

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

**REASONED REQUEST**

in Case ECS-6/16

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (“the Treaty”) and Article 11(3) 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, as amended by PA/2015/04/MC-EnC, the

**SECRETARIAT OF THE ENERGY COMMUNITY**

against

**BOSNIA AND HERZEGOVINA**

is seeking a Decision from the Ministerial Council that Bosnia and Herzegovina,

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, fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/MC-EnC.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

**I. Relevant Facts**

**a. Introduction**

- (1) In July 2009, the European Union adopted the so-called third legislative liberalisation package (“the Third Energy Package”). This package consists of two directives and two regulations, that is Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks. In the European Union, this legislation entered into force on 3 March 2011.
- (2) These legal acts were incorporated in the Energy Community *acquis communautaire* by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC)

No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty (“Decision 2011/02/MC-EnC”).<sup>1</sup> Decision 2011/02/MC-EnC was preceded by Recommendation No 2010/02/MC-EnC of 24 September 2010 by the Ministerial Council on the implementation of amendments to the *acquis communautaire* on energy.<sup>2</sup>

## **b. Background**

- (3) Following the adoption of Decision 2011/02/MC-EnC, the Secretariat initiated activities to plan the phases of transposition of the Third Energy Package in a timely and structured manner. A detailed Implementation Plan,<sup>3</sup> outlining the different preparatory activities to be taken by the Contracting Parties as well as the institutions was adopted by the Permanent High Level Group on 14 December 2011.
- (4) At its meeting in December 2012, the Permanent High Level Group reviewed its Implementation Plan on the basis of the facts presented by the Secretariat and deplored the significant delay in preparatory work.<sup>4</sup> The Permanent High Level Group further asked that the “*Contracting Parties will initiate the necessary amendments to primary laws during 2013 with the goal to adopt them in early 2014.*” Each Contracting Party was expected to send to the Secretariat a timeline for the law amendment process by the end of February 2013.<sup>5</sup> Finally, the Permanent High Level Group also concluded that the Secretariat is expected to present an initial report on elements to be transposed in order to achieve compliance with the Third Energy Package at the next meeting of the Permanent High Level Group in March 2013.
- (5) On that ground, the Secretariat prepared a Background Paper on the main new elements of the Third Energy Package for implementation in the Contracting Parties presented to the Permanent High Level Group’s meeting on 14 March 2013.<sup>6</sup> The Permanent High Level Group, at the same meeting in March 2013, discussed the need for the technical assistance and consultancy to draft amendments to the existing primary legislation and signaled the availability of support by the European Commission and other donors. Bosnia and Herzegovina notified the Permanent High Level Group of need for technical assistance concerning gas regulatory framework.<sup>7</sup>
- (6) In October 2013, the Ministerial Council in accordance with Article 91 of the Treaty declared the existence of a breach by Bosnia and Herzegovina of its obligations in the gas sector in Case ECS-8/11.<sup>8</sup> Although the Case ECS-8/11 concerns the lack of appropriate gas legal framework in Bosnia and Herzegovina pursuant to the requirements of the Second Energy Package,<sup>9</sup> in its conclusions, the Ministerial Council called upon Bosnia and Herzegovina to rectify its breach by adopting a relevant legislation which should be compliant with Directive 2009/73/EC and Regulation (EC) 715/2009,<sup>10</sup> since the later were already part of the Energy Community *acquis*.
- (7) During its meeting in March 2014, the Permanent High Level Group expressed its concerns about the state of preparations in Bosnia and Herzegovina, and in particular with regard to the

---

<sup>1</sup> ANNEX 1

<sup>2</sup> Ministerial Council Recommendation No 2010/02/MC-EnC of 24 September 2010

<sup>3</sup> 23<sup>rd</sup> Permanent High Level Group meeting, PHLG/14/12/2011-Annex 1/30.11.2011, Implementation Plan: Structured Approach to Transposing the 3<sup>rd</sup> Package in the Energy Community

