



56th PHLG/Annex 5c

**PROCEDURAL ACT
OF THE MINISTERIAL COUNCIL
OF THE ENERGY COMMUNITY**

**PA 2019/02/MC-EnC: on establishing a method for calculating penalty payments under
Article 92' of the Treaty establishing the Energy Community**

Commented [A1]: Please see COM comments to the explanatory note.

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community (the Treaty), and in particular Article 92', as well as Articles 47(c), 82, 83, 86 and 87 thereof,

Whereas, Title VII of the Treaty contains provisions on implementation of decisions and dispute settlement,

Whereas, compliance with the decisions of the Ministerial Council is a *sine qua non* condition for ensuring full, uniform application of Energy Community law in the Contracting Parties,

Whereas the High Level Reflection Group mandated by the Ministerial Council concluded that "[W]eak enforcement mechanism constitute one of the major obstacles to implementation of the *acquis communautaire* in the Contracting Parties"¹ and considered that "a refurbishment of the institutional architecture is necessary, in particular to enable the enforcement of the far-reaching commitments the Parties accepted under the Treaty"²,

Whereas on [...], the Parties to the Treaty adopted amendments to the Treaty under Article 100, and on [...] the amendments entered into force,

Whereas, Article 92' of the Treaty introduces a possibility for the Ministerial Council to adopt decisions imposing penalty payments in cases where a Contracting Party has not taken the necessary measures to comply with a decision of the Ministerial Council under Article 91 within a deadline set by the Ministerial Council;

Whereas, Article 92' of the Treaty calls upon the Ministerial Council to adopt a Procedural Act establishing the method as well as the macroeconomic data used for the calculation of penalty payments,

Whereas the Permanent High Level Group, at its meeting on [...] endorsed the present Procedural Act,

¹ An Energy Community for the Future, p. 19.

² An Energy Community for the Future, p. 19.

Having regard to the proposal submitted by the Secretariat,

HAS ADOPTED THIS PROCEDURAL ACT:

Article 1 Purpose

This Procedural Act implements Article 92' of the Treaty by establishing the method as well as the macroeconomic data used for the calculation of penalty payments.

Article 2 Procedure

1. Before initiating procedure under Article 92', **and after a decision under Article 92 has already been taken**, the Party, the Secretariat or the Regulatory Board shall approach the Contracting Party concerned and request provision of information regarding the measures taken in order to implement the Decision adopted under Article 91 of the Treaty within a period not shorter than two weeks. In the same communication, the Contracting Party concerned shall also be informed that, in case the measures taken to implement the Decision adopted under Article 91 of the Treaty shall be deemed insufficient, the procedure envisaged by Article 92' will be initiated.
2. The Article 92' procedure is initiated by way of a simple request. A copy of the request shall be sent to the Secretariat in case the latter is not the initiator.
3. The request under Article 92' shall **indicate specify** the amount of daily penalty payments which the initiator considers appropriate to the circumstances, calculated in accordance with Article [XXX] of this Procedural Act.

Commented [A2]: If we understand correctly this is the sequencing proposed in draft amendment of the Treaty itself. Important to reflect it here given that otherwise only Article 91 is mentioned.

Commented [A3]: 2 weeks to provide information seems to be a very short period. We would suggest extending it. Additionally, in the Explanatory note it is said that the concerned CP can then submit its observations within 2 months. This should also be reflected in the PA itself.

Commented [A4]: The wording should be in line with the one of the provision in the ECT.

Article 3 Principles for the calculation of daily penalty payments

1. The daily penalty payments shall be proportional and appropriate to the circumstances. The calculation of shall be based on the following criteria:
 - the seriousness of the infringement,
 - the duration of the infringement,
 - the capacity to pay of the Contracting Party concerned, and
 - the need to ensure that the penalty is a deterrent for further infringements.

2. The imposition of penalty payments shall respect the principle of equal treatment between Contracting Parties by application of this Procedural Act to all Contracting Parties, in the same way and without exception.

2-3.

The daily penalty payments shall be high enough to maintain sufficient pressure on the Contracting Party concerned to comply with the Decision of the Ministerial Council establishing a breach under Article 91 of the Treaty, and to ensure that the Contracting Party does not repeat the same infringement again. ~~Purely symbolic penalty payments shall not be imposed.~~

Commented [A5]: Does not seem necessary given that there is a clear method for establishing the penalties in the PA. This statement seems rather an explanation belonging at the most to a recital.

