

Vienna, 8 October 2019  
ECS-3/08S-ECS-9/13SO08-10-2019

**Subject: Request under Article 92 of the Treaty in Cases ECS-3/08 S and ECS-9/13 S**

Excellency,

Please find attached the Request for measures in reference to Cases ECS-3/08 S and ECS-9/13 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. VADIM BRINZAN  
MINISTER OF ECONOMY AND INFRASTRUCTURE  
REPUBLIC OF MOLDOVA**

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

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

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

**REQUEST**

in Cases ECS-3/08 S and ECS-9/13 S

Submitted pursuant to Article 92(1) of the Treaty establishing the Energy Community, Articles 39 to 42 of Procedural Act No 2008/1/MC-EnC of 27 June 2008 and Articles 39 to 42 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty,<sup>1</sup>

the

**SECRETARIAT OF THE ENERGY COMMUNITY**

seeking a Decision from the Ministerial Council that

1. Republic of Serbia continues with a serious and persistent breach of its obligations within the meaning of Article 92(1) of the Treaty, as established by the Ministerial Council, by failing to implement Ministerial Council Decisions and rectifying the breaches established therein
  - 2016/02/MC-EnC in Case ECS-3/08 of 14 October 2016 and 2018/12/MC-EnC of 29 November 2018 in Case ECS-3/08 S,
  - 2014/03/MC-EnC of 23 September 2014 in Case ECS-9/13 and 2016/17/MC-EnC of 14 October 2016 in Case ECS-9/13 S.
2. The right of Republic of Serbia to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty, as well as the right to participate in votes for Decisions under Article 91 of the Treaty are suspended.
3. The Secretariat is requested to suspend the application of its Reimbursement Rules to the representatives of Republic of Serbia for all meetings organized by the Energy Community.
4. 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 Serbia in the sectors covered by the Treaty.

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<sup>1</sup> Case ECS-9/13 S has been initiated under the Dispute Settlement Rules of 2008, and Case ECS-3/08 S has been initiated under the Dispute Settlement Rules of 2015. Dispute Settlement Procedures adopted by the Ministerial Council in 2008 have been amended in October 2015. The wording of the respective articles is the same, with the only difference that the word "sanctions" from 2008 Rules is replaced by the word "measures" in the 2015 Rules. Pursuant to Article 46(2) of the Procedural Act of 2015 amending the Dispute Settlement Procedures, however, „[c]ases initiated already before 16 October 2015 shall be dealt with in accordance with the Procedural Act applicable before the amendments adopted on that date.“

5. The effect of the measures adopted by this Decision is limited for one year upon their adoption at the meeting of the Ministerial Council in the second half of 2019. 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 2020.
6. Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decisions 2016/02/MC-EnC and 2018/12/MC-EnC in Cases ECS-3/08 and ECS-3/08 S, and 2014/03/MC-EnC and 2016/17/MC-EnC in Cases ECS-9/13 and ECS-9/13 S in cooperation with the Secretariat and shall report to the Ministerial Council in 2020 about the implementation measures taken.
7. The Secretariat is invited to monitor compliance of the measures taken by Republic of Serbia with the *acquis communautaire*.

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

## I. Relevant Facts

### 1. Cases ECS-3/08 and ECS-3/08 S

- (1) On 17 September 2010, the Secretariat initiated dispute settlement procedures against Republic of Serbia by an Opening Letter in Case ECS-3/08 for failure to fulfill its obligations under the Energy Community Treaty by not complying with Articles 3 and 6 of Regulation 1228/2003.<sup>2</sup> On 14 October 2016, the Ministerial Council upheld the Secretariat's Reasoned Request by adopting Decision 2016/02/MC-EnC on the failure by Republic of Serbia to comply with the Energy Community Treaty in ECS-3/08.<sup>3</sup> Serbia was obligated to rectify the breaches established in Article 1 of Decision 2016/02/MC-EnC until December 2016.
- (2) On 29 November 2018, the Ministerial Council adopted Decision 2018/12/MC-EnC establishing a serious and persistent breach within the meaning of Article 92(1) of the Treaty in Case ECS-3/08 S.<sup>4</sup> In Article 1(1) of Decision 2018/12/MC-EnC, the Ministerial Council held that “[u]nless Republic of Serbia rectifies the breaches identified in Ministerial Council Decision 2016/02/MC-EnC within six months of the present Decision, the failure by Serbia to implement Decision 2016/02/MC-EnC will be considered a serious and persistent breach within the meaning of Article 92(1) of the Treaty. Both, Serbia and Kosovo\* will make their best efforts to find a solution.”<sup>5</sup>
- (3) In its Decision, the Ministerial Council also invited the Secretariat to request measures under Article 92 of the Treaty, if the identified breach was not rectified by Republic of Serbia by 1 July 2019.

<sup>2</sup> Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ 2003 L 176/1.

<sup>3</sup> Annex I.

<sup>4</sup> Annex II.

<sup>5</sup> See also: Point 10, MC Conclusions, 29 November 2018.

