

**Subject: Request under Article 92 of the Treaty in Case ECS-8/11 S**

Excellency,

Please find attached the Request for Sanctions in reference to Case ECS-8/11 S.  
Please accept, the expression of my highest considerations.

Yours sincerely,

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

Janez Kopač

H.E. MR. VALDRIN LLUKA  
MINISTER OF ECONOMIC DEVELOPMENT OF THE REPUBLIC OF KOSOVO\*

H.E. MR. DRITON KUQI, MINISTER OF ECONOMY  
OF THE REPUBLIC OF MACEDONIA

H.E. MR. MIRKO ŠAROVIĆ  
MINISTER OF FOREIGN TRADE AND ECONOMIC RELATIONS OF BOSNIA AND  
HERZEGOVINA

MS ANNE-CHARLOTTE BOURNOVILLE  
EUROPEAN COMMISSION

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

**REQUEST**

In Case ECS-8/11 S

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,<sup>1</sup> the

**SECRETARIAT OF THE ENERGY COMMUNITY**

seeking a Decision from the Ministerial Council that

1. Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC and 2016/16/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.
2. The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC and Article 3(1) of Decision 2016/16/MC-EnC is extended for one year until the meeting of the Ministerial Council in the second half of 2018.
3. In addition, the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas sector by all Energy Community institutions, as well as the right to participate in votes for Measures under Article 91 of the Treaty is suspended.
4. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2018.

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

**I. Relevant Facts**

- (1) 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.<sup>2</sup> Bosnia and Herzegovina was obliged, until June 2014, to rectify the breaches established in Article 1 of the Decision 2013/04/MC-EnC.

<sup>1</sup> Hereinafter: Dispute Settlement Procedures.

<sup>2</sup> Annex I.

- (2) On 23 September 2014, the Ministerial Council adopted Decision 2014/04/MC-EnC establishing serious and persistent breach within the meaning of Article 92(1) of the Treaty.<sup>3</sup> By the same Decision, the Ministerial Council also ordered Bosnia and Herzegovina to adopt legislation compliant with Directive 2009/73/EC and Regulation (EC) 715/2009 and present to the Ministerial Council at its next meeting,<sup>4</sup> and it requested the Secretariat to offer assistance. As a follow up to that Decision, on 20 October 2014, the Secretariat submitted a Third Energy Package-compliant draft Gas Law to the authorities of Bosnia and Herzegovina.<sup>5</sup> This draft was discussed and elaborated further during 2015 in a series of meetings both at ministerial level and in a working group of experts representing the State and the two entities, without bringing any tangible result.<sup>6</sup>
- (3) In the absence of any progress, the Ministerial Council at its meeting on 16 October 2015 decided that Bosnia and Herzegovina had failed to rectify the serious and persistent breaches identified in Decisions 2013/04/MC-EnC and 2014/04/MC-EnC and adopted the following measures under Article 92 of the Treaty:<sup>7</sup>

Article 2

**Measures under Article 92**

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

- (4) Moreover, the Ministerial Council decided that

*The European Union, in line with Article 6 of the Treaty, will during the period of infringement, analyse appropriate measures with regard to the suspension of financial support to projects in the gas sector in Bosnia and Herzegovina which should have no influence on the possibility to rectify the identified breaches.<sup>8</sup>*

- (5) The Ministerial Council further obliged Bosnia and Herzegovina to

*take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2013/04/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2016.*

- (6) Discussions on designing a national legal framework rectifying the breaches identified by the Ministerial Council, implementing its Decisions and transposing the Third Energy Package were held at numerous meetings in Sarajevo and Vienna, as set out in details in the Secretariat's Request submitted on 5 August 2016 to the Ministerial Council for extending the validity of the measures under Article 92 of the Treaty imposed to Bosnia and

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<sup>3</sup> Annex II.

<sup>4</sup> Article 2(1) Decision 2014/04/MC-EnC.