Article 4 Amount of penalty payment

1. The penalty payments shall accrue daily. The amount of the penalty payments is calculated by day of delay.
2. The Decision of the Ministerial Council on imposition of penalty payments under Article 92' shall include a deadline after which the penalty payments are due. Penalties shall be payable from the day after the expiry of that deadline until the Ministerial Council adopts a Decision ordering the cessation of payments, or until the date mentioned in that Decision. The latter will be the exact date on which the breach has been terminated.
3. The amount of the daily penalty payments is calculated as follows:
 - multiplication of a standard flat-rate amount by a coefficient for seriousness and a coefficient for duration;
 - multiplication of the result obtained by an amount fixed for each Contracting Party (the "n" factor), taking into account the capacity of the Contracting Party to pay.

4. The formula for calculating the penalty payment per day is:

$$Dp = (Bfrap \times Cs \times Cd) \times n$$

where,

"Dp" is the daily penalty payment;

"Bfrap" is the basic flat-rate amount;

"Cs" is the coefficient for seriousness;

"Cd" is the coefficient for duration; and

the "n"-factor represents the Contracting Party's capacity to pay.

Article 5 The standard flat-rate amount

1. The standard flat-rate amount is the fixed basic amount to which the multiplier coefficients are applied. It penalises the violation of the principle of legality, namely the failure to comply with Decisions of the Ministerial Council.
2. The standard flat-rate is fixed at 690 EUR.
3. The Ministerial Council shall adjust the standard flat-rate amount every three years in line with the inflation.

Commented [A6]: Is this a clerical error? The amount does not seem consistent with the explanatory note.

Article 6 The seriousness of the infringement

1. The coefficient for seriousness shall range between a minimum of 1 and a maximum of 20.
2. In deciding on the seriousness of the infringement, the importance of the rules breached and the impact of the infringement on general and particular interests shall be taken into consideration.
3. The breach of the principle of non-discrimination, the free movement rules as well as breach of obligations under Energy Community law that might endanger human health directly or harm the environment and climate shall normally be regarded as particularly serious.
4. The effects of infringements on general or particular interests shall be established and evaluated on a case-by-case basis.

Article 7 The duration of the infringement

The coefficient for duration increases the standard flat-rate by a multiplier between 1 and 3, calculated at a rate of 0.10 per month from the date of the Decision by the Ministerial Council under Article 91 of the Treaty until the date of the Decision by the Ministerial Council under Article 92' of the Treaty on the imposition of financial penalties.

Article 8 The "n" factor

1. The "n" factor takes into account the Contracting Party's ability to pay.

2. The n-factor is calculated as the square root of the fraction between the respective Contracting Party's gross domestic product (GDP) per capita and the average GDP per capita in the European Union:

$$\sqrt{\frac{\text{GDPpc}(\text{CP})}{\text{GDPpc}(\text{EUav})}}$$

3. Every year, the Secretariat shall adopt a Procedural Act with the calculations for the n-factor and penalty payments applicable to each Contracting Party for the following year.
4. The overall GDPs used for calculations are the GDPs at current prices published by the National Accounts Section of the United Nations Statistics Division.

Article 9 **Modalities of daily penalty payments**

1. The payment of daily penalty payments shall be made by each Contracting Party concerned at the end of the financial year. The Director of the Secretariat shall inform each Contracting Party concerned of the amount of penalty payments due sufficiently in advance.
2. Penalty payments not paid at the end of the financial year in question shall increase the annual budget contribution of the Contracting Party concerned for the year following the year when the penalty payments were due.
- ~~2.3.~~ Amounts which are overdue shall not be cancelled following remediation of the breach.
- ~~3.4.~~ The Ministerial Council shall adopt a Procedural Act regarding the areas of work and the projects which shall be supported from the funding through penalty payments.

Commented [A7]: This period of time should be specified in this PA.

Commented [A8]: This is important to be clarified, to avoid that delayed payments are cancelled when the breach is terminated.

Article 10 **Cessation of penalty payments**

1. The Contracting Party concerned may submit evidence of compliance with the termination of a breach established under Article 91 of the Treaty at any point, and request the Ministerial Council to adopt a decision by correspondence ordering the cessation of daily penalty payments.
2. The Ministerial Council shall decide upon receiving the views of the initiator of the procedure under Article 92' and the assessment of the Secretariat in cases when it is not initiator.



**Article 11
Entry into force**

This Procedural Act shall enter into force upon adoption.

**Article 12
Publication**

The Director of the Energy Community Secretariat shall make this Procedural Act available to all Parties and institutions under the Treaty within 7 days of its adoption and to the public on the website of the Energy Community.

Done in Chisinau, on 13 December 2019

For the Presidency

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