AGREEMENT
ON THE INTERPRETATION AND APPLICATION
OF THE ENERGY CHARTER TREATY

THE KINGDOM OF BELGIUM,

THE REPUBLIC OF BULGARIA,

THE CZECH REPUBLIC,

THE KINGDOM OF DENMARK,

THE FEDERAL REPUBLIC OF GERMANY,

THE REPUBLIC OF ESTONIA,

IRELAND,

THE HELLENIC REPUBLIC,

THE KINGDOM OF SPAIN,

THE FRENCH REPUBLIC,

THE REPUBLIC OF CROATIA,

THE ITALIAN REPUBLIC,

THE REPUBLIC OF CYPRUS,

THE REPUBLIC OF LATVIA,

THE REPUBLIC OF LITHUANIA,

THE GRAND DUCHY OF LUXEMBOURG,

THE REPUBLIC OF MALTA,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF AUSTRIA,

THE REPUBLIC OF POLAND,

THE PORTUGUESE REPUBLIC,

ROMANIA,

THE REPUBLIC OF SLOVENIA,

THE SLOVAK REPUBLIC,

THE REPUBLIC OF FINLAND,

THE KINGDOM OF SWEDEN and

THE EUROPEAN UNION,

hereinafter jointly referred to as the "Parties",

HAVING in mind the Energy Charter Treaty, signed in Lisbon on 17 December 1994 and approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom on 23 September 1997, as last amended,

HAVING in mind the rules of customary international law as codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969,

CONSIDERING that the members of a Regional Economic Integration Organisation within the meaning of Article 1, point 3, of the Energy Charter Treaty hereby express a common understanding on the interpretation and application of a treaty in their *inter se* relations,

RECALLING that withdrawal from the Energy Charter Treaty does not affect the composition of the Regional Economic Integration Organisation referred to in that Treaty, nor does it preclude an interest in expressing a common understanding on the interpretation and application of that Treaty for as long as it may be held to produce legal effects in relation to a Party that withdrew, and in particular in respect of Article 47(3) of the Energy Charter Treaty,

HAVING in mind the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the general principles of European Union law,

CONSIDERING that the references to the European Union in this Agreement are to be understood also as references to its predecessor, the European Economic Community and, subsequently, the European Community, until the latter was superseded by the European Union,

RECALLING that, in line with the case-law of the Permanent Court of International Justice and of the International Court of Justice, the right of giving an authoritative interpretation of a legal rule belongs to the parties to an international agreement in relation to that agreement,

RECALLING that the Member States of the European Union ("Member States") have assigned the right of giving authoritative interpretations of Union law to the Court of Justice of the European Union (CJEU), as explained by the CJEU in its judgment of 30 May 2006 in case C-459/03, *Commission* v *Ireland* (Mox Plant), which held that the exclusive competence to interpret and apply Union law extends to the interpretation and application of international agreements to which the European Union and its Member States are parties in the case of a dispute between two Member States or between the European Union and a Member State,

RECALLING that, in accordance with Article 344 TFEU, Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to a method of settlement other than those provided for therein,

RECALLING that in its judgment of 6 March 2018 in case C-284/16, *Achmea*, the CJEU held that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept,

RECALLING the consistently reiterated position of the European Union that the Energy Charter Treaty was not meant to apply in intra-EU relations and that it was not, and could not have been, the intention of the European Union, of the European Atomic Energy Community and of their Member States that the Energy Charter Treaty would create any obligations among them since it was negotiated as an instrument of the European Union's external energy policy with a view to establishing a framework for energy cooperation with third countries whereas, by contrast, the European Union's internal energy policy consists of an elaborate system of rules designed to create an internal market in the field of energy which exclusively regulates relations between Member States in that field,

RECALLING that in its judgment of 2 September 2021 in case C-741/19, *Republic of Moldova* v *Komstroy* (the "Komstroy judgment"), as confirmed in its opinion of 16 June 2022, 1/20, the CJEU held that Article 26(2), point (c), of the Energy Charter Treaty must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the former Member State,

