

Vienna, 8 October 2019

ECS-8/11S-ECS-6/16S-ECS-2/13SO/08-10-2019

**Subject: Request under Article 92 of the Treaty in Cases ECS-8/11 S, ECS-6/16 S and ECS-2/13 S**

Excellency,

Please find attached the Request for measures in reference to Cases ECS-8/11 S, ECS-6/16 S and ECS-2/13 S.

Please accept, Excellency, the expression of my highest considerations.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač

**H.E. MR. VADIM BRINZAN  
MINISTER OF ECONOMY AND INFRASTRUCTURE  
REPUBLIC OF MOLDOVA**

**H.E. MRS. DRAGICA SEKULIĆ  
MINISTER OF ECONOMY  
MONTENEGRO**

**MRS. ANNE-CHARLOTTE BOURNOVILLE  
EUROPEAN COMMISSION**

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

**REQUEST**

in Cases ECS-8/11 S, ECS-6/16 S and ECS-2/13S

Submitted pursuant to Article 92(1) of the Treaty establishing the Energy Community, Articles 39 to 42 of Procedural Act No 2008/1/MC-EnC of 27 June 2008 and Articles 39 to 42 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,<sup>1</sup>

the

**SECRETARIAT OF THE ENERGY COMMUNITY**

is seeking a Decision from the Ministerial Council that

1. Bosnia and Herzegovina continues with a serious and persistent breach of its obligations within the meaning of Article 92(1) of the Treaty, as established by the Ministerial Council, by failing to implement Ministerial Council Decisions and rectifying the breaches established therein
  - 2013/04/MC-EnC of 24 October 2013 in Case ECS-8/11 and 2014/04/MC-EnC of 23 September 2014, 2015/10/MC-EnC of 16 October 2015, 2016/16/MC-EnC of 14 October 2016 and 2018/17/MC-EnC of 29 November 2018 in Case ECS-8/11S;
  - 2016/07/MC-EnC of 14 October 2016 in Case ECS-6/16 and 2018/16/MC-EnC of 29 November 2018 in Case ECS-6/16 S;
  - 2016/03/MC-EnC of 14 October 2016 in Case ECS-2/13 and 2018/13/MC-EnC of 29 November 2018 in Case ECS-2/13 S.
2. The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC and Article 3(1) of Decision 2016/16/MC-EnC is extended for one year after the adoption of the Decision extending measures at the meeting of the Ministerial Council in the second half of 2019.
3. The right of Bosnia and Herzegovina to participate in votes for Decisions under Article 91 and 92 of the Treaty is suspended.

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<sup>1</sup> Cases ECS-8/11 S and ECS-2/13 S have been initiated under the Dispute Settlement Rules of 2008, and Case ECS-6/16 S has been initiated under the Dispute Settlement Rules of 2015. Dispute Settlement Procedures adopted by the Ministerial Council in 2008 have been amended in October 2015. The wording of the respective articles is the same, with the only difference that the word "sanctions" from 2008 Rules is replaced by the word "measures" in the 2015 Rules. Pursuant to Article 46(2) of the Procedural Act of 2015 amending the Dispute Settlement Procedures, however, „[c]ases initiated already before 16 October 2015 shall be dealt with in accordance with the Procedural Act applicable before the amendments adopted on that date.“

4. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2020.

The Secretariat of the Energy Community has the honour of submitting the following Request to the Ministerial Council under Article 92(1) of the Treaty:

## I. Relevant Facts

### 1. Cases ECS-8/11 and ECS-8/11 S

- (1) On 7 October 2011, the Secretariat initiated dispute settlement proceedings against Bosnia and Herzegovina by an Opening Letter in Case ECS-8/11 for failure to fulfill its obligations under the Energy Community Treaty by not having transposed and implement the Second Energy Package<sup>2</sup> in the gas sector. On 24 October 2013, the Ministerial Council upheld the Secretariat's Reasoned Request by adopting Decision 2013/04/MC-EnC on the failure by Bosnia and Herzegovina to comply with certain obligations under the Treaty in Case ECS-8/11.<sup>3</sup> Bosnia and Herzegovina was obliged, to rectify the breaches established in Article 1 of the Decision 2013/04/MC-EnC until June 2014.
- (2) On 23 September 2014, the Ministerial Council adopted Decision 2014/04/MC-EnC establishing serious and persistent breach within the meaning of Article 92(1) of the Treaty in Case ECS-8/11 S.<sup>4</sup>
- (3) In the absence of any progress, the Ministerial Council at its meeting on 16 October 2015 decided that Bosnia and Herzegovina had failed to rectify the serious and persistent breaches identified in Decisions 2013/04/MC-EnC and 2014/04/MC-EnC and imposed measures under Article 92 of the Treaty by Decision 2015/10/MC-EnC.<sup>5</sup> The measures consisted in suspending the right of Bosnia and Herzegovina to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty, and the suspension of the application of the Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community. Moreover, the European Union, in line with Article 6 of the Treaty, was invited to take the appropriate measures for the suspension of financial support for projects in the gas sector in Bosnia and Herzegovina. The effect of the measures under Article 92 was limited to one year upon its adoption.
- (4) In 2016, an "Agreement on Removal of Serious and Persistent Breach under the Energy Community Treaty in the gas sector" signed on 13 October 2016 by the Minister of Foreign Trade and Economic Relation of Bosnia and Herzegovina, the entities' responsible ministers, the Director of the Energy Community Secretariat and the Director General for Energy at the

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<sup>2</sup> 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 Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks.

<sup>3</sup> Annex I.

<sup>4</sup> Annex II.

<sup>5</sup> Annex III.

European Commission (hereinafter, "Agreement of 13 October 2016") was signed. The Agreement endorses a draft state law<sup>6</sup> and an Action Plan prepared by the Secretariat.

- (5) While the Ministerial Council at its meeting on 14 October 2016, decided once again that Bosnia and Herzegovina had failed to rectify the serious and persistent breaches identified in the previous Decisions, and extended the measures under Article 92 of the Treaty (Decision 2016/16/MC-EnC<sup>7</sup>), it suspended the effect of the measures under Article 92 of the Treaty until 31 March 2017.
- (6) Due to failure to implement the Agreement of 13 October 2016 within the deadlines established therein, the measures already adopted under Decision 2015/10/MC-EnC took effect again after 31 March 2017 until the next meeting of the Ministerial Council in 2017. In its Conclusions, the Ministerial Council in 2017 "*regretted that no sufficient progress was made by Bosnia and Herzegovina in the transposition and implementation of Decision 2013/04/MC-EnC on the failure by Bosnia and Herzegovina to comply with certain obligations under the Treaty nor any of the subsequent decisions taken under Article 92 of the Treaty, despite the firm commitment of a state and two entity Ministers at last year's Ministerial Council.*"
- (7) On 29 November 2018, the Ministerial Council adopted Decision 2018/17/MC-EnC<sup>8</sup> holding that Bosnia and Herzegovina had failed to rectify the serious and persistent breaches identified in Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC and 2016/16/MC-EnC. In addition to the measures imposed already by the Ministerial Council in Article 2(2) of Decision 2015/10/MC-EnC related to participation in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty (related to budget) and suspension of the application of the Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community, the Ministerial Council also suspended the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas sector by all Energy Community institutions, as well as to suspend the right of Bosnia and Herzegovina to participate in votes for Measures under Article 92 of the Treaty.
- (8) Article 2(1) of Decision 2018/12/MC-EnC postponed the effect of the Measures imposed in Case ECS-8/11 S, for six months to be reactivated "*if Bosnia and Herzegovina does not rectify the failure to implement the previous Decisions adopted by the Ministerial Council.*"<sup>9</sup>
- (9) On 16 April 2019, another Joint Statement was issued<sup>10</sup> by the Prime Ministers of both entities and the State Minister for Foreign Trade and Economic Relations together with the Director of the Energy Community Secretariat, the Deputy Head of the EU Delegation and the Ambassadors of USA, UK and Germany. The parties to the Joint Statement in particular supported the adoption of the State Electricity and Gas law transposing the Third Energy Package on state level, as well as the subsequent amendments to entity-level laws, in order to ensure overall harmonization and compliance with the Third Energy Package.

