

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

REQUEST

In Case ECS-8/11

Submitted pursuant to Article 92(1) of the Treaty establishing the Energy Community and Articles 39 to 42 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,¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

seeking a Decision from the Ministerial Council that

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 its transmission system operators,
 - c. to exclude the possibility for negotiated access to the transmission system and to approve and to publish transmission and distribution tariffs (or a corresponding methodology), and
 - d. to grant eligibility to all non-household customersconstitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. 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.
3. 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.
4. The Parties and institutions of the Energy Community are requested to suspend all present and future financial support granted to authorities of and companies in Bosnia and Herzegovina for their participation in the following projects on the Ministerial Council's List of Projects of Energy Community Interest:
 - a. Combined Heat and Power Plant KTG Zenica,
 - b. Hydro Power Plant Dabar,
 - c. Hydro Power Plant Dubrovnik (Phase II),

¹ Hereinafter: Dispute Settlement Procedures.

- d. Hydro Power Plants on the Upper and Middle Drina,
 - e. 400 kV electricity overhead line Banja Luka – Lika (HR),
 - f. 400 kV electricity overhead line Pljevlja (ME) – Visegrad,
 - g. Gas pipeline interconnector Slobodnica – Bosanski Brod – Zenica,
 - h. Gas pipeline interconnector Ploče – Mostar – Sarajevo/Zagvozd – Posušje/Travnik,
 - i. Gas pipeline interconnector Lička Jesenica – Tržac – Bosanska Krupa.
5. 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 Energy Community Treaty.
6. The effect of the sanctions listed in Articles 2 to 5 of this Decision 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 2015.
7. To assist Bosnia and Herzegovina in the rectification of the breaches identified by Decision 2013/04/MC-EnC, the Secretariat shall submit to Bosnia and Herzegovina by the end of 2014 a draft for a State gas law in line with the Third Energy Package. Bosnia and Herzegovina shall report to the Ministerial Council about the implementation measures taken on the basis of this draft in 2015.

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

I. Relevant Facts

- (1) On 7 October 2011, the Secretariat initiated dispute settlement procedures against Bosnia and Herzegovina by way of an Opening Letter under Article 12 of the Dispute Settlement Procedures for the failure to transpose and implement certain provisions of the Energy Community *acquis communautaire* related to gas² (Case ECS-8/11). Having not been satisfied by the respective replies sent by Bosnia and Herzegovina, the Secretariat sent a Reasoned Opinion under Article 13 of the Dispute Settlement Procedures on 24 January 2013 and submitted a Reasoned Request to the Ministerial Council under Article 28 of the Dispute Settlement Procedures on 21 May 2013. The Advisory Committee established under Article 32 of the Dispute Settlement Procedures delivered its Opinion on the Reasoned Request on 11 September 2013.
- (2) On 24 October 2013, the Ministerial Council adopted Decision 2013/04/MC-EnC on the failure by Bosnia and Herzegovina to comply with certain obligations under the Treaty.³ This Decision reads as follows:

Article 1

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

Bosnia and Herzegovina,

² Namely 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 on conditions of access to the natural gas network.

³ Annex I.

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.

- (3) In the Conclusions of the meeting of 24 October 2013,⁴ the Ministerial Council added the following statement:

The Ministerial Council called upon Bosnia and Herzegovina to rectify its breach by adopting a relevant legislation by June 2014. The Law should be compliant with Directive 2009/73/EC and Regulation (EC) 715/2009. **The Ministerial Council will consider the failure to do so as a serious and persistent breach within the meaning of Article 92 of the Treaty and, in such a case, invited the Secretariat to launch the required proceedings.**⁵

- (4) In the aftermath of the Ministerial Council meeting in October 2013, Bosnia and Herzegovina was reminded several times of the obligations resulting from the Decision 2013/04/MC-EnC.

- (5) At a Ministerial Meeting on 28 January 2014 in Brussels between the European Commission and the Secretariat on the one hand, and the Minister of Foreign Trade and Economic Relations of Bosnia and Herzegovina as well as the two Prime Ministers of the Federation of Bosnia and Herzegovina and of Republika Srpska on the other hand, it was agreed that

... the Minister of Foreign Trade and Economic Relations will call for a meeting with all relevant authorities within the next two weeks with a view to coordinating the next steps in order for Bosnia and Herzegovina to comply with Ministerial Council Decision D/2013/04/MC-EnC.⁶

- (6) The Secretariat is not aware of any outcome of such coordination, or whether it has even taken place.

- (7) As documented in the Conclusions of the Permanent High Level Group's meeting of 19 March 2014,⁷

Bosnia and Herzegovina was reminded of the Decision by the Ministerial Council of October 2013 declaring the existence of a breach by the country with respect to its obligations in the gas sector. Bosnia and Herzegovina so far has not shown any activity to rectify the breach by June 2014 **and thus faces sanctions in accordance with Article 92 of the Treaty.**⁸

- (8) By a letter dated 23 May 2014,⁹ the Secretariat again reminded Bosnia and Herzegovina of its obligations under Decision 2013/04/MC-EnC and expressed its dissatisfaction with regard to the fact that Bosnia and Herzegovina has remained inactive ever since. Outlining the main tasks to be completed in order to achieve full compliance – including a “Concept paper for a state level gas law in Bosnia and Herzegovina” – the Secretariat offered its assistance in the drafting process.

⁴ Annex II.

⁵ Emphasis added.

⁶ Annex III.

⁷ Annex IV.

⁸ Emphasis added.

⁹ Annex V.

- (9) By a letter dated 30 May 2014,¹⁰ the Minister of Foreign Trade and Economic Relations of Bosnia and Herzegovina informed the Secretariat about measures taken with the aim to rectify the breaches of the Treaty. The letter concluded with the assertion that the responsible institutions from Bosnia and Herzegovina in line with their legal responsibility have made considerable efforts to comply legislation and practice at its internal market with the requirements of the Energy Community Treaty, and to rectify the breaches identified in Article 1 of the Decision D/2013/04/MC-EnC of the Ministerial Council of the Energy Community.
- (10) For reasons set out in more details below, the Secretariat is not satisfied with this point of view. In particular, it is not convinced that the country rectified all breaches identified by the Ministerial Council in the meantime. The Minister's letter mainly summarizes the different positions by the two entities, challenges certain findings in Decision 2013/04/MC-EnC and lists intentions for future legislative endeavours. In sum, the Minister himself concedes that
- ... we are still facing with different views on some fundamental issues such as legal, organizational and regulatory set up of the internal gas market in Bosnia and Herzegovina.**¹¹
- (11) By draft Conclusions of the Permanent High Level Group's meeting of 18 June 2014,¹²
- [T]he PHLG expressed its concerns in particular about the state of transposition in Bosnia and Herzegovina which was reminded of the Decision by the Ministerial Council of October 2013 declaring the existence of a breach by the country with respect to its obligations in the gas sector. Bosnia and Herzegovina so far has not shown any activity to rectify the breach by June 2014 and thus faces sanctions in accordance with Article 92 of the Treaty. Bosnia and Herzegovina recalled the letter sent to the Secretariat on 30 May 2014.

II. Relevant Energy Community Law

- (12) 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".*
- (13) Article 76 of the Treaty reads:
- "... A Decision is legally binding in its entirety upon those to whom it is addressed.*
..."
- (14) 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."*
- (15) Article 92(1) of the Treaty reads:

¹⁰ Annex VI.

¹¹ Emphasis added.

¹² Annex VII.

“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.”

- (16) Article 37 of the Dispute Settlement Procedures (“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.”*
- (17) 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.”*
- (18) 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.”*
- (19) 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.*
- (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.”*
- (20) 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.*
- (a) The decision taken by the Ministerial Council shall be made publicly available on the Secretariat's website.*

(21) Article 42 of the Dispute Settlement Procedures ("Sanctions") reads:

"(1) In the decision establishing the existence of a serious and persistent breach, the Ministerial Council shall determine sanctions 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 sanctions were imposed."

III. Legal Assessment

1. Introduction

aa. The binding nature of a Decision under Article 91 of the Treaty

- (22) A Decision taken by the Ministerial Council has binding effect vis-à-vis the Party concerned. This follows from Article 76 of the Treaty and Article 37 of the Dispute Settlement Procedures. As a consequence, Parties are under an obligation to implement Decisions in their domestic legal systems (Articles 6 and 89 of the Treaty).
- (23) In the case of a Decision taken under Article 91 of the Treaty, such as Decision 2013/04/MC-EnC, the obligation to implement amounts to an obligation to fully rectify the breaches identified in the Decision and to ensure compliance with Energy Community law. This is expressly stipulated in Article 38(1) of the Dispute Settlement Procedures. In Article 2 of Decision 2013/04/MC-EnC, the Ministerial Council set a deadline of June 2014 for Bosnia and Herzegovina to take all appropriate measures to that effect.
- (24) Procedurally, Article 38(2) of the Dispute Settlement Procedures tasks the Secretariat with monitoring the "post-decision" behaviour of the Party concerned. Article 2 of Decision 2013/04/MC-EnC calls on Bosnia and Herzegovina to cooperate with the Secretariat in its efforts to ensure compliance with the Decision and the Treaty.
- (25) It follows from the above that the non-implementation of a Ministerial Council Decision under Article 91 by the Party concerned in itself constitutes a breach of Energy Community law. Once this (first) Decision has been adopted, it is not possible any longer for that Party to contest the validity or the lawfulness of that Decision. The Treaty does not foresee an appeal against Decisions of the Ministerial Council, the supreme decision-maker under the Treaty. If a Party wants to challenge the position taken by the Secretariat in the course of a dispute settlement procedure, it needs to do so during the procedure leading up to the Decision by the Ministerial Council under Article 91 of the Treaty. Once that Decision is taken, the Party is precluded from raising any arguments challenging the findings contained in the Decision. Otherwise legal certainty and the binding effect of decisions would be frustrated. The only pathway the Treaty envisages for setting aside a Decision by the Ministerial Council under Article 91 of the Treaty is a request for revocation under Article 91(2) of the Treaty.
- (26) Consequently, arguments put forward by Bosnia and Herzegovina in its letter dated 30 May 2014 which explicitly or implicitly challenge the correctness of the Ministerial

Council's Decision¹³ cannot be taken into account. This is the case for, *inter alia*, the arguments brought forward by Republika Srpska with regard to the lack of accounting unbundling and functional unbundling of its transmission system operator.¹⁴ Likewise, the domestic laws invoked by Republika Srpska evidently predate the adoption of Decision 2013/04/MC-EnC,¹⁵ and should have been put forward in the preliminary procedure leading up to that Decision.

- (27) It follows from the binding effect of decisions under Energy Community law that Bosnia and Herzegovina remains obliged to implement the Decision. Subsequent changes to domestic legislation or regulatory practice will thus affect the present Request only to the extent they result in effective rectification of the breaches identified in Article 1 of Decision 2013/04/MC-EnC. The majority of the arguments put forward by Bosnia and Herzegovina in its letter dated 30 May 2014 either explicitly or implicitly admits that no progress was achieved, challenges the validity of Decision 2013/04/MC-EnC, or only announces effective changes for the near future. Any events which took effect after Decision 2013/04/MC-EnC was issued will be discussed below at III. 2.

bb. Measures to be taken under Article 92 of the Treaty

- (28) Besides triggering a self-standing obligation of the Party concerned to rectify any breaches identified in a Decision under Article 91(1) of the Treaty, Article 92(1) of the Treaty opens the possibility for further follow-up measures to be taken against the Party violating Energy Community law, namely (1) the determination of a serious and persistent breach of the obligations under the Treaty, and (2) the suspension of certain rights deriving from the application of the Treaty.
- (29) Article 42(1) of the Dispute Settlement Procedures links these two measures in the sense that a decision establishing the existence of a serious and persistent breach mandatorily "shall" include a decision on sanctions in accordance with Article 92(1) of the Treaty, leaving discretion only for the decision on the nature of the sanctions to be imposed.
- (30) Furthermore, the Decision to be taken under Article 92 of the Treaty does not require a preliminary procedure of the type applicable to decisions pursuant to Article 91 of the Treaty. The fact that the present Request is a follow-up to the Ministerial Council's Decision concluding Case ECS-8/11 means that a comprehensive preliminary procedure has already been carried out during which Bosnia and Herzegovina was given ample opportunity to be heard. This procedure also introduced the Ministerial Council to the subject-matter of the present Request.
- (31) Moreover, unlike Article 91 of the Treaty, Article 92 of the Treaty does not require a reasoning of the Request made to the Ministerial Council. Nevertheless, the Secretariat in accordance with Article 40(3) of the Dispute Settlement Procedures will set out the factual background and the main legal reasons for submitting the present Request.
- (32) The present case is the first-ever case under Article 92 of the Treaty to be heard by the Ministerial Council. Article 92(1) of the Treaty resembles Article 7 of the EU Treaty (TEU). This provision was introduced into the TEU by the Treaty of Amsterdam as an instrument of ensuring that EU Member States respect certain common values. In

¹³ Or the Advisory Committee's Opinion, see Letter by Bosnia and Herzegovina, dated 30 May 2014, page 3.

¹⁴ Article 1 No 2, 3 and 5 of Decision 2013/04/MC-EnC.

¹⁵ Letter by Bosnia and Herzegovina, dated 30 May 2014, page 3.

essence, it is a diplomatic or political rather than a legal procedure. Whether or not this procedure is suitable for the enforcement of the Treaty is not for the Secretariat to decide. It notes, however, that the European Commission considers that *"the procedure laid down by Article 7 of the Union Treaty ... is not designed to remedy individual breaches"*.¹⁶ Similarly, the recent report by the Ministerial Council's High Level Reflection Group comes to the conclusion that *"the current political approach of 'suspending certain rights' in reaction to a serious and persistent breach' does not satisfy the standards of an Energy Community based on the rule of law"*.¹⁷

- (33) As Article 7 TEU has so far not been used within the EU, no precedence of relevance under Article 94 of the Treaty exists. In this situation, the Secretariat will base itself on the *travaux préparatoires* and the aforementioned interpretation issued by the European Commission when applying Article 92(1) of the Treaty to the present case.
- (34) In the following, the Secretariat will submit that Bosnia and Herzegovina, at the date of this Request, continues to breach Energy Community law (2.), that several of these breaches are serious and persistent (3.) and propose sanctions to the Ministerial Council (4.).

