and the effect thereof in terms of market distortion. It shall in particular consider:

- the implementation by each Contracting Party of the provisions on unbundling, certification and on independence of the national regulatory authorities and application of these provisions in practice,

- the existence of non-discriminatory network access,

- effective regulation,

- the development of interconnection infrastructure and the security of supply situation in the Energy Community,

- the extent to which the full benefits of the opening of markets are accruing to small enterprises and household customers, notably with respect to public service and universal service standards,

- the extent to which markets are in practice open to effective competition, including aspects of market dominance, market concentration and predatory or anti-competitive behaviour,

- the extent to which customers are actually switching suppliers and renegotiating tariffs,

- price developments, including supply prices, in relation to the degree of opening of the markets, and
- the experience gained from application of this Decision as far as effective independence of system operators in vertically integrated undertakings is concerned and whether other measures in addition to functional independence and separation of accounts have been developed which have effects equivalent to legal unbundling.

3. The Secretariat shall present a report to the Ministerial Council for the first time by 30 June 2012, and thereafter on an annual basis, summarising the opinions issued by the Secretariat in application of the acts referred to in Article 1, as adapted by this Decision.

Article 32

This Decision enters into force upon its adoption and is addressed to the Contracting Parties.

Done in Chisinau on 06th October 2011

For the Ministerial Council

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Presidency

ANNEX

"On all issues pertaining to the definition of "interconnectors and cross border exchanges of energy" the term "Member States" shall be construed as "Adhering Parties".