- (4) The breach by Republic of Serbia subject to Case ECS-3/08 consist in “*not using the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, former Yugoslav Republic of Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003, [by which] Republic of Serbia, to which actions and non-actions of its state-owned transmission system operator are imputable, has failed to comply with Article 6 of Regulation 1228/2003.*”
- (5) Within six months from Decision 2018/12/MC-EnC, this breach has still not been rectified. In the absence of any “efforts to find a solution” by both transmission system operators, the Secretariat on 6 May 2019 suggested the opening of negotiations, and through its Dispute Resolution and Negotiation Centre, made available third-party facilitation of negotiations between the transmission system operators of Republic of Serbia and Kosovo\*. As both transmission system operators could not agree to meet, the negotiations were held in a way that proposals were exchanged via the Secretariat. After proposals made by the parties themselves proved to be unacceptable by the respective other side, the Secretariat, on 26 July 2019, submitted a draft agreement to both parties on the sharing of congestion revenue on the relevant borders. Those proposals are still subject to further discussions, in particular as regards the actual scope of the negotiations.
- (6) For the purpose of the present Request, it must be concluded that a bilateral agreement between *Elektromreža Srbije* (“EMS”) and of *Kosovo Operator Sistemi, Transmisioni dhe Tregu të Kosovës Sh.a.* (“KOSTT”) on compensation of KOSTT for the loss of congestion revenue from past, present or future congestion management is not in place, nor is any other arrangement which would restore compliance by Republic of Serbia with the Energy Community rules related to the use of congestion management.
- (7) Hence, it is undisputed that the transmission system operator for electricity in Republic of Serbia, the state owned EMS, still performs congestion management and allocates 50% of the available transfer capacities on the three interconnectors of the system operated by KOSTT with Albania, North Macedonia and Montenegro.
- (8) It is further undisputed that Republic of Serbia still fails to ensure that its state-owned transmission system operator uses revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, North Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003, in compliance with Energy Community law, and the previous Decisions by the Ministerial Council in particular.
- (9) The present Request does not intend to attribute blame for the failure of negotiations, or to discuss whether Republic of Serbia made enough efforts to find a solution. It rather follows up on the Ministerial Council’s invitation to request measures under Article 92 of the Treaty, if the identified breach is not rectified by 1 July 2019. For this purpose, it needs to be established that the breach subject to Ministerial Council Decision 2018/12/MC-EnC has not been rectified. This is evidently the case.
- (10) By the date of this Request, no progress has been achieved for compliance with the Ministerial Council’s Decisions in Cases ECS-3/08 and ECS-3/08 S. In substance, the breach consisting in the failure of Republic of Serbia to ensure that the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, North Macedonia and Montenegro are used for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003, continues to exist and thus qualifies as a serious and persistent breach in line with Decision 2018/12/MC-EnC.

## 2. Cases ECS-9/13 and ECS-9/13 S

- (11) On 24 October 2013, the Secretariat initiated dispute settlement procedures against Republic of Serbia by an Opening Letter in Case ECS-9/13 for failure to transpose and implement certain provisions of the Energy Community *acquis communautaire* related to gas at the time.<sup>6</sup> On 23 September 2014, the Ministerial Council upheld the Secretariat's Reasoned Request by adopting Decision 2014/03/MC-EnC on the failure by Republic of Serbia to unbundle the state-owned gas incumbent *Srbijagas* in line with the requirements of the Second Energy Package.<sup>7</sup>
- (12) Only a few days before the Ministerial Council meeting in 2016, on 11 October 2016, the Government of Republic of Serbia adopted a conclusion on the adoption of an action plan on the restructuring of *Srbijagas* ("Government's 2016 Action Plan"). On 14 October 2016, the Ministerial Council adopted Decision 2016/17/MC-EnC<sup>8</sup> establishing that the failure of Republic of Serbia to implement Decision 2014/03/MC-EnC and the Energy Community's gas *acquis* constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty but postponed the adoption of measures under Article 92 of the Treaty to 2017.
- (13) The Government's 2016 Action Plan was never implemented, nor has unbundling been achieved. In the following, the Secretariat submitted two requests for imposing measures under Article 92 in Case ECS-9/13 S against Serbia, one on 12 October 2017 and another one on 12 September 2018. Yet no decision imposing measures under Article 92 of the Treaty has been adopted. Instead, in its Conclusions in 2017,<sup>9</sup> the Ministerial Council "*regretted that no tangible progress was achieved in unbundling of the Serbian gas transmission system operator and hence rectifying the breach identified in Decision 2014/03/MC-EnC.*"
- (14) The breaches of Republic of Serbia relate to its obligations for unbundling of its gas TSOs *Srbijagas* and *Yugorosgaz*. Namely, no proper legal and functional separation of *Srbijagas* from other activities not relating to transmission was performed, and *Yugorosgaz* was not separated functionally, in its organisation and decision-making from other activities not related to transmission.
- (15) In the aftermath of 2016/17/MC-EnC, Republic of Serbia was reminded several times of the obligations arising from it and necessary measures to implement in order to rectify those breaches in the gas sector. Most recently, the Secretariat recalled in its 2018 Implementation Report<sup>10</sup> that one of the most severe breaches is the lack of unbundling of *Srbijagas*.
- (16) At a meeting held in Belgrade on 18 April 2019, the Secretariat and Serbia agreed on an Action Plan for the unbundling of *Srbijagas*. The Secretariat followed-up by sending an email on 29 April 2019 in which the exact actions and deadlines of *Srbijagas* unbundling were specified, among others filing new application for certification by *Transportgas Srbija* by 15 May 2019 and completing the unbundling by 1 October 2019. The Secretariat sent two more emails, one on 27 May 2019 and another one on 9 July 2019, in which it raised concern for

<sup>6</sup> 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 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks.