2. (Continued) existence of a breach

- (35) The Secretariat submits that Bosnia and Herzegovina continues to breach Article 1 of Decision 2013/04/MC-EnC and the various provisions of Directive 2003/55/EC and Regulation (EC) No 1775/2005 to which this Article makes reference.
- (36) According to Bosnia and Herzegovina's letter dated 30 May 2014, the only effective change in the domestic legal framework since 24 October 2013 is the "Rulebook on Amendments to the Rulebook on Licensing" in Republika Srpska, which is relevant for legal unbundling of the company *Gas Promet a.d. Istočno Sarajevo-Pale*.¹⁸ According to information provided by the regulatory authority of Republika Srpska, *Gas Promet a.d. Istočno Sarajevo-Pale* is no more authorised to supply of and trade in natural gas.¹⁹ However, measures with regard to the functional unbundling of the company, as regards its organisational and decision-making independence, have not been effectively implemented.²⁰ In any event, no unbundling steps have been taken for the other two transmission system operators, *BH Gas* and *Sarajevo-gas*.²¹ With regard to transmission tariffs in Republika Srpska,²² the three rulebooks related to network and connection tariffs to be adopted by the regulatory authority of Republika Srpska in May 2014 are still published for public consultation only. In any event, they have not yet been implemented

¹⁶ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, p. 7, ANNEX VIII.

¹⁷ Report of the High Level Reflection Group, page 20.

¹⁸ Article 1 No 2 of Decision 2013/04/MC-EnC.

¹⁹ A draft decision as of 21 May 2014 on withdrawing the licence from *Gas Promet Pale* is uploaded on the website of the regulatory authority RERS.

²⁰ Letter by Bosnia and Herzegovina, dated 30 May 2014, page 2. A draft decision as of 21 May 2014 on withdrawing the licence from *Gas Promet Pale* is uploaded on the website of the regulatory authority RERS. According to this draft, the applicant (*Gas Promet*) only initiated the procedure as requested by the Gas Law and on the amended Rulebook.

²¹ The vertically integrated company *Sarajevo-gas* even requested (renewal) of the following licences: transportation of natural gas, DSO and distribution of natural gas; supply of tariff customers; trade.

²² Article 1 No 6 of Decision 2013/04/MC-EnC.

and tariffs have not been set.²³ Likewise, the amendments to the Rulebook on the Operation of Natural Gas Transmission Network have neither been approved nor implemented yet.²⁴ Finally, Republika Srpska also concedes that Article 1 No 13 of Decision 2013/04/MC-EnC related to penalties has not been implemented yet.²⁵

- (37) The Federation of Bosnia and Herzegovina has not reported any effective change to the situation prevailing at the date of adoption of Decision 2013/04/MC-EnC. As it did during the preliminary procedure in Case ECS-8/11, it continues to make reference to a draft Law on Gas which has not yet been adopted²⁶ and is again not compliant with the *acquis*.²⁷
- (38) As regards in particular the failure to designate one or more competent bodies with the function of regulatory authorities to cover the entire gas sector in Bosnia and Herzegovina, Republika Srpska essentially suggests – as it had been doing throughout the preliminary procedure in Case ECS-8/11 – that this breach should be rectified by establishing regulatory authorities in both entities and Brčko District with a harmonized set of competences,²⁸ whilst the Federation of Bosnia and Herzegovina continues to argue that all breaches identified by Decision 2013/04/MC-EnC relate to the lack of State-level legislation,²⁹ which is blocked by Republika Srpska. Being fully aware of the complexity of Bosnia and Herzegovina in its relations between the entities and the state, the Secretariat considers it the internal affair of a Party how to rectify a breach of Energy Community law. The Secretariat consistently offered its assistance in drafting and reviewing legislation and will continue to do so. But it obviously cannot replace the legislatures' lack of will to comply with the Treaty. What matters in the context of the present Request is that Bosnia and Herzegovina is still without a regulatory authority or regulatory authorities which would cover the Federation of Bosnia and Herzegovina and Brčko District, and thus a significant part of the country and its gas sector.
- (39) In conclusion, the Secretariat respectfully submits that Bosnia and Herzegovina, in its letter dated 30 May 2014, failed to show that significant and effective progress was achieved in rectifying the breaches listed in Decision 2013/04/MC-EnC since October 2013. In particular, the country has still not
- I. designated "one or more competent bodies with the function of regulatory authorities to cover the entire gas sector in Bosnia and Herzegovina", as required by Article 1 No 1 of Decision 2013/04/MC-EnC and Article 25 of Directive 2003/55/EC;
 - II. implemented "the requirement of legal unbundling of transmission system operators from other activities not relating to transmission", as required by Article 1 No 2 of Decision 2013/04/MC-EnC and Article 9(1) of Directive 2003/55/EC;

²³ Letter by Bosnia and Herzegovina, dated 30 May 2014, page 5, related to Article 1 No 6 of Decision 2013/04/MC-EnC.

²⁴ Letter by Bosnia and Herzegovina, dated 30 May 2014, pages 6 f., related to Article 1 No 11 and 12 of Decision 2013/04/MC-EnC.

²⁵ Letter by Bosnia and Herzegovina, dated 30 May 2014, page 7.

²⁶ Letter by Bosnia and Herzegovina, dated 30 May 2014, page 8.

²⁷ See the Reasoned Request for further details.

²⁸ Letter by Bosnia and Herzegovina, dated 30 May 2014, page 1.

²⁹ Letter by Bosnia and Herzegovina, dated 30 May 2014, page 7.

- III. ensured “the independence of the transmission system operators in terms of its organization and decision-making from other activities not relating to transmission”, as required by Article 1 No 3 of Decision 2013/04/MC-EnC and Article 9(1) and (2) of Directive 2003/55/EC;
- IV. obligated “the transmission system operator of the Federation of Bosnia and Herzegovina to establish a compliance programme”, as required by Article 1 No 4 of Decision 2013/04/MC-EnC and Article 9(2)d of Directive 2003/55/EC;
- V. implemented “the obligation to audit and publish the accounts of natural gas undertakings”, as required by Article 1 No 5 of Decision 2013/04/MC-EnC and Article 17(2) of Directive 2003/55/EC;
- VI. set and applied “separate transmission tariffs in Republika Srpska”, as required by Article 1 No 6 of Decision 2013/04/MC-EnC and Articles 18(1) and 25(2) of Directive 2003/55/EC as well as Article 3 of Regulation 1775/2005;
- VII. abolished “the possibility for negotiated access to the transmission system in the Federation of Bosnia and Herzegovina”, as required by Article 1 No 7 of Decision 2013/04/MC-EnC and Article 18(1) of Directive 2003/55/EC;
- VIII. approved and published “transmission and distribution tariffs (or a corresponding methodology) in the Federation of Bosnia and Herzegovina” as required by Article 1 No 8 of Decision 2013/04/MC-EnC and Article 18(1) of Directive 2003/55/EC and Article 3 of Regulation 1775/2005;
- IX. required “the involvement of a regulatory authority in the procedure for exempting major new gas infrastructures from certain provisions of Directive 2003/55/EC, and ... an exemption decision to be reasoned and published in the Federation of Bosnia and Herzegovina”, as required by Article 1 No 9 of Decision 2013/04/MC-EnC and Article 22 of Directive 2003/55/EC;
- X. granted “eligibility to all „non-household” customers in the Federation of Bosnia and Herzegovina”, as required by Article 1 No 10 of Decision 2013/04/MC-EnC and Article 23(1)(b) of Directive 2003/55/EC.

3. *Serious and persistent breaches*

- (40) As mentioned above, Article 92 of the Treaty is modelled on Article 7 TEU, the provision aimed to penalize and remedy a serious and persistent breach of certain common values by EU Member States.
- (41) As a point of departure, the Communication by the European Commission on Article 7 TEU from 2003³⁰ suggests that, as in the European Union, the Ministerial Council of the Energy Community disposes of a discretionary power to determine that there is a serious and persistent breach. In this respect, the Secretariat recalls that in the Conclusions of the meeting of 24 October 2013, the Ministerial Council pledged to “*consider the failure to do so [i.e. 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*”.

³⁰ Commission, Communication on Article 7 of the Treaty on European Union, pages 3, 7.

- (42) Nevertheless, the Secretariat will also substantiate its concurring point of view with specific regard to the ten established violations listed at point 39 above. They concern the failure to establish a regulatory authority, to unbundle network operators, to grant third-party access based on pre-established regulated tariffs and to open the market. All these requirements from the *acquis* are fundamental elements of Directive 2003/55/EC as extended to the Contracting Parties since 2006. While the failure to implement any of them would suffice to be considered a serious and consistent breach, in sum such failure must be considered as a denial of the very essence of the European energy market model as enshrined in the Directive. In the view of the Secretariat, these breaches of Energy Community law constitute serious and persistent breaches of the Treaty.
- (43) This does not mean that, by contrast, the Secretariat would consider the remaining four breaches as not being serious and persistent. It reserves the right to make them the subject of another Request under Article 92(1) of the Treaty. For reasons of procedural economy, however, the present Request will be limited to the ten breaches identified by Article 1 No 1 to 10 of Decision 2013/04/MC-EnC.

aa. Seriousness of the breaches

- (44) In a Communication of 2005 concerning the EU pre-Lisbon infringement action procedure, the Commission stated that “[a]n infringement concerning non-compliance with a judgment is always serious”.³¹ It can be argued that this statement is applied by analogy to the situation at hand. Given that Article 92 of the Treaty was modelled on Article 7 TEU, the Secretariat also considers relevant the Commission’s Communication of 2003 which offers a view on what qualifies a breach as serious. Within this procedure, the breach in question must go beyond specific situations and concern a more systematic problem. In order to determine the seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach.
- (45) Reforming and opening Contract Parties’ gas markets and their regional and pan-European integration rank amongst the Energy Community’s primary objectives, as laid down in Article 2 of the Treaty.
- (46) Taking into account a forecasted increase of the natural gas demand in the country and planned gasification projects, it is of vital importance for Bosnia and Herzegovina to establish a stable and consistent regulatory framework in order to ensure, amongst others, an attractive investment environment, development of competitive and liquid gas market, and its full opening from January 2015, effective supplier switching right for final customers, diversified and reliable supplies of energy and energy sources, as well as regional and EU integration of the internal market.
- (47) The ten breaches identified by Article 1 No 1 to 10 of Decision 2013/04/MC-EnC relate to central prerequisites to achieve the Treaty’s objective in the gas sector. This is reflected in the recitals of Directive 2003/55/EC. With regard to third-party access (Article 1 No 6 to 8 of Decision 2013/04/MC-EnC), recital 8 underlines that “[i]n order to complete the internal gas market, non-discriminatory access to the network of the transmission and distribution system operators is of paramount importance”. Recital 10 highlights the importance of unbundling (Article 1 No 2 to 5 of Decision 2013/04/MC-EnC) in this context as follows: “In order to ensure efficient and non-discriminatory network access it is appropriate that the transmission and distribution systems are

³¹ Communication from the Commission, SEC(2005) 1658, section 16.

operated through legally separate entities where vertically integrated undertakings exist. ... It is also appropriate that the transmission and distribution system operators have effective decision making rights with respect to assets necessary to maintain and operate and develop networks when the assets in question are owned and operated by vertically integrated undertakings.” As regards the creation of independent energy regulatory authorities (Article 1 No 1 and 9 of Decision 2013/04/MC-EnC), recital 13 of Directive 2003/55/EC stipulates that the “existence of effective regulation, carried out by one or more national regulatory authorities, is an important factor in guaranteeing non-discriminatory access to the network. ... It is important that the regulatory authorities in all Member States share the same minimum set of competences. Those authorities should have the competence to fix or approve the tariffs, or at least, the methodologies underlying the calculation of transmission and distribution tariffs In order to avoid uncertainty and costly and time consuming disputes, these tariffs should be published prior to their entry into force”. Moreover, “[n]ational regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs...” (recital 16). Finally, recital 18 clearly states that “[g]as customers should be able to choose their supplier freely” (Article 1 No 10 of Decision 2013/04/MC-EnC), in accordance with a phased approach such as the one defined in Annex I to the Treaty.

- (48) In this way, Directive 2003/55/EC itself establishes the seriousness of all elements of a gas market governance which Bosnia and Herzegovina failed to implement. Each individual breach of Directive 2003/55/EC, and even more so cumulatively results in nothing less than preventing the reform and opening of the gas sectors in Bosnia and Herzegovina and its integration in the Energy Community. It indeed amounts to a systematic problem which is, in the view of the Secretariat, sufficient to establish the seriousness of the breach.
- (49) Additional consequences stemming from the non-implementation of key elements of Directive 2003/55/EC further exacerbate the seriousness of the breach.
- (50) Firstly, without rectifying these breaches an implementation of Directive 2009/73/EC and Regulation (EC) 715/2009, to which Bosnia and Herzegovina committed by Decision of the Ministerial Council of 2011 on incorporating the so-called Third Package into the Energy Community by 2015 is impossible. The Third Package now forms the basis for market reform and integration throughout the Energy Community. Among other things, it increases the degree of unbundling applicable to transmission system operators. Most importantly in the context of the present Request, it 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 will fail to implement the Third Package and fall further behind the other Contracting Parties.
- (51) Secondly, the Secretariat considers the absence of regulatory authorities in the entire territory of Bosnia and Herzegovina particularly serious as new infrastructure such as the projects listed as Projects of Energy Community Interest or the South Stream project may require exemptions in which the national regulatory authority will have to play the decisive role (Article 36 of Directive 2009/73/EC). The Secretariat notes that Bosnia and Herzegovina already negotiated an intergovernmental agreement with the Russian Federation which in itself not compliant with the *acquis*. In the absence of a competent, independent and State-level regulatory authority, achieving compliance at a later stage through an exemption procedure will be impossible.

- (52) Thirdly, Bosnia and Herzegovina's breach of Article 25 of Directive 2003/55/EC is also exceptional in the Energy Community. All other Contracting Parties did establish regulatory authorities in the gas sector. This singularity underlines the seriousness of the breach subject to this Request.
- (53) Finally, Bosnia and Herzegovina also refuses to remedy the situation as a matter of principle. This again relates primarily to the absence of a national regulatory authority covering the entire territory of Bosnia and Herzegovina, arguably the most serious breach of those identified by the Ministerial Council. As becomes evident from the letters sent by the Government in the preliminary procedure in Case ECS-8/11 as well as the letter dated 30 May 2014, this breach is a direct result of the persistent refusal of Republika Srpska to support the adoption of a State-level gas law which would include the creation of a State-level regulatory authority for gas, as well as the persistent refusal of the Federation of Bosnia and Herzegovina to create an entity-level regulatory authority in this situation. The Ministerial Meeting in January 2014 in Brussels as well as subsequent communication made it very clear that this attitude has not changed and will not change in the future.

bb. Persistence of the breaches

- (54) According to the Commissions, for a breach to be persistent, it must last some time.³² Bosnia and Herzegovina has failed to comply with Energy Community law in the gas sector, and in particular with respect to unbundling, third-party access, tariffication and the creation of regulatory entity(ies) already since 2006, when the Treaty entered into force. In fact, this is the most persistent breach imaginable.
- (55) The Secretariat recalls that Bosnia and Herzegovina has been constantly reminded of its breach in the Secretariat's Implementation Reports as well as by numerous Ministerial Council and Permanent High Level Group meetings, without any result.
- (56) As noted above, Bosnia and Herzegovina, in its letter dated 30 May 2014, does not rectify the breach, nor does it commit to a clear and credible roadmap to rectifying the breach subject to this Request.