<sup>5</sup> [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/NEWS/News\\_Details?p\\_new\\_id=9741](https://www.energy-community.org/portal/page/portal/ENC_HOME/NEWS/News_Details?p_new_id=9741)

<sup>6</sup> Request for extension of Measures under Article 92 of the Treaty, submitted by the Energy Community Secretariat on 5 August 2016, p. 4.

<sup>7</sup> Annex III.

<sup>8</sup> Article 3(1) of Decision 2015/10/MC-EnC.

Herzegovina by Decision 2015/10/MC-EnC.<sup>9</sup> However, no progress was achieved and the non-compliant gas legislation of Bosnia and Herzegovina remained completely unchanged.

- (7) Nevertheless, the Secretariat continued to mediate further discussions between the entities, that led to the conclusion of an “*Agreement on Removal of Serious and Persistent Breach under the Energy Community Treaty in the gas sector*”, signed on 13 October 2016 by the Minister of Foreign Trade and Economic Relation of Bosnia and Herzegovina, entities’ responsible ministers, and the Director of the Energy Community Secretariat, in the presence of Director General for Energy at the European Commission (hereinafter, “Agreement of 13 October 2016”).<sup>10</sup>
- (8) By signing the Agreement of 13 October 2016, the utmost obligation of Bosnia and Herzegovina to rectify the serious and persistent breaches in the gas sector and transpose the Energy Community gas *acquis* in its entire territory was recognised. The parties endorsed a draft state gas law and an Action Plan as attached to the Agreement. Namely, the agreed Plan foresaw the adoption of a state law transposing the minimum requirements related to the regulatory authority and transmission system operators, to be complemented by harmonized gas laws envisaged for adopted at entity levels. The envisaged measures at both state level and entities’ level should have been adopted by 1 July 2017. The Secretariat reiterated its engagement to provide further assistance to Bosnia and Herzegovina, and agreed to modify its request for the extension of measures under Article 92 by allowing for their suspension until 31 March 2017, so as for Bosnia and Herzegovina to undertake the envisaged steps under the Action Plan.
- (9) The Ministerial Council at its meeting on 14 October 2016, taking note of the above Agreement, decided that Bosnia and Herzegovina had failed to rectify the serious and persistent breaches identified in Decisions 2013/04/MC-EnC, 2014/04/MC-EnC and adopted Decision 2016/16/MC-EnC<sup>11</sup> for the extension of measures under Article 92 of the Treaty. However, in accordance with the terms of the Agreement of 13 October 2016, it suspended the effect of the measures under Article 92 of the Treaty until 31 March 2017. Decision 2016/16/MC-EnC reads as follows:

Article 1

**Failure to rectify serious and persistent breach**

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

Article 2

**Extension of measures under Article 92**

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

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<sup>9</sup> Request for extension of Measures under Article 92 of the Treaty, submitted by the Energy Community Secretariat on 5 August 2016, p. 4.

<sup>10</sup> Annex V.

<sup>11</sup> Annex IV.

Article 3  
**Follow-up**

1. The European Union, in line with Article 6 of the Treaty, is invited to take the appropriate measures for the suspension of financial support granted to Bosnia and Herzegovina in the sectors covered by the Treaty.
2. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*.
3. In any event, if no State Law is adopted by 31 March 2017, the duration of the measures under Article 2 of Decision 2015/10/MC-EnC is extended until the next meeting of the Ministerial Council. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its next meeting in 2017.