<sup>7</sup> Annex III.

<sup>8</sup> Annex IV.

<sup>9</sup> Point 17, Ministerial Council Conclusions, 14 December 2017.

<sup>10</sup> Annual Implementation Report Energy Community Secretariat of 1 September 2018, p. 162

successful fulfillment of the agreed actions and requested information about the progress. To date, Serbia has not replied to these requests.

- (17) Serbia continues with the failure to implement full and proper unbundling of its natural gas transmission system operators in compliance with Energy Community law both under the Second Energy Package, in breach of Articles 9(1) and 9(2) of Directive 2003/55/EC, which is subject to the present case, and under the Third Energy Package.
- The obligation to implement the requirement of legal unbundling of *Srbijagas* from other activities not relating to transmission is not fulfilled. The mere incorporation of a new company, *ransportgas Srbija*, even if it is foreseen for the future to be designated as a transmission system operator for natural gas, cannot be considered as proper legal unbundling of transmission activities from the vertically integrated undertaking *Srbijagas*. *Firstly*, all transmission related activities are continued to be exercised by an internal department of a vertically integrated *Srbijagas* as well as all relevant assets and capacities further remain fully possessed by this company. *Secondly*, *Transportgas Srbija* is a shell company which has no human, technical and/or financial resources as well as assets and capacities necessary for performance of transmission activities. And *finally*, *Transportgas Srbija* was not authorised (licensed) and, taking into account its lack of necessary assets and capacities, it is even not yet eligible for authorisation and designation as a transmission system operator for natural gas.
  - The obligation to ensure the independence of *Yugorosgaz-Transport* in terms of its organisation and decision-making from other activities not relating to transmission is not fulfilled. Even though *Yugorosgaz Transport* was legally unbundled from the holding company *Yugorosgaz* already before the Ministerial Council's Decision in 2014 it still has not complied with all criteria for functional unbundling of the transmission system operator. Namely, *Yugorosgaz-Transport* is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity, does not seem to have at its disposal the required resources for carrying out its tasks as TSO, does not seem to have the ability to comply with all tasks and obligations of a transmission system operator independently, thus currently does not comply with the unbundling requirements set out in Energy Community law.
  - The obligation to ensure the independence of the two transmission system operators in terms of its organisation and decision-making from other activities not relating to transmission is not fulfilled. Functional unbundling of transmission system operator in line with Directive 2003/55/EC demands for specific criteria to be implemented so as to ensure an actual operator's independence from production and supply activities, including independence of persons responsible for the management of the transmission system operator, effective decision-making rights with regard to assets, and establishment of the compliance programme and its observance. Implementation of these measures does require for a thorough review of the operator's corporate structure, status of its management and operational separation from the holding company.
- (18) AERS recently, on 27 August 2019, informed the Secretariat that on 16 July 2019 it has withdrawn the certificate from *Yugorosgaz-Transport* because the later has not complied with the independence criteria related to its organization and decision-making which AERS set as conditions in its certification decision under the Third Energy Package. The failure to unbundle *Yugorosgaz-Transport* under the Third Energy Package is subject to an open

infringement procedure.<sup>11</sup> However, AERS's findings that *Yugorosgaz-Transport* fails to comply with the independence criteria related to decision-making confirm that this TSO is not yet functionally unbundled.

- (19) By the date of this Request, no progress has been achieved for compliance with the Ministerial Council's Decisions or the various actions plans. The commitments and assurances given by Serbia's representatives were not followed up by actions. Serbia continues to breach the unbundling requirements under the Second Energy Package in case of both natural gas transmission systems operators.

### 3. Failure to comply

- (20) For the reasons given above, the Secretariat submits that the violations by Republic of Serbia of its obligations under the Treaty established by:
- Decision 2016/02/MC-EnC in Case ECS-3/08 and qualified as serious and persistent by Decision 2018/12/MC-EnC in Case ECS-3/08 S and
  - Decision 2014/03/MC-EnC in Case ECS-9/13 and qualified as serious and persistent by Decision 2016/17/MC-EnC in Case ECS-9/13 S

continue to exist. Therefore, the Secretariat follows-up on the Ministerial Council's request in Decisions 2018/12/MC-EnC of 29 November 2018 and 2016/17/MC-EnC of 14 October 2016 and submits this Request to the Ministerial Council for imposing measures under Article 92 of the Treaty in Cases ECS-3/08 S and ECS-9/13 S.

## II. Relevant Energy Community Law

- (21) 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".*

- (22) Article 76 of the Treaty reads:

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

- (23) 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."*

- (24) Article 92(1) of the Treaty reads:

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<sup>11</sup> See Case ECS-10/17.