3. Sanctions

- (57) In the Secretariat's view, leaving established serious and persistent breaches of Energy Community law unsanctioned would amount to giving up on the very idea of enforcement itself, and thus on the credibility of implementation.
- (58) From a formal perspective, the Secretariat recalls that Article 42(1) of the Dispute Settlement Procedures requires that a decision establishing the existence of a serious and persistent breach shall also include a decision on sanctions in accordance with Article 92(1) of the Treaty.
- (59) The present Request concerns several serious and persistent breaches by a country which, despite all efforts made by the institutions established under the Treaty over many years and the importance of implementing at least the key features of Energy Community law in the gas sector, has refused to react in any tangible manner. It is the only Contracting Party today which has not implemented any of the key features required by Directive 2003/55/EC, and in particular remains without a regulatory

³² Commission Communication on Article 7 of the Treaty on European Union, page 8.

authority covering the entire gas sector. This refusal amounts to an outright denial of the will and capability to implement Energy Community law on gas. If the Energy Community institutions were to tolerate such behaviour, they would 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.

- (60) It is true that Bosnia and Herzegovina, as a Contracting Party of the Energy Community, stands out by high constitutional complexity and the lack of will to cooperate between the entities for which clear evidence exists not only in the energy sectors. This has been frustrating for many international organizations and donors over the last decades.
- (61) Yet a community based on the rule of law cannot just openly or silently accept that one of its members openly disrespects fundamental obligations it entered into due to internal problems. Otherwise it risks moral hazard by other Parties which will undermine its own foundations.
- (62) Moreover, the Secretariat, from its own as well as from other international actors' experience, has become convinced that Bosnia and Herzegovina needs strong support from outside to help overcoming its internal difficulties. Without the Energy Community taking noticeable action, the chances that the country by itself will overcome the long-standing controversies and implement the Second Package are minimal. They are even smaller for the timely implementation of the Third Package, which will indeed require the adoption of a State-level law. Without action taken by the Ministerial Council, Bosnia and Herzegovina will fall further behind all other Contracting Parties.
- (63) For these reasons, the Secretariat proposes that the Ministerial Council take effective and deterring sanctions for the breaches subject to the present Request.
- (64) Article 92(1) of the Treaty envisages only a limited range of sanctions. It allows the Ministerial Council to "*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.*"
- (65) In evaluating present Article 92(1) of the Treaty, the High Level Reflection Group acknowledges that "*sanctions are essential for enforcement*" and constitute "*.... the key for better implementation of the Treaty ...*". The Group considers that "*the sanctions foreseen by the Treaty lack any weight and do not provide an incentive for Contracting Parties to fulfil their obligations*". It concludes that the sanctions mechanism needs to be revisited and makes concrete proposals in that respect. The Secretariat fully supports the findings of the High Level Reflection Group in this respect.
- (66) Under current Article 92(1) of the Treaty, however, the Ministerial Council is limited to the suspension of Bosnia and Herzegovina's rights deriving from the application of the Treaty. The Treaty lists three of these rights by way of examples, namely voting rights, the right to attend meetings and unspecified "mechanisms" provided for in the Treaty.
- (67) The Secretariat recommends a cautious approach to the suspension of voting rights and the right to attend meetings, as they may amount to excluding a Party from the ongoing integration process taking place in various institutions, fora and meetings organized by the Energy Community. Yet it considers it appropriate to deprive Bosnia and Herzegovina of the right to vote for budget-related measures under Chapter VI of Title V of the Treaty.

- (68) Furthermore, being in a serious and persistent breach of the Treaty, Bosnia and Herzegovina should not benefit from the financial advantages linked to the participation in the meetings organized by the Energy Community, namely reimbursement of travel expenses. Reimbursement of travel expenses for Energy Community meetings is governed by the Secretariat's Reimbursement Rules (in its most recent version in Procedural Act 214/04/ECS-EnC of 1 March 2014).³³ The Secretariat proposes to suspend their application to the representatives of Bosnia and Herzegovina for the period of one year.
- (69) In terms of mechanisms provided for in the Treaty, it is to be noted that the Energy Community does not dispose of significant financial resources to support projects in its Contracting Parties. That said, the Ministerial Council in 2013 established a List of Projects of Energy Community Interest (PECI) encompassing projects of regional importance in electricity generation, electricity infrastructure, gas infrastructure and oil infrastructure. This list includes four power generation projects located (at least partially) on the territory of Bosnia and Herzegovina, namely Combined Heat and Power Plant KTG Zenica, Hydro Power Plant Dabar, Hydro Power Plant Dubrovnik (Phase II) and a series of Hydro Power Plants on the Upper and Middle Drina. It also includes two 400 kV electricity overhead lines involving Bosnia and Herzegovina, namely Banja Luka – Lika (HR) and Pljevlja (ME) – Visegrad. In terms of gas infrastructure, the list includes three interconnections with Croatia, namely Slobodnica – Bosanski Brod – Zenica, Ploče – Mostar – Sarajevo/Zagvozd – Posušje/Travnik, Lička Jesenica – Tržac – Bosanska Krupa.
- (70) Given their cross-border and regional importance, it would be disproportionate to take these projects off the List of Projects of Energy Community Interest. Nevertheless, a country in serious and persistent breach of Energy Community law should not be entitled to any financial support currently or potentially granted to these projects. The Secretariat thus proposes the Ministerial Council to require the Parties and institutions of the Energy Community to suspend all financial support granted to authorities and companies in Bosnia and Herzegovina for any of the projects listed above for a period of at least one year. It emphasizes that the withdrawal of such support shall only affect the part of the respective projects located on the territory of Bosnia and Herzegovina, and may not frustrate established legal right or legitimate expectations of private parties.
- (71) Finally, Article 6 of the Treaty calls upon all Parties, including the European Union, to facilitate the achievement of the Energy Community's tasks. Effectively penalizing a Contracting Party which breaches Energy Community in a serious and persistent manner and refuses to implement the *acquis* forms part of the Energy Community's tasks. Otherwise the very essence of the implementation commitment and the adherence to the rule of law are in jeopardy. The European Union, through its IPA programmes and otherwise, is a major bilateral donor to Energy Community Contracting Parties such as Bosnia and Herzegovina. Suspension in part or in whole of this support in response to the country's established breach is likely to be by far more effective than the suspension of reimbursement and financial support (only) for PECIs. In this situation, and with a view to Article 6 of the Treaty, the Secretariat invites the Ministerial Council to invite the European Union to suspend financial support granted to Bosnia and Herzegovina in the energy sectors for a period of at least one year.

³³ Annex VI.

- (72) Given that the breaches subject to this Request amount to a factual refusal for the past eight years to implement the core elements of Energy Community legislation in the area of gas, the Secretariat considers the sanctions proposed and limited to the duration of one year both necessary and proportionate to make Bosnia and Herzegovina respect its commitments under the Treaty.
- (73) The Secretariat is ready to assist Bosnia and Herzegovina in implementing the *acquis*. This commitment extends also to assistance in rectifying breaches identified by the Ministerial Council, even – and even more so – when they are of serious and persistent nature. As the most serious breaches identified by Decision 2013/04/MC-EnC, and in particular the lack of a regulatory authority, can only be rectified on State level, the Secretariat should be obliged to draft State level legislation for Bosnia and Herzegovina to consider. Given the deadline of 1 January 2015 for transposition of the Third Energy Package, the draft should comply with the latter.

ON THESE GROUNDS

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

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 its transmission system operators,
 - c. to exclude the possibility for negotiated access to the transmission system and to approve and to publish transmission and distribution tariffs (or a corresponding methodology), and
 - d. to grant eligibility to all non-household customers

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

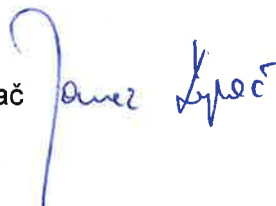
2. The right of Bosnia and Herzegovina to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty is suspended.
3. The Secretariat is requested to suspend the application of its Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community.
4. The Parties and institutions of the Energy Community are requested to suspend all present and future financial support granted to authorities of and companies in Bosnia and Herzegovina for their participation in the following projects on the Ministerial Council's List of Projects of Energy Community Interest:
 - a. Combined Heat and Power Plant KTG Zenica,
 - b. Hydro Power Plant Dabar,

- c. Hydro Power Plant Dubrovnik (Phase II),
 - d. Hydro Power Plants on the Upper and Middle Drina,
 - e. 400 kV electricity overhead line Banja Luka – Lika (HR),
 - f. 400 kV electricity overhead line Pljevlja (ME) – Visegrad,
 - g. Gas pipeline interconnector Slobodnica – Bosanski Brod – Zenica,
 - h. Gas pipeline interconnector Ploce – Mostar – Sarajevo/Zagvozd – Posušje/Travnik,
 - i. Gas pipeline interconnector Lička Jesenica – Tržac – Bosanska Krupa.
5. 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 Energy Community Treaty.
6. The effect of the sanctions listed in Articles 2 to 5 of this Decision 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 2015.
7. To assist Bosnia and Herzegovina in the rectification of the breaches identified by Decision 2013/04/MC-EnC, the Secretariat shall submit to Bosnia and Herzegovina by the end of 2014 a draft for a State gas law in line with the Third Energy Package. Bosnia and Herzegovina shall report to the Ministerial Council about the implementation measures taken on the basis of this draft in 2015.

On behalf of the Secretariat of the Energy Community

Vienna, 18 July 2014

Janez Kopač
Director

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

Dirk Buschle
Deputy Director / Legal Counsel

List of Annexes

Annex I	Ministerial Council Decision D/2013/04/MC-EnC
Annex II	Conclusions of the Ministerial Council's meeting of 24 October 2013
Annex III	EC – Bosnia and Herzegovina Conclusions on energy related matters – Ministerial Meeting of 28 January 2014
Annex IV	Conclusions of the Permanent High Level Group's meeting of 19 March 2014
Annex V	The Secretariat's letter to Bosnia and Herzegovina of 23 May 2014
Annex VI	The Minister of Foreign Trade and Economic Relations of Bosnia and Herzegovina's letter to the Secretariat of 30 May 2014
Annex VII	Draft Conclusions of the Permanent High Level Group's meeting of 18 June 2014
Annex VIII	Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15 October 2003



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. 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

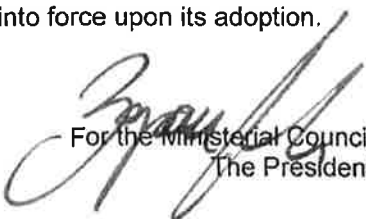
Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law, in cooperation with the Secretariat, by June 2014. Bosnia and Herzegovina shall report to the Ministerial Council about the measures taken.

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



11TH ENERGY COMMUNITY MINISTERIAL COUNCIL

MEETING CONCLUSIONS

Belgrade, 24th October 2013

1. The Ministerial Council meeting was opened by H.E. Mrs. Zorana Mihajlović – Minister of Energy, Development and Environmental Protection – on behalf of Serbia as Presidency in office. Mr Fabrizio Barbaso, Deputy Director-General for Energy in the European Commission, and Vice-Minister Aleksandras Spruogis of Lithuania, for the Presidency of the Council of the European Union, welcomed the participants on behalf of the European Union as Vice-Presidency.
2. The Ministerial Council thanked the Presidency Authorities for their hospitality.
3. The Ministerial Council approved the agenda of the meeting.
4. The Ministerial Council adopted the A-points as indicated in Annex 1.
5. Following its request under Article 95 of the Energy Community Treaty, Finland was welcomed as a Participant EU Member State in the Energy Community process.
6. The Ministerial Council welcomed the application of Georgia for full membership and called upon the European Commission and Georgia, with the support of the Energy Community Secretariat, to start negotiations on membership early enough so that an Accession Protocol with Georgia could be signed at the next Ministerial Council meeting in October 2014.
7. The Ministerial Council appointed Mr. Wolfgang Urbantschitsch, Prof. Dr. Rajko Pirnat and Prof. Dr. Helmut Schmitt von Sydow as members and Mr Nikola Radovanović (Serbia), Mr Visar Hoxha (Kosovo*¹) and Ms Amela Alihodžić (Bosnia & Herzegovina) as alternate members of the Advisory Committee for the period 2014-2015.
8. Taking note of the progress in implementing the energy efficiency acquis in the Energy Community, and in view of the 2012 upgrade of such rules in the European Union, the Ministerial Council adopted a Recommendation to implement Directive 2012/27/EU in the Energy Community with certain adaptations. The Recommendation should serve as the legal basis for the Contracting Parties to prepare its implementation, with a view to adopt a binding decision, in 2014.

¹ This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence

9. The Director of the Secretariat, Mr. Janez Kopač, reported on the main conclusions of the Security of Supply Group, than met on 23rd October.
10. Upon proposal by the European Commission and taking into account the discussions at the Permanent High Level Group (PHLG), the Ministerial Council adopted a decision adapting Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants, and a decision implementing Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU and amending Article 16 and Annex II of the Treaty.
11. Upon request of Ukraine, the Ministerial Council will endeavour to consider a decision based on Article 24 of the Energy Community Treaty to take into account the specific situation of this Contracting Party as concerns the implementation of acquis on reduction of emissions from existing large combustion plants.
12. The Ministerial Council reviewed the state of play of the implementation of the Treaty on the ground of the annual Implementation Report as presented by the Secretariat. Welcoming the progress made in the Contracting Parties the Ministerial Council expressed its concerns with regard to the lack of progress in effective market opening and slow regional integration. The Report provides specific conclusions and country specific recommendations, which were supported by the Ministerial Council.
13. The Ministerial Council recognized the importance of the transposition and implementation of the Third Energy Package in the context of providing security of supply and adequate conditions for investments. In this context the Third Energy Package related activities should continue to be in the center of the activities over the next reporting period.
14. Upon Reasoned Request by the Secretariat and having heard both parties to the case as well as the opinion of the Advisory Committee, the Ministerial Council in accordance with Article 91 of the Treaty declared the existence of a breach by Bosnia and Herzegovina of its obligations in the gas sector. The Ministerial Council called upon Bosnia and Herzegovina to rectify its breach by adopting a relevant legislation by June 2014. The Law should be compliant with Directive 2009/73/EC and Regulation (EC) 715/2009. The Ministerial Council will consider the failure to do so as a serious and persistent breach within the meaning of Article 92 of the Treaty and, in such a case, invited the Secretariat to launch the required proceedings.
15. The Ministerial Council welcomed the report by Serbia on the agreements reached with Kosovo* affecting pending dispute settlement case ECS-3/08. It called upon both parties to keep working towards a full implementation of said agreements, under the auspices of the Secretariat and the European Commission. The Ministerial Council took note of the Secretariat's intention to submit a Reasoned Request to the Ministerial Council for its meeting in October 2014, should no further progress be made in due time.