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<sup>6</sup> Law on the Regulator of electricity and natural gas, transmission and trade on electricity market in Bosnia and Herzegovina.

<sup>7</sup> Annex IV.

<sup>8</sup> Annex V.

<sup>9</sup> See also: Conclusions of the Ministerial Council in 2018 of 29 November 2018.

<sup>10</sup> The Joint Statement followed a high-level meeting held between representatives of BIH authorities and representatives of International Community in BIH during the V Energy Summit held in Neum.

- (10) The issues of non-compliance by Bosnia and Herzegovina in the gas sector subject to Case ECS-8/11 include the lack of a regulatory entity with competences on State level, the lack of regulatory authorities for gas in the Federation of Bosnia and Herzegovina, the lack of proper legal, functional and account unbundling in either entity, the lack of properly set and published network tariffs, issues related to exemptions for new infrastructure, the lack of market opening as well as failure to transpose the provisions of the Gas Regulation 1775/2005 and the Security of Supply Directive 2004/67/EC.
- (11) By the date of this Request, no progress has been achieved for compliance with the Ministerial Council's Decisions or the various agreements and statements. The commitments and assurances given by Bosnia and Herzegovina's representatives to resolve the deadlock in the gas sector were not followed up by actions. The adoption of a new draft gas law is pending adoption for more than four years. No consensus on granting competences for energy regulation to the State level has been achieved. The existing legal framework currently in place does not comply with the obligations of Bosnia and Herzegovina under the Treaty, as only one of the entities – Republika Srpska - transposes the gas *acquis*, while the other entity – the Federation of Bosnia and Herzegovina – does not even comply with the Second Energy Package. Furthermore, the regulatory authority established at State level, nor any other regulatory body, has competences covering the whole territory of Bosnia and Herzegovina.
- (12) The gas sector in Bosnia and Herzegovina is currently governed by the following legal acts:
- The Law on Gas in Republika Srpska<sup>11</sup> transposes the main elements of the gas *acquis*, i.e. the Third Energy Package at the entity level (i.e without giving competences to the State-level regulatory authority).
  - In the Federation of Bosnia and Herzegovina, a 2007 government decree<sup>12</sup> fails to transpose any key principle of the gas *acquis*, in breach of both the Second and Third Energy Package. A draft Law on Gas for the Federation of Bosnia and Herzegovina has been stuck in parliament for more than three years. The draft in its present form is also not compliant with the Third Energy Package.

## 2. Cases ECS-6/16 and ECS-6/16 S

- (13) On 13 May 2016 the Secretariat initiated dispute settlement procedures against Bosnia and Herzegovina, by way of submitting a Reasoned Request for non-compliance with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 ("Third Energy Package") by 1 January 2015 by not transposing the Third Energy Package and by failure to notify transposing measures to the Secretariat.
- (14) On 14 October 2016, the Ministerial Council adopted Decision 2016/07/MC-EnC on the failure by Bosnia and Herzegovina to comply with certain obligations under Title II of the Treaty by failure to transpose the Third Energy Package in electricity and gas sectors in Case ECS-6/16.<sup>13</sup>

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<sup>11</sup> Law on Gas of Republika Srpska published in the Official Gazette RS, No. 22 from 15.06.2018.

<sup>12</sup> The Decree on Organization and Regulation of Gas Industry Sector in the Federation of Bosnia and Herzegovina published in the Official Gazette FBiH, No. 83/07.

<sup>13</sup> Annex VI.

- (15) On 29 November 2018, the Ministerial Council adopted Decision 2018/16/MC-EnC establishing serious and persistent breach within the meaning of Article 92(1) of the Treaty in Case ECS-6/16 S related to the same subject-matter.<sup>14</sup>
- (16) The Federation's Ministry of Energy, Mining and Industry<sup>15</sup> on 16 July 2019 submitted to the State Ministry of Foreign Trade and Economic Relations its comments on the draft State law transposing the electricity *acquis* of the Third Energy Package. The Ministry of Energy and Mining of Republika Srpska on 18 July 2019<sup>16</sup> informed the State Ministry that the Government of Republika Srpska issued a positive opinion on the draft State law and gave its permission to have it forwarded to the Council of Ministers of Bosnia and Herzegovina. However, the Law has not been adopted.
- (17) As it was agreed by the Joint Statement following the meeting in April 2019, referred to in paragraph 9 above, "[o]nce State law sets the legal framework, entity level laws will be adopted and amended in order to ensure overall harmonization and compliance with the EU Third Energy Package."
- (18) By the date of this Request, Bosnia and Herzegovina failed to comply with the Ministerial Council's Decision 2018/16/MC-EnC. Bosnia and Herzegovina still has not adopted the necessary national measures to transpose the Third Energy Package either in gas or electricity sector, and hence to rectify the breach established in Cases ECS-6/16 and ECS-6/16 S.

*(a) Status quo of transposition of Third Energy Package in the gas sector*

- (19) As explained in paragraph 4 above, the parties to the Agreement of October 2016, endorsed a draft state law and an Action Plan as attached to the Agreement to be adopted by 31 March 2017. However, this draft has been pending already for three years in public consultation. The entities also failed to adopt compliant, harmonized and congruent legislation. Namely, in the Federation of Bosnia and Herzegovina, a 2007 government decree is in place which fails to transpose any key principle of the gas *acquis*, in breach of both the Second and Third Energy Package. Republika Srpska has adopted a Law on Gas in 2018 which transposes the main elements of the Third Energy Package.
- (20) In any event, even if both entities adopted separate laws that would not be sufficient to comply with the obligation for transposing and implementing the Third Energy Package, to the extent they fail (as they do) to establish or designate one or more competent bodies with the function of regulatory authorities which would cover - alone or complementary - the entire gas market in Bosnia and Herzegovina.

*(b) Status quo of transposition of Third Energy Package in the electricity sector*

- (21) A compliant legal framework on state and entities' level transposing the Third Energy Package does not exist. At State level, three non-compliant primary laws governing the transmission and international trade activity are still in effect.<sup>17</sup> A draft Law on Regulator,

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<sup>14</sup> Annex VII.

<sup>15</sup> No. 03-17-1115/17.

<sup>16</sup> No. 05.05/020-1552-1/17.

<sup>17</sup> The Law on Transmission of Electric Power, Regulator and System Operator of Bosnia and Herzegovina, Official Gazette BiH, no. 7/02, 21.03.2002; the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina as amended by Law no. 76/09 (18.09.2009) and Law no. 20/14 (12.03.2014); the Law Establishing an Independent System Operator for the Transmission System of Bosnia and Herzegovina Official Gazette BiH, no.35/04.