*“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.”*

(25) 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.”*

(26) 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.”*

(27) 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.”*

(28) 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.”*

(29) 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.*

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



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

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

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

### III. Legal Assessment

#### 1. Introduction

##### *aa. The binding nature of a Ministerial Council Decision*

- (31) 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).
- (32) The non-implementation of a Ministerial Council Decision under Article 91 or 92 by the Party concerned in itself constitutes a breach of Energy Community law. In the case of Ministerial Council Decisions such as Decisions 2016/02/MC-EnC and 2018/12/MC-EnC in Cases ECS-3/08 and ECS-3/08 S respectively, as well as Decisions 2014/03/MC-EnC and 2016/17/MC-EnC in Cases ECS-9/13 and ECS-9/13 S respectively, 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.
- (33) In Article 2(3) of Decision 2018/12/MC-EnC in Case ECS-3/08, the Ministerial Council set a deadline of 1 July 2019, for Serbia to take all appropriate measures to rectify the breach, and it invited the Secretariat to initiate the procedure for imposing measures under Article 92 of the Treaty if that does not happen. Similarly, in Decision 2016/17/MC-EnC in Case ECS-9/13 S, the Secretariat was invited to initiate a procedure for imposing measures under Article 92 in case Republic of Serbia would not comply by 2017. As explained in paragraph 13 of this Request, the Secretariat has followed up with submitting two such Requests in advance of the Ministerial Council, which due to promises of Republic of Serbia and submitted plans for compliance have not been followed up by Decisions imposing measures.
- (34) Once a Decision establishing a breach has been adopted, it is not possible any longer for the Party concerned 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.

- (35) It follows from the binding effect of decisions under Energy Community law that Serbia is obliged to implement Decisions 2016/02/MC-EnC and 2018/12/MC-EnC in Case ECS-3/08 and ECS-3/08 S, as well as Decisions 2014/03/MC-EnC and 2016/17/MC-EnC in Cases ECS-9/13 and ECS-9/13 S respectively. Subsequent changes to domestic legislation or regulatory practice, as well as any legal and corporate reforms would thus affect the present Request only to the extent they result in effective rectification of the breaches identified by the Ministerial Council. At the date of this Request, this is not the case for either Case ECS-3/08 S or ECS-9/13 S.

*bb. Measures under Article 92 of the Treaty*

- (36) 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.
- (37) In its decisions related to Cases ECS-8/11 and 9/13, the Ministerial Council has first established a serious and persistent breach in both cases subject to the present Request.
- (38) Since in the present Cases ECS-3/08 S and ECS-9/13 S, serious and persistent breaches have already been established by the Ministerial Council, by the present Request the Secretariat asks for a Decision by the Ministerial Council on imposing measures to Republic of Serbia under Article 92(1) of the Treaty.
- (39) The Decision 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 Decisions concluding Cases ECS-3/08 and ECS-9/13 means that a comprehensive preliminary procedure has already been carried out during which Republic of Serbia was given ample opportunity to be heard. This procedure also introduced the Ministerial Council to the subject-matters of the two cases subject to the present Request.
- (40) 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.
- (41) In the following, the Secretariat will submit that Serbia, at the date of this Request, continues to seriously and persistently breach Energy Community law (2.) and propose measures to the Ministerial Council (3.).

*2. Continued existence of a serious and persistent breach*

- (42) In Case ECS-3/08 S, the Ministerial Council by Decision 2018/12/MC-EnC adopted on 29 November 2018, determined serious and persistent breaches of Energy Community law based on its earlier findings in Decision 2016/02/MC-EnC. As noted in paragraph 2 of this

Request, the Ministerial Council Decision 2018/12/MC-EnC took effect within six months from its adoption, i.e. on 29 May 2019, because Republic of Serbia did not rectify the failure to implement the previous Decision adopted by the Ministerial Council. Since that date the breach established by Ministerial Council Decision 2016/02/MC-EnC is considered serious and persistent.

- (43) As described above, the Secretariat assumed a proactive role in all discussions and negotiations aiming at settling amicably the dispute between the two transmissions system operators involved. Nevertheless, all efforts made over the last ten years by the Secretariat as well as other authorities, including the European Commission and ENTSO-E, did ultimately not result in Republic of Serbia complying with Article 6 of Regulation 1228/2003.
- (44) In Case ECS-9/13 S, on 14 October 2016, the Ministerial Council adopted Decision 2016/17/MC-EnC establishing a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
- (45) As described above, the Secretariat also provided assistance to Serbia to design and implement the necessary measures for rectifying the breaches identified by the Ministerial Council. In close cooperation with the Government, the Secretariat prepared guidelines for unbundling of the transmission system operator providing a road-map for legal and functional unbundling under Directive 2003/55/EC, including a concrete action plan, as well as options available for Serbia for unbundling the transmission system operator under the Third Energy Package. It also assisted the Ministry and *Srbijagas* in developing the relevant legal and corporate acts for the establishment of the new natural gas transmission company. Furthermore, the Secretariat supported the adoption of the Government's 2016 Action Plan, and even requested postponement of measures by the Ministerial Council following the adoption of this binding Action Plan, provided that compliance is achieved in 2017. For *Yugorosgaz Transport*, which is ultimately controlled by the Russian company Gazprom, the AERS first certified this TSO despite the negative Opinion of the Secretariat, and has subsequently withdrawn the certification decision because the applicant does not comply with the unbundling requirements. Namely, AERS confirmed that *Yugorosgaz-Transport* has not been properly functionally unbundled related to its organization and decision-making, which is also a requirement under the Second Energy Package subject to this case.
- (46) Despite numerous reminders by the Energy Community institutions and reports about the obligations of Republic of Serbia to comply with the obligations and to rectify the serious and persistent breaches established by Ministerial Council decisions, the breaches identified by the Ministerial Council have not been rectified.
- (47) As follows from the account given above, non-compliance by Serbia with the *acquis communautaire* and the previous Decisions of the Ministerial Council still persists and the serious and persistent breaches identified in Decisions 2018/12/MC-EnC and 2016/17/MC-EnC have not been remedied to date.
- (48) All breaches have been qualified by the Ministerial Council as serious and persistent under Article 92 of the Treaty already in 2016 and 2018 respectively. The Secretariat respectively submits that with every year of continued non-compliance, seriousness and persistence of the respective breaches increase.