16. The Ministerial Council adopted the list of Projects of Energy Community Interest (PECIs) and called on the Contracting Parties to take necessary actions to facilitate their timely and effective implementation. Because of their regional importance, it is imperative that the implementation of PECIs takes place in full compliance with the Energy Community acquis and the relevant national legislation. Furthermore, the PEGI label on the projects is without prejudice to the results of environmental impact assessments to be carried out in line with the Contracting Parties' obligations under the Energy Community Treaty, as well as any other relevant standards and procedures applicable under national or international law. Where there is evidence that the Energy Community acquis or national legislation is breached, or an environmental impact assessment has not been performed properly, the Secretariat may initiate infringement action and propose the PHLG that the PEGI label for the project be removed.
17. The Ministerial Council thanked Ms Catharina Sikow Magny, Head of Unit at the European Commission, for her work as Chair of the Energy Strategy – PEGI Task Force.
18. In order to facilitate the implementation of Regulation (EU) no 347/2013 on guidelines for trans-European energy infrastructure, the Ministerial Council invited the European Commission and the Secretariat to prepare the proposals for adoption of certain provisions applicable to the Energy Community. The Ministerial Council invited the Secretariat to carry out a review of the implementation process of the PECIs and the experience of cooperation among national regulators and present its finding report on the progress, at its next meeting in October 2014. In light of the findings, the Ministerial Council shall decide whether the PEGI list should be updated at regular intervals.
19. The Ministerial Council re-called the core competence of regulators in promoting new investments. The Ministerial Council underlined its expectation for regulatory tariff systems to financially stimulate new gas and electricity infrastructure projects, and PEGI in particular, via development of adequate risk-return ratios. The Ministerial Council further stressed the need for regulatory frameworks to provide stable, predictable, transparent and non-discriminatory rules and accelerated procedures in order to attract investments. It endorsed a series of regulatory incentives (Annex 2).
20. Under Article 97 of the Treaty, the Ministerial Council decided to extend the duration of the Energy Community Treaty until 2026. This decision is without prejudice to any internal procedures which may be required under national law.
21. The Ministerial Council set up a High Level Reflection Group mandated to make an independent assessment of the adequacy of the institutional set up and working methods of the Energy Community to the achievement of the objectives of the Energy Community Treaty, taking into consideration the evolution of this organization over the past years and its extended Membership, and to make proposals for improvements to the Ministerial Council in 2014. Professor Jerzy Buzek was appointed as chairman of the Group.

22. The Ministerial Council thanked the current Serbian Presidency of the Energy Community in the person of Zorana Mihajlović and welcomed the 2014 Presidency – Ukraine.

23. The Ministerial Council took note of the priorities for the 2014 Presidency presented by Minister Stavytsky, which will focus on:

- Preparation of proposals for updating the Treaty, which would largely unite efforts of the Energy Community member states in energy sector development, improve the competitiveness of companies in the energy market and provide more effective mechanisms for interest protection, mutual assistance, giving equal opportunity to use the European Union instruments to achieve common objectives.
- Increasing European energy independence and security by:
 - Functioning of the gas market in the reverse direction on the border between Ukraine and the EU and creation of the East European Gas Hub based on the Ukrainian underground gas storages (UGS);
 - Developing the alternative transit routes for security supplies of energy resources;
 - Developing and adapting the legislation;
 - Attracting the investments to implement the PECO projects.

These Conclusions are adopted.

Done in Belgrade on October 24, 2013



For the Ministerial Council,
THE PRESIDENCY

Annex 1

- 1) The Ministerial Council adopted the Annual Report on the Activities of the Energy Community pursuant to Art. 52 of the Treaty.
- 2) The Ministerial Council took note of the Report on the Audit of the Energy Community Financial Statements for the year ended 31 December 2012, further, of the Budget Committee's Report on Audit 2012 as well as of the Director's Report under Art. 75 of the Treaty on the execution of the Energy Community Budget 2012.
- 3) Based on the information under item 2 above, the Ministerial Council adopted a Decision on Discharge of the Director of the Secretariat from his management and administrative responsibility for the financial year 2012.
- 4) The Ministerial Council adopted the Conclusions of the 27th, 28th, 29th and 30th Permanent High Level Group meetings.
- 5) The Ministerial Council approved proposed amendments to the current version of Internal Rules of Procedure of the Ministerial Council.
- 6) The Ministerial Council adopted amendments of Annex IV of the Treaty establishing the Energy Community after Croatia's accession to the EU.
- 7) The Ministerial Council adopted a decision on the implementation of Commission Regulation (EU) No 147/2013 of 13 February 2013 amending Regulation (EC) No 1099/2008 of the European Parliament and of the Council on energy statistics, as regards the implementation of updates for the monthly and annual energy statistics in the Energy Community.
- 8) The Ministerial Council approved the Work Program and corresponding Budget for the biennium 2014-2015.
- 9) The Ministerial Council adopted Outline of Social Strategy.

Annex 2 – Regulatory investment incentives

While acknowledging that the risk profile of a regulatory framework builds on a complex combination and interplay of individual components that need to be carefully considered when analyzing the level of incentives, the Ministerial Council calls upon regulators to especially:

- issue decisions on the allocation of costs for cross-border projects and their inclusion in the regulated network tariffs;
- grant specific incentives to eligible projects characterized by high risks, including but not exclusively:
 - Rules of anticipatory investment;
 - Rules for recognition of certain costs before commissioning of the project;
 - The introduction of longer regulatory periods (i.e. timeframes within which regulated tariffs are not changed or reviewed by the national regulatory authority but only adjust according to the parameters of the tariff methodology set by the authority) with a view to facilitate investments by increasing the stability and predictability of the regulatory system;
 - Additional return on capital invested for the project;
 - Stimulative, project-targeted depreciation deviating from the general tariffication methodology. This may involve either longer (e.g. to facilitate greenfield projects with high start up costs) or shorter depreciation periods;
 - “Negative” incentives following which congestion revenues that are not used for investments in the network could lead to reduction of the regulated network charge, as envisaged by Article 6(6) of Regulation (EC) 1228/2003;
 - Other measures deemed necessary.

Where national regulators are not equipped with sufficient powers for executing the above mentioned activities yet, the Ministerial Council urges the national legislators of the Contracting Parties to empower regulators accordingly without delay but by end of March 2014 the latest.

EC-BOSNIA AND HERZEGOVINA CONCLUSIONS ON ENERGY RELATED MATTERS - MINISTERIAL MEETING

Brussels (28 January) – Deputy Director General for Energy of the European Commission, Mr Fabrizio Barbato, on the one hand, and the Minister of Foreign Trade and Economic Relations of Bosnia and Herzegovina, Mr Boris Tučić, and the two Prime Ministers, of the Federation of Bosnia and Herzegovina, Mr Nermin Nikšić, and of Republika Srpska, Ms Željka Cvijanović, on the other, discussed energy related matters of relevance for the EU integration of Bosnia and Herzegovina.

The fruitful discussions took place in an open and frank way taking into account the various interests and both political and technical/legal aspects. They led to the following conclusions:

1. The representatives of the European Commission and Bosnia and Herzegovina underlined the high importance of the integration of Bosnia and Herzegovina in the European energy market. They agreed to further strengthen their efforts to reach this objective, not the least in view of the large potential of Bosnia and Herzegovina in this field, in particular with regard to the generation of electricity.

2. The representatives of the European Commission reminded that Bosnia and Herzegovina, by signing the Energy Community Treaty, committed itself to ensure the security of energy supply, in line with Directive 2005/89. The representatives of Bosnia and Herzegovina including the two Entities confirmed that a well functioning countrywide operating electricity transmission company is one of the cornerstones to guarantee the security of supply with electricity of the entire Bosnia and Herzegovina.

3. The representatives of the European Commission welcomed substantial progress reached in making the company functioning, in particular the ongoing setting up of the management and the finalisation of audited financial plans, and that there is now a comprehensive agreement of the Shareholders to make TRANSCO fully functioning.

4. The Prime Ministers of both Entities and the Minister of Foreign Trade and Economic Relations commit themselves - within the framework of their competences - to contribute to the operational safety, functionality and viability of TRANSCO. The long-term ability of the transmission network of TRANSCO to meet reasonable demand shall be ensured. The Prime Ministers of both Entities agreed on the following:

4.1 The outstanding tasks of the setup of the (full) new management and the approval of the 2012 financial report will be completed by 28 February 2014.

4.2 No more than BAM 100 million accumulated revenues are distributed to the two shareholders under the current financial exercise. The distribution of any further accumulated revenues will not take place before the 10 year transmission network development plan has been adopted by the Shareholders' General Assembly and approved by the Regulatory Authority (SERC).

4.3 The Prime Ministers of both Entities agreed that experts of the Energy Community Secretariat technically support TRANSCO in the finalisation of the mid-term investment plan and the 10 year transmission network development plan to ensure Bosnia and Herzegovina's compliance with the Energy Community Treaty. These investment plans will be submitted to the Secretariat before 10 February 2014. The Secretariat will issue the experts' assessment by the end of February 2014.

5. The representatives of the European Commission informed that the EU funded technical assistance project for the alignment of the legislation on electricity with EU requirements has been completed at the end of December. The EU Delegation will make sure that the final report is sent to the respective stakeholders in Bosnia and Herzegovina. With the adoption of the required legislation before 2015, Bosnia and Herzegovina would meet its current obligations in the field of electricity under the Energy Community Treaty.

6. With regard to gas, the Minister of Foreign Trade and Economic Relations will call for a meeting with all relevant authorities within the next two weeks with a view to coordinating the next steps in order for Bosnia and Herzegovina to comply with Ministerial Council Decision D/2013/04/MC-EnC.

7. The European Commission took note of the ongoing negotiations on an Intergovernmental Agreement (IGA) of Bosnia and Herzegovina with the Russian Federation on the Southstream pipeline. In line with the letter of the Secretariat of the Energy Community dated 16 January 2014, the Commission highlighted the need for the final IGA to be in compliance with the legal framework of the Energy Community Treaty, in particular with regard to the principle of third party access and unbundling between transmission system operation on the one hand, and gas production and supply, on the other.

http://ec.europa.eu/commission_2010-2014/fule/headlines/news/2014/01/20140128_en.htm

32nd PERMANENT HIGH LEVEL GROUP

Brussels
19 March 2014

1. The meeting was chaired by Mr Oleg Schevchenko on behalf of Ukraine as Presidency in office and Mr Fabrizio Barbaso for the European Union as Vice-Presidency.
2. The PHLG approved the agenda.
3. The Secretariat presented results and participants of public consultation about the future of the Energy Community. Prof Buzek presented elements of draft final report of the High Level Reflection Group and invited Permanent High Level Group members to actively participate on the public hearing in the European Parliament.
4. ¹The Secretariat as well as the Contracting Parties informed about the state of preparations for the transposition of the Third Package by 1 January 2015. The PHLG invited all Contracting Parties to continue the cooperation with the Secretariat and urged them to adopt compliant laws before the expiry of the deadline. Where drafts cannot be developed in house or with technical assistance on time, the Contracting Parties concerned are requested to ask the Secretariat to provide them with drafts.
5. The PHLG expressed its concerns in particular about the state of preparations in Bosnia and Herzegovina and Moldova. Bosnia and Herzegovina was reminded of the Decision by the Ministerial Council of October 2013 declaring the existence of a breach by the country with respect to its obligations in the gas sector. Bosnia and Herzegovina so far has not shown any activity to rectify the breach by June 2014 and thus faces sanctions in accordance with Article 92 of the Treaty.
6. The Secretariat presented the Commission Regulation (EU) No 543/2013 of 14 June 2013 amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, as well as the Secretariat's views concerning submission and publication of data in electricity markets in the Energy Community.
7. The PHLG took note of the presentation of the Secretariat, the ECRB Recommendation on the adoption of Commission Regulation (EU) No 543/2013, and the commitment for cooperation expressed by the ENTSO-E.
8. The PHLG recognised the importance of transparency in electricity markets, especially the need for a harmonised minimum set of data relating to generation, transportation and consumption of electricity to be made available to market participants, including the central collection and publication of the data, for the integrity, functioning and development of the Internal Market for Electricity.

¹ Article commented by Bosnia and Herzegovina in line with Procedural Act No. 2013/01/PHLG-EnC of 23 October 2013 (Article 2). This article shall be finalised in the 33rd PHLG meeting on 18 June 2014.

9. The Secretariat presented the Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply in the Energy Community framework and its views on its implementation in the Energy Community.
10. The Member States and the Contracting Parties share the same risks of security of gas supply and could mitigate such risks under the common institutional and regulatory framework, based on the principles embedded in the Regulation.
11. ²Serbia supported early transposition of the Regulation No 994/2010 but properly adapted. It stressed that only a regulation which takes into account the reciprocity among EU member states and Contracting Parties is reasonable. Also Ukraine, Bosnia and Herzegovina and Kosovo supported the adoption of the regulation. All Contracting Parties supported further efforts to achieve better security of supply and recognised the Regulation 994/2010 as an important tool to achieve this. The European Commission thanked the Secretariat for the technical input provided, which will be duly considered, together with the Contracting Parties' views, when preparing a Commissions' proposal to the Ministerial Council. It warned about the risk of widening the implementation gap.
12. The PHLG took note of the developments regarding the implementation of PECIs, mainly in the area of investments preparation.
13. The PHLG welcomed the creation of a Task Force on the evolution of the WBIF, and the acknowledgement of the WBIF Steering Committee that the Energy Community Secretariat has an important role to play in such discussions including the deliberations on financial instruments to facilitate financing of agreed priority projects.
14. The PHLG thanked European Commission and WBIF for its continuing technical assistance for preparation of investment projects, and welcomed the approach to have additional financial support for implementation of infrastructure priorities.
15. The PHLG invited the Contracting Parties to support the implementation of PECIs through national and international funding, as well as by preparing the adequate regulatory framework (mainly in the area of cross – border projects).
16. The Secretariat presented the Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and its views on its adoption in the Energy Community. Serbia supported early adoption of the Regulation with needed adaptations since it is essential especially for the PECIs which are at the same time listed among PCIs, while Bosnia and Herzegovina referred to its problems with adoption of new acquis. The Commission stressed the importance of assessing which elements of the regulation are needed to facilitate proper investments without unnecessary burdens.
17. Ukraine presented its concerns about the South Stream project and its implications on the Ukrainian gas pipeline system. The Commission and the Secretariat clarified their position related to this project and its compatibility with the acquis. The Commission reported about the past activities related with the project and stressed its attachment to the principles of the acquis.
18. Ukraine informed the PHLG about its challenges related to investments into coal thermo power plants to fulfil the provisions of the Large Combustion Plants Directive and possibility to be in delay when respecting the obligations under the Treaty and suggested to discuss this problem in the Environmental Task Force. The Commission urged Ukraine to prepare National Emissions

² Article commented by Serbia in line with Procedural Act No. 2013/01/PHLG-EnC of 23 October 2013 (Article 2). This article shall be finalised in the 33rd PHLG meeting on 18 June 2014.