Article 4  
**Addressees and entry into force**

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

- (10) On 13 December 2016, a meeting between responsible ministers and the Secretariat was held in Sarajevo as a follow up on the Action Plan under the Agreement of 13 October 2016, where the commitments of the state and the entities were reiterated. Afterwards, no further progress was communicated and no further meetings took place.
- (11) Due to failure to implement the Agreement within the deadlines, Bosnia and Herzegovina once again failed to comply with Articles 1 and 2 of Decision 2016/16/MC-EnC, the measures already adopted under Decision 2015/10/MC-EnC took effect again after 31 March 2017 until the next meeting of the Ministerial Council in 2017.
- (12) In the aftermath of Decision 2016/16/MC-EnC, Bosnia and Herzegovina was reminded several times of the obligations arising from it and necessary measures to implement in order to rectify those breaches.
- (13) Namely, the 14<sup>th</sup> Ministerial Council at its meeting on 14 October 2016 in Sarajevo<sup>12</sup> took note of the Implementation Report of 1 September 2016 presented by the Secretariat and urged the Contracting Parties, among which former Bosnia and Herzegovina to address the identified delays in the implementation of the *acquis* urgently. In the Implementation Report 2016 to which the Ministerial Council made reference put particular emphasis on the deadlock of the gas sector in Bosnia and Herzegovina. It reiterated that the natural gas sector in Bosnia and Herzegovina is still regulated at the level of the entities, and pointed out that while in Federation of Bosnia and Herzegovina, a 2007 government decree fails to transpose any key principle of the gas *acquis* in breach of the Second Energy Package, in Republika Srpska, the natural gas sector is regulated by the Law on Gas adopted in 2007 and amended in 2012, which however also fails to comply with the Third Energy Package.
- (14) The 12<sup>th</sup> Energy Community Gas Forum, held in Ljubljana, in conclusions of 20 September 2017,<sup>13</sup> underlined the need to urgently align primary legislation with the Third Energy Package and overcome the persisting related deadlock in Bosnia and Herzegovina.

<sup>12</sup> Conclusions of the 14<sup>th</sup> Ministerial Council dated 14 October 2016 at its meeting held in Sarajevo, available at: [https://www.energy-community.org/dam/jcr:5d1081a1-fb42-478b-a543-6fde938a5b49/MC102016\\_Conclusions.pdf](https://www.energy-community.org/dam/jcr:5d1081a1-fb42-478b-a543-6fde938a5b49/MC102016_Conclusions.pdf).

<sup>13</sup> Conclusions of the Energy Community Gas Forum at its 12<sup>th</sup> meeting held in Ljubljana, on 20 September 2017, available at: [https://www.energy-community.org/dam/jcr:7bf1daf6-a542-41bf-80fd-9d45f4fdc095/GF\\_092017\\_conclusions.pdf](https://www.energy-community.org/dam/jcr:7bf1daf6-a542-41bf-80fd-9d45f4fdc095/GF_092017_conclusions.pdf).

- (15) On 28 September 2017, the Secretariat assessed in a special report for the CESEC High Level Group Meeting “*State of Gas Market Integration in the Energy Community*”<sup>14</sup>, the status of Third Energy Package implementation and gas market development, where it again stressed that Bosnia and Herzegovina failed to transpose any key principle of the gas *acquis*; and that as a result is subject to infringement cases in this context and has been imposed serious measures.
- (16) In the Implementation Report 2017<sup>15</sup>, the Secretariat reiterated the same conclusions as those of the previous year. Namely, it pointed out that while in Federation of Bosnia and Herzegovina, a 2007 government decree fails to transpose any key principle of the gas *acquis* in breach of the Second Energy Package, in Republika Srpska, the natural gas sector is regulated by the Law on Gas adopted in 2007 and amended in 2012, which however also fails to comply with the Third Energy Package.
- (17) By the date of this Request, no progress has been achieved for compliance with the Ministerial Council’s Decision 2016/16/MC-EnC. The commitments and assurances given by Bosnia and Herzegovina’s representatives to resolve the deadlock in the gas sector were once again not kept.
- (18) Instead, Bosnia and Herzegovina failed to adopt any state law compliant with gas *acquis*. The draft state law that was endorsed by the Agreement of 13 October 2016 is still pending in public consultation. The entities also failed to adopt harmonized laws on their level, thus failing to comply with the commitments undertaken in the Action Plan.
- Currently, in the Federation of Bosnia and Herzegovina, a 2007 government decree<sup>16</sup> fails to transpose any key principle of the gas *acquis*, in breach of both the Second and Third Energy Package. The adoption of a new draft gas law at entity level for the Federation of Bosnia and Herzegovina has been stuck in parliament for more than three years and the draft in its present form is also not compliant with the Third Energy Package.
  - In Republika Srpska, the natural gas sector is regulated by the Law on Gas adopted in 2007<sup>17</sup> and amended in 2012<sup>18</sup>. This Law, however, also fails to comply with the Third Energy Package. In the first quarter of 2017, the government of Republika Srpska prepared a draft gas law, which is mainly compliant with the Third Energy Package but failed to make any link to a single state regulatory authority, and risks to widen the gap between the two entities. This draft is currently in the parliamentary procedure of the Republika Srpska.
- (19) As will be reasoned below, the violation by Bosnia and Herzegovina of its obligations under the Treaty established by Decision 2013/04/MC-EnC, and qualified as serious and persistent breaches by Decision 2014/04/MC-EnC continue. Therefore, the Secretariat decided to follow-up on the Ministerial Council’s request and to submit this Request for extension of Measures under Article 92 of the Treaty to the Ministerial Council.