RECALLING that, as an interpretation by the competent court and reflecting a general principle of public international law, the interpretation of the Energy Charter Treaty in the Komstroy judgment applies as of the approval of the Energy Charter Treaty by the European Communities and their Member States,

CONSIDERING that Articles 267 and 344 TFEU must be interpreted as precluding an interpretation of Article 26 of the Energy Charter Treaty that allows for disputes between, on the one hand, an investor of one Member State and, on the other hand, another Member State or the European Union to be resolved before an arbitral tribunal ("intra-EU arbitration proceedings"),

CONSIDERING, in any event, that, where a dispute between, on the one hand, an investor of one Member State and, on the other hand, another Member State or the European Union cannot be settled amicably, a party to that dispute may as always choose to submit it for resolution to the competent courts or administrative tribunals in accordance with national law, as guaranteed by general principles of law and respect for fundamental rights enshrined, inter alia, in the Charter of Fundamental Rights of the European Union,

SHARING the common understanding expressed in this Agreement that, as a result, a clause such as Article 26 of the Energy Charter Treaty could not in the past and cannot now or in the future serve as the legal basis for arbitration proceedings initiated by an investor from one Member State concerning investments in another Member State,

REITERATING Declaration No 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, which recalls that the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States, and that the principle of primacy constitutes a conflict rule in their mutual relations,

RECALLING, consequently, that, in order to resolve any conflict of norms, an international agreement concluded by the Member States under international law may apply in intra-EU relations only to the extent that its provisions are compatible with the EU Treaties,

CONSIDERING that, as a result of the non-applicability of Article 26 of the Energy Charter Treaty as a legal basis for intra-EU arbitration proceedings, Article 47(3) of the Energy Charter Treaty cannot extend, and was not intended to extend, to such proceedings,

CONSIDERING that, as a result of the non-applicability of Article 26 of the Energy Charter Treaty as a legal basis for intra-EU arbitration proceedings, Parties that are concerned by pending intra-EU arbitration proceedings, whether as respondent or as the Member State of an investor, should cooperate in order to ensure that the existence of this Agreement is brought to the attention of the arbitral tribunal concerned to allow the appropriate conclusion to be drawn as to the absence of jurisdiction of that tribunal,

CONSIDERING, in addition, that no new intra-EU arbitration proceedings should be registered, and AGREEING that, where a notice of arbitration is nevertheless delivered, the Parties that are concerned by those proceedings, whether as respondent or as the Member State of an investor, should cooperate in order to ensure that the existence of this Agreement is brought to the attention of the arbitral tribunal concerned to allow the appropriate conclusion to be drawn that Article 26 of the Energy Charter Treaty cannot serve as a legal basis for such proceedings,

CONSIDERING, nevertheless, that settlements and awards in intra-EU investment arbitration cases that can no longer be annulled or set aside and that were voluntarily complied with or definitively enforced should not be challenged,

REGRETTING that arbitral awards have already been rendered, continue to be rendered and could still be rendered, by arbitral tribunals in intra-EU arbitration proceedings initiated with reference to Article 26 of the Energy Charter Treaty, in a manner contrary to European Union law, including as expressed in the case-law of the CJEU,

also REGRETTING that such arbitral awards are the subject of enforcement proceedings, including in third countries, that in pending intra-EU arbitration proceedings purportedly based on Article 26 of the Energy Charter Treaty arbitral tribunals do not decline competence and jurisdiction, and that arbitral institutions continue to register new arbitration proceedings and do not reject them as manifestly inadmissible due to lack of consent to submit to arbitration,

CONSIDERING, therefore, that it is necessary to reiterate, expressly and unambiguously, the consistent position of the Parties by means of an agreement reaffirming their common understanding on the interpretation and application of the Energy Charter Treaty, as interpreted by the CJEU, to the extent that it concerns intra-EU arbitration proceedings,