Reduction Plan and to continue the discussion as it was envisaged under the conclusion of the Ministerial Council in 2013 (conclusion No 11).

19. ³The PHLG thanked the Secretariat for its assessment report, and took note of the progress in the implementation of the 1st EEAP, as well as the reporting on the 2nd EEAP; PHLG reminded the Contracting Parties to provide adequate resources for the implementation of energy efficiency measures from the EEAPs.
20. The PHLG urged the Contracting Parties (especially Albania, Bosnia and Herzegovina and Ukraine) to finalise the legal framework in energy efficiency, and especially by transposing the Energy Performance of Buildings Directive and its associated secondary legislation.
21. The Secretariat presented information on the cases opened against Albania, Bosnia and Herzegovina, former Yugoslav Republic of Macedonia, Montenegro and Ukraine for not adopting and submitting to the Secretariat a National Renewable Energy Action Plan. On account of the Plans' importance for achieving the national targets, the PHLG urged the Contracting Parties concerned to comply with their obligations within the deadlines set by the Secretariat. The PHLG urged the Contracting Parties to start preparing a report on the progress in the promotion and use of energy renewable sources which has to be sent to the Secretariat by the end of 2014.
22. The PHLG thanked the World Bank and ECA Consulting for the Inception Report on Gas to Power Consortium, and encouraged the Contracting Parties to continue engaging in the preparatory work for launching the Consortium. The PHLG will discuss the results of the study on June's meeting again.
23. The PHLG thanked Mr Charalampos Pippas, representing the Hellenic Presidency for his welcoming speech. He stressed high priority of Energy Community issues for the Hellenic Presidency and presented other priorities for the first half of 2014, including the EU/Western Balkans Ministerial Conference on May 8 in Thessaloniki.

Done in Brussels on 19 March 2014

For the Permanent High Level Group,

THE PRESIDENCY

³ Article commented by Bosnia and Herzegovina in line with Procedural Act No. 2013/01/PHLG-EnC of 23 October 2013 (Article 2). This article shall be finalised in the 33rd PHLG meeting on 18 June 2014.



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Vienna, 23 May 2014
BH-MIN/O/jko/01/23-05-2014

Subject: Compliance with the Energy Community gas law

Excellency,

The Secretariat would like to draw your attention that Bosnia and Herzegovina has failed to comply with the Energy Community gas law already for seven years after the entry into force of the Treaty establishing the Energy Community. By its Decision D/2013/04/MC-EnC of 24 October 2013, the Ministerial Council of the Energy Community declared significant gaps in compliance with the EU gas *acquis* and noted that Bosnia and Herzegovina shall take all appropriate measures to rectify the identified breaches and to ensure compliance with the Energy Community law, in cooperation with the Secretariat, by June 2014. Unfortunately, we have to admit, Bosnia and Herzegovina has remained inactive since.

Considering that all Contracting Parties are obliged to ensure full transposition of the EU Third Energy Package to their domestic legislations by 1 January 2015, legal and regulatory reforms rectifying the above-referred breaches should be initiated and processed in line with respective measures required for the transposition and implementation of the gas *acquis* deriving from the EU Third Energy Package, taking into account relevant adaptations applied for the Energy Community.

We are of the opinion that the State-level legal framework has to be developed in Bosnia and Herzegovina, in order to ensure a unanimous legal background regulating those elements of the natural gas sector, which are vested to the State-level competences. The State-level Gas Law should encompass at least the following regulatory fields:

H.E. MR. ZLATKO LAGUMDŽIJA
MINISTER OF FOREIGN AFFAIRS
BOSNIA AND HERZEGOVINA

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- Establishment of an independent State-level regulatory authority for natural gas, which should act as a single designated regulatory authority representing Bosnia and Herzegovina and which should be delegated with all respective competences and regulatory powers deriving from the Directive 2009/73/EC.
- Unbundling of transmission system operators for natural gas, their certification, functions and activities in the natural gas sector.
- Opening, organisation and operation of the natural gas market as of a single economic space, including its regional and EU integration.
- Cross-border trade in natural gas, including respective authorisations for market participants.
- Cooperation among competent institutions and authorities of the State and Entities, as well as international cooperation in the field of natural gas.
- Introduction of safeguard measures in the natural gas sector in the events of major energy crisis, as well as other instruments related to the ensured security of supply.

Please see attached a more detailed study of the necessary elements of the state gas law that were on 24 September 2013 sent to Minister Šarović.

Following preparation of the respective legal and regulatory framework at the State-level, a detailed revision of the Entity's gas legislation will have to be done and required amendments introduced, in order to ensure a consistent legal basis for activities in the natural gas sector and harmonised regulatory practices thereto.

Taking into account a forecasted increase of the natural gas demand in the country and planned gasification projects, it is of vital importance for Bosnia and Herzegovina to establish a stable and consistent legal and regulatory framework in order to ensure, amongst others, an attractive investment environment, development of competitive and liquid gas market, and its full opening from January 2015, effective supplier switching right for final customers, diversified and reliable supplies of energy and energy sources, as well as regional and EU integration of the internal market.

By virtue of the Treaty establishing the Energy Community and the applicable EU gas *acquis*, this task is seen as of a key priority for Bosnia and Herzegovina, which requires for strong national capacities to be assigned and political consensus at different levels to be reached without any delay.

The Secretariat continuously remains at its assistance to Bosnia and Herzegovina in proceeding with any respective reforms, including necessary legal, regulatory, political and cross-border arrangements.

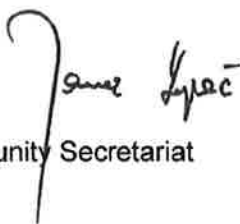
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Please, accept, Excellency, the assurance of my highest considerations.

Yours sincerely,

Janez Kopač
Director
Energy Community Secretariat



Copy to the attention of:

H.E. MR. BORIS TUČIČ
MINISTER OF FOREIGN TRADE AND ECONOMIC RELATIONS
BOSNIA AND HERZEGOVINA

Concept paper for a state level gas law in Bosnia and Herzegovina

Explanatory introduction

- The scope of the state level Gas Law should be brought in compliance already with the Third package requirements as the deadline for its implementation in the Energy Community – and consequently for Bosnia and Herzegovina – is 1 January 2015. Any considerations of a law which would be developed on the Second Package gas acquis at this moment, after 7 years of inactivity of the responsible authorities in BH, would be a failure as it would have become obsolete at the very moment of its adoption.
- The current project "Development of an EU *acquis*-compliant electricity legislative framework in Bosnia and Herzegovina" was launched with the same aim – to facilitate introduction of comprehensive electricity legislation in the whole territory of Bosnia and Herzegovina, based on the Third package. This is an encouraging development as it proves that the similar task can be symmetrically executed for the gas sector.
- What is very important to be understood is that the Third Package gas directive and regulation are to be read not only by letter but also by spirit. The Third package is introduced to materialize a truly common European gas market. It is vital that Bosnia and Herzegovina, with the state gas law, creates a common BH gas market which could be easily integrated into a regional/European gas market.
- Article 39 of Directive 73/2009/EC (Designation and independence of regulatory authorities), read together with the Decision of the Ministerial Council of the Energy Community D/2011/02/MC-EnC, requires from each Contracting Party to designate a single national regulatory authority at national level. Therefore, it is obligation for Bosnia and Herzegovina to establish a state regulator for the gas sector with the responsibilities and duties to create and foster open gas market.
- The concept of the law is focused on the role of strong national regulator and truly unbundled transmission gas operators, as these two stakeholders stand at the core of the Third package agenda. In a nutshell, TSO has to be unbundled according to stringent requirements of the Gas Directive. This is to be verified in the process of certification by the national regulator, who will be independent and fully empowered for such a task. In a final step, the Secretariat issues its opinion on the certification which will be taken into account by the national regulator.

Content of the state level gas law

1. The law shall lay down the rules related to the opening, organisation and functioning of the gas market within the entire territory of Bosnia and Herzegovina. The law will establish a state level national regulatory authority (NRA) and, in particular, provide for a regulatory framework of transmission activities.
2. NRA shall be designated at state level as a single point for representation and contact purposes at regional and/or international level for cooperation of the regulatory authorities for gas, including representation at the Energy Community Regulatory Board. In this capacity, NRA shall closely consult and cooperate with regulatory authorities of the Contracting Parties and Participants to the Energy Community Treaty, and shall provide them and the Energy Community Regulatory Board with any information necessary.

3. Independence from other public bodies or industry, as well as its funding (for example, from regulatory fees etc) will be developed in details.
4. The most important regulatory powers of such NRA shall cover, as a minimum, *inter alia*:
 - a) Certification of TSOs, as well as certification in relation to the 3rd countries and communication with the Energy Community Secretariat taking the utmost account of the Secretariat's opinion on the decision on the certification;
 - b) Fixing or approving tariffs and tariff methodologies for transport, connection and access to the transportation system;
 - c) Ensuring compliance of TSOs with the Energy Community acquis;
 - d) Deciding on case-by-case basis on the exemption of major new gas infrastructure from TPA/tariff regimes/unbundling, communicating the decision with the Secretariat and taking the utmost account of the Secretariat's opinion on such a decision;
 - e) Monitoring investment plans of TSOs;
 - f) Fixing or approving the provisions of balancing services;
 - g) Issuing of licenses for operation of TSOs and supply;
 - h) Monitoring security of supply including the balance of supply and demand, level of expected future demand and available supply, foreseen additional capacity which is planned or under construction, and quality and level of network maintenance as well as measures for covering peak demand and resolving shortages with one or several suppliers;
 - i) approving/setting standards and requirements of quality of service;
 - j) monitoring the level of transparency, market opening and competition at wholesale and retail levels;
 - k) setting minimum requirements for the transportation system operator for transportation system maintenance and development, including interconnection capacities;
 - l) Approving:
 - i. rules for management and allocation of interconnection capacities, together with regulatory authorities of the neighboring Contacting Parties;
 - ii. transparent requirements concerning transportation system operators, sufficient to ensure efficient access to the network by network users;
 - iii. approving rules on congestion management in the gas transportation network including interconnections.
5. NRA shall be vested with powers to issue binding decisions on gas undertakings which operate within the scope of its competences and to impose effective penalties on those companies not complying with the Energy Community Treaty provisions.
6. NRA will have access to accounts of the relevant gas undertakings. It will be responsible for disputes between TSOs and system users.
7. NRA will report to the national parliament and to the Energy Community institutions. The law will promote regional cooperation among TSOs and NRAs.
8. The Law shall focus on transmission activities and TSOs tasks. It will cover, as minimum and *inter alia*:

- a) Unbundling of TSOs, the requirements for their timely unbundling, in line with the Decision on implementing the Third Package in the Energy Community;
 - b) TSOs tasks, responsibilities and duties;
 - c) Third party access to transmission system and connection to transmission system; refusal of access, direct lines;
 - d) The content of transmission network code (to be approved by NRA), - as a minimum rules of connection and access to network, capacity allocation, congestion management, secondary capacity markets, balancing rules, network development and investment decisions; data exchange, reporting and transparency.
9. In order to foster a common gas market in Bosnia and Herzegovina, it would be necessary that the law sets the foundation for gas market opening, rules on the organization of the market (including definition of participants). This could be elaborated either in a separate market code or even within a network code (the other Contracting Parties did it both ways). These rules will be subject to the NRA's approval.
10. The law shall define the necessary safeguard measures in the event of major crisis, which shall be in line with the Treaty.
11. Derogations in relation to take-or-pay commitments will be the part of the state level gas law.

Concluding remarks

- Details of these as well as other issues as the case may be (criteria for licence/authorisation issuance etc), would be worked out in the law;
- The Third Package gives the Contracting Parties and their regulators both the responsibilities and the tools to create and foster open markets. This goes beyond network operation only but includes the supply markets and the companies active on those. That is why NRA is in charge of licensing suppliers in the whole territory of BH.
- This concept does not deprive the entity regulators of meaningful tasks, quite the contrary - they should have (exclusive) competences over distribution as well as the competence to impose and enforce public service obligation on suppliers (of course within the framework of EU law). In other words, they could/would remain competent for price regulation, universal/public service, supply of last resort etc.

БОСНА И ХЕРЦЕГОВИНА
МИНИСТАРСТВО СПОЉНЕ ТРГОВИНЕ
И ЕКОНОМСКИХ ОДНОСА



BOSNA I HERCEGOVINA
MINISTARSTVO VANJSKE
TRGOVINE I EKONOMSKIH ODNOSA

BOSNIA AND HERZEGOVINA
MINISTRY OF FOREIGN TRADE AND
ECONOMIC RELATIONS

Ref: 06-02-50-189-20/13
Sarajevo, May 30th, 2014

BH-MIN/I/340/02/06-06-2014

ENERGY COMMUNITY SECRETARIAT

Subject: Decision D/2013/04/MC-EnC of the Ministerial Council of the Energy Community

Following the Article 2 of the Decision D/2013/04/MC-EnC of the Ministerial Council of the Energy Community we are informing you on measures taken in Bosnia and Herzegovina with the aim to rectify the breaches of the Treaty establishing the Energy Community. Letter was structured in a way to reflect responds and positions of the relevant entity Ministries (Ministry of Industry, Energy and Mining of the Republic of Srpska and Ministry of Energy, Mining and Industry of the Federation of Bosnia and Herzegovina).

