

Vienna, 12 October 2017
BA-ECS-6_16-S_O_01_12-10-2017

Subject: Request under Article 92 of the Treaty in Case ECS-6/16 S

Honorable Presidency and Vice-Presidencies of the Energy Community,

Please find attached the Request for Sanctions in reference to Case ECS-6/16 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-6/16 S

Submitted pursuant to Article 92 (1) of the Treaty establishing the Energy Community and Articles 39 to 42 of Procedural Act 2015/04-MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty,¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

seeking a Decision from the Ministerial Council that

1. The failure by Bosnia and Herzegovina to implement Ministerial Council Decision 2016/07/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/07/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2018.
3. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

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

I. Relevant Facts

- (1) On 13 May 2016, the Secretariat initiated dispute settlement procedures against Bosnia and Herzegovina, by way of submitting a Reasoned Request based on Article 11(3) of the amended Dispute Settlement Rules, for non-compliance with the Treaty establishing the Energy Community, and in particular with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 ("Third Energy Package") by 1 January 2015, pursuant to Article 3(1) of Ministerial Council Decision 2011/02/MC-EnC, and for failure to forthwith notify those measures to the Secretariat, in breach of Articles 6 and 89 of the Energy Community Treaty as well as Article 3(1) and (2) of the Ministerial Council Decisions 2011/02/MC-EnC of 6 October 2011.

¹ Hereinafter: Dispute Settlement Procedures.

- (2) On 14 October 2016, the Ministerial Council adopted Decision 2016/07/MC-EnC on the failure by Bosnia and Herzegovina to comply with certain obligations under Title II of the Treaty.² This Decision reads as follows:

Article 1
Failure by the Bosnia and Herzegovina to comply with the Treaty

1. By failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 by 1 January 2015 pursuant to Article 3(1) of Ministerial Decision 2011/02/MC-EnC and by failing to forthwith notify those measures to the Secretariat, the Bosnia and Herzegovina has failed to comply with Articles 6 and 89 of the Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/MC-EnC.
2. For the reasons sustaining these findings, reference is made to the Reasoned Request.

Article 2
Follow-up

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

Article 3
Addressees and entry into force

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

- (3) In the aftermath of Decision 2016/07/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.
- (4) In its Western Balkans 6 Electricity Monitoring Reports of March 2017³ and of July 2017⁴ the Secretariat reiterated that Bosnia and Herzegovina had not taken any measure to put in place the necessary legal framework in compliance with the Third Energy Package. The Secretariat identified such failure as a major legal obstacle to establishing an organized electricity market and market couplings with neighbouring countries.
- (5) The Energy Community Fora also invited Bosnia and Herzegovina to adopt Third Energy Package compliant legislation. Namely, the 22nd Energy Community Electricity Forum held in Athens on 31 May and 1 June 2017⁵, invited the governments of the Western Balkans, including Bosnia and Herzegovina, to adopt necessary decisions enabling the set-up of national electricity markets in compliance with the Third Energy Package. At this Forum, the

² Annex I.

³ Western Balkans 6 Electricity Monitoring Report, Energy Community Secretariat, March 2017, available at: https://www.energy-community.org/dam/jcr:ffed9ec9-229a-4f98-a925-d54e0e52bbba/WB6_EL_032017.pdf.

⁴ Western Balkans 6 Electricity Monitoring Report, Energy Community Secretariat, July 2017, available at: https://www.energy-community.org/dam/jcr:751f707d-5eb8-4d6c-afde-d29c111e8dc1/EnC_WB6_EL_072017.pdf.

⁵ Conclusions of the 22nd Energy Community Electricity Forum, held in Athens, 31.05—1.06.2017, available at: https://www.energy-community.org/dam/jcr:968436cb-0507-4523-be86-cc080c01937d/AF2017_Conclusions.pdf.

importance to have in place a compliant national legislation with the Third Energy Package was also stressed as a prerequisite to further enable the link with the Infrastructure Package. The 12th Energy Community Gas Forum, held in Ljubljana, in conclusions of 20 September 2017⁶, underlined the need to urgently align primary legislation with the Third Energy Package and overcome the persisting related deadlock in Bosnia and Herzegovina.