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<sup>14</sup> CESEC High Level Group Report “*State of Gas Market Integration in the Energy Community*”, 28 September 2017, available at: [https://www.energy-community.org/dam/jcr:e13af33b-63a5-4df9-b88f-f22ad1174482/ECS\\_CESEC\\_092017.pdf](https://www.energy-community.org/dam/jcr:e13af33b-63a5-4df9-b88f-f22ad1174482/ECS_CESEC_092017.pdf).

<sup>15</sup> Energy Community Secretariat’s Annual Implementation Report for year 2017, Section 5 Bosnia and Herzegovina, 5.2. Gas.

<sup>16</sup> The Decree on Organization and Regulation of Gas Industry Sector in the Federation of Bosnia and Herzegovina published in the Official Gazette FBiH, No. 83/07.

<sup>17</sup> The Gas Law published in the Official Gazette of the Republic of Srpska, no. 86/07.

<sup>18</sup> Amendment to Gas Law published in Official Gazette of the Republic of Srpska, no. 121/12.

## II. Relevant Energy Community Law

(20) 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”.*

(21) Article 76 of the Treaty reads:

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

(22) 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.”*

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

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

(24) Article 37 of the Dispute Settlement Procedures<sup>19</sup> (“Binding nature of the decision”) reads:

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

(25) 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.”*

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<sup>19</sup> Even though the Dispute Settlement Rules of 2008 have been amended in 2015 (PA/2015/04/MC-EnC), according to Article 46(2) of the amended Dispute Settlement Rules, cases initiated before 16 October 2015 are dealt with under the Dispute Settlement Rules of 2008.

(26) 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.”*

(27) 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.”*

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

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

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

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

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

(29) 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. Continued existence of a serious and persistent breach*

(30) By Decision 2014/04/MC-EnC adopted on 23 September 2014, the Ministerial Council determined a number of serious and persistent breaches of Energy Community law based on its earlier findings in Decision 2013/04/MC-EnC. By Decision 2015/10/MC-EnC, upon a Request submitted by the Secretariat, the Ministerial Council decided that Bosnia and Herzegovina failed to rectify the serious and persistent breaches and imposed measures, which were extended by Decision 2016/16/MC-EnC.



- (31) Despite the signature of the Agreement of 13 October 2016, as outlined above, and the suspension of the measures by 31 March 2017, and irrespective of the Secretariat's efforts, Bosnia and Herzegovina failed to adopt any compliant gas state law within the set deadline. This failure cannot be made up by the adoption of gas legislation by the entities as the state-level regulatory authority would need to assume key functions and competences for the Bosnian gas sector.
- (32) In any event, Bosnia and Herzegovina has not notified the Secretariat legislation adopted by any, let alone both entities which could rectify the breaches established by the Ministerial Council in its earlier decisions. The Secretariat is only aware of draft legislation both at state level, as endorsed by the Agreement of 13 October 2016, and at entities level which are not fully compliant with the Energy Community *acquis*. Having draft legislation prepared but not yet adopted and entered into force cannot be considered as measures necessary to comply with a Decision of the Ministerial Council.<sup>20</sup>
- (33) As follows from the account given above, non-compliance by Bosnia and Herzegovina with the *acquis communautaire* and the previous Decisions of the Ministerial Council still persists and the serious and persistent breaches identified in Decision 2014/04/MC-EnC have not been remedied even after the adoption of Decision 2016/16/MC-EnC. In particular, the country has still not designated one or more competent bodies with the function of regulatory authorities to cover the entire gas sector in Bosnia and Herzegovina, implemented the requirement of legal and functional unbundling of all its transmission system operators, excluded the possibility for negotiated access to the transmission system and to approve and to publish transmission tariffs (or a corresponding methodology) for all transmission system operators, nor effectively opened the market for all customers.