Transmission and Power Market and the complementary law on the establishment of a transmission system operator for electricity have never been adopted. The entities' legislation regulate activities related to electricity production, electricity distribution, electricity supply, and trading on the electricity markets in the respective territories. A Law on Electricity of 2008<sup>18</sup> and the Energy Law of 2009<sup>19</sup> govern the electricity sector in Republika Srpska. The Electricity Law of 2013<sup>20</sup> governs the electricity sector in the Federation Bosnia and Herzegovina. In Brčko District, a Law on Electricity governs generation, distribution and supply of electricity.<sup>21</sup>

- (22) A draft Electricity Law in Republika Srpska was submitted to the Parliament for adoption on 11 July 2019. Even if adopted, this law would not be sufficient for complying with the Ministerial Council's decisions because it does not fully transpose the Third Energy Package. Namely, provisions on unbundling and operation of transmission, wholesale market liberalization and cross-border cooperation and exchange of electricity, as well as vulnerable customers' protection, are not addressed by this draft. In any event, it does not cover the entire electricity sector in Bosnia and Herzegovina.
- (23) At this moment, legislation failing to transpose the Third Energy Package for the electricity sector in Bosnia and Herzegovina are still in force – on the state level, in the Federation of Bosnia and Herzegovina and in Republika Srpska.

### 3. Cases ECS-2/13 and ECS-2/13 S

- (24) On 11 February 2013, the Secretariat initiated dispute settlement proceedings against Bosnia and Herzegovina in Case ECS-2/13 by way of an Opening Letter. On 14 October 2016, the Ministerial Council adopted Decision 2016/03/MC-EnC<sup>22</sup> on the failure to transpose and implement some provisions of Directive 1999/32/EC.<sup>23</sup> According to the Decision, Bosnia and Herzegovina failed to ensure that heavy fuel oils are not used if their sulphur content exceeds 1.00 % by mass on its entire territory in line with Article 3(1) of Directive 1999/32/EC. It also failed to ensure that gas oils are not used if their sulphur content exceeds 0.1 % by mass on its entire territory, in line with Article 4(1) of Directive 1999/32/EC.
- (25) On 29 November 2018, the Ministerial Council adopted Decision 2018/13/MC-EnC establishing a serious and persistent breach by Bosnia and Herzegovina under Article 92(1) of the Treaty in Case ECS-2/13 S related to the same subject matter.<sup>24</sup>
- (26) On 26 July 2019, the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina informed the Secretariat about a new draft Decision on the Quality of Liquid Petroleum Fuels. However, the draft Decision is not able to dispel the concerns presented in the Reasoned Request. Article 35 of the draft Decision provides a general and unconditional

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<sup>18</sup> Official Gazette of RS, no. 8/08. This Law has been amended by Law no. 34/09 (08.04.2009), 92/09 (24.09.2009) and 01/11 (21.12.2010).

<sup>19</sup> Official Gazette of RS, no. 49/09.

<sup>20</sup> Official Gazette FBiH, no. 66/13.

This Law has been amended by Law no. 94/15 (03.12.2015).

<sup>21</sup> Official Gazette Brčko District BiH, no. 36/04. This Law has been amended by Law no. 28/07 (26.06.2007), Law no. 61/10 (29.12.2010), and Law no. 4/13 (27.02.2013).

<sup>22</sup> Annex VIII.

<sup>23</sup> Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC.

<sup>24</sup> Annex IX.

exemption for the domestic producer, allowing it to continue to produce heavy fuel oils above the 1.00 % threshold and gas oils above the 0.10 % threshold.

- (27) This means that the domestic producer of heavy fuel oil and gas oil will still be allowed to place fuels on the market that are not in compliance with Articles 3(1) and 4(1) of Directive 1999/32/EC. In the reply to the Opening Letter in this case, Bosnia and Herzegovina argued that “[T]his exemption for medium fuel oils ‘S’ produced in Bosnia and Herzegovina is given in order for the single domestic producer to be able to sell these types of fuel, and above all to increase the security of supply.” Furthermore, the title of the draft Decision (“Exemption from application regarding sulphur and aromatic hydrocarbons content”) leaves no doubt about the legislator’s intent.
- (28) Therefore, the Secretariat respectfully submits that the general and unconditional exemption for the domestic producer, the concern against which formed part of Case ECS-2/13 since the opening of the dispute settlement procedures, would remain unresolved even if the draft Decision were to be adopted by the Government of Bosnia and Herzegovina.

#### 4. *Continued existence of a serious and persistent breaches in Cases ECS-8/11 S, ECS-6/16 S and ECS-2/13 S*

- (29) In Case ECS-8/11 S, the Ministerial Council by Decision 2014/04/MC-EnC adopted on 23 September 2014, determined a number of serious and persistent breaches of Energy Community law based on its earlier findings in Decision 2013/04/MC-EnC. By Decision 2015/10/MC-EnC, upon a Request submitted by the Secretariat, the Ministerial Council decided that Bosnia and Herzegovina failed to rectify the serious and persistent breaches and imposed measures, which were extended by Decisions 2016/16/MC-EnC and 2018/17/MC-EnC. As noted in paragraph 7 of this Request, the Ministerial Council Decision 2018/17/MC-EnC took effect within six months from its adoption, i.e. on 29 May 2019, because Bosnia and Herzegovina did not rectify the failure to implement the previous Decisions adopted by the Ministerial Council.
- (30) In Case ECS-6/16 S, on 29 November 2018, the Ministerial Council adopted Decision 2018/16/MC-EnC establishing a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
- (31) In Case ECS-2/13 S, on 29 November 2018, the Ministerial Council adopted Decision 2018/13/MC-EnC establishing a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
- (32) Despite numerous reminders by the Energy Community institutions and reports about the obligations of Bosnia and Herzegovina to comply with the obligations and to rectify the serious and persistent breaches established by Ministerial Council decisions, the breaches identified by the Ministerial Council have not been rectified by legislation or any other appropriate manner.<sup>25</sup> According to settled case-law of the Court of Justice of the European Union, draft legislation prepared but not yet adopted and entered into force cannot be considered as measures necessary to comply with a Decision of the Ministerial Council.<sup>26</sup>

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<sup>25</sup> See para. 11 of this Request.

<sup>26</sup> See, to that effect, Case C-430/98 *Commission v Luxembourg*, paragraphs 8-13 (ECLI:EU:C:1999:520); Case C-648/13 *Commission v Poland*, paragraphs 129-132 (ECLI:EU:C:2016:490).

- (33) Bosnia and Herzegovina has also not notified the Secretariat about any legislation transposing the Third Energy Package within its national legal framework, despite the fact that the deadline expired on 1 January 2015, and has not rectified Ministerial Council decision establishing a serious and persistent breach in Case ECS-6/16 S. Having only a draft legislation prepared in Republika Srpska in the electricity sector, and the Gas Law adopted (only) by the same entity, cannot bring Bosnia and Herzegovina as a Contracting Party in compliance with the *acquis*.
- (34) Bosnia and Herzegovina has also not taken any measures in order to comply with the provisions of Directive 1999/32/EC, and has not rectified Ministerial Council Decision 2018/13/MC-EnC establishing a serious and persistent breach in Case ECS-2/13 S.
- (35) As follows from the account given above, non-compliance by Bosnia and Herzegovina with the *acquis communautaire* and the previous Decisions of the Ministerial Council still persists and the serious and persistent breaches identified in Decisions 2014/04/MC-EnC, 2018/16/MC-EnC and 2018/13/MC-EnC have not been remedied to date.
- (36) All breaches have been qualified by the Ministerial Council as serious and persistent under Article 92 of the Treaty in 2014 and 2018 respectively. The Secretariat respectively submits that with every year of continued non-compliance, seriousness and persistence of the respective breaches increase.