- (6) 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”⁷, 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 it noted that only one of the entities (Republika Srpska) had adopted a law in the gas sector, which however is still not compliant with the Third Energy Package.
- (7) In the Implementation Report 2017⁸, the Secretariat again emphasized that Bosnia and Herzegovina had failed to transpose the Third Energy Package. It also referred to the present infringement case opened against Bosnia and Herzegovina on failure to transpose the Third Energy Package⁹.
- (8) On 1 March 2017, the Secretariat sent a letter to the Minister of Foreign Trades and Economic Relations of Bosnia and Herzegovina where it requested a report on the measures taken for rectifying the breach identified in Ministerial Council Decision 2016/07/MC-EnC not later than 15 March 2017.¹⁰ Bosnia and Herzegovina has neither replied to the Secretariat’s letter nor submitted a report as requested.
- (9) By the date of this Request, no progress has been achieved for compliance with the Ministerial Council’s Decision 2016/07/MC-EnC.
- (10) Instead, Bosnia and Herzegovina failed to adopt the necessary national measures to transpose the Third Energy Package either in gas or electricity sector.

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

- In the framework of addressing the serious and persistent breaches identified in Case ECS-8/11S, on 13 October 2016, an “*Agreement on Removal of Serious and Persistent Breach under the Energy Community Treaty in the gas sector*” was 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 (hereinafter, “Agreement of 13 October 2016”).¹¹ Within the Agreement, the parties endorsed a draft state gas law and an Action Plan as attached to the Agreement to be adopted by 31 March 2017. However, the draft state law endorsed by the Agreement of 13 October 2016 is still pending in public consultation. The entities also failed to adopt the respective complementary harmonized laws thus failing to comply with the commitments undertaken in the Action Plan.
- Currently, in the Federation of Bosnia and Herzegovina, a 2007 government decree¹² 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

⁶ Conclusions of the Energy Community Gas Forum at its 12th 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.

⁷ 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:7bf1daf6-a542-41bf-80fd-9d45f4fdc095/GF_092017_conclusions.pdf.

⁸ Energy Community Secretariat’s Annual Implementation Report for year 2017, Section 5 Bosnia and Herzegovina, 5.1. Electricity, 5.2. Gas.

⁹ *Ibid.*

¹⁰ Annex II.

¹¹ Annex III.

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

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 2007¹³ and amended in 2012¹⁴. 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.
- On 13 December 2016, a meeting between responsible ministers and the Energy Community Secretariat was organized in Sarajevo as a follow up to the Action Plan under the Agreement of 13 October 2016, where commitments of the state and the entities were reiterated. However, no further progress was communicated and no further meeting was organized.

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

- Neither of the jurisdictions has harmonized its national legal framework with the Third Energy Package. At the date of this Request, a compliant legal framework on the state level has not been adopted.
- In the course of 2016 and first half of 2017 the Secretariat assisted the drafting of the Law on Regulator for Electricity and Natural Gas, Transmission and Electricity Market in Bosnia and Herzegovina,¹⁵ partially transposing the Third Package in the domain of energy activities governed by the State level authorities of Bosnia and Herzegovina.
- On 3 May 2017 authorities of Bosnia and Herzegovina have launched and have completed public hearing¹⁶ for the draft Law on the Regulator for Electricity and Natural Gas, Transmission and Electricity Market in Bosnia and Herzegovina prepared in cooperation with the Secretariat in 2016. No further activities concerning adoption of the draft Law were undertaken since then.