## 2. Necessity for extending the duration of the measures under Article 92(1) of the Treaty

- (34) By Decision 2015/10/MC-EnC, the Ministerial Council adopted measures under Article 92 of the Treaty. The measures taken by the Ministerial Council consist in suspending the voting rights of Bosnia and Herzegovina for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty, and in suspending the application of the Secretariat's Reimbursement Rules<sup>21</sup> to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community.
- (35) The measures adopted by the Ministerial Council under Article 92(1) of the Treaty in October 2015 were in force for one year after the adoption of Decision 2015/10/MC-EnC. i.e. until 16 October 2016. Based on the Secretariat's report included in the Request submitted by the Secretariat on 13 May 2016, the Ministerial Council at its meeting in 2016 reviewed the effectiveness of the measures taken and the need for maintaining the measures beyond their expiry.<sup>22</sup>
- (36) While in 2015, the Ministerial Council invited the European Union during the period of infringement, "*to analyze appropriate measures with regard to the suspension of financial support to projects in the gas sector in Bosnia and Herzegovina,*" in 2016, it invited the European Union "*to take the appropriate measures for the suspension of financial support granted to Bosnia and Herzegovina in the sectors covered by the Treaty.*"
- (37) At its meeting in 2016, the Ministerial Council suspended the measures imposed to Bosnia and Herzegovina and granted additional time to Bosnia and Herzegovina for the adoption of

<sup>20</sup> See, to that effect, Case C-430/98 *Commission v Luxembourg*, paragraphs 8-13 (ECLI:EU:C:1999:520); Case C-648/13 *Commission v Poland*, paragraphs 129-132 (ECLI:EU:C:2016:490).

<sup>21</sup> Procedural Act of the Energy Community Secretariat 2015/05/ECS-EnC of 1 December 2015 on the adoption of the Reimbursement Rules of the Energy Community, available at: [https://www.energy-community.org/dam/jcr:d1f4daff-2140-4174-a5af-2aab368d6f9e/PA\\_2015\\_05\\_ECS\\_reimbursement.PDF](https://www.energy-community.org/dam/jcr:d1f4daff-2140-4174-a5af-2aab368d6f9e/PA_2015_05_ECS_reimbursement.PDF).

<sup>22</sup> Article 2(3) of Decision 2015/10/MC-EnC.

the required legislative amendments until 31 March 2017. However, since no progress was achieved by Bosnia and Herzegovina, measures under Article 2 of Decision 2015/10/MC-EnC started to apply again as of 1 April 2017.