Republic of Srpska

This chapter presents activities and positions of the institutions in the Republic of Srpska related to breaches identified within the Article 1 of the Decision D/2013/04/MC-EnC of the Ministerial Council of the Energy Community. All activities are presented following numerical order of the breaches within Article 1 of the Ministerial Council Decision.

1. The Law on Gas of the Republic of Srpska¹ and the Law on Energy of the Republic of Srpska² stipulate that regulation of activities in natural gas sector in the Republic of Srpska is performed by Regulatory Commission for Energy of Republic of Srpska (hereinafter referred to as: Regulatory Commission), and the same are fully complied with Energy Community Treaty and Directive 2003/55/EC. Proposal of the Republic of Srpska is to rectify the breaches through the establishment and operation of regulatory authorities in both entities and Brčko District, provided that their competences are mutually harmonized.

¹ RS Official Gazette no. 86/07 and 121/12

² RS Official Gazette no. 49/09

Clarification

The Republic of Srpska, through previously enacted legislation, has already transposed the provisions of Directive 2003/55/EC in terms of establishment and designation of one competent body with the function of regulatory authority in the natural gas sector, as determined by the Energy Community Secretariat, as follows:

- Law on Energy - Articles 15-21 and 24-26 and
- Law on Gas³ - Articles 4-7, 17, 43-47, and 55-57.

In addition, in order to rectify non-compliance mentioned in the Opening Letter, in Articles 4 and 5 of the Law on Amendments to the Law on Gas⁴, the Republic of Srpska has performed further alignment of its legislation with the provisions of Article 25 (1) of Directive 2003/55/EC, and defined the jurisdiction of the regulatory authority (Regulatory Commission for Energy of Republic of Srpska).

In this regard, performing the aforementioned activities regarding the harmonization of legislation related to the regulatory authority, the Republic of Srpska has expressed the willingness to harmonize legislation on its entire territory and in accordance with its jurisdiction, and thus to contribute to overall fulfilment of the obligations of Bosnia and Herzegovina under the Energy Community Treaty.

Designation of regulatory authorities and harmonization of legislation in Federation of BiH and Brčko District in this respect, along with the existing system in the Republic of Srpska, would allow for the obligations to be fully fulfilled on the entire territory of Bosnia and Herzegovina.

2. Legal unbundling of transmission system operators from other activities not relating to transmission, i.e. compliance with Article 9(1) of Directive 2003/55/EC has been done by passing Rulebook on Amendments to the Rulebook on Licensing⁵ by Regulatory Commission.

Clarification

In order to harmonize legislation with Directive 2003/55/EC, the Regulatory Commission has passed the Rulebook on Amendments to the Rulebook on Licensing. Pursuant to Article 60 of the Law on Amendments to the Law on Gas and Article 69 of the Rulebook on Licensing⁶, the proceedings were initiated to revoke the license for natural gas trade and supply from the transmission system operator „Gas Promet“ a.d. Istočno Sarajevo – Pale.

By June 2014, the Regulatory Commission shall complete the process of revocation of the license for natural gas trade and supply from the transmission system operator „Gas Promet“ a.d. Istočno Sarajevo – Pale. Upon the completion of this process, „Gas

³ RS Official Gazette no. 86/07

⁴ RS Official Gazette no. 121/12

⁵ RS Official Gazette no. 65/13

⁶ RS Official Gazette no. 39/10

Promet" a.d. Istočno Sarajevo – Pale will not be able to perform any other activity than transmission activity, and thus the above lack of compliance has been eliminated.

3. The obligation of legal, functional and account unbundling of the transmission system operator in the Republic of Srpska in accordance with Directive 2003/55/EC is defined in:

- RS Law on Gas,
- RS Company Law⁷, which is complied with the provisions of EU company directives and
- Rulebook on Amendments to the Rulebook on Licensing passed by Regulatory Commission.

In this regard, these regulations eliminated the above lack of compliance.

Clarification

Directive 2003/55/EC does not distinguish between transmission and operation of the transmission system, calling the both system operator. For the transmission system operator, legal unbundling is mandatory for trade and supply. Since the law in the Republic of Srpska separates management system from transmission, it is only necessary to revoke the license for trade from the transmission system operator, which would completely separate transmission system operator from all activities not relating to transmission.

"Sarajevo gas" a.d. Istočno Sarajevo cannot be considered as system operator (this opinion is given in the "Opinion by the Advisory Committee" which was discussed along with the Reasoned request of the Energy Community Secretariat - page 4, legal unbundling). Secondary legislation passed by Regulatory Commission and the license conditions imposed to the system operator (license conditions, points 6.8.2 and 6.8.3) and to all transmission license holders (license conditions, points 6.8.2 and 6.8.3) an obligation to regulate mutual relations by contract. The aim of the above provisions is that the network user sees only ONE contact point - transmission system operator.

All issues regarding mutual cooperation between the operator and the transmission license holder, including payments, shall be regulated by contract.

After the issuance of approval by Regulatory Commission for the price of transmission system management and transport, these contracts would fully regulate relations between transmission system operator and transporters.

All of the above certainly implies for the activity of the transmission system operator to be performed in accordance with regulations (relating to "Gas promet" a.d. Istočno Sarajevo). All breaches shall be rectified after the license granted to the "Gas promet" a.d. Istočno Sarajevo has been revoked.

5. The obligation of account unbundling of gas undertakings in the Republic of Srpska in accordance with Directive 2003/55/EC is defined in:

⁷ RS Official Gazette no. 127/08 and 100/11

- RS Law on Gas and RS Law on Amendments to the Law on Gas,
- Rulebook on Licensing and Rulebook on Amendments to the Rulebook on Licensing passed by Regulatory Commission,
- RS Law on Accounting and Auditing⁸ and accompanying secondary legislation in the field of accounting, which is complied with EU Directives governing this field.

Also, as for public companies, this obligation is defined by Law on Public Enterprises⁹ and accompanying secondary legislation, which is complied with EU Directives.

Clarification

Account unbundling is initiated in 2011 in accordance with license conditions issued by the Regulatory Commission. In accordance with the license conditions for supply of tariff customers with natural gas (point 6.11) issued on 30.07.2009, pursuant to Article 48 (e) of the Rulebook on Licensing, as well as Article 33 of the Rulebook on Amendments to the Rulebook on Licensing, companies "Sarajevo gas" a.d. Istočno Sarajevo and JP "Zvornik stan" a.d. Zvornik are obliged to implement account unbundling of tariff customers supply from all the other activities they perform.

In accordance with the license conditions for trade and supply of tariff customers with natural gas (point 6.8) issued on 30.07.2009, pursuant to Article 48 (e) of the Rulebook on Licensing, as well as Article 34 of the Rulebook on Amendments to the Rulebook on Licensing, companies "Sarajevo gas" a.d. Istočno Sarajevo and JP "Zvornik stan" a.d. Zvornik are obliged to implement account unbundling of tariff customers trade and supply from all the other activities they perform.

When it comes to legal, functional and account unbundling of distribution and management system for the distribution of natural gas from supply and account unbundling from other activities, energy undertakings from the Republic of Srpska i.e. distributors are not obliged in these terms because they do not serve more than 100,000 connected customers.

Namely, in accordance with Directive 2003/55/EC, this provision is incorporated in the RS Law on Gas and Rulebook on Licensing passed by Regulatory Commission.

In accordance with the Law on Accounting and Auditing of the Republic of Srpska and secondary legislation in this field, all companies have performed an audit of annual financial statements (audit performed by independent auditors).

The financial statements are submitted to the Regulatory Commission in accordance with the Rulebook on Reporting, in the ordinary course of reporting, and are published on the website of Banja Luka Stock Exchange.

"Sarajevo gas" a.d. Istočno Sarajevo completely fulfilled the obligation of account unbundling, as demonstrated in the Notes to the financial statements for 2011, 2012 and 2013, and Independent Auditor's Report for 2012 (Report for 2013 is expected to be submitted by the end of June 2014).

⁸ RS Official Gazette no.36/09 and 52/11

⁹ RS Official Gazette no.75/04 and 78/11

Although the company "Gas promet" Istočno Sarajevo-Pale has been granted the license for supply and trade, it has never performed these activities, and therefore there was no need for unbundling.

Please note that the procedure for revocation of the Gas promet's license for trade and supply with natural gas shall be completed by the Regulatory Commission by June 2014. The company "Zvornik stan" a.d. Zvornik submits separate reports for distribution and tariff customers supply only for the purpose of regulatory reporting in the form prescribed by the Regulatory Commission.

The preparation of financial statements by business segments i.e. by activities for which it owns the license is underway, which rectifies the above lack of compliance.

6. This requirement is regulated by the Law on Gas of the Republic of Srpska, which fully transposed Articles 18 (1) and 25 (2) of Directive 2003/55/EC and Article 3 of Regulation 1775/2005. The Law on Gas of the Republic of Srpska stipulates the obligation of the transmission system operator to draft "Rulebook on the Operation of Transmission Network", which should include the conditions of access and use of the transmission system that must be applied on the basis of public and pre-published tariffs for access and use of the transmission system, based on the principle of non-discrimination, equality of users of the transmission system and confidentiality. Acting in accordance with this obligation, the Regulatory Commission on 21.5.2014 adopted:

- Rulebook on Tariff Methodology and Tariff System for Transport and Storage of Natural Gas,
- Rulebook on Tariff Methodology and Tariff System for Distribution of Natural Gas and Supply with Natural Gas and
- Rulebook on Methodology for Calculating the Cost of Connection to the Natural Gas Distribution and Transmission System¹⁰.

Clarification

After the publication of the above Rulebooks, the Regulatory Commission shall, in cooperation with the license holders in the natural gas sector, initiate tariff proceedings for determination of tariff rates for all gas systems (transmission and distribution system, supply, storage and transport).

These activities shall be followed by publication and implementation of the approved tariffs for all gas systems, which will completely eliminate the abovementioned lack of compliance.

11. The Law on Gas of the Republic of Srpska stipulates the obligation of transparent and non-discriminatory acting of transmission system operator in the transmission system management, based on economic principles and in accordance with the regulations and standards. In order to eliminate the above non-compliance, and in accordance with

¹⁰ These Rulebooks shall be published in the RS Official Gazette at the beginning of June 2014

the Law on Gas, on May 21st, 2014 the Regulatory Commission passed new Rulebook on Tariff Methodology and Tariff System for Transport and Storage of Natural Gas¹¹.

Clarification

Detailed requirements relating to firm services, as well as interruptible services that should be provided by the transmission system operator ("Gas promet") are defined by new Rulebook on Tariff Methodology and Tariff System for Transport and Storage of Natural Gas.

Rulebook on Tariff Methodology for Transport defines firm and interruptible capacity on annual, monthly and daily basis.

On April 30th, 2014 the transmission system operator for natural gas "Gas promet" a.d. Istočno Sarajevo-Pale submitted, along with application for issuance (extension) of license for transmission system management, proposal of amendments to rulebook on the operation of natural gas transmission network in the Republic of Srpska.

After the publication of Rulebook on Tariff Methodology and approval of the Amendments to Rulebook on the Operation of Natural Gas Transmission Network, the following obligations of transmission system operator shall be more precisely defined:

- Providing firm and interruptible services,
- Ensuring the availability of services on long and short-term basis,
- Allocation of capacity,
- Congestion management and balancing mechanisms appropriate to specific conditions of the transmission network in the Republic of Srpska.

Approval of the Amendments to Rulebook on the Operation of Transmission Network is complied with the issuance of license for performance of activity, and the same will be implemented by the beginning of July 2014.

After these procedures are completed, the above breaches will be rectified.

12. The Law on Gas of the Republic of Srpska stipulates the obligation of the transmission system operator to develop "Rulebook on Operation of Transmission Network," which include a way of providing ancillary services (balancing mechanisms), in accordance with Article 4 (1)(b)(c) of Regulation 1775/2005.

In order to eliminate the above non-compliance, and in accordance with the Law on Gas, on May 21st, 2014 the Regulatory Commission passed new Rulebook on Tariff Methodology and Tariff System for the Transmission and Storage of Natural Gas¹².

Clarification

On April 30th, 2014 the transmission system operator for natural gas "Gas promet" a.d. Istočno Sarajevo-Pale submitted, along with application for issuance (extension) of license for transmission system management, proposal of amendments to Rulebook on Operation of Transmission Network. These amendments shall more precisely define

¹¹ This Rulebook shall be published in the RS Official Gazette at the beginning of June 2014

¹² This Rulebook shall be published in the RS Official Gazette at the beginning of June 2014

balancing rules in accordance with Article 7 (1) and 13 of Regulation 1775/2005. Approval of the Amendments to Rulebook on the Operation of Transmission Network is complied with the issuance of license for performance of activity, and the same will be implemented by the beginning of July 2014. After these procedures are completed, the above breaches will be rectified.

13. The Law on Gas of the Republic of Srpska stipulates the rights and obligations of participants in the natural gas market, as well as penalty provisions.

Clarification

Given that the activities in the natural gas sector are energy activities, they are subject to the obligation to hold a license issued by the Regulatory Commission. Accordingly, the sanctioning mechanism is based on inspection and Law on Inspection. The Regulatory Commission is obliged, in accordance with the Rulebook on Licensing, to monitor undertakings which hold the license and to revoke the license, if the license conditions are breached.

Further alignment of primary gas legislation in the Republic of Srpska shall ensure effective, proportionate and mandatory penalties, and thus the above lack of compliance shall be rectified.

Federation of Bosnia and Herzegovina

This chapter presents activities and positions of the Ministry of Energy, Mining and Industry of the Federation of Bosnia and Herzegovina related to breaches identified within the Article 1 of the Decision D/2013/04/MC-EnC of the Ministerial Council of the Energy Community.

Analysing Decision D/2013/04/MC-EnC of the Ministerial Council of the Energy Community, i.e. its Article 1, it is evident that all observed failures relate to obligations that the State of Bosnia and Herzegovina has not fulfilled in accordance with the Treaty, i.e., the adoption of relevant State level legislation in order to remove the observed failures.

It is also important to note that most of the items under Article 1 of the Decision relate to failures of Bosnia and Herzegovina regarding the absence of: establishment of an independent state-level regulatory authority for natural gas transportation, legal framework for gas transportation at the state level, compliance with obligations related to unbundling of gas transportation from other activities of the gas sector, determination of tariff methodologies for transportation, etc.

Having in mind the above, and the constant commitment of the Federation of Bosnia and Herzegovina to resolve the issues regarding the regulation of gas transportation, international trade and market opening, as well as balancing and ancillary services of the transportation system by an applicable State-level law, of which you have been continuously informed lately, the Federation of Bosnia and Herzegovina did not get down to eliminating these deficiencies, but, by the new Law on Gas in the Federation of BiH, created preconditions for

the Gas Sector at the state level to comply with *acquis communautaire* on gas, which ultimately is an obligation of the State of Bosnia and Herzegovina.