<sup>4</sup> Conclusion 3 of 27<sup>th</sup> Permanent High Level Group meeting, 6 December 2012

<sup>5</sup> Conclusions 5 and 6 of 27<sup>th</sup> Permanent High Level Group meeting, 6 December 2012

<sup>6</sup> 28<sup>th</sup> Permanent High Level Group meeting, ANNEX1/28th PHLG/28-02-2013, Background Paper on the main new elements of the Third Package for implementation in the Contracting Parties

<sup>7</sup> Conclusion 7 of the 28<sup>th</sup> Permanent High Level Group meeting, 14 March 2013

<sup>8</sup> For details on the case see: [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/AREAS\\_OF\\_WORK/Dispute\\_Settlement/2011/8\\_11](https://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Dispute_Settlement/2011/8_11)

<sup>9</sup> Ministerial Council Decision D/2013/04/MC-EnC on the failure by Bosnia and Herzegovina to comply with certain obligations under the Treaty of 24 October 2013

<sup>10</sup> Conclusion 14 of 11<sup>th</sup> Ministerial Council meeting, 24 October 2013

gas sector.<sup>11</sup> Similar conclusion was adopted by the Permanent High Level Group in June 2014.<sup>12</sup>

- (8) At its meeting on 23 September 2014, the Ministerial Council adopted a Decision that Bosnia and Herzegovina's failure to implement the relevant provisions from the gas *acquis* constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.<sup>13</sup> In its conclusions, the Ministerial Council noted again that the country did not adopt legislation in compliance with Directive 2009/73/EC and Regulation (EC) 715/2009. The Secretariat was invited to offer assistance to Bosnia and Herzegovina in drafting legislation.<sup>14</sup> Bosnia and Herzegovina committed to present gas legislation in compliance with the Third Energy Package to the Ministerial Council in 2015 (without prejudice to its deadline for transposition on 1 January 2015).<sup>15</sup>
- (9) At its meeting in 2015, the Ministerial Council concluded that Bosnia and Herzegovina had failed to rectify the serious and persistent breaches identified in Decisions 2013/04/MC-EnC and 2014/04/MC-EnC and adopted measures under Article 92 of the Treaty.<sup>16</sup>
- (10) Besides the discussions about the transposition and implementation of the Third Energy Package at institutional meetings, the Secretariat organized several workshops on addressing the challenges of implementation of the Third Energy Package in the Contracting Parties. The first workshop already took place on 15 April 2010, followed by the 3<sup>rd</sup> Joint Energy Community Regulatory Board and Permanent High Level Group meeting on 26 May 2011. These two events took place even before a legally binding decision on the Third Energy Package was adopted by the Energy Community institutions. Following those events, other dedicated workshops on implementation of the provisions of the Directives the Third Energy Package took place on 20 June 2012, in June 2013 and very recently in April 2016. Implementation of the gas *acquis* was also presented and discussed during the joint Energy Community and ENTSO-G workshop in February 2016.
- (11) In its Implementation Reports, the Secretariat has been continuously reminding the Contracting Parties about the deadline for transposition of Third Energy Package at national level and encouraging them to mobilize and speed up works on necessary legislative measures.<sup>17</sup> The Secretariat has also analysed the yearly progress in transposing the Third Energy Package after the deadline set in Decision 2011/02/MC-EnC expired and measured the Contracting Parties' compliance against that yardstick.
- (12) The Ministerial Council addressed the importance of timely implementation of the Third Energy Package regularly at its annual meetings since 2011.<sup>18</sup> At the meeting in 2014, the Ministerial Council "*urged all Contracting Parties to transpose the Third Package by 1 January 2015 with the assistance of the Secretariat, and invited the Secretariat to launch enforcement against those Contracting Parties lagging behind after that date.*"<sup>19</sup>

---

<sup>11</sup> Conclusion 5 of 32<sup>nd</sup> Permanent High Level Group meeting, 19 March 2014

<sup>12</sup> Conclusion 10 of 33<sup>rd</sup> Permanent High Level Group meeting, 18 June 2014

<sup>13</sup> Ministerial Council Decision D/2014/04/MC-EnC on determination of serious and persistent breach of the Treaty by Bosnia and Herzegovina of 23 September 2014

<sup>14</sup> On the activities of the Secretariat to assist Bosnia and Herzegovina with drafting legislation compliant with the Third Energy Package, see section c. below.