CONSIDERING that, in accordance with the judgment of the International Court of Justice of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited*, and as explained by the CJEU in the Komstroy judgment, certain provisions of the Energy Charter Treaty are intended to govern bilateral relations,

CONSIDERING therefore that this Agreement only concerns bilateral relationships between the Parties and, by extension, investors from those Member States as Contracting Parties to the Energy Charter Treaty, and that, as a result, this Agreement affects only those Contracting Parties to the Energy Charter Treaty that are governed by the law of the European Union as a Regional Economic Integration Organisation within the meaning of Article 1, point 3, of the Energy Charter Treaty and does not affect the enjoyment by the other Contracting Parties to the Energy Charter Treaty of their rights under that Treaty or the performance of their obligations,

RECALLING that the Parties have informed the Contracting Parties to the Energy Charter Treaty of their intention to conclude this Agreement,

CONSIDERING that by concluding this Agreement and in line with their legal obligations under European Union law, but without prejudice to their right to make such claims as they consider appropriate in relation to costs incurred by them as respondents in relation to intra-EU arbitration proceedings, the Parties ensure full and effective compliance with the Komstroy judgment, and underline the unenforceability of existing arbitral awards, the obligation for arbitral tribunals to immediately terminate any pending intra-EU arbitration proceedings, the obligation for arbitral institutions not to register any future intra-EU arbitration proceedings, in line with their respective powers under Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID"), concluded in Washington on 18 March 1965, and Article 12 of the Stockholm Chamber of Commerce ("SCC") arbitration rules, and the obligation for arbitral tribunals to declare that any intra-EU arbitration proceedings sought to be registered before them lack a legal basis,

UNDERSTANDING that this Agreement covers investor-State arbitration proceedings involving the Parties in intra-EU disputes based on Article 26 of the Energy Charter Treaty under any arbitration convention or set of rules, including ICSID and the ICSID arbitration rules, the Arbitration Institute of the SCC arbitration rules, the United Nations Commission on International Trade Law arbitration rules and ad hoc arbitration, and

BEARING in mind that the provisions of this Agreement are without prejudice to the right of the European Commission or any Member State to bring an action before the CJEU based on Articles 258, 259 and 260 TFEU,

HAVE AGREED AS FOLLOWS:

SECTION 1

COMMON UNDERSTANDING ON THE NON-APPLICABILITY OF ARTICLE 26 OF THE ENERGY CHARTER TREATY AS A BASIS FOR INTRA-EU ARBITRATION PROCEEDINGS

ARTICLE 1

Definitions

For the purposes of this Agreement, the following definitions shall apply:

(1) "Energy Charter Treaty" means the Energy Charter Treaty signed at Lisbon on 17 December 1994 and approved on behalf of the European Communities by Decision 98/181/EC, ECSC, Euratom on 23 September 1997, as it may be amended from time to time;

(2) "intra-EU relations" means relations between Member States or between a Member State and the European Union;

(3) "intra-EU arbitration proceedings" means any proceedings before an arbitral tribunal initiated with reference to Article 26 of the Energy Charter Treaty to resolve a dispute between, on the one hand, an investor of one Member State and, on the other hand, another Member State or the European Union.

ARTICLE 2

Common understanding on the interpretation
and continued non-applicability of Article 26
of the Energy Charter Treaty
and the lack of legal basis for intra-EU arbitration proceedings

1. The Parties hereby reaffirm, for greater certainty, that they share a common understanding on the interpretation and application of the Energy Charter Treaty according to which Article 26 of that Treaty cannot and never could serve as a legal basis for intra-EU arbitration proceedings.

The common understanding expressed in the first subparagraph is based on the following elements of European Union law:

(a) the interpretation by the CJEU of Article 26 of the Energy Charter Treaty to mean that that provision does not apply, and should never have been applied, as a basis for intra-EU arbitration proceedings; and

(b) the primacy of European Union law, recalled in Declaration No 17, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, as a rule of international law governing conflict of norms in their mutual relations, with the result that, in any event, Article 26 of the Energy Charter Treaty does not and could not apply as a basis for intra-EU arbitration proceedings.