Part of failure related to unbundling of transmission system operator in terms of its organization, independence and other obligations (items 2, 3, 7) has been removed under the new law, as well as the part having to do with all elements related to gas distribution regulation, which is under the competence of the entities (item 8).

For your information, the Law on Gas in the Federation of Bosnia and Herzegovina has gone through the procedure of public discussion; appropriate remarks have been implemented, and by the end of this month the Law shall be sent into the parliamentary procedure in the form of proposal.

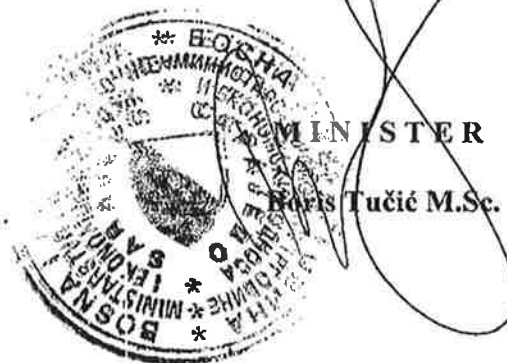
Conclusion

Analysing what has been presented throughout this letter we may conclude that responsible institutions from Bosnia and Herzegovina in line with their legal responsibility have made considerable efforts to comply legislation and practice at its internal gas market with the requirements of the Energy Community Treaty, and to rectify the breaches identified in Article 1 of the Decision D/2013/04/MC-EnC of the Ministerial Council of the Energy Community.

Although, implementation of the Treaty establishing Energy Community in the field of gas is subject of intensive internal discussion since adoption of the Treaty, we are still facing with different views on some fundamental issues such as legal, organizational and regulatory set up of the internal gas market in Bosnia and Herzegovina.

We are very much aware of the requirements of the Treaty and we remain committed to its full implementation. In this respect Ministry of Foreign Trade and Economic Relations will together with relevant entity Ministries and other institutions intensify internal communication and cooperation in order to try to find acceptable solution on actual open issues and to implement the Energy Community Treaty, including 3rd Gas Package. Advisory support from the Energy Community Secretariat in this process is welcomed.

Yours,



MINISTER
Marko Tučić M.Sc.

Copy:

- Ministry of Industry, Energy and Mining of the Republic of Srpska
- Ministry of Energy, Mining and Industry of the Federation of BiH

33rd PERMANENT HIGH LEVEL GROUP

Vienna
18 June 2014

1. The meeting was chaired by Mr Oleg Schevchenko on behalf of Ukraine as Presidency in office and Mr Fabrizio Barbaso for the European Union as Vice-Presidency.
2. The PHLG approved the agenda and remaining three conclusions from the 32nd PHLG meeting.
3. Prof Jerzy Buzek presented the final report of the High Level Reflection Group (HLRG) together with the other HLRG members. The Commission expressed its general support and stressed the need for the reinforcement of the Energy Community to ensure the application of the acquis in the Contracting Parties but recalled that its final position will be finalised after additional consultation with the Member States. Also some Contracting Parties expressed a need for further elaboration of some aspects of the HLRG report and announced concrete proposals. The PHLG generally expressed its satisfaction on the outcome and also its expectation for wide support of the proposals on the forthcoming Ministerial Council.
4. PHLG invited all Contracting Parties to send their concrete proposals and comments related to the HLRG report to the Secretariat to be included into the analysis envisaged by the Procedural act regarding the Report of the HLRG.
5. The PHLG warmly thanked Prof Jerzy Buzek and the other members of the HLRG for their excellent work and all-encompassing engagement in the past months.
6. The PHLG endorsed the Procedural Act No 2014/01/MC-EnC establishing a roadmap related to the report of the HLRG.
7. The Commission and Georgia reported on the ongoing negotiations for entering the Energy Community as a Contracting Party. The PHLG expressed its expectation that the negotiation process will end before Ministerial Council on 23 September 2014.
8. The Secretariat informed the PHLG about the state of play of its Implementation Report for 2013/2014 and invited all Contracting Parties to comprehensively cooperate with the Secretariat in its finalization. Ukraine stressed the importance of respecting the provisions of the Third Package provisions in relation to South Stream project and suggested to discuss this issue during the next Ministerial Council meeting.
9. The Secretariat summarized the state of play of the Third Package transposition. The PHLG expressed its concern about the lack of progress since the last meeting in March. It invited all the Contracting Parties to send their draft energy legislation to the Secretariat for review by the end of June 2014.
10. The PHLG took note of the Secretariat's report on ongoing dispute settlement procedures, and in particular the Reasoned Request submitted to the Ministerial Council. It invited all Contracting Parties concerned by dispute settlement procedures to take appropriate steps for solving the situations of non compliance, in close cooperation with the Secretariat. The PHLG expressed its concerns in particular about the state of transposition in Bosnia and Herzegovina which was

reminded of the Decision by the Ministerial Council of October 2013 declaring the existence of a breach by the country with respect to its obligations in the gas sector. Bosnia and Herzegovina so far has not shown any activity to rectify the breach by June 2014 and thus faces sanctions in accordance with Article 92 of the Treaty. Bosnia and Herzegovina recalled the letter sent to the Secretariat on 30 May 2014.

11. The PHLG welcomed the announcement by the Secretariat and the Commission to request, under Article 94 of the Treaty, an Interpretation by the Ministerial Council on the definition of interconnectors between Contracting Parties and EU Member States, an issue of serious concern to many Contracting Parties. The PHLG requested the Secretariat and the Commission to share their draft for the Ministerial Council's Interpretation well ahead of the next meeting.
12. The Secretariat presented its Position paper on the definition of "new" and "existing" plant in the context of Decision 2013/06/MC-EnC of the Ministerial Council. The PHLG endorsed the definition presented by the Secretariat. The definition of operation permit is to be finalized at the next meeting of the Environmental Task Force, based on the practice in the European Union¹.
13. Ukraine announced the submission of a draft national emissions reduction plan within the immediate future. In view of the special situation in Ukraine, the PHLG requested this item to be put on the agenda of the Ministerial Council (item 3.). The PHLG proposed the Ministerial Council to support an extended deadline for Ukraine, to invite the Commission to present a proposal for a formal Decision, and to adopt this via written procedure.
14. The PHLG discussed the Decision on adapting certain Delegated Regulations on energy related products (Annex 6) which mirrors the developments in EU since 2009, pointed out the differences between Secretariat's and Commission's proposal and decided to discuss it again on PHLG meeting in September 2014 with a view for endorsement prior to the Ministerial Council.
15. The following documents, due for the Ministerial Council, were presented in brief to the PHLG for information: the draft agenda of the MC meeting, the report on Audit 2013, the Budget Committee report on the Audit 2013, the Director's Report on budget execution for 2013.
16. The PHLG reconfirmed its request for a full incorporation of Regulation 347/2013 into the Energy Community at the Ministerial Council meeting in 2015. It welcomed the proposal to focus, in the meantime, on a project-by-project approach where a list of elements of an improved administrative and regulatory governance, including those from Regulation 347/2013 would be identified and made binding for each individual PEI project. For this purpose, it is recommended that the Ministerial Council tasks the PHLG to proceed with this approach, relying on close cooperation between the Contracting Parties concerned, the Secretariat and the Commission.
17. The Ministerial Council agenda should include a political debate on security of gas supply upon presentation by the Commission of its recent European Energy Security Strategy.

¹ Article commented by Serbia in line with Procedural Act No. 2013/01/PHLG-EnC of 23 October 2013 (Article 2). This article shall be finalised in the 34th PHLG meeting on 22nd September 2014.

18. On the ground of the presented budget related information and documents, the PHLG endorsed the draft decision for discharge of the Director for 2013 with a view for adoption by the Ministerial Council.
19. The PHLG endorsed draft Procedural Act No. 2014/.../MC-EnC of 18 June 2014 on the adoption of amended Energy Community procedures for the establishment and implementation of the budget, and for presenting and auditing accounts and inspection.
20. The Secretariat presented the delay in electricity Wholesale Market Opening and reminded the Contracting Parties on their responsibility to more actively push national TSOs to comply with the elements of the Regional Action Plan. The Secretariat also re-called the need to reform national legislation with a view to enable wholesale market opening, in particular related to the introduction of market based balancing and day ahead market rules and the abolishment of existing legal barriers - such as regulated generation, regulated wholesale and retail prices and single buyer models.
21. The PHLG endorsed the conclusions of the 19th electricity (Athens) forum.
22. The PHLG welcomed the progress made on establishment of the SEE CAO for long-term capacity allocation. The Secretariat urged Albania to overcome the only remaining issue, VAT legislation, preventing the Albanian TSO from joining the SEE CAO. The Secretariat further reminded on the request of the recent Electricity Forum for the TSOs of FYR of Macedonia and Serbia to present to the Secretariat by the end July 2014 a roadmap with concrete actions and timelines for participation in any regional body performing long-term capacity allocation; the Secretariat called upon Serbia and FYR of Macedonia to provide political support to this.
23. The PHLG welcomed the Secretariat's announcement to prepare Policy Guidelines on trade and integration barriers related to VAT matters that will be issued before PHLG meeting in September 2014.
24. With regard to steps taken and discussions started on power exchange development, the Secretariat calls upon Contracting Parties to opt for cooperative models with joint shareholdership in one or two regional power exchanges (PXs) instead of fragmented national PXs in all Contracting Parties.
25. The PHLG thanked the World Bank and ECA Consulting for the Inception Report on Gas to Power Study, and encouraged the Contracting Parties to continue engaging in the preparatory work for developing the consortium concept and to nominate Country Contact Points to supply information on potential gas infrastructure and gas –to- power projects and to engage with consultant to develop sub-regional project proposals.
26. Representatives of Ukraine reported on the negotiations on securing gas supplies from Russia and Ukraine's preparedness for the winter season. The PHLG invited Ukraine to make utmost efforts to overcome the crisis. In this context, the Commission and the Secretariat expressed readiness to assist Ukraine as well as any other Contracting Party that might face the disruption of supply. The Commission invited the Contracting Parties to participate in the upcoming risk assessments (stress tests).
27. The Secretariat presented the Budget Committee's Annual Activity Report for 2013.
28. The Secretariat presented conclusions from the Renewable Energy workshop and urged the respective Contracting Parties who fail to adopt the National Renewable Action Plans to do so

with priority. The implementation of Directive 2009/28/EC is the key to trigger further investments and to contribute to diversification and reducing dependency on energy imports. The existing rate of growth in the use of renewable energy is falling short for many Contracting Parties and is diverging from being on trajectory to 2020. The Commission underlined the importance of participation of relevant representatives from all Contracting Parties on workshops and other events, organised by the Secretariat.

Done in Vienna on 18 June 2014

For the Permanent High Level Group,

THE PRESIDENCY



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.10.2003
COM(2003) 606 final

**COMMUNICATION FROM THE COMMISSION
TO THE COUNCIL AND THE EUROPEAN PARLIAMENT**

**on Article 7 of the Treaty on European Union.
Respect for and promotion of the values on which the Union is based**

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"Morality always makes better citizens than law"

Montesquieu "Persian Letters"

INTRODUCTION

Article 6(1) of the Treaty on European Union (the "Union Treaty") lists the principles on which the Union is based: *"the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States"*.

This enumeration of *common principles*, or to use the terminology of the draft Constitution, of *common values*,¹ puts the person at the very centre of the European integration project. It constitutes a hard core of defining features in which every Union citizen can recognise himself irrespective of the political or cultural differences linked to national identity.

Respect for these values and the concern to work together to promote them is one of the conditions for any State wishing to join the European Union. Article 49 of the Union Treaty speaks very clearly to States wishing to accede to the Union: *"Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union"*.

Article 7 of the Union Treaty, introduced by the Amsterdam Treaty and amended by the Nice Treaty, and Article 309 of the Treaty establishing the European Community (the "EC Treaty"), equip the Union institutions with the means of ensuring that all Member States respect the common values.

The entry into force of the Nice Treaty on 1 February 2003 was a defining moment for the Union's means of action here. By giving the Union the capacity to act preventively in the event of a clear threat of a serious breach of the common values, Nice greatly enhanced the operational character of the means already available under the Amsterdam Treaty, which allowed only remedial action after the serious breach had already occurred.

In this respect, the amended Article 7 confers new powers on the Commission in its monitoring of fundamental rights in the Union and in the identification of potential risks. The Commission intends to exercise its new right in full and with a clear awareness of its responsibility.

The ultimate purpose of the means laid down is to penalise and remedy a serious and persistent breach of the common values. But first, and above all, they are intended to prevent such a situation arising by giving the Union the capacity to react as soon as a clear risk of a breach is identified in a Member State.

A serious and persistent breach of the common values by a Member State would radically shake the very foundations of the European Union. Given the current economic, social and political situation in the Member States, the European Union is without doubt one of the places in the world where democracy and fundamental rights are best protected, thanks largely to the domestic judicial systems and in particular the Constitutional Courts.

¹ Article I-2 of the draft Treaty establishing a Constitution for Europe.

However, a number of factors of variable importance make it necessary to conduct a meticulous examination of issues linked to respect for democracy and fundamental rights in the Member States:

- At a time when the Union is about to enter on a new stage of development, with the forthcoming enlargement and the increased cultural, social and political diversity between Member States that will ensue, the Union institutions must consolidate their common approach to the defence of the Union's values.

- Developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms, are among the main objectives of Union and Community policies directed at countries outside the EU. In this connection, the Commission wishes to make clear, like the European Parliament in its report on the human rights situation in the European Union of 12 December 2002,² that the EU's internal and external policies must be coordinated and consistent if they are to be effective and credible.

- Members of the public and representatives of civil society who are most active in the protection of fundamental rights are unsure of the exact scope of Member States' obligations under Article 7 of the Union Treaty. The Commission notes in particular that the regular complaints that it receives from individuals show that Union citizens often regard Article 7 of the Union Treaty as a possible means of remedying the fundamental rights breaches that they have suffered.

In view of these various factors, the Commission believes that a debate on the protection and promotion of our common values within the meaning of the Union Treaty is vital.

The Commission wishes to contribute to this debate.

This Communication accordingly aims both to examine the conditions for activating the procedures of Article 7 and to identify the operational measures which, through concerted action by the Union institutions and cooperation with the Member States, could make for respect and promotion of the common values.

However, it does not address questions concerning the penalties that should be ordered by the Council against a Member State that is in default in accordance with Article 7(3) of the Union Treaty and Article 309 of the EC Treaty. The Commission considers that it would be well advised not to speculate on these questions. It prefers to approach Article 7 of the Union Treaty in a spirit of prevention of the situations to which it applies and in a concern to promote common values.