#### 5. *Failure to comply*

- (37) For the reasons given above, the Secretariat submits that the violations by Bosnia and Herzegovina of its obligations under the Treaty established by:
- Decision 2013/04/MC-EnC in Case ECS-8/11 and qualified as serious and persistent breaches by Decision 2014/04/MC-EnC in Case ECS-8/11 S;
  - Decision 2016/07/MC-EnC in Case ECS-6/16 and qualified as serious and persistent breaches by Decision 2018/16/MC-EnC in Case ECS-6/16 S and
  - Decision 2016/03/MC-EnC in Case ECS-2/13 and qualified as serious and persistent breaches by Decision 2018/13/MC-EnC in Case ECS-2/13 S

continue to exist. Therefore, the Secretariat follows up on the Ministerial Council's requests in Decisions 2018/17/MC-EnC, 2018/16/MC-EnC and 2018/13/MC-EnC of 29 November 2019 and submits this Request to the Ministerial Council for extension of measures under Article 92 of the Treaty in Case ECS-8/11 S, and to impose measures under Article 92 of the Treaty in Cases ECS-6/16 S and ECS-2/13 S.

## II. Relevant Energy Community Law

- (38) 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 this Treaty".*

(39) Article 76 of the Treaty reads:

*"... A Decision is legally binding in its entirety upon those to whom it is addressed. ..."*

(40) 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."*

(41) Article 92(1) of the Treaty reads:

*"At the request of a Party, the Secretariat or the Regulatory Board, the Ministerial Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its obligations under this Treaty and may suspend certain of the rights deriving from application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty."*

(42) Article 37 of the Dispute Settlement Procedures<sup>27</sup> ("Binding nature of the decision") reads:

*"The decision by the Ministerial Council shall be binding on the Parties concerned from the date of its adoption."*

(43) Article 38 of the Dispute Settlement Procedures ("Consequences of a decision establishing failure to comply") reads:

*"(1) Where the Ministerial Council establishes the existence of a breach of a Party's obligation pursuant to Article 91 of the Treaty, the Party concerned shall take all appropriate measures to rectify the breach and ensure compliance with Energy Community law.*

*(2) The Secretariat, in accordance with Article 67(b) of the Treaty, shall review the proper implementation by the Party concerned of the decision by the Ministerial Council, and may again bring the matter before the Ministerial Council on the grounds of a failure to take the necessary measures to comply with the decision."*

(44) Article 39 of the Dispute Settlement Procedures ("Serious and persistent breach") reads:

*"The Ministerial Council shall establish the existence of a serious and persistent breach by a Party of its obligations under the Treaty taking into account the particularities of each individual case."*

(45) Article 40 of the Dispute Settlement Procedures ("Request") reads:

*"(1) A Party, the Secretariat or the Regulatory Board may request the Ministerial Council to determine the existence of a serious and persistent breach without a preliminary procedure.*

*(2) The request may follow up on a prior decision taken by the Ministerial Council under Article 91 of the Treaty or raise a new issue.*

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<sup>27</sup> Even though the Dispute Settlement Rules of 2008 have been amended in 2015 (PA/2015/04/MC-EnC), according to Article 46(2) of the amended Dispute Settlement Rules, cases initiated before 16 October 2015 are dealt with under the Dispute Settlement Rules of 2008.

*(3) The request shall set out the allegations against the Party concerned in factual and legal terms. It shall also contain a proposal as to concrete sanctions to be taken in accordance with Article 92(1) of the Treaty.”*

(46) Article 41 of the Dispute Settlement Procedures (“Decision-making procedure”) reads:

*(1) The Presidency shall, within seven days after receiving it, forward the request to the Party concerned and ask it for a reply to the allegations made in the request.*

*(2) The Presidency and the Vice-Presidency may ask the Advisory Committee for its written opinion.*

*(3) The decision by the Ministerial Council on the existence of a serious and persistent breach shall be taken in accordance with Articles 92(1) and 93 of the Treaty.*

*(4) The decision taken by the Ministerial Council shall be made publicly available on the Secretariat's website.*

(47) Article 42 of the Dispute Settlement Procedures (“Measures”) reads:

*“(1) In the decision establishing the existence of a serious and persistent breach, the Ministerial Council shall determine measures in accordance with Article 92(1) of the Treaty and specify a time-limit.*

*(2) The obligations of the Party concerned under the Treaty shall in any case continue to be binding on that Party.*

*(3) The Ministerial Council shall at each subsequent meeting verify that the grounds continue to apply on which the decision establishing the existence of a serious and persistent breach was made and measures were imposed.”*

### **III. Reasons**

1. *Necessity for imposing and extending the duration of the measures under Article 92(1) of the Treaty*

(48) By Decision 2015/10/MC-EnC in Case ECS-8/11 S, the Ministerial Council for the first time adopted measures under Article 92 of the Treaty. The measures against Bosnia and Herzegovina have been extended on 29 November 2018 by Decision 2018/17/MC-EnC. In addition to the original measures imposed by the Ministerial Council in 2015, which consisted in the suspension of the participation in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty (related to budget) and suspension of the Energy Community Reimbursement Rules to the representatives of Bosnia and Herzegovina for meetings organized by the Energy Community, the Ministerial Council in 2018 imposed also measures to suspend the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas sector and suspended the right of Bosnia and Herzegovina to participate in votes for Measures under Article 91 of the Treaty.

(49) For the serious and persistent breaches identified in Cases ECS-6/16 S and ECS-2/13 S, the Ministerial Council has not imposed measures under Article 92 of the Treaty so far.

- (50) Bosnia and Herzegovina is the only Contracting Party, which still has not even implemented the key features of the Second Package's laid down by Directive 2003/55/EC. It is also the only Contracting Party that has failed to implement the Third Energy Package even though those legal acts were incorporated in the Energy Community in 2011 and the deadline for transposition expired almost five years ago in January 2015. Furthermore, despite the dispute settlement procedure going on since 2013, Bosnia and Herzegovina failed to transpose and implement the provisions of Directive 1999/32/EC, for which the deadline expired more than seven years ago, in January 2012.
- (51) The persistent and serious state of non-compliance of Bosnia and Herzegovina with the key *acquis* in three main areas of work of the Energy Community also seriously compromises the transposition of other upgraded pieces of EU *acquis* including technical rules such as Network Codes and Guidelines stemming from the Third Energy Package. The Third Package now forms the basis for market reform and integration throughout the Energy Community. Among other things, it requires unbundling of transmission system operators. None of the transmission system operators in the country have been unbundled or certified. The Third Energy Package also upgrades the tasks, competences and independence of regulatory authorities significantly. Without having such authorities in place for its entire territory – and actually at the State-level – Bosnia and Herzegovina necessarily fails to implement the Third Package and fall further behind the other Contracting Parties. The absence of regulatory authorities in the entire territory of Bosnia and Herzegovina compromises development of new infrastructure such as the projects listed as Projects of Energy Community Interest or the South Stream project, which might require exemptions in which the national regulatory authority will have to play the decisive role.
- (52) As regards Directive 1999/32/EC, there is scientific consensus on the fact that sulphur which is naturally present in oil and coal is the dominant source of sulphur dioxide emissions which are one of the main causes of 'acid rain' and one of the major causes of the air pollution experienced in many urban and industrial areas.<sup>28</sup> Acidification and atmospheric sulphur dioxide damages sensitive ecosystems as well as buildings and the cultural heritage and can have significant effects on human health, particularly among those sectors of the population suffering from respiratory diseases. Emissions of sulphur dioxide contribute significantly to the problem of acidification and sulphur dioxide also has a direct effect on human health and on the environment. The lack of action of Bosnia and Herzegovina to transpose the provisions of Directive 1999/32/EC into domestic law and therefore combat air pollution for bottom of the barrel petroleum products clearly hinders the attainment of important health and environmental objectives.
- (53) These failures amount to an outright denial of the will and capability to implement Energy Community law in core areas of gas, electricity and environment. Tolerance of such behaviour by the Energy Community institutions would mean to admit their own lack of will or capability to protect the very essence of the Energy Community, the implementation of European law in the Energy Community and the respect of commitments taken by its Parties. Since Bosnia and Herzegovina has failed to rectify several breaches of the Treaty for more than ten years, the non-extension of the measures for additional year would be understood as acceptance by the Energy Community institutions of the failure to remedy serious and persistent breaches.
- (54) The Secretariat thus requests extension of the measures imposed by Decisions 2015/10/MC-EnC, Decision 2016/16/MC-EnC and 2018/17/MC-EnC related to suspension of the