2. The Parties reaffirm, for greater certainty, that they share the common understanding that, as a result of the absence of a legal basis for intra-EU arbitration proceedings pursuant to Article 26 of the Energy Charter Treaty, Article 47(3) of the Energy Charter Treaty does not extend, and could not have extended at any time, to such proceedings. Accordingly, Article 47(3) of the Energy Charter Treaty cannot have produced legal effects in intra-EU relations when a Member State withdrew from the Energy Charter Treaty prior to the conclusion of this Agreement and would not produce legal effects in intra-EU relations if a Party withdrew from the Energy Charter Treaty subsequently.

3. For greater certainty, the Parties are in agreement that, in accordance with the common understanding expressed in paragraphs 1 and 2 of this Article, and without prejudice thereto, Article 26 of the Energy Charter Treaty does not apply as a basis for intra-EU arbitration proceedings and Article 47(3) of the Energy Charter Treaty does not produce legal effects in intra-EU relations.

4. Paragraphs 1 to 3 are without prejudice to the interpretation and application of other provisions of the Energy Charter Treaty to the extent that they concern intra-EU relations.

SECTION 2

FINAL PROVISIONS

ARTICLE 3

Depositary

1. The Secretary-General of the Council of the European Union shall act as depositary of this Agreement (the 'Depositary').

2. The Depositary shall notify the Parties of:

(a) the deposit of any instrument of ratification, approval or acceptance in accordance with Article 5;

(b) the date of entry into force of this Agreement in accordance with Article 6(1);

(c) the date of entry into force of this Agreement for each Party in accordance with Article 6(2).

3. The Depositary shall publish this Agreement in the *Official Journal of the European Union* and notify the depositary of the Energy Charter Treaty, as well as the Energy Charter Secretariat, of its adoption and entry into force.

4. The Depositary shall invite the depositary of the Energy Charter Treaty to notify this Agreement to the other Contracting Parties to the Energy Charter Treaty.

5. This Agreement shall be registered by the Depositary with the United Nations Secretariat, in accordance with Article 102 of the Charter of the United Nations, following its entry into force.

ARTICLE 4
Reservations

No reservations shall be made to this Agreement.

ARTICLE 5
Ratification, approval or acceptance

This Agreement shall be subject to ratification, approval or acceptance.

The Parties shall deposit their instruments of ratification, approval or acceptance with the Depositary.

ARTICLE 6
Entry into force

1. This Agreement shall enter into force 30 calendar days after the date on which the Depositary receives the second instrument of ratification, approval or acceptance.

2. For each Party which ratifies, approves or accepts it after its entry into force in accordance with paragraph 1, this Agreement shall enter into force 30 calendar days after the date of deposit by such Party of its instrument of ratification, approval or acceptance.

ARTICLE 7

Authentic texts

This Agreement, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each text being equally authentic, shall be deposited in the archives of the Depositary.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, duly authorised to this effect, have signed this Agreement.

Done at …, this … day of … in the year …

For the Kingdom of Belgium,

For the Republic of Bulgaria,

For the Czech Republic,

For the Kingdom of Denmark,

For the Federal Republic of Germany,

For the Republic of Estonia,

For Ireland,

For the Hellenic Republic,

For the Kingdom of Spain,

For the French Republic,

For the Republic of Croatia,

For the Italian Republic,

For the Republic of Cyprus,

For the Republic of Latvia,

For the Republic of Lithuania,

For the Grand Duchy of Luxembourg,

For the Republic of Malta,

For the Kingdom of the Netherlands,

For the Republic of Austria,

For the Republic of Poland,

For the Portuguese Republic,

For Romania,

For the Republic of Slovenia,

For the Slovak Republic,

For the Republic of Finland,

For the Kingdom of Sweden and

For the European Union