(11) As will be reasoned below, the violation by Bosnia and Herzegovina of its obligations under the Treaty established by Article 1 of Decision 2016/07/MC-EnC continues and is to be qualified as a serious and persistent breach. Therefore, the Secretariat decided to follow-up on the Ministerial Council's request and to initiate a procedure under Article 92 of the Treaty.

II. Relevant Energy Community Law

(12) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as "a Treaty obligation or to implement a Decision or Procedural Act addressed to it within the required period". A violation of Energy Community Law occurs if "a Party fails to comply with its obligation under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community".

(13) 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

¹³ The Gas Law published in the Official Gazette of the Republic of Srpska, no. 86/07.

¹⁴ Amendment to Gas Law published in Official Gazette of the Republic of Srpska, no. 121/12.

¹⁵ available at:

http://www.mvteo.gov.ba/Aktuelni_propisi_i_javne_konsultacije/03052017_Prednacr_ZAKON_O_REGULATORU_ELEKTRICNE_ENE_RGIJE_I_PRIRODNOG_GASA_PREN.pdf

¹⁶ available at: http://www.mvteo.gov.ba/Aktuelni_propisi_i_javne_konsultacije_II/default.aspx?id=8654&langTag=en-US

Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty".

(14) Article 76 of the Treaty reads:

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

(15) 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."

(16) 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."

(17) 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."

(18) 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 directly before the Ministerial Council on the grounds of a failure to take the necessary measures to comply with the decision."

(19) 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."

(20) 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.

(4) The request shall be submitted to the Presidency and the Vice-Presidency at least 60 days before the respective meeting. A copy shall be submitted to the Secretariat for registration. The request shall not be made public.

(21) 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.

(22) Article 42 of the Dispute Settlement Procedures (“Measures under Article 92”) reads:

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

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

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

III. Legal Assessment

1. Introduction

aa. The binding nature of a Ministerial Council Decision

(23) 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).

(24) In the case of a Decision taken under Article 91 such as Decision 2016/07/MC-EnC, the obligation to implement amounts to an obligation to fully rectify the breaches identified and to ensure compliance with Energy Community law. This is expressly stipulated in Article 38(1) of the Dispute Settlement Procedures. Moreover, in Article 2 of Decision 2016/07/MC-EnC, the Ministerial Council set a deadline of December 2016 for Bosnia and Herzegovina to take all appropriate measures to that effect, as well as report regularly to the Secretariat and the Permanent High Level Group about measures taken.

(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 a Decision establishing a breach is taken 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 or 92 of the Treaty is a request for revocation under Article 91(2) or Article 92(2) of the Treaty respectively.

- (26) It follows from the binding effect of decisions under Energy Community law that Bosnia and Herzegovina remains obliged to implement the Ministerial Council Decision 2016/07/MC-EnC. Subsequent changes to domestic legislation or regulatory practice would thus affect the present Request only to the extent they result in effective rectification of breaches identified in Article 1 of that decision. At the date of this Request, this is not the case as no progress was achieved in adopting national measures implementing the Third Energy Package.

bb. Measures under Article 92 of the Treaty

- (27) Besides triggering a self-standing obligation of the Party concerned to rectify any breaches identified in a previous Decision under Article 91(1) or Article 92(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.
- (28) 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. Contrary to this, in its case law in Cases ECS-8/11 and 9/13, the Ministerial Council has followed an approach of separating these two measures. It has first established a serious and persistent breach,¹⁷ and only in cases where the serious and persistent breach has not been rectified, it has imposed measures related to suspension of certain rights deriving from the application of the Treaty.¹⁸ Therefore, in the present Request the Secretariat requests a decision by the Ministerial Council on establishing serious and persistent breach only. The Secretariat reserves the right to request measures related to suspension of certain rights deriving from the application of the Treaty subject to another request under Article 92(1) of the Treaty.
- (29) Decisions under Article 92 of the Treaty do not require a preliminary procedure. The fact that the present Request is a follow-up to the Ministerial Council’s Decision concluding Case ECS-6/16 means that Bosnia and Herzegovina was given opportunity to be heard, despite the abolishment of a preliminary procedure in cases related to non-transposition under Article 11(3) of the Dispute Settlement Procedures, by the possibility to reply to the Reasoned Request. Bosnia and Herzegovina did not avail itself of this possibility. The procedure under Article 91 of the Treaty also introduced the Ministerial Council to the subject-matter of the present Request.
- (30) 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.
- (31) 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 essence, it is a diplomatic or political rather than a legal procedure. Whether or not this procedure is suitable for the enforcement