*aa. Continued seriousness of the breach*

- (49) In relation to Case ECS-3/08 S, as specified in Preamble 9 of Regulation 1228/2003, in an open, competitive market, transmission system operators should be compensated for costs incurred as a result of hosting cross-border flows of electricity on their networks by the operators of the transmission systems from which cross-border flows originate and the systems where those flows end. Ensuring that revenues resulting from capacity allocation in interconnectors with different countries are used for the purposes specified in Article 6(6) of Regulation 1228/2003 constitutes a particularly important element of the *acquis* as it serves the aim of upgrading congestion management and interconnection capacities among Contracting Parties. It is therefore of key importance for Contracting Parties to comply with requirements set out in Article 6(6) of Regulation 1228/2003 in order to increase the effective functioning of the Energy Community internal market and attain the objectives of the Energy Community.
- (50) Moreover, the failure by Republic of Serbia to comply with Article 6(6) of Regulation 1223/2003 further exacerbates the seriousness of the breach since it substantially impacts its capability of complying with more stringent criteria of the subsequent Regulation under the Third Energy Package, namely Article 16(6) of Regulation 714/2009.
- (51) Similarly, in relation to Case ECS-9/13 S, reforming and opening Contracting 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. Unbundling is a key requirement for ensuring efficient and non-discriminatory network access and thus constitutes a precondition to the opening of the natural gas market. In this regard, Recital 10 of the Preamble of Directive 2003/55/EC emphasizes the necessity to ensure that transmission systems are operated through legally separated entities where vertically integrated undertakings exist, that transmission system operators have effective decision making rights with respect to assets necessary to maintain, operate and develop networks, and that non-discriminatory decision-making process should be ensured through organisational measures regarding the independence of the decision-makers responsible. Thus, there is broad consensus in identifying unbundling as a basic important tool for achieving objectives of the Energy Community in the gas sector.
- (52) Furthermore, taking into account the vulnerability of Serbia's natural gas sector due to the dependency on the supply of natural gas from a single source, the dominant position of *Srbijagas* on the national gas market and over access to infrastructure, compliance with the deadlines for unbundling under the Third Energy Package as well as the developments of new natural gas interconnectors supported by many international partners is of vital importance for the country to proceed with the restructuring and unbundling of its gas transmission system operators as required by Energy Community law. This in turn is of key importance for the completion of national gas market reforms, as well as regional and EU integration of the internal gas market.
- (53) The failure by Serbia to unbundle its natural gas transmission system operators in compliance with Energy Community law concerns and challenges one of the fundamental elements of Directive 2003/55/EC as extended to the Contracting Parties since 2006. The failure to implement it for both of the country's transmission system operators must be considered a serious and consistent breach and a denial of the very essence of the European gas market model as enshrined in the Directive.
- (54) The following consequences resulting from the non-implementation of this key element of Directive 2003/55/EC and the open disregard of deadlines set under the Second Energy

Package further exacerbate the seriousness of the breaches and substantially impact the transposing of subsequent *acquis* from the concerned Contracting Party.

- (55) Firstly, without a proper implementation of legal and functional unbundling of natural gas transmission system operators, further implementation of the unbundling requirements stemming from Directive 2009/73/EC<sup>12</sup> will be and, in case of Serbia, already is obstructed and delayed. The Secretariat hereby recalls that Serbia was obliged to unbundle its natural gas transmission system operators in line with Directive 2009/73/EC and its own Energy Law,<sup>13</sup> i.e. to implement the rules for ownership unbundling, independent system operator or independent transmission operator before 1 June 2016. As mentioned in the Request prior to the adoption of Decision 2016/17/MC-EnC, Serbia is still far away from reaching this objective for both its gas transmission system operators. The Secretariat reiterates that the regulatory authority AERS had to withdraw its own certification decision of June 2017 on because *Yugorosgaz* could not comply with the unbundling requirements of the Third Energy Package.<sup>14</sup>
- (56) Secondly, failure to unbundle natural gas transmission system operators and therefore to ensure their independence from other activities in the sector seriously hampers any further developments of competitiveness, transparency and liquidity in the natural gas market and its integration. Without effective separation of transmission networks from activities of production and supply there is always a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks. In particular, exemption from certain requirements of the *acquis* of projects developed and implemented by undertakings that are not properly unbundled has effectively prevent competitors to enter the Serbian market and leads to discrimination by allowing use of the interconnection capacity exclusively for its own deliveries.<sup>15</sup> Only effective unbundling can ensure the removal of any conflict of interests between producers, suppliers and transmission system operators allowing to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime.
- (57) Thirdly, failure to ensure effective unbundling of transmission activities allows the vertically integrated undertaking or any part thereof to cross-subsidise its commercial activities of production and/or supply through incomes received from transmission and, consequently, at the expense of all transmission network users. Such a situation encourages unfair, discriminatory and non-transparent business practices and distorts the competitions in the natural gas market not to mention its attractiveness for investors or new entrants.
- (58) Finally, the Secretariat recalls that the Ministerial Council by Decisions 2018/12/MC-EnC in Case ECS-3/08 S and 2016/17/MC-EnC in Case ECS-9/13 S has already decided on the seriousness of the above breaches, and has postponed adoption of measures for six additional months. Nevertheless, the Ministerial Council had urged the Secretariat to submit a Request for measures under Article 92 of the Treaty already in 2017 for the first time and again in 2018 in Case ECS-9/13 S as well as in 2018 in Case ECS-3/08 S, in event of non-implementation by Serbia of the necessary measures.