<sup>15</sup> Conclusion 14 of 12<sup>th</sup> Ministerial Council meeting, 23 September 2014

<sup>16</sup> See Ministerial Council Decision D/2015/10/MC-EnC on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty of 16 October 2015

<sup>17</sup> Secretariat's Annual Implementation Report, 1 September 2013, p.10

<sup>18</sup> Conclusion 5 of 10<sup>th</sup> Ministerial Council meeting, 18 October 2012: "*effectively start the preparations for the implementation of the Third Package should be in the focus of the activities over the next reporting period. The ministers noted the importance of implementation in the context of providing security of supply and adequate conditions for investments.*"; Conclusion 13 of 11<sup>th</sup> Ministerial Council meeting, 24 October 2013: "*The Ministerial Council recognized the importance of the transposition and implementation of the Third Energy Package in the context of providing security of supply and adequate conditions for investments. In this context the Third Energy Package related activities should continue to be in the center of the activities over the next reporting period*"

<sup>19</sup> Conclusion 9 of the 12<sup>th</sup> Ministerial Council meeting, 23 September 2014

### **c. Activities for transposition of the Third Energy Package in Bosnia and Herzegovina**

#### **aa. Transposition for electricity *acquis***

- (13) Preparations for transposition of the electricity legislation from the Third Energy Package in Bosnia and Herzegovina started shortly after the adoption of the Ministerial Council Decision 2011/02/MC-EnC.
- (14) In early 2013, an EU-funded project for development of electricity legislative framework compliant with the Third Energy Package for all jurisdictions in Bosnia and Herzegovina started drafting new primary and some acts of secondary legislation in the area of electricity. Drafts of the new legal acts on State level, Republika Srpska, the Federation of Bosnia and Herzegovina and Brčko District of Bosnia and Herzegovina were developed in July and August 2013. Public discussions and several reviews by the national experts in cooperation with the Secretariat took place until December 2013, when the project was closed.
- (15) The final drafts were submitted to the relevant authorities (line ministries and government of Brčko District) on 24 January 2014. These documents were considered by all jurisdictions as reference for the development of draft legislation in the future, but were never considered as official drafts in that respect.
- (16) On 26 October 2015 a meeting was held in Sarajevo between the Secretariat and the three Ministers at State and entities' level responsible for energy in Bosnia and Herzegovina, as well as the regulatory authorities and energy undertakings. It was agreed that a working group consisting of all relevant stakeholders and coordinated by the Ministry of Foreign Trade and Economic Relations should be established to start developing drafts for the respective legislative procedures.
- (17) Between 30 November and 2 December 2015 further meetings were held between the working group consisting of representatives of Bosnia and Herzegovina and the Secretariat in Vienna. A set of draft laws of relevance for the electricity sector resulted from those meetings.
- (18) On 21 and 22 December 2015, a meeting of the working group together with the Secretariat's experts was held in Sarajevo at which all key provisions were agreed and tasks were assigned to individual members of the working group to finalize the text of the draft laws. A further meeting was held on 12 and 13 January 2016 in Banja Luka.
- (19) A meetings between the Secretariat and the three Ministers of Bosnia and Herzegovina on 29 January 2016 in Vienna and on 21 April 2016 in Neum, the Ministers and the Secretariat discussed the status of drafting the new legal framework for gas and electricity.