- (38) 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, and despite the measures taken by the Ministerial Council under Article 92(1) of the Treaty on repetitive basis, Bosnia and Herzegovina has not even agreed to a draft of the legislative measures needed to rectify the serious and persistent breaches identified by the Ministerial Council, let alone adopted such measures.
- (39) In particular, the commitments and assurances given by Bosnia and Herzegovina's representatives under the Agreement of 13 October 2016 and reiterated during meeting of 13 December 2016, to resolve the deadlock in the gas sector were once again not kept. Though in the said Agreement, concluded under the mediation and assistance of the Secretariat and the European Commission, the entities' responsible ministers had endorsed a draft law and established an Action Plan for the adoption of a state law transposing minimum requirements on the single state regulatory authority and on transmission system operators complemented by harmonized gas laws at entity levels, such state law has not been agreed upon between the entities and not been adopted. Instead, the draft state law is still under public consultation. At entities' level, the draft gas laws - which in their present form are not compliant with the gas *acquis* – have been in parliamentary procedure for years.
- (40) Bosnia and Herzegovina is the only Contracting Party which has not implemented the key features required by the Second Package's Directive 2003/55/EC, while other Contracting Parties already implement the Third Package. This amounts to an outright denial of the will and capability to implement Energy Community law on gas. As the Secretariat already stated in its Request under Article 91 of the Treaty in Case ECS-8/11 and its Requests under Article 92 of the Treaty in Case ECS-8/11 S, tolerance of such behaviour by the Energy Community institutions would mean to admit their own lack of will or capability to protect the very essence of the Energy Community, the implementation of European law in the Energy Community and the respect of commitments taken by its Parties.
- (41) The persistent and serious state of non-compliance of Bosnia and Herzegovina with the key gas *acquis* under the Second Package has also seriously compromised and further exacerbated transposition of other upgraded pieces of EU *acquis* in the gas sector, such as additional requirements under Third Energy Package. As a result of these continued and persistent failures, Bosnia and Herzegovina is also subject to a separate request for measures in Case ECS-6/16 S after the Ministerial Council has established existence of a breach in Case ECS-6/16.
- (42) Since Bosnia and Herzegovina failed to rectify serious and persistent breaches of the Treaty already identified in four Decisions of the Ministerial Council for more three years, the non-extension of the measures identified by Decision 2015/10/MC-EnC and Decision 2016/16/MC-EnC could only be understood that the failure to remedy serious and persistent breaches is accepted by the Energy Community institutions.
- (43) The Secretariat thus requests extension of the measures imposed by Decisions 2015/10/MC-EnC and Decision 2016/16/MC-EnC. This request is also based on an analysis of the effectiveness of these measures.
- (44) The Secretariat generally recommends a cautious approach to the suspension of other voting rights, as this measure is one of those listed by way of an example in Article 92(1) of the Treaty, 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 under the extraordinary circumstances giving rise to the resent Request, it considers it

appropriate to deprive Bosnia and Herzegovina of the right to vote for Measures and Procedural Acts to be adopted under Chapter II of Title II related to the gas sector. Since Bosnia and Herzegovina has failed to comply with the Energy Community *acquis* stemming from the Second Energy Package, the Secretariat considers that suspending the voting rights of Bosnia and Herzegovina on adoption of new gas-related *acquis* stemming from the Third Energy Package – which is also not transposed and implemented in Bosnia and Herzegovina - appropriate. The measure requested covers all gas-related *acquis* to be adopted by all Energy Community institutions, such as Ministerial Council but also PHLG, thus including the adoption of Network Codes and Guidelines.