<sup>12</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for internal market in natural gas and repealing Directive 2003/55/EC, as incorporated and adapted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.

<sup>13</sup> Energy Law of the Republic of Serbia of 29 December 2014 (Official Gazette of Republic of Serbia, No 145/2014).

<sup>14</sup> AERS, Decision No. 311.01-2/2016-C-1, 15.07.2019

<sup>15</sup> See: ECS, Opinion 1/2019 on the exemption of the *Gastrans* natural gas pipeline project from certain requirements under Directive 2009/73/EC by the Energy Agency of Republic of Serbia of 01.02.2019.

*bb. Continued persistence of the breach*

- (59) Serbia has failed to comply with Energy Community law in the electricity and gas sector, and in particular with respect to unbundling of its natural gas transmission system operators as well as with Article 6(6) of Regulation 1228/2003, already since 2006, when the Treaty entered into force. In fact, this is one of the most persistent breaches imaginable. In a case of measures under Article 92 against Bosnia and Herzegovina (in Case ECS-8/11 S), the Ministerial Council in 2014 deemed eight years of serious breaches as being persistent within the meaning of the Article.
- (60) The Secretariat recalls that Serbia has been constantly reminded of its breach in the Secretariat's Implementation Reports and its bilateral communication, as well as by numerous Ministerial Council and Permanent High Level Group meetings, without any tangible progress so far.
- (61) As noted above, despite Decisions 2018/12/MC-EnC in Case ECS-3/08 S and 2016/17/MC-EnC in Case ECS-9/13 S, Serbia has not yet rectified the breaches subject to this Request. Failure to comply with various legally binding decisions of the Ministerial Council on such serious breaches for three years already obviously amounts to a persistent breach, besides compliance with breaches identified in both cases was due back in 2006.

Breach has been already held persistent in 2016 when the Ministerial Council adopted Decision 2016/17/MC-EnC and by consequence, today in 2019 finding that the breach has not yet been rectified confirms its persistence.

3. *Measures under Article 92 of the Treaty*

- (62) In the Secretariat's view, leaving established serious and persistent breaches of Energy Community law unsanctioned for another year would amount to giving up on the very idea of enforcement itself, and thus on the credibility of implementation.
- (63) The present Request concerns a breach by a country, which despite all efforts made by the institutions established under the Treaty over many years and the importance of implementing unbundling in the gas sector, has refused to react in any tangible manner. If the Energy Community institutions were to tolerate such behavior, 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.
- (64) 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 within the community's legal framework. Otherwise, it risks moral hazard by other Parties, which will undermine its own foundations.
- (65) Without the Energy Community taking noticeable action, the chances that Serbia by itself will overcome such a persistent failure to implement the unbundling of its natural gas transmission system operators are minimal. The Secretariat's own experience over the last years testifies to that. The chances are even smaller for the implementation of the Third Energy Package. Without action taken by the Ministerial Council, the Secretariat will be compelled to launch the next round of infringement procedures on this account already in the very near future.

- (66) For these reasons, the Secretariat proposes that the Ministerial Council to take effective and deterring measures for the breaches subject to the present Request.
- (67) Article 92(1) of the Treaty envisages only a limited range of measures. 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.*” Under current Article 92(1) of the Treaty, the Ministerial Council is limited to the suspension of Serbia’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.
- (68) 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.
- (69) Yet it considers it appropriate to deprive Serbia of the right to vote for budget-related measures under Chapter VI of Title V of the Treaty. Voting on such measures within the Energy Community institutions takes place biannually, which not only would function as an incentive for Serbia to comply with its obligations but it also provides sufficient time to do so without being excluded from the ongoing activities.
- (70) Furthermore, being in a serious and persistent breach of the Treaty, Serbia 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 of the Energy Community Secretariat 2015/05/ECS-EnC of 1 December 2015 on the adoption of the Reimbursement Rules of the Energy Community). The Secretariat proposes to suspend their application to the representatives of Serbia for the period of one year.
- (71) Moreover, the Secretariat considers suitable and appropriate to request the Ministerial Council to suspend the voting rights of Serbia in relation to measures to be adopted under Article 91 of the Treaty, i.e. in dispute settlement procedures. It would be inappropriate for Republic of Serbia to vote when a decision is to be taken by the Ministerial Council concerning infringement action against another Party to the Treaty when Serbia itself has not complied with its obligations under the Treaty, and has disregarded all decisions taken by the Ministerial Council in dispute settlement proceedings so far. Namely, Serbia has failed to implement three Decisions that the Ministerial Council has addressed to it under Article 91 of the Treaty and all the three of them have been subsequently qualified as serious and persistent breaches of Energy Community law.
- (72) 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 law in a serious and persistent manner and refuses to implement the *acquis communautaire* 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 Instrument for Pre-Accession Assistance (IPA) programs and otherwise, is a major bilateral donor to Energy Community Contracting Parties such as Serbia. 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. It should extend to all loans and grants related to infrastructure which

