



Brussels, 11.2.2019
COM(2019) 74 final

2019/0036 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the EU-Ukraine Association Council amending Annex XXVII to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the EU-Ukraine Association Council in connection with the envisaged adoption of a Decision concerning the amendment of Annex XXVII (Energy Cooperation including nuclear issues) to the EU-Ukraine Association Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The EU-Ukraine Association Agreement

The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ('the Agreement') aims to provide a framework for a progressive achievement of political association and economic integration between the EU and Ukraine. It provides commitments to reform sectors of Ukrainian economy in line with the EU acquis, including the objective of increasing market integration and regulatory approximation towards key elements of the EU acquis in the energy sector, based on the EU's energy acquis. The energy sector commitments are listed in Chapter 1 (Energy Cooperation including nuclear issues) of Title V (Economic and sector cooperation) of the Agreement. Some of these commitments, such as transit and transportation rules, which pertain to trade-related aspects of the energy sector, are also referred to in Chapter 11 (Trade-related energy) of Title IV (Trade and trade-related matters) The Agreement entered into force on 1 September 2017.

2.2. The EU-Ukraine Association Council

The EU-Ukraine Association Council is one of the joint bodies established by the Agreement. In line with Article 461 of the Agreement, it supervises and monitors the application and implementation of the Agreement and reviews periodically its functioning in light of its objectives. The Association Council meets at ministerial level in all necessary configurations, consisting of members of the Council of the European Union, members of the European Commission and members of the Government of Ukraine, at regular intervals, at least once a year and where circumstances require. It has the power to take decisions within the scope of the Agreement, which are binding on the Parties to the Agreement, including decisions concerning the update or amendment of the Annexes to the Agreement. It may also adopt recommendations. Such decisions or recommendations are adopted by agreement between the Parties, following the completion of respective internal procedures.

2.3. The envisaged act of the EU-Ukraine Association Council

The EU-Ukraine Association Council is to adopt a Decision regarding the amendment of Annex XXVII to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ('the envisaged act').

The purpose of the envisaged act is to update the list of EU acts provided for in Annex XXVII (Energy Cooperation including nuclear issues) in order to reflect the substantial evolution of the EU energy acquis that took place in the EU since the completion of negotiations on the Agreement.

The envisaged act also intends to set out additional provisions in Annex XXVII to the Agreement on the monitoring of the energy sector approximation process in Ukraine. These aim to strengthen the coordination and oversight of the legal aspects of energy sector reform

and contribute to the adequate and effective implementation of domestic acts based on the EU energy acquis in Ukraine.

The envisaged act will become binding on the parties in accordance with Article 463 of the Agreement, which provides: ‘For the purpose of attaining the objectives of this Agreement, the Association Council shall have the power to take decisions within the scope of this Agreement, in the cases provided for therein. Such decisions shall be binding upon the Parties, which shall take appropriate measures, including if necessary action in specific bodies established under this Agreement, to implement the decisions taken. The Association Council may also make recommendations. It shall adopt its decisions and recommendations by agreement between the Parties, following completion of the respective internal procedures.’

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The envisaged act consists of an update to the list of the EU acquis provided for in Annex XXVII of the Agreement, to which Ukraine committed to approximate its internal legislation and of an additional set of rules that aim to support the process of approximation by Ukraine of the EU energy acquis in its domestic legislation.

With respect to the list of EU acquis, the Annex requires an update in order to reflect the substantial evolution of the EU energy acquis that took place in the EU since the completion of negotiations on the Agreement. As a result, several EU acts listed in the original Annex to the Agreement are no longer in force, have been repealed or amended, while new ones were adopted by the European Union. These changes require an update of Annex XXVII to the Agreement to ensure the consistency of Ukraine's approximation efforts with the current status of the EU acquis. Consequently, these commitments of Ukraine to approximate its energy sector legislation to the EU energy acquis do not alter the EU's own rules or change their scope. Furthermore, Ukraine's own energy-sector obligations have expanded, both as a result of its membership in the Energy Community since 2011 and implementation of the EU acquis listed in Annex XXVII to the Agreement. Moreover, energy sector cooperation between the EU and Ukraine was further strengthened in 2016 through the signature of the EU-Ukraine Memorandum of Understanding on a Strategic Energy Partnership. The Memorandum supports the commitment to achieve economic integration and political association and sets out as its objective the achievement of full energy markets integration, based on the five dimensions of the EU's Energy Union. From the above-mentioned evolution stems the requirement to update the list of EU acquis in Annex XXVII to the Agreement.