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<sup>28</sup> WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulfur dioxide (2006).

participation in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty, suspension of application of the Energy Community Reimbursement Rules to representatives of Bosnia and Herzegovina for meetings organized by the Energy Community and suspension of the right of Bosnia and Herzegovina to participate in votes for Measures under Article 91 of the Treaty) for an additional year. The Secretariat further requests extending the measures to include suspension of the right of Bosnia and Herzegovina to participate in votes for Measures under Article 92 of the Treaty due to the lack of progress and the additional failure to comply with decisions establishing serious and persistent breaches in Cases ECS-8/11 S, ECS-6/16 S and ECS-2/13 S.

- (55) Since Bosnia and Herzegovina has failed to comply with the Energy Community *acquis* stemming from the Second Energy Package, has failed to transpose the Third Energy Package as well as key provisions from the *acquis* on environment the Secretariat considers suitable and appropriate to request the Ministerial Council to suspend the voting rights of Bosnia and Herzegovina in relation to Measures to be adopted under Article 91 and 92 of the Treaty, i.e. in dispute settlement procedures. It would be inappropriate for Bosnia and Herzegovina to vote when a decision is to be taken by the Ministerial Council concerning infringement action against another Party to the Treaty when Bosnia and Herzegovina itself has not even implemented the Second Energy Package, is the only Contracting Party that has not transposed the Third Energy Package or the Sulphur in Fuels Directive, and has disregarded almost all decisions taken by the Ministerial Council under Articles 91 and 92 so far.<sup>29</sup> Bosnia and Herzegovina is the Contracting Party to which the Ministerial Council has addressed the highest number of decisions - six decisions - establishing breaches under Article 91 of the Treaty, three of which have been subsequently qualified as serious and persistent breaches of Energy Community law. It is also the only Contracting Party to whom measures have been imposed by the Ministerial Council and those measures have been extended for four years (since 2015).
- (56) On the contrary, the Secretariat does not request the extension of the measures imposed by the Ministerial Council in Decision 2018/17/MC-EnC consisting in suspension of the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas for the two additional areas (electricity and environment) subject to Cases ECS-6/16 S and ECS-2/13 S. In the Secretariat's view extending the measure related to voting for new *acquis* in these two areas as well may have an effect on disengaging the authorities of Bosnia and Herzegovina further from participation in the Energy Community institutions and procedures.
- (57) As regards the suspension of the application of the Secretariat's Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community, the Secretariat considers that this measure was effective and should be therefore maintained further. Out of 61 meetings<sup>30</sup> organised by the Energy Community after the Ministerial Council decisions 2018/17/MC-EnC, 2018/16/MC-EnC and 2018/13/MC-EnC in 2018, the Secretariat did invite but did not reimburse the representatives of Bosnia and Herzegovina. Nonetheless, 82 representatives from Bosnia and Herzegovina attended 43 of those meetings at their own expenses. In fact, the number of representatives from Bosnia and Herzegovina that attended Energy Community meetings increased in 2018/2019 in

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<sup>29</sup> Bosnia and Herzegovina has rectified only on ebreach after Ministerial Council Decision under Article 91 in Case ECS-4/14.

<sup>30</sup> Those meetings concern institutional meetings of the Energy Community (PHLG, ERB, for a...) as well as meetings of the Task Forces and Working Groups of the Energy Community.

comparison with the previous period.<sup>31</sup> These facts show that, even though the suspension of reimbursement for the representatives from Bosnia and Herzegovina did not have an effect to exclude this Party from the ongoing integration process, taking place in the fora and meetings organized by the Energy Community, the suspension of the reimbursement rules had an effect in increasing the costs of Bosnia and Herzegovina. Therefore, the Secretariat considers it suitable and appropriate to once again extend the validity and the duration of this measure for one more year until end 2020.

- (58) Finally, the Secretariat sees no reason why Bosnia and Herzegovina should benefit from any new financial assistance and support concerning gas infrastructure projects. Financial support by a Party of the Energy Community to another Party's infrastructure projects despite the latter's refusal to adopt and implement the legislation to govern that infrastructure based on the European Union's *acquis* would amount to tolerating and supporting the breach of that *acquis*. Therefore, the Secretariat considers it suitable and appropriate for the Ministerial Council to invite the European Union, in line with Article 6 of the Treaty, extend the measure under Article 3(1) of Decision 2016/16/MC-EnC for one more year until the meeting of the Ministerial Council in the second half of 2020, suspending the financial support to projects in the gas and extending it to the electricity sector in Bosnia and Herzegovina, including those identified as priorities in the process of implementation of Regulation 347/2013, as adapted by the Ministerial Council. The second list is expected to be adopted by the Ministerial Council at its meeting in 2018, and depending on whether Bosnia and Herzegovina would rectify the serious and persistent breaches of Energy Community law, the Ministerial Council will review the necessity of maintaining this measure further.
- (59) Given that the breaches subject to this Request amount to a factual refusal for the past ten years to implement the core elements of Energy Community legislation in the area of gas, electricity and environment the Secretariat considers the extension of the measures under Article 92 of the Treaty for another year are both necessary and proportionate to make Bosnia and Herzegovina respect its commitments under the Treaty.
- (60) For these reasons, the Secretariat proposes that the Ministerial Council at its meeting in December 2019 to extend the validity of the measures adopted in its Decision 2015/10/MC-EnC, Decision 2016/16/MC-EnC and 2018/17/MC-EnC until the meeting of the Ministerial Council in the second half of 2019. It also proposes extending the measures suspending voting rights related to dispute settlement cases under Article 91 of the Treaty.

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<sup>31</sup> For reference, in the period 2015/2016, 61 meetings were held, and 50 representatives from Bosnia and Herzegovina were present at 22 meetings.

## ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community in accordance with Article 92(1) of the Treaty to declare that:

1. Bosnia and Herzegovina continues with a serious and persistent breach of its obligations within the meaning of Article 92(1) of the Treaty, as established by the Ministerial Council, by failing to implement Ministerial Council Decisions and rectifying the breaches established therein
  - 2013/04/MC-EnC of 24 October 2013 in Case ECS-8/11 and 2014/04/MC-EnC of 23 September 2014, 2015/10/MC-EnC of 16 October 2015, 2016/16/MC-EnC of 14 October 2016 and 2018/17/MC-EnC of 29 November 2018 in Case ECS-8/11S;
  - 2016/07/MC-EnC of 14 October 2016 in Case ECS-6/16 and 2018/16/MC-EnC of 29 November 2018 in Case ECS-6/16 S;
  - 2016/03/MC-EnC of 14 October 2016 in Case ECS-2/13 and 2018/13/MC-EnC of 29 November 2018 in Case ECS-2/13 S.
2. The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC and Article 3(1) of Decision 2016/16/MC-EnC is extended for one year after the adoption of the Decision extending measures at the meeting of the Ministerial Council in the second half of 2019.
3. The right of Bosnia and Herzegovina to participate in votes for Decisions under Article 91 and 92 of the Treaty is suspended.
4. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2020.