¹⁷ See: Ministerial Council Decision D/2014/04/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina in Case ECS-8/11, dated 23 September 2014; Ministerial Council Decision D/2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty in Case ECS-9/13, dated 14 October 2016.

¹⁸ Ministerial Council Decision D/2015/10MC-EnC: on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty, in Case ECS-8/11, dated 16 October 2015.

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”.¹⁹ Similarly, the 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”.²⁰

- (32) As Article 7 TEU has so far not been used within the EU,²¹ no precedence of relevance under Article 94 of the Treaty exists. In this situation, the Secretariat bases 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. This was also the case in Secretariat’s Requests under Article 92 of the Treaty in Cases ECS-8/11 and 9/13.
- (33) In the following, the Secretariat will submit that the failure of Bosnia and Herzegovina, at the date of this Request, to comply with the Energy Community Law constitutes a serious and persistent breach of Energy Community law.

2. *Continued existence of a breach*

- (34) The Secretariat submits that Bosnia and Herzegovina continues to breach Article 1 of Decision 2016/07/MC-EnC and provisions of the *acquis communautaire* referred to therein.
- (35) As described above, the Secretariat assumed a proactive role in helping Bosnia and Herzegovina to draft and adopt the necessary measures for rectifying the breaches identified by the Ministerial Council.
- (36) In close cooperation with the Government, the Secretariat assisted in developing the relevant draft legislation. Particularly, already on 20 October 2014 the Secretariat had submitted a Third Energy Package-compliant draft Gas Law to relevant authorities of Bosnia and Herzegovina. Numerous meetings and exchanges have taken place between the Secretariat and the authorities of Bosnia and Herzegovina afterwards, as detailed in the Reasoned Request in Case ECS-6/16 submitted by the Secretariat on 13 May 2016. Furthermore, as detailed in Section 1 of this Request, the Secretariat mediated in discussions that led to the conclusion of the Agreement of 13 October 2016, and provided assistance for all and any proposed draft legislation, both at state or entity level. Moreover, the Secretariat participated in a meeting held in Sarajevo on 13 December 2016, where national and entities’ responsible ministers reiterated their commitments to bring domestic laws at both national and entities level in compliance with the Third Energy Package. The Secretariat has not been able to organize any further meeting, nor has received any further communication.
- (37) The Secretariat made thus great efforts to find a solution for Bosnia and Herzegovina’s non-compliant gas sector by bringing together all relevant parties and presenting a number of proposals, but to no avail. The commitments and assurances given by the country’s representatives to resolve the deadlock in the gas sector were once again not kept.
- (38) In parallel, the Secretariat assisted Bosnia and Herzegovina in developing the relevant Third Energy Package-compliant draft legislation for the electricity sector as well. In particular, in the course of 2016 and first half of 2017 the Secretariat assisted the drafting of the Law on Regulator for Electricity and Natural Gas, Transmission and Electricity Market in Bosnia and

¹⁹ 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.

²⁰ Report of the High Level Reflection Group, p. 20.

²¹ The European Commission has recently issued a recommendation to Poland stating that in case the Polish authorities take any measures that will aggravate the systemic threat to the rule of law, the Commission is ready to immediately activate Article 7 TEU (Commission Recommendation of 26.7.2017 regarding the rule of law in Poland C(2017) 5320 final). Furthermore, in the case of Hungary, the European Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 TEU (European Parliament resolution of 17 May 2017 on the situation in Hungary 2017/2656(RSP)).