Furthermore, the envisaged act also sets out additional provisions in Annex XXVII to the Agreement on the monitoring of the energy sector approximation process in Ukraine, including rules on effective implementation of EU energy acquis, consultations on draft legislative proposals in that sector and reporting to the Association Council. These aim to strengthen the coordination and oversight of the legal aspects of the energy sector reform and to contribute to the adequate and effective implementation of domestic acts based on the EU energy acquis in Ukraine. The experience of the past four years indicates progress made by Ukraine on several aspects of energy sector reform, but points to the need to provide further support measures to ensure that the reforms undertaken have an irreversible and lasting character. The additional provisions are therefore intended to contribute to a correct approximation and implementation of the approximated legislation by Ukraine, based on the EU energy acquis.

This proposal is fully consistent with the EU's Eastern Partnership policy in general, and towards Ukraine in particular, as it supports the implementation of the Association Agreement and contributes to achieving its objectives. It is also consistent with the EU's energy policy,

based on the five dimensions of the Energy Union, including its security of energy supply dimension and the role of Ukraine as a strategic transit country for gas. It reflects the EU energy acquis and promotes its adoption by the EU's associated partners, contributing thereby to the EU's security of energy supply objectives. Finally, it is consistent with the EU's external energy policy as a whole and towards the Energy Community in particular, supporting the latter in achieving the objective of energy markets integration among its member countries, including Ukraine.

Finally, the proposal is consistent with the revised EU Neighbourhood Policy and related cooperation with Ukraine and other neighbourhood countries. It notably contributes to achieving an effective and sustainable energy sector reform in Ukraine, as part of the political association and economic integration between the EU and Ukraine. These efforts, in turn, contribute to the objective of building a stable and prosperous neighbourhood. Considering that energy sector reform, based on the EU energy acquis, will contribute to a more sustainable climate policy of Ukraine, the proposal also ensures consistency with the EU's climate policy objectives. Finally, the proposal supports further development of bilateral trade in energy products and services as well as investment, given that the energy sector reform aims to address the existing regulatory barriers to energy trade.

The envisaged proposal is expected to provide additional support to energy sector reform in Ukraine, now in its implementation stage, in order to achieve the full implementation of energy sector commitments provided for in the EU-Ukraine Association Agreement.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘*the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.*’

The concept of ‘*acts having legal effects*’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘*capable of decisively influencing the content of the legislation adopted by the EU legislature*’¹.

4.1.2. Application to the present case

The EU-Ukraine Association Council is a body set up by an agreement, namely the EU-Ukraine Association Agreement.

The act which the EU-Ukraine Association Council is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 463 of the EU-Ukraine Association Agreement. The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

¹ Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the energy sector, including nuclear issues. Therefore, the substantive legal basis of the proposed decision is Article 194 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 194 TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the EU-Ukraine Association Council will amend Annex XXVII to the EU-Ukraine Association Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194 TFEU, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ('the Agreement') was concluded by the Union by Council Decision 2017/1248² and entered into force on 1 September 2017.
- (2) According to Article 273 of the Agreement the Parties shall adapt their legislation, as referred to in Annex XXVII to the Agreement, to ensure that all conditions for transport of electricity and gas are objective, reasonable, transparent and non-discriminatory.
- (3) Furthermore, with a view to making progress towards market integration, Article 337 of the Agreement provides that the Parties continue and intensify their cooperation on energy matters, including through gradual approximation in the energy sector.
- (4) Article 341 of the Agreement sets out that gradual approximation in the energy sector shall proceed in accordance with a timetable as set out in Annex XXVII to the Agreement.
- (5) Article 474 of the Agreement provides for an obligation for Ukraine to carry out gradual approximation of its legislation to that of the Union, including in the energy sector.
- (6) The EU acquis in the energy sector has substantially evolved since the conclusion of negotiation of the Agreement.
- (7) Pursuant to Articles 463(1) and 463(3) of the Agreement, the EU-Ukraine Association Council ('the Association Council') may adopt decisions for the purpose of attaining the objectives of this Agreement. In particular, it may update or amend the Annexes to the Agreement, taking into account the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties.

² OJ L 181, 12 July 2017, p. 4-5.

- (8) The Association Council is therefore to amend Annex XXVII to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, to reflect the evolution of the Union's acquis.
- (9) Article 475 of the Agreement defines in general terms the monitoring of progress in the approximation of Ukrainian law to EU law, including aspects of implementation and enforcement. It provides that the reporting and assessment process will take into account specific modalities defined in the Agreement or in decisions by the institutional bodies established under this Agreement.
- (10) In order to ensure more effective implementation of reforms, it is necessary to strengthen the monitoring mechanism for energy sector reform.
- (11) The Association Council is therefore to amend Annex XXVII to the Agreement in order to provide for more detailed rules for monitoring the approximation of Ukrainian law to the EU law in the energy sector.
- (12) It is therefore necessary to establish the position to be taken on the Union's behalf in the EU-Ukraine Association Council, as regards the Association Council Decision to amend Annex XXVII to the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the EU-Ukraine Association Council shall be based on the draft act of the EU-Ukraine Association Council attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*