Vienna, 8 October 2019

On behalf of the Secretariat of the Energy Community

Janez Kopač  
Director

A blue ink signature of Janez Kopač.

Dirk Buschle  
Deputy Director / Legal Counsel

A black ink signature of Dirk Buschle.

## List of Annexes

Annex I	Ministerial Council Decision 2013/04/MC-EnC
Annex II	Ministerial Council Decision 2014/04/MC-EnC
Annex III	Ministerial Council Decision 2015/10/MC-EnC
Annex IV	Ministerial Council Decision 2016/16/MC-EnC
Annex V	Ministerial Council Decision 2018/17/MC-EnC
Annex VI	Ministerial Council Decision 2016/07/MC-EnC
Annex VII	Ministerial Council Decision 2018/16/MC-EnC
Annex VIII	Ministerial Council Decision 2016/03/MC-EnC
Annex IX	Ministerial Council Decision 2018/13/MC-EnC

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2013/04/MC-EnC: on the failure by Bosnia and Herzegovina to comply with certain obligations under the Treaty**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 91(1)(a) thereof,

Upon the Reasoned Request by the Secretariat in Case ECS-8/11 dated 21 May 2013;

Having regard to the absence of a Reply by Bosnia and Herzegovina;

Having regard to the Opinion by the Advisory Committee established under Article 32 of Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty, dated 11 September 2013;

ADOPTS THIS DECISION:

### *Article 1*

#### **Failure by Bosnia and Herzegovina to comply with certain obligations under the Treaty**

Bosnia and Herzegovina,

1. by failing to designate one or more competent bodies with the function of regulatory authorities to cover the entire gas sector in Bosnia and Herzegovina, fails to comply with Article 25 of Directive 2003/55/EC;
2. by failing to implement the requirement of legal unbundling of transmission system operators from other activities not relating to transmission, fails to comply with Article 9(1) of Directive 2003/55/EC;
3. by failing to ensure the independence of the transmission system operators in terms of its organization and decision-making from other activities not relating to transmission, fails to comply with Article 9(1) and (2) of Directive 2003/55/EC;
4. by failing to obligate the transmission system operator of the Federation of Bosnia and Herzegovina to establish a compliance programme, fails to comply with Article 9(2)d of Directive 2003/55/EC;
5. by failing to implement the obligation to audit and publish the accounts of natural gas undertakings, fails to comply with Article 17(2) of Directive 2003/55/EC. 6. by failing to set and apply separate transmission tariffs in Republika Srpska, fails to comply with Articles 18(1) and 25(2) of Directive 2003/55/EC as well as Article 3 of Regulation 1775/2005;

7. by maintaining a possibility for negotiated access to the transmission system in the Federation of Bosnia and Herzegovina, fails to comply with Article 18(1) of Directive 2003/55/EC;
8. by failing to approve and to publish transmission and distribution tariffs (or a corresponding methodology) in the Federation of Bosnia and Herzegovina, fails to comply with Article 18(1) of Directive 2003/55/EC and Article 3 of Regulation 1775/2005,
9. by failing to require the involvement of a regulatory authority in the procedure for exempting major new gas infrastructures from certain provisions of Directive 2003/55/EC, and by not requiring an exemption decision to be reasoned and published in the Federation of Bosnia and Herzegovina, fails to comply with Article 22 of Directive 2003/55/EC;
10. by failing to grant eligibility to all „non-household“ customers in the Federation of Bosnia and Herzegovina, fails to comply with Article 23(1)(b) of Directive 2003/55/EC;
11. by the transmission system operator in Republika Srpska failing to offer third party access services other than firm services and only for one year ahead, fails to comply with Article 4(1)(b) and (c) of Regulation 1775/2005;
12. by the transmission system operator in Republika Srpska failing to balance the gas system in accordance with balancing rules, and to set cost-reflective imbalance charges and publish them, fails to comply with Article 7(1) and (3) of Regulation 1775/2005;
13. by failing to provide for effective, proportionate and dissuasive penalties for non-compliance with the obligations under the Rulebook on the Operation of Transmission Network in Republika Srpska, fails to comply with Article 13 of Regulation 1775/2005;
14. by failing to adopt appropriate legislation and to apply it by the transmission system operator of the Federation of Bosnia and Herzegovina, fails to comply with Articles 4, 5, 6, 7,8 and 13 of Regulation 1775/2005.

For the reasons sustaining these findings, reference is made to the Reasoned Request.

*Article 2*

**Follow-up**

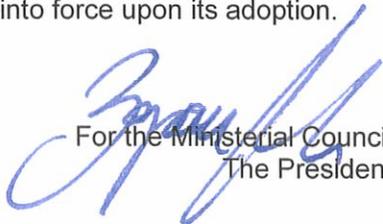
Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law, in cooperation with the Secretariat, by June 2014. Bosnia and Herzegovina shall report to the Ministerial Council about the measures taken.

*Article 3*

**Addressee and entry into force**

This Decision is addressed to Bosnia and Herzegovina and enters into force upon its adoption.

Done at Belgrade, 24.10.2013



For the Ministerial Council  
The President

## **DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY**

**D/2014/04/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1)(a) thereof, as well as Articles 39 to 41 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty,

On the basis of Ministerial Council Decision 2013/04/MC-EnC of 24 October 2013 in Case ECS-8/11,

Having regard to the failure by Bosnia and Herzegovina to rectify all breaches identified in Article 1 of Decision 2013/04/MC-EnC, and ensure compliance with Energy Community law by June 2014, as requested by Article 2 of Decision 2013/04/MC-EnC,

Having regard to the Ministerial Council conclusion of 24 October 2013 to consider the failure to adopt legislation in compliance with Directive 2009/73/EC and Regulation (EC) 715/2009 by June 2014 as a serious and persistent breach within the meaning of Article 92 of the Treaty,

Taking note of the achievements in Republika Srpska and the adoption of a Gas Law in the Federation of Bosnia and Herzegovina,

Considering that the Gas Law of the Federation of Bosnia and Herzegovina is based on a draft which was reviewed already in the procedure leading up to Decision 2013/04/MC-EnC, and is not suitable to rectify the breaches identified by that Decision,

Considering that breaches of Energy Community law by that entity are attributable to Bosnia and Herzegovina as a Contracting Party to the Treaty,

Upon Request by the Secretariat,

HAS ADOPTED THIS DECISION:

### **Article 1 Serious and persistent breach**

1. The failure by Bosnia and Herzegovina
  - a. to designate one or more competent bodies with the function of regulatory authorities to cover the entire gas sector in Bosnia and Herzegovina,

- b. to implement the requirement of legal and functional unbundling of all its transmission system operators,
- c. to exclude the possibility for negotiated access to the transmission system and to approve and to publish transmission tariffs (or a corresponding methodology) for all transmission system operators, and
- d. to effectively open the market for all non-household customers

constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.

- 2. For the reasons sustaining these findings, reference is made to the Secretariat's Request.

### **Article 2 Follow-up**

1. Bosnia and Herzegovina shall adopt legislation compliant with Directive 2009/73/EC and Regulation (EC) 715/2009 and present to the Ministerial Council at its next meeting.

2. The Secretariat is invited to offer assistance to Bosnia and Herzegovina in the legislative process and monitor compliance with the *acquis communautaire* in this respect.