would benefit either of the two gas undertakings responsible for Serbia's serious and persistent breach of Energy Community law or the Government exercising control over *Srbijagas*, including financial support for Projects of Energy Community Interest (PECI) for all state-owned project promoters. In this situation, and with a view to Article 6 of the Treaty, the Secretariat requests the Ministerial Council to invite the European Union to suspend financial support granted to Serbia in energy sectors for a defined period.

- (73) Given that the breaches subject to this Request amount to a factual refusal for the past ten years to implement one of the core elements of Energy Community law in the field of electricity and natural gas, the Secretariat considers the measures proposed and limited to the duration of one year both necessary and proportionate to make Serbia respect its commitments under the Treaty.

For these reasons, the Secretariat proposes that the Ministerial Council at its meeting in December 2019 to impose measures against Republic of Serbia until the meeting of the Ministerial Council in the second half of 2020.

## 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:

8. Republic of Serbia continues with a serious and persistent breach of its obligations within the meaning of Article 92(1) of the Treaty, as established by the Ministerial Council, by failing to implement Ministerial Council Decisions and rectifying the breaches established therein
  - 2016/02/MC-EnC in Case ECS-3/08 of 14 October 2016 and 2018/12/MC-EnC of 29 November 2018 in Case ECS-3/08 S,
  - 2014/03/MC-EnC of 23 September 2014 in Case ECS-9/13 and 2016/17/MC-EnC of 14 October 2016 in Case ECS-9/13 S.
9. The right of Republic of Serbia to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty, as well as the right to participate in votes for Decisions under Article 91 of the Treaty are suspended.
10. The Secretariat is requested to suspend the application of its Reimbursement Rules to the representatives of Republic of Serbia for all meetings organized by the Energy Community.
11. 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 Serbia in the sectors covered by the Treaty.
12. The effect of the measures adopted by this Decision is limited for one year upon their adoption at the meeting of the Ministerial Council in the second half of 2019. 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 2020.
13. Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decisions 2016/02/MC-EnC and 2018/12/MC-EnC in Cases ECS-3/08 and ECS-3/08 S, and 2014/03/MC-EnC and 2016/17/MC-EnC in Cases ECS-9/13 and



ECS-9/13 S in cooperation with the Secretariat and shall report to the Ministerial Council in 2020 about the implementation measures taken.

14. The Secretariat is invited to monitor compliance of the measures taken by Republic of Serbia with the *acquis communautaire*.

Vienna, 8 October 2019

On behalf of the Secretariat of the Energy Community



Janez Kopač  
Director



Dirk Buschle  
Deputy Director / Legal Counsel

### List of Annexes

Annex I	Ministerial Council Decision 2016/02/MC-EnC
Annex II	Ministerial Council Decision 2018/12/MC-EnC
Annex III	Ministerial Council Decision 2014/03/MC-EnC
Annex IV	Ministerial Council Decision 2016/17/MC-EnC

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2016/02/MC-EnC: on the failure by the Republic of Serbia to comply with the Energy Community Treaty in Case ECS-3/08**

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-3/08 dated 13 May 2016, as partially withdrawn on 20 July 2016;

Having regard to the Reply by the Republic of Serbia;

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 10 October 2016;

HAS ADOPTED THIS DECISION:

### **Article 1**

#### **Failure by the Republic of Serbia to comply with the Treaty**

1. By not using the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, the former Yugoslav Republic of Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003, the Republic of Serbia, to which actions and non-actions of its state-owned transmission system operator are imputable, has failed to comply with Article 6 of Regulation 1228/2003.
2. For the reasons sustaining these findings, reference is made to the Reasoned Request.

### **Article 2**

#### **Follow-up**

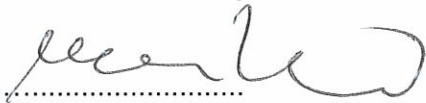
1. The Republic of Serbia shall take all appropriate measures to rectify the breach identified in Article 1 and ensure compliance with Energy Community law by December 2016. The Republic of Serbia shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.
2.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

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

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

Done in Sarajevo on 14 October 2016

For the Presidency

  
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## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2018/12/MC-EnC on the determination of a serious and persistent breach of the Treaty by the Republic of Serbia**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Article 92(1)(a) thereof, as well as Articles 39 to 41 of Procedural Act 2015/04-MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty,

Having regard to the Ministerial Council Decision 2016/02/MC-EnC of 14 October 2016 in Case ECS-3/08,