Herzegovina. However, no progress has been achieved in transposing the Third Energy Package provisions related to the electricity sector either.

- (39) Therefore, due to the continued impasse, the priorities remain the same as in previous reporting years. Reaching agreement on implementing the Third Energy Package provisions in the whole territory of Bosnia and Herzegovina is the utmost priority.
- (40) Finally, despite the Secretariat's assistance as well as numerous reminders and several meetings, more than a year after the Ministerial Council meeting in October 2016 no tangible results in compliance with Energy Community law have been achieved for the overall territory of Bosnia and Herzegovina.
- (41) Therefore, the Secretariat concludes that the de facto situation as regards the compliance of the national legislation of Bosnia and Herzegovina with the Third Energy Package remained unchanged since the last decision of the Ministerial Council and breaches identified in Decision 2016/07/MC-EnC have not been remedied.
- (42) The Secretariat is not aware of any force majeure event that would impede rectifying a breach of Energy Community law. While the Secretariat consistently offered its assistance in drafting and reviewing legislation, Bosnia and Herzegovina did not rectify any of the breaches of its obligations under the Treaty, as indicated by the Ministerial Council. The Secretariat stresses that demonstrated willingness to pursue activities for complying with the Treaty obligations is not in any whatsoever manner sufficient to rectify any of the identified breaches. Furthermore, the Secretariat notes that 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.²²
- (43) Based on the above, the Secretariat submits that Bosnia and Herzegovina, in the aftermath of the Decision 2016/07/MC-EnC, failed to show that any sufficient progress was achieved in rectifying the breaches listed in Article 1 of the Decision 2016/07/MC-EnC since October 2016. In particular, the country has still not adopted national measures to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 by 1 January 2015 pursuant to Article 3(1) of Ministerial Council Decision 2011/02/MC-EnC, and has failed to notify those measures to the Secretariat, in breach of Articles 6 and 89 of the Energy Community Treaty as well as of Article 3(1) and (2) of the Ministerial Council Decisions 2011/02/MC-EnC.
- (44) In conclusion, the Secretariat respectfully submits that Bosnia and Herzegovina, in the aftermath of Decision 2016/07/MC-EnC, failed to rectify the breaches of its obligations under the Treaty as listed in Article 1 of that Decision.

aa. Serious breaches

- (45) 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".²³ It can be argued that this statement is applied by analogy to the situation at hand. Given that Article 92 of the Treaty was modeled 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.

²² 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.

²³ Communication from the Commission, SEC(2005) 1658, section 16. See also: See ECJ C-169/13, *Commission v Italy*, ECLI:EU:C:2014:2407, para. 100; ECJ C-378/13, *Commission v Greece*, ECLI:EU:C:2014:2405, paras. 37, 72.