### **Article 3 Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Kyiv on 23 September 2014

For the Presidency



## DECISION

### OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2015/10MC-EnC: on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1) thereof, as well as Articles 39 to 41 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty,

Having regard to Ministerial Council Decision 2013/04/MC-EnC of 24 October 2013 in Case ECS-8/11,

On the basis of Ministerial Council Decision 2014/04/MC-EnC of 23 September 2014 in Case ECS-8/11, considering the failure to adopt legislation in compliance with Directive 2009/73/EC and Regulation (EC) 715/2009 as a serious and persistent breach within the meaning of Article 92 of the Treaty,

Having regard to the failure by Bosnia and Herzegovina to rectify all breaches identified in Article 1 of Decision 2013/04/MC-EnC and Article 1 of Decision 2014/04/MC-EnC, and ensure compliance with Energy Community law as requested by Article 2 of Decision 2014/04/MC-EnC,

Having regard to the Ministerial Council conclusion of 23 September 2014 recalling the possibility to impose measures under Article 92 at its next meeting in 2016,

Considering the assistance provided by the Secretariat by submitting a draft gas legislation to the authorities of Bosnia and Herzegovina,

Considering that no progress has been achieved to date in adopting a compliant gas legislation rectifying the breaches identified by Decisions 2013/04/MC-EnC and 2014/04/MC-EnC,

Considering that breaches of Energy Community law by its entities are attributable to Bosnia and Herzegovina as a Contracting Party to the Treaty,

Upon Request by the Secretariat,

HAS ADOPTED THIS DECISION:

**Article 1**  
**Failure to rectify serious and persistent breach**

Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC and 2014/04/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.

**Article 2**  
**Measures under Article 92**

1. The right of Bosnia and Herzegovina to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty is suspended.
2. The Secretariat is requested to suspend the application of its Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community.
3. The effect of the measures under Article 92 listed in this Article is limited to one year upon its adoption. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures at its next meeting in 2016.

**Article 3**  
**Follow-up**

1. The European Union, in line with Article 6 of the Treaty, will, during the period of infringement, analyse appropriate measures with regard to the suspension of financial support to projects in the gas sector in Bosnia and Herzegovina which should have no influence on the possibility to rectify the identified breaches.
2. Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2013/04/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2016.
3. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*.

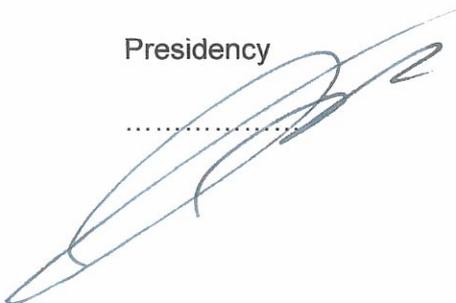
**Article 4**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Tirana on 16 October 2015

For the Ministerial Council

Presidency

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## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

### **D/2016/16/MC-EnC: on extending the measures imposed on Bosnia and Herzegovina under Article 92(1) of the Treaty**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1) thereof, as well as Articles 39 to 41 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty;

Having regard to Ministerial Council Decision 2013/04/MC-EnC of 24 October 2013 in Case ECS-8/11;

On the basis of Ministerial Council Decision 2014/04/MC-EnC of 23 September 2014 in Case ECS-8/11, considering the failure to adopt legislation in compliance with Directive 2009/73/EC and Regulation (EC) 715/2009 as a serious and persistent breach within the meaning of Article 92 of the Treaty;

Having regard to Ministerial Council Decision 2015/10/MC-EnC of 16 October 2015 imposing the measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty;

Having regard to the continuous failure by Bosnia and Herzegovina to rectify all breaches identified in Article 1 of Decision 2013/04/MC-EnC and Article 1 of Decision 2014/04/MC-EnC, and ensure compliance with Energy Community law as requested by Article 2 of Decision 2014/04/MC-EnC;

Having regard to the failure by Bosnia and Herzegovina to take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2013/04/MC-EnC and to report to the Ministerial Council on any tangible progress thereto in 2016 as requested by Article 2 of Decision 2015/10/MC-EnC;

Considering the overall assistance provided by the Secretariat to Bosnia and Herzegovina in drafting, assessing, reviewing and adjusting a draft gas legislation as well as organising and moderating common work with various stakeholders in the gas sector;

Considering that no progress has been achieved to date in adopting a compliant gas legislation rectifying the breaches identified by Decision 2013/04/MC-EnC and 2014/04/MC-EnC;

Considering that breaches of Energy Community law by its entities are attributable to Bosnia and Herzegovina as a Contracting Party to the Treaty;

Upon Request by the Secretariat;

HAS ADOPTED THIS DECISION:

**Article 1**  
**Failure to rectify serious and persistent breach**

Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC and 2015/10/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.

**Article 2**  
**Extension of measures under Article 92**

The duration of the measures under Article 92 of the Treaty imposed in Article 2 of Decision 2015/10/MC-EnC is suspended until 31 March 2017 starting from the date when the Minister of the Federation of Bosnia and Herzegovina notifies the Ministerial Council of changes to the conclusions adopted by his Government on 22 September 2016.

**Article 3**  
**Follow-up**

1. The European Union, in line with Article 6 of the Treaty, is invited to take the appropriate measures for the suspension of financial support granted to Bosnia and Herzegovina in the sectors covered by the Treaty.

2. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*.

3. In any event, if no State Law is adopted by 31 March 2017, the duration of the measures under Article 2 of Decision 2015/10/MC-EnC is extended until the next meeting of the Ministerial Council. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its next meeting in 2017.

**Article 4**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Sarajevo on 14 October 2016

For the Presidency



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## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

### **2018/17/MC-EnC on extending the measures imposed on Bosnia and Herzegovina under Article 92(1) of the Treaty**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1) thereof, as well as Articles 39 to 41 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty;

Having regard to Ministerial Council Decision 2013/04/MC-EnC of 24 October 2013 in Case ECS-8/11;

Having regard to Ministerial Council Decision 2013/04/MC-EnC of Ministerial Council Decision 2014/04/MC-EnC of 23 September 2014 on a serious and persistent breach within the meaning of Article 92 of the Treaty;

Having regard to Ministerial Council Decision 2015/10/MC-EnC of 16 October 2015 imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty;

Having regard to Ministerial Council Decision 2016/16/MC-EnC of 14 October 2016 extending the measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty;

Having regard to the continuous failure by Bosnia and Herzegovina to rectify all breaches identified in Article 1 of Decision 2013/04/MC-EnC and Article 1 of Decision 2014/04/MC-EnC, and ensure compliance with Energy Community law as requested by Article 2 of Decision 2014/04/MC-EnC;

Having regard to the failure by Bosnia and Herzegovina to take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2013/04/MC-EnC and to report to the Ministerial Council on any tangible progress thereto in 2016 as requested by Article 2 of Decision 2015/10/MC-EnC;

Having regard to the failure by Bosnia and Herzegovina to adopt a State Law by 31 March 2017 as requested under Article 3(3) of Decision 2016/16/MC-EnC;

Considering the overall assistance provided by the Secretariat to Bosnia and Herzegovina in drafting, assessing, reviewing and adjusting a draft gas legislation as well as organising and moderating common work with various stakeholders in the gas sector;

Considering that no progress has been achieved to date in adopting a compliant gas legislation rectifying the breaches identified by Decision 2013/04/MC-EnC and 2014/04/MC-EnC;

Upon Request by the Secretariat;

HAS ADOPTED THIS DECISION:

**Article 1**  
**Failure to rectify serious and persistent breach**

Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC and 2016/16/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.

**Article 2**  
**Measures under Article 92**

The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC and Article 3(1) of Decision 2016/16/MC-EnC is extended for one year if, within six months of the present Decision, the breaches referred to in Article 1 of the present Decision are not rectified.