- (45) Moreover, the Secretariat considers suitable and appropriate to request the Ministerial Council to suspend the voting rights of Bosnia and Herzegovina in relation to Measures to be adopted under Article 91 of the Treaty, i.e. in dispute settlement procedures. It would be inappropriate for Bosnia and Herzegovina to vote when a decision is to be taken by the Ministerial Council concerning infringement action against another Party to the Treaty when the breaches are related to implementation of the Third Energy Package when Bosnia and Herzegovina itself has not implemented correctly its predecessor, i.e. the Second Energy Package, and has not even transposed the Third Energy Package.
- (46) As regards the suspension of the application of the Secretariat's Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community, the Secretariat considers that this measure was effective and should be therefore maintained further. Out of 27 meetings<sup>23</sup> organised by the Energy Community after Decision 2016/16/MC-EnC, the Secretariat did invite but did not reimburse the representatives of Bosnia and Herzegovina. Nonetheless, 50 representatives from Bosnia and Herzegovina attended 22 of those meetings at their own expenses. In fact, the number of representatives from Bosnia and Herzegovina that attended Energy Community meetings increased in 2015/2016 in comparison with the previous period.<sup>24</sup> These facts show that, even though the suspension of reimbursement for the representatives from Bosnia and Herzegovina did not have an effect to exclude this Party from the ongoing integration process, taking place in the fora and meetings organized by the Energy Community, the suspension of the reimbursement rules had an effect in increasing the costs of Bosnia and Herzegovina. Therefore, the Secretariat considers it suitable and appropriate to once again extend the validity and the duration of this measure for one more year until end 2018.
- (47) Finally, the Secretariat sees no reason why Bosnia and Herzegovina should benefit from any new financial assistance and support concerning gas infrastructure projects. Financial support by a Party of the Energy Community to another Party's infrastructure projects despite the latter's refusal to adopt and implement the legislation to govern that infrastructure based on the European Union's *acquis* would amount to tolerating and supporting the breach of that *acquis*. Therefore, the Secretariat considers it suitable and appropriate for the Ministerial Council to invite the European Union, in line with Article 6 of the Treaty, extend the measure under Article 3(1) of Decision 2016/16/MC-EnC for one more year until the meeting of the Ministerial Council in the second half of 2018, suspending the financial support to projects in the gas sector in Bosnia and Herzegovina, including those identified as priorities in the process of implementation of Regulation 347/2013, as adapted by the Ministerial Council. The second list is expected to be adopted by the Ministerial Council at its meeting in 2018, and depending on whether Bosnia and Herzegovina would rectify the serious and persistent

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<sup>23</sup> Those meetings concern institutional meetings of the Energy Community (PHLG, ERB, for a...) as well as meetings of the Task Forces and Working Groups of the Energy Community.

<sup>24</sup> For reference, in the period October 2014-October 2015, 35 meetings were held, and 28 representatives from Bosnia and Herzegovina were present 21 of which were reimbursed. Period of comparison is from October until July of the relevant year.

breaches of Energy Community law, the Ministerial Council will review the necessity of maintaining this measure further.

- (48) Given that the breaches subject to this Request amount to a factual refusal for the past ten years to implement the core elements of Energy Community legislation in the area of gas, the Secretariat considers the extension of the measures under Article 92 of the Treaty for another year are both necessary and proportionate to make Bosnia and Herzegovina respect its commitments under the Treaty.
- (49) For these reasons, the Secretariat proposes that the Ministerial Council at its meeting in December 2017 to extend the validity of the measures adopted in its Decision 2015/10/MC-EnC and Decision 2016/16/MC-EnC until the meeting of the Ministerial Council in the second half of 2018. It also proposes including a new measure related to suspension of voting rights related to adoption of new gas *acquis* pursuant to Title II of the Treaty, and suspension of voting rights related to dispute settlement cases.

### **ON THESE GROUNDS**

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

1. Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC and 2016/16/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.
2. The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC and Article 3(1) of Decision 2016/16/MC-EnC is extended for one year until the meeting of the Ministerial Council in the second half of 2018.
3. In addition, the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new *acquis* in the gas sector by all Energy Community institutions, as well as the right to participate in votes for Measures under Article 91 of the Treaty is suspended.
4. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2018.

Vienna, 12 October 2017

On behalf of the Secretariat of the Energy Community

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

Janez Kopač  
Director

A handwritten signature in black ink, appearing to read "Dirk Buschle".

Dirk Buschle  
Deputy Director / Legal Counsel

## List of Annexes

- Annex I Ministerial Council Decision 2013/04/MC-EnC
- Annex II Ministerial Council Decision 2014/04/MC-EnC
- Annex III Ministerial Council Decision 2015/10/MC-EnC
- Annex IV Ministerial Council Decision 2016/16/MC-EnC
- Annex V Agreement on Removal of Serious and Persistent Breach under the Energy Community Treaty in the gas sector, signed by the Minister of Foreign Trade and Economic Relation of Bosnia and Herzegovina, entities' responsible ministers, and the Director of the Energy Community Secretariat, in the presence of Director General for Energy at the European Commission, on 13 October 2016