#### **bb. Transposition of gas *acquis***

- (20) Preparations for transposition of the gas legislation from the Third Energy Package in Bosnia and Herzegovina started in 2014.
- (21) As requested by the Ministerial Council in September 2014,<sup>20</sup> the Secretariat in October 2014 submitted to the Ministry of Foreign Trade and Economic Relations a draft gas law meant to transpose the relevant provisions of the Third Energy Package. The draft was meant for adoption on State level, whereas provisions concerning cooperation among the State and the entities' institutions and undertakings was envisaged to be transposed in line with the Bosnian national and constitutional requirements.
- (22) Discussions on a solution for developing a national legal framework transposing the Third Energy Package in a manner compliant with the Energy Community *acquis* were held at numerous meetings in Sarajevo<sup>21</sup> and Vienna.<sup>22</sup>

---

<sup>20</sup> *Supra* fn.16

<sup>21</sup> Missions of Secretariat's experts to Bosnia and Herzegovina in May and October 2015, April 2016 and discussions with the three Ministers (at entities' level and State level) referred to above

<sup>22</sup> Meetings held in November 2015 and January 2016

- (23) At a meeting in November 2015 in Vienna between the Secretariat and the Ministers of Bosnia and Herzegovina responsible for energy, as well as with national experts, draft legislation transposing Directive 2009/73/EC were again discussed. In January 2016, another meeting in that format in Vienna led to the establishment of a gas working group consisting of two representatives from each entity, from the State and from the Secretariat. The working group met in January and March 2016 in Sarajevo and in April 2016 in Neum for further discussions. After each of those meetings, the Secretariat prepared updated draft legislation.
- (24) On 11 April 2016 the Secretariat sent a letter to the Minister of Foreign Trade and Economic Relations,<sup>23</sup> informing him that the Energy Community Secretariat intends to submit to the Ministerial Council a case against Bosnia and Herzegovina for non-compliance with the Treaty, and in particular with Article 6 thereof as well as Article 3(1) of the Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of the Third Energy Package.
- (25) To date, the Secretariat has received no information from the Bosnia and Herzegovina authorities indicating that national measures to comply with the obligation to adopt 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 have been adopted and implemented, nor is it in possession of any other information enabling it to conclude that such measures have, nevertheless, been taken.
- (26) On that basis, the Secretariat decided to submit this Reasoned Request to the Ministerial Council for decision.

## II. Relevant Energy Community Law

- (27) Energy Community law is defined in Article 1 of the Dispute Settlement Rules<sup>24</sup> 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”.
- (28) 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 the Treaty.”*
- (29) 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.*
- (30) Annex I to the Treaty, entitled “Lists of Acts Included in the *Acquis Communautaire* on Energy”, reads:
- “Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011*  
*Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011*  
*Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011*

<sup>23</sup> Letter sent to the Minister of Economy, dated 11 April 2015, ANNEX 2

<sup>24</sup> Dispute Settlement Rules, amended by Procedural Act 2015/04-MC-EnC of 16 October 2015 on amending Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty (“Dispute Settlement Rules”)

*Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011”*

(31) Article 3 of the Ministerial Council Decision D/2011/02/MC-EnC, reads:

*“1. Each Contracting Party shall bring into force the law, 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, as adapted by this Decision, by 1 January 2015. They shall forthwith inform the Energy Community Secretariat thereof.*

*The Contracting Parties shall apply the measures referred to in the previous paragraph with effect from 1 January 2015 with the following exceptions:*

*[....]*

*2. The Contracting Parties shall communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by this Decision.”*

(32) Article 11(3) of the Dispute Settlement Rules reads:

*(3) Where the Secretariat initiates a dispute settlement procedure on the grounds that a Party has failed to fulfil its obligation to notify measures transposing a Decision addressed to it within the deadline specified in that Decision, the Secretariat shall submit a reasoned request to the Ministerial Council without preliminary procedure.*

### **III. Legal Assessment**

(33) The present Reasoned Request concerns non-compliance of Bosnia and Herzegovina with the obligation to adopt and implement 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 to forthwith notify those measures to the Secretariat within the deadline specified in that Decision, i.e. by 1 January 2015 pursuant to Article 3(2) of Ministerial Decision 2011/02/MC-EnC.