In addition, the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas sector by all Energy Community institutions, as well as the right to participate in votes for Measures under Article 91 of the Treaty will be suspended.

**Article 3**  
**Follow-up**

1. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2019.
3. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*.

**Article 4**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Skopje, on 29 November 2018

For the Ministerial Council

A handwritten signature in blue ink, appearing to be "A. Blazevic".

Presidency

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2016/07/MC-EnC: on the failure by Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-6/16**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 91(1)(a) thereof;

Upon the Reasoned Request by the Secretariat in Case ECS-6/16 dated 13 May 2016;

Having regard to the absence of a Reply by Bosnia and Herzegovina;

Having regard to the Letter by the Advisory Committee established under Article 32 of Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty, as amended by Procedural Act No 2015/04/MC-EnC, dated 22 July 2016, not to give an Opinion on the case;

HAS ADOPTED THIS DECISION:

### **Article 1**

#### **Failure by Bosnia and Herzegovina to comply with the Treaty**

1. By failing to adopt and apply 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 by 1 January 2015 pursuant to Article 3(1) of Ministerial Decision 2011/02/MC-EnC and by failing to forthwith notify those measures to the Secretariat, fails to comply with Articles 6 and 89 of the Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/MC-EnC.
2. For the reasons sustaining these findings, reference is made to the Reasoned Request.

### **Article 2**

#### **Follow-up**

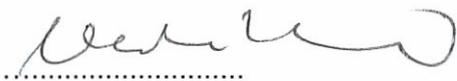
1. Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law, in cooperation with the Secretariat, by December 2016. Bosnia and Herzegovina shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.
2. If the breaches have not been rectified, the Secretariat is invited to initiate a procedure under Article 92 of the Treaty.

**Article 3**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Sarajevo on 14 October 2016

For the Presidency

A handwritten signature in black ink, appearing to be "D. Kovačević", written over a dotted line.

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2018/16/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1)(a) thereof, as well as Articles 39 to 41 of Procedural Act 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,

Having regard to the Ministerial Council Decision 2016/07/MC-EnC of 14 October 2016 in Case ECS-6/16,

On the basis of Ministerial Council Decision 2016/07/MC-EnC of 14 October 2016 in Case ECS-6/16 declaring the existence of a breach by Bosnia and Herzegovina of its obligations relating to failure to transpose the Third Energy Package,

Having regard to the failure by Bosnia and Herzegovina to rectify all breaches identified in Article 1 of Decision 2016/07/MC-EnC and ensure compliance with Energy Community law by December 2016 as requested by Article 2 of Decision 2016/07/MC-EnC,

Having regard to the Ministerial Council invitation to the Secretariat to initiate a procedure under Article 92 of the Treaty should the breaches identified in Article 1 Decision 2016/07/MC-EnC be not rectified,

Considering the overall assistance provided by the Secretariat to Bosnia and Herzegovina in drafting, assessing, reviewing and adjusting draft primary legislation as well as organising and moderating common work with various stakeholders in the energy sector;

Considering that no tangible progress has been achieved in the aftermath of Decision 2016/07/MC-EnC with regard to the transposition of the Third Energy Package in Bosnia and Herzegovina,

Upon Request by the Secretariat,

HAS ADOPTED THIS DECISION:

**Article 1**  
**Serious and persistent breach**

1. The failure by Bosnia and Herzegovina to implement Ministerial Council Decision 2016/07/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. For the reasons sustaining these findings, reference is made to the Secretariat's Request.

**Article 2**  
**Follow-up**

1. Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/07/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken.
2. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*.
3. If Bosnia and Herzegovina fails to implement the Ministerial Council Decision 2016/07/MC-EnC by 1 July 2019, the Secretariat is invited to request Measures under Article 92 of the Treaty in 2019.

**Article 3**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Skopje, on 29 November 2018

For the Ministerial Council

A handwritten signature in blue ink, appearing to be "G. B. ...", written over a dotted line.

Presidency

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2016/03/MC-EnC: on the failure by Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-2/13**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 91(1)(a) thereof;

Upon the Reasoned Request by the Secretariat in Case ECS-2/13 dated 13 May 2016;

Having regard to the absence of a Reply by Bosnia and Herzegovina;

Having regard to the Opinion by the Advisory Committee established under Article 32 of Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty, dated 16 September 2016;

HAS ADOPTED THIS DECISION:

### **Article 1**

#### **Failure by Bosnia and Herzegovina to comply with the Treaty**

Bosnia and Herzegovina,

1. by failing to ensure that heavy fuel oils are not used if their sulphur content exceeds 1.00 % by mass on its entire territory, has failed to fulfil its obligations under Article 3(1) of Directive 1999/32/EC in conjunction with Article 16 of the Treaty; and
2. by failing to ensure that gas oils are not used if their sulphur content exceeds 0.1 % by mass on its entire territory, has failed to fulfil its obligations under Article 4(1) of Directive 1999/32/EC in conjunction with Article 16 of the Treaty.

For the reasons sustaining these findings, reference is made to the Reasoned Request.

### **Article 2**

#### **Follow-up**

1. Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law immediately. Bosnia and Herzegovina shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.

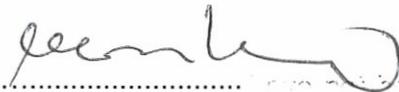
2. If the breaches have not been rectified, the Secretariat is invited to initiate a procedure under Article 92 of the Treaty.

**Article 3**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Sarajevo on 14 October 2016

For the Presidency

  
.....  
The Presidency of the Energy Community  
Sarajevo

.....  
The Secretariat of the Energy Community  
Sarajevo

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2018/13/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1)(a) thereof, as well as Articles 39 to 41 of Procedural Act 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,

Having regard to the Ministerial Council Decision 2016/03/MC-EnC of 14 October 2016 in Case ECS-2/13,

On the basis of Ministerial Council Decision 2016/03/MC-EnC of 14 October 2016 in Case ECS-2/13 declaring the existence of a breach by Bosnia and Herzegovina of its obligations relating to failure to ensure that heavy fuel oils are not used if their sulphur content exceeds 1.00 % by mass on its entire territory and failing to ensure that gas oils are not used if their sulphur content exceeds 0.1 % by mass on its entire territory, failed to comply with Article 3(1) and Article 4(1) of Directive 1999/32/EC in conjunction with Article 16 of the Treaty,

Having regard to the failure by Bosnia and Herzegovina to rectify all breaches identified in Article 1 of Decision 2016/03/MC-EnC and ensure compliance with Energy Community law as requested by Article 2 of Decision 2016/03/MC-EnC,

Having regard to the Ministerial Council invitation to the Secretariat to initiate a procedure under Article 92 of the Treaty should the breaches identified in Article 1 Decision 2016/03/MC-EnC be not rectified,

Considering that no tangible progress has been achieved in the aftermath of Decision 2016/03/MC-EnC with regard to compliance with the Directive 1999/32/EC,

Upon Request by the Secretariat,

HAS ADOPTED THIS DECISION:

**Article 1**  
**Serious and persistent breach**

1. The failure by Bosnia and Herzegovina to implement Ministerial Council Decision 2016/03/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. For the reasons sustaining these findings, reference is made to the Secretariat's Request.

**Article 2**  
**Follow-up**

1. Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/03/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken.
2. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*.
3. If Bosnia and Herzegovina fails to implement the Ministerial Council Decision 2016/03/MC-EnC by 1 July 2019, the Secretariat is invited to request Measures under Article 92 of the Treaty in 2019.

**Article 3**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

Done in Skopje, on 29 November 2018

For the Ministerial Council

A handwritten signature in blue ink, appearing to be "A. Z. ...", written over a dotted line.

Presidency