- (46) The Secretariat considers that adopting and implementing the laws, regulations and administrative provisions necessary to comply with the Third Energy Package, constitute fundamental elements of the *acquis communautaire* as extended to the Contracting Parties by the Treaty and the Ministerial Council Decision in 2011. Adopting national legislation transposing the Third Energy Package constitutes a prerequisite for reforming and opening Contract Parties' energy markets and their regional and pan-European integration as one of the Energy Community's primary objectives, laid down in Article 2 of the Treaty.
- (47) While the failure to implement any of the elements of the Third Energy Package would suffice to be considered a serious and consistent breach, not having transposed and implemented any of the four pieces of EU *acquis* referred to in Article 1 of Decision 2016/07/MC-EnC must be considered as a denial of the very essence of the European electricity and gas market models.
- (48) Additional consequences stemming from the non-transposition and non-implementation of the Third Energy Package further exacerbate the seriousness of the breach.
- (49) Firstly, without transposing the Third Energy Package by 2015, to which Bosnia and Herzegovina committed by Decision of the Ministerial Council of 2011, its implementation and reform of energy markets is impossible. Namely, taking into account the persistent non-compliance far beyond the established deadline, i.e. 1 January 2015, it is of vital importance for Bosnia and Herzegovina to immediately transpose and implement the Third Energy Package at national level in order to ensure, amongst others, an attractive investment environment, development of competitive and liquid energy market, and its full opening, as well as regional and EU integration of the electricity and gas markets.
- (50) Secondly, the Third Energy Package now forms the basis for market reform and integration throughout the Energy Community. The adoption of other pieces of EU *acquis* that are based on the Third Energy Package, such as the Network Codes and Guidelines, which will become part of Energy Community *acquis* could also not be properly implemented in the Contracting Parties without having transposed the Directives and Regulations referred to in Article 1 of Decision 2016/07/MC-EnC,
- (51) Thirdly, as noted in several reports and detailed in Section 1 of this Request, non-transposition of the Third Energy Package provisions at national level leads to several concrete breaches related to the implementation of the EU *acquis* in both the electricity and the gas sector. Namely, the Third Energy Package introduces new requirements for unbundling applicable to transmission system operators. Lack of legal basis in primary legislation is preventing proper unbundling and certification of either electricity or gas TSO in this Contracting Party. The Third Energy Package also upgrades the tasks, competences and independence of regulatory authorities significantly. Without such upgrade in primary and secondary legislation, Bosnia and Herzegovina falls further behind the other Contracting Parties.
- (52) All the more, Bosnia and Herzegovina is the only Contracting Party today, which has not implemented the key features required by the Second Package's gas Directive 2003/55/EC, and all those are precondition for implementing the Third Package. This is also subject to a separate request for measures ECS-8/11 S, and measures under Article 92 of the Treaty have already been imposed to this Contracting Party. This situation amounts to an outright denial of the will and capability to implement Energy Community law. 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 non-household customers. All of these

constitute major obstacles to the introduction of additional requirements in line with the Third Energy Package.

- (53) Finally, the Communication by the European Commission on Article 7 TEU from 2003/24 - upon which Article 92 of the Treaty was modeled - 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.
- (54) No communication, after the Decision 2016/07/MC-EnC has been adopted, notifies about any significant change rectifying the breaches identified therein. The Secretariat considers thus those breaches as being serious under Article 92(1) of the Treaty. In this respect the Secretariat recalls that it was invited by the Ministerial Council in Decision 2016/07/MC-EnC to initiate a procedure under Article 92 of the Treaty if the breaches have not been rectified by December 2016. This presupposes as well the existence of a serious (and persistent) breach.

bb. Persistence of the breaches

- (55) According to the European Commission, for a breach to be persistent, it must last some time.²⁵ Bosnia and Herzegovina has failed to adopt and apply, within the prescribed established timetable, national measures to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Third Energy Package by 1 January 2015, and it failed to notify any such measure to the Secretariat by that date. Therefore, this Contracting Party persistently breaches its obligations for implementing the Third Energy Package for three years.
- (56) The Secretariat recalls that Bosnia and Herzegovina has been constantly reminded of its breach in the Secretariat's Implementation Reports as well as by various Ministerial Council and Permanent High Level Group meetings and communications, without any result.
- (57) As noted above, despite the Decision of the Ministerial Council 2016/07/MC-EnC, Bosnia and Herzegovina has not yet rectified the breaches subject to this Request. Failure to comply with legally binding decisions of the Ministerial Council amounts to a persistent breach.

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. The failure by Bosnia and Herzegovina to implement Ministerial Council Decision 2016/07/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/07/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2018.
3. The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

²⁴ Commission, Communication on Article 7 of the Treaty on European Union, pp. 3, 7.

²⁵ Commission Communication on Article 7 of the Treaty on European Union, p. 8.

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 2016/07/MC-EnC
- Annex II Letter sent by the Energy Community Secretariat on 1 March 2017, No. ECS-06/16/01-03-2017
- Annex III 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