1. THE CONDITIONS FOR APPLYING ARTICLE 7 OF THE UNION TREATY

The innovation made at Nice was the addition of a prevention mechanism to the penalty mechanism provided for by the Amsterdam Treaty. Two mechanisms now coexist, with activation of the first not required for the second: they are determination that there is a threat of a serious breach (Article 7(1)) and determination that there is a serious and persistent breach of the common values (Article 7(2)).

²

A5-0451/2002.

Article 7 of the Union Treaty is quite precise when it comes to the respective roles of the European Parliament, the Member States and the Commission in activating the two mechanisms. The Commission can only refer readers to the wording of Article 7, annexed to this Communication.

However, the Commission would wish to underline certain fundamental aspects of Article 7.

1.1. Mechanisms applicable in all areas of activity of the Member States

The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously.

The fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.

Article 7 thus gives the Union a power of action that is very different from its power to ensure that Member States respect fundamental rights when implementing Union law. The courts have always held that Member States are obliged to respect fundamental rights as general principles of Community law. However, this obligation operates only in national situations where Community law applies.³ Unlike the mechanisms of Article 7 of the Union Treaty, compliance with this obligation is enforced by the Court of Justice, for example in infringement proceedings (Articles 226 and 227 of the EC Treaty) or in preliminary rulings (Article 234 of the EC Treaty).

1.2. Mechanisms allowing a political assessment by the Council

Article 7 gives a discretionary power to the Council both to determine that there is a clear threat of a serious breach and to determine that there is a serious and persistent breach, acting as appropriate on the basis of a proposal by the European Parliament, one third of the Member States or the Commission. However, the Council's hands are not tied either in determining that there is a clear risk or in determining that there is a serious or persistent breach.

Likewise, under Article 7(3), once the Council has determined the seriousness and persistence of the breach, it may decide to apply penalties, but is not obliged to do so.

³ Judgment in Case 5/88 *Wachauf* [1989] ECR 2609 (given on 13.7.1989) and in Case C-260/89 *ERT* [1991] ECR I-2925 (given on 18.6.1991).

These options underline the political nature of Article 7 of the Union Treaty, which leaves room for a diplomatic solution to the situation which would arise within the Union following identification of a serious and persistent breach of the common values.

However, the Council's discretionary power cannot evade democratic control by the European Parliament, in the form of the assent that it must give before the Council can act.

On the other hand, and despite the repeated suggestions made by the Commission in the run-up to the Amsterdam and Nice Treaties, the Union Treaty does not give the European Court of Justice the power of judicial review of the decision determining that there is a serious and persistent breach of common values or a clear risk of such a breach. Under Article 46(e) of the Union Treaty, the Court reviews “*the purely procedural stipulations in Article 7*”, which allows the relevant State's defence rights to be respected.

1.3. Involvement of independent persons

The involvement of “independent persons”, who can be invited to present a report on the situation in the relevant Member State within a reasonable time, as provided for by Article 7(1), could help to provide a full and objective picture of the situation on which the Council has to take a decision.

The Commission suggests that thought be given to the possibility for the Council of having a list of names of “independent persons” who could be consulted quickly if needed.

1.4. Essential conditions for applying Article 7 of the Union Treaty: the clear risk of a serious breach and the serious and persistent breach of the common values

For Article 7 of the Union Treaty to be applied, essential conditions must be met with regard to a breach or risk of a breach. These conditions are different for the prevention mechanism and for the penalty mechanism: the prevention mechanism can be activated where there is a “clear risk of a serious breach”, whereas the penalty mechanism can be activated only if there is a “serious and persistent breach” of the common values.

A variety of international instruments can offer guidance for interpreting the concept of “serious and persistent” breach, which is taken over from public international law. Article 6 of the United Nations Charter reads: “*A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council*”. Likewise Article 8 of the Statute of the Council of Europe reads: “*Any member of the Council of Europe which has seriously violated Article 3⁴ may be suspended from its rights of representation ...*”.

4

“Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

However, the concept of risk introduced by the Nice Treaty to allow the Union to take preventive action is a specific creature of the Union legal system.

Before analysing these concepts, which distinguish between a situation of risk and that of a breach which has already taken place, we must first point out that the clarity of the risk of a serious breach and the persistence and seriousness of the breach determine the threshold for activating Article 7 of the Union Treaty. This threshold is much higher than in individual cases of breaches of fundamental rights such as established by the national courts, the European Court of Human Rights or, in the field of Community law, by the Court of Justice.

1.4.1. The threshold for activating Article 7 of the Union Treaty: breach of the common values themselves

It is obvious that, for the victim of a manifest breach of his rights, every breach is serious. In the light of the complaints it receives, the Commission has observed that a large and growing number of people consider that any breach of fundamental rights in the Member States could activate Article 7 and often suggest that the Commission start proceedings. It is therefore essential that this point be clarified.

The procedure laid down by Article 7 of the Union Treaty aims to remedy the breach through a comprehensive political approach. It is not designed to remedy individual breaches.

A combined reading of Articles 6(1) and 7 of the Union Treaty shows that there must be a breach of the common values themselves for the existence of a breach within the meaning of Article 7 to be established. The risk or breach identified must therefore go beyond specific situations and concern a more systematic problem. This is in fact the added value of this last-resort provision compared with the response to an individual breach.

This is not, of course, to say that there is a legal void. Individual fundamental rights breaches must be dealt with through domestic, European and international court procedures. The national courts, the Court of Justice, in the field covered by Community law, and the European Court of Human Rights all have clearly defined and important roles to play here.

1.4.2. The clear risk of a serious breach

A risk of serious breach remains within the realm of the potential, though there is a qualification: the risk must be “clear”, excluding purely contingent risks from the scope of the prevention mechanism. A serious breach, on the other hand, requires the risk to have actually materialised. To take a hypothetical example, the adoption of legislation allowing procedural guarantees to be abolished in wartime is a clear risk; its actual use even in wartime would be a serious breach.

By introducing the concept of “clear risk”, Article 7 of the Union Treaty provides a means of sending a warning signal to an offending Member State before the risk materialises. It also places the institutions under an obligation to maintain constant surveillance, since the “clear risk” evolves in a known political, economic and social environment and following a period of whatever duration during which the first signs of, for instance, racist or xenophobic policies will have become visible.

1.4.3. Serious breach

The serious breach criterion is common to the prevention and the penalty mechanisms: the clear risk must be that of a “serious” breach and the breach itself when it occurs must be “serious”.

To determine the seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach.

Regarding the purpose of the breach, for instance, one might consider the social classes affected by the offending national measures. The analysis could be influenced by the fact that they are vulnerable, as in the case of national, ethnic or religious minorities or immigrants.

The result of the breach might concern any one or more of the principles referred to in Article 6. Even if it is enough for one of the common values to be violated or risk being violated for Article 7 to be activated, a simultaneous breach of several values could be evidence of the seriousness of the breach.

1.4.4. Persistent breach

This condition applies only to the activation of the penalty mechanism in respect of a breach which has already taken place.

By definition, for a breach to be persistent, it must last some time. But persistence can be expressed in a variety of manners.

A breach of the principles in Article 6 could come in the form of a piece of legislation or an administrative instrument. It might also take the form of a mere administrative or political practice of the authorities of the Member State. There might already have been complaints or court actions, in the Member State or internationally. Systematic repetition of individual breaches could provide stronger arguments for applying Article 7.

The fact that a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the European Court of Human Rights or by non-judicial international bodies such as the Parliamentary Assembly of the Council of Europe or the United Nations Commission on Human Rights and has not demonstrated any intention of taking practical remedial action is a factor that could be taken into account.

2. MEANS OF SECURING RESPECT FOR AND PROMOTION OF COMMON VALUES ON THE BASIS OF ARTICLE 7 OF THE UNION TREATY

Apart from the fact that the Union policies themselves help to secure respect for and promotion of common values, the legal and political framework for the application of Article 7 as described above, based on prevention, requires practical operational measures to ensure thorough and effective monitoring of respect for and promotion of common values.

2.1. Introducing regular monitoring of respect for common values and developing independent expertise

Substantial efforts are already being made by the three institutions - European Parliament, Council and Commission. The European Parliament's annual report on the fundamental rights situation in the European Union is a major contribution to the elaboration of an exact diagnosis on the state of protection in the Member States and the Union.⁵

Many other sources of information are available, such as the reports of international organisations,⁶ NGO reports⁷ and the decisions of regional and international courts, among them the European Human Rights Court.⁸

The very large number of individual complaints addressed to the Commission or the European Parliament are another valuable source of information. In most cases the Commission has no grounds for investigating a breach of Community law and bringing an action against the Member State before the Court of Justice, as they concern situations for which the Member States alone are responsible without any link to Union law, but they do provide a basis for summing up the public's major concerns in fundamental rights matters.

In its 2000 report on the fundamental rights situation in the European Union,⁹ Parliament recommended establishing a network of authoritative fundamental rights experts to provide a high degree of expertise regarding each of the Union Member States. A pilot project was carried out involving the establishment in 2002 of a network by the European Commission.¹⁰ It is a good example of cooperation between the Commission and Parliament, because, although its aim is to provide input for the Commission's work, it also provides Parliament with essential information.

The network's main task is to prepare an annual report on the fundamental rights situation in the Union¹¹ giving a precise picture of the situation in each Member State. The published report reaches a wide audience.

The information should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty.

Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches.

⁵ Report on the fundamental rights situation in the European Union (2002) (2002/2013(INI)), Rapporteur: Mr Fodé Sylla, A5-0281/2003. See also, for 2001, report by Ms Swiebel (PE311.039/DEF) and, for 2000, report by Mr Cornillet (PE 302.216/DEF).

⁶ E.g. Resolutions of the UN General Assembly and reports by the Human Rights Commission, the Council of Europe, and its Commissioner for Human Rights in particular, and the OSCE.

⁷ E.g. documents and reports published by Amnesty International, Human Rights Watch and Fédération Internationale des Droits de l'Homme.

⁸ But also the International Court of Justice and, in future, the International Criminal Court.
⁹ 2000/2231(INI).

¹⁰ The invitation to tender for the network was issued in OJ S60 on 26 March 2002.

¹¹ http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm.

Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.

It is important for the Member States to be involved in the exercise of evaluating and interpreting the results of the work of the network of independent experts. With a view to exchanging information and sharing experience, the Commission could organise regular meetings on the information gathered with the national bodies dealing with human rights.

The network of experts is independent of both the Commission and Parliament, and this independence must be preserved. Obviously neither the Commission nor Parliament is bound by the network's analyses.

The network is currently operating on the basis of a contract of limited duration between the Commission and a university centre.¹²

The role played by the current network of experts will be meaningful only if its continuity, or even permanent status, is ensured. To this end, the network's work needs to be provided with an appropriate legal basis.

Proper coordination would at all events be needed in order to avoid any risk of duplication with the European Monitoring Centre on Racism and Xenophobia,¹³ which for some years has played an important role in collecting data on racism and xenophobia in the EU's Member States through the network of national contact points (Raxen).

In the light of experience with the network, the situation could be reviewed in the medium term to see how best to continue.

2.2. Concertation between institutions and with the Member States

Activating the Article 7 mechanism would have repercussions for the Member State being criticised but also for the Union as a whole. The seriousness of the resulting situation will be such that a need for concerted action will probably be felt, especially with the European Parliament and the country concerned.

If the Commission is to make a proposal, it will seek, with due respect for its powers, close contacts with the two other parties involved at the various stages prior to presenting a proposal with a view to identifying situations likely to be caught by Article 7, to analysing them and to making initial informal contact with the authorities of the Member State concerned.

This Member State could be contacted for its opinion on the situation. These contacts would enable the Commission to present the facts of which the Member State is accused and allow that Member State to make its views known.

¹² The network is made up of high-level experts from each Member State, coordinated by Mr O. De Schutter from the Université Catholique de Louvain.

¹³ Regulation (EC) No 1035/97 of 2 June 1997, OJ L 151, 10.6.1997.

Any such informal contacts would not be mandatory and would in no way prejudice the decision which the Commission will ultimately have to take in all conscience.

The Commission considers that it would be helpful for the Member States to designate contact points that could operate as a network with the Commission and the European Parliament and provide support to the network of independent experts.

2.3. Cooperation with the Council of Europe's Commissioner for Human Rights

Established in 1999 as an independent institution within the Council of Europe,¹⁴ the Commissioner for Human Rights is a non-judicial body responsible for promoting respect for and education in human rights, as derived from the Council of Europe's instruments. It submits an annual report to the Committee of Ministers and the Parliamentary Assembly.

As part of the cooperation between the Council of Europe and the European Community, contacts should be established between the Council of Europe's Commissioner and the Community institutions. The Commission is willing to establish such contacts with a view, for example, to mutual exchange of information.

2.4. Regular dialogue with civil society

Civil society plays a particularly important monitoring role, both in protecting and in promoting fundamental rights. It is often thanks to reports by non-governmental organisations that public and institutional attention is drawn to breaches but also to good practices.

The Commission would therefore like to establish a regular dialogue with NGOs responsible for fundamental rights in the Union along the lines of what is done under its external policy.

2.5. Information and education for the public

Education projects and projects promoting fundamental rights are already in place, supported by the Community programmes Socrates, Youth and Leonardo da Vinci or by other education and culture programmes, as well as devised as part of the Commission's information policy on the Charter of Fundamental Rights.¹⁵

The Commission considers it would be worthwhile developing a public awareness and education policy with the Member States and international organisations, like the Council of Europe and NGOs active in the fundamental rights field, which have developed a body of practice.

¹⁴ Resolution (99) 50 on the Council of Europe Commissioner for Human Rights adopted by the Committee of Ministers on 7 May 1999, at its 104th Session.

¹⁵ The Commission has approved the Community financial contribution for several projects selected after a call for proposals. They seek to inform the public about their fundamental rights, including the Charter.

Conclusion

The European Union is first and foremost a Union of values and of the rule of law. The conquest of these values is the result of our history. They are the hard core of the Union's identity and enable every citizen to identify with it.

The Commission is convinced that in this Union of values it will not be necessary to apply penalties pursuant to Article 7 of the Union Treaty and Article 309 of the EC Treaty.

But the preservation of the common values must be at the centre of every political consideration and every action of the Union, in order to promote peace and the well-being of its peoples.

The Commission believes it is contributing to achievement of that objective by insisting on measures based on prevention, strict monitoring of the situation in the Member States, cooperation between the institutions and with the Member States and lastly, public information and education.

ANNEX

Article 7 of the Treaty on European Union

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community.