On the basis of Ministerial Council Decision 2016/02/MC-EnC of 14 October 2016 in Case ECS-3/08 declaring the existence of a breach by the Republic of Serbia of its obligations relating to failure to use the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, the former Yugoslav Republic of Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of the Regulation 1228/2003,

Having regard to the failure by the Republic of Serbia to rectify all breaches identified in Article 1 of Decision 2016/02/MC-EnC and ensure compliance with Energy Community law by December 2016 as requested by Article 2 of Decision 2016/02/MC-EnC,

Having regard to the Ministerial Council invitation to the Secretariat to initiate a procedure under Article 92 of the Treaty should the breaches identified in Article 1 Decision 2016/02/MC-EnC be not rectified,

Considering that no tangible progress has been achieved in the aftermath of Decision 2016/02/MC-EnC with regard to the use of revenues from allocation of Interconnection capacity in the Republic of Serbia,

Upon Request by the Secretariat,

HAS ADOPTED THIS DECISION:

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

1. Unless the Republic of Serbia rectifies the breaches identified in Ministerial Council Decision 2016/02/MC-EnC within six months of the present Decision, the failure by Serbia to implement Decision 2016/02/MC-EnC will be considered a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. For the reasons sustaining these findings, reference is made to the Secretariat's Request.

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

1. The Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/02/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken.
2. The Secretariat is invited to monitor compliance of the measures taken by the Republic of Serbia with the *acquis communautaire*.
3. If Serbia fails to implement the Ministerial Council Decision 2016/02/MC-EnC by 1 July 2019, the Secretariat is invited to request Measures under Article 92 of the Treaty in 2019.

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

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

Done in Skopje, on 29 November 2018

For the Ministerial Council

A blue ink signature, likely of the President of the Energy Community, written over a dotted line.

Presidency

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2014/03/MC-EnC: On the failure by the Republic of Serbia 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-9/13 dated 22 April 2014;

Having regard to the absence of a Reply by the Republic of Serbia;

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 9 July 2014;

HAS ADOPTED THIS DECISION:

### **Article 1**

#### **Failure by the Republic of Serbia to comply with certain obligations under the Treaty**

The Republic of Serbia,

1. by failing to implement the requirement of legal unbundling of its transmission system operator *Srbijagas* from other activities not relating to transmission, fails to comply with Article 9(1) of Directive 2003/55/EC;
2. by failing to ensure the independence of its transmission system operator *Srbijagas* in terms of its organisation and decision-making from other activities not relating to transmission, fails to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC; and
3. by failing to ensure the independence of its transmission system operator *Yugorosgaz Transport* in terms of its organisation and decision-making from other activities not relating to transmission, fails to comply with Articles 9(1) and 9(2) of Directive 2003/55/EC.

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

### **Article 2**

#### **Follow-up**

1. The Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law, in cooperation with the Secretariat, by December 2014. The Republic of Serbia shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.

2. If the breaches have not been rectified by 1 July 2015, the Secretariat is invited to initiate a procedure under Article 92 of the Treaty.

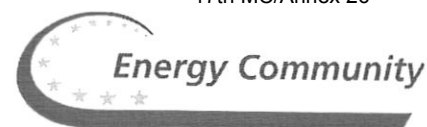
**Article 3**  
**Addressees and entry into force**

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

Done in Kyiv on 23 September 2014

For the Presidency

  
  
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## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

### **D/2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty**

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

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

On the basis of Ministerial Council Decision 2014/03/MC-EnC of 23 September 2014 in Case ECS-9/13 declaring the existence of a breach by the Republic of Serbia of its obligations relating to unbundling of its gas transmission system operators, and in particular the failure to comply with Articles 9(1) and 9 (2) of Directive 2003/55/EC;

Having regard to the failure by the Republic of Serbia to rectify all breaches identified in Article 1 of Decision 2014/03/MC-EnC and ensure compliance with Energy Community law as requested by Article 2 of Decision 2014/03/MC-EnC;

Having regard to the Ministerial Council invitation to the Secretariat to initiate a procedure under Article 92 of the Treaty should the breaches identified in Article 1 of Decision 2014/03/MC-EnC be not rectified;

Considering the assistance provided by the Secretariat to the Republic of Serbia in structuring and drafting the measures, action plan and relevant legal and corporate acts for unbundling of gas transmission system operators in compliance with Energy Community law;

Considering that no tangible progress has been achieved in the aftermath of Decision 2014/03/MC-EnC with regard to the unbundling of gas transmission system operators in the Republic of Serbia;

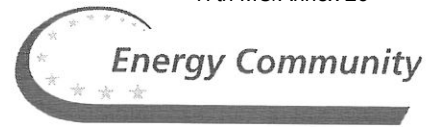
Upon Request by the Secretariat;

HAS ADOPTED THIS DECISION:

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

The failure by Serbia to implement Ministerial Council Decision 2014/03/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.





## Article 2 Follow-up

1. The Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2014/03/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2017.
2. The Secretariat is invited to monitor compliance of the measures taken by the Republic of Serbia with the *acquis communautaire*.
3. If Serbia fails to implement the Action Plan adopted by the Government's conclusion on 11 October 2016, the Secretariat is invited to request Measures under Article 92 of the Treaty in 2017.

## Article 3 Addressees and entry into force

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

Done in Sarajevo on 14 October 2016

For the Presidency

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