(34) The Reasoned Request is based on Article 11(3) of the Dispute Settlement Rules in force. In October 2015, the Ministerial Council amended the Dispute Settlement Rules and abolished the preliminary procedure in dispute settlement proceedings for non-transposition., i.e. in case where a Party has failed to fulfill its obligations to notify measures transposing a Decision addressed to it within the deadline specified in that Decision. Hence, in cases such as the one at issue, the Secretariat is obliged to submit a reasoned request to the Ministerial Council directly, without performing a preliminary procedure.

(35) As a Contracting Party to the Treaty, Bosnia and Herzegovina is under an obligation to implement, i.e. to transpose at national level and to apply, the *acquis communautaire* on energy, including the Third Energy Package, as referred to in Article 11 of the Treaty and defined by its Annex I.<sup>25</sup>

(36) Article 3(1) of Decision 2011/02/MC-EnC requires the Contracting Parties to bring into force the laws, regulations and administrative provisions necessary to comply with the Third Energy Package and to apply them as from 1 January 2015.

(37) Article 3(2) Ministerial Council Decision 2011/02/MC-EnC also requires the Contracting Parties to communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by Decision 2011/02/MC-EnC.<sup>26</sup>

(38) Article 6 of the Treaty imposes upon the Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty. Article 89 of the Treaty requires Parties to implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.

<sup>25</sup> As amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC

<sup>26</sup> Article 3(3) Ministerial Council Decision 2011/02/MC-EnC

- (39) The time limit for Bosnia and Herzegovina to take measures necessary to comply with Article 3 of Decision 2011/02/MC-EnC as well as Articles 6 and 89 of the Treaty expired on 1 January 2015.
- (40) Despite numerous invitations and constant reminders issued by all Energy Community institutions and the assistance offered by the Secretariat and other organizations, Bosnia and Herzegovina evidently has not taken the measures necessary to comply with its obligations. At the date of submitting this Reasoned Request, the draft Laws meant to transpose the Third Energy Package are still pending in Parliament. It is undisputed that Bosnia and Herzegovina to date has not adopted the measures necessary to implement Decision 2011/02/MC-EnC. In the absence of any legal effect, 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.
- (41) In any event, the Secretariat has not been notified of any measures necessary to transpose the Third Energy Package.
- (42) Under those circumstances, the Secretariat must conclude that by failing to take, or to notify the Secretariat of, the measures necessary to comply with the Article 3(1) of the Ministerial Council Decision 2011/02/MC-EnC, Bosnia and Herzegovina has failed to fulfill its obligations under Articles 6 and 89 of the Treaty as well as Article 3(1) and (2) of the Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of the Third Energy Package.

## ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community declare in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community that:

by failing to adopt 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, Bosnia and Herzegovina fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/MC-EnC.

On behalf of the Secretariat of the Energy Community

Vienna, 13 May 2016



Janez Kopač  
Director



Dirk Buschle  
Deputy Director / Legal Counsel



**List of Annexes**

ANNEX 1 Ministerial Council Decision D/2011/02/MC-EnC

ANNEX 2 Letter by the Secretariat to the Minister of Foreign Trade and Economic Relations,  
dated 11 April 2016

## DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

**D/2011/02/MC-EnC: Decision on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty**

The Ministerial Council of the Energy Community,

Having regard to the Treaty establishing the Energy Community ('the Treaty'), and in particular Articles 24, 25, 79 and 100(i) and (ii) thereof,

Having regard to the proposal from the European Commission,

Whereas:

1. Article 11 of the Treaty defines the '*acquis communautaire* on energy' as meaning: (i) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, (ii) 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 (iii) 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.
2. By Decision No 2007/06/MC-EnC of 18 December 2007, the Ministerial Council decided that the Contracting Parties were to implement Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks.
3. The above-mentioned pieces of European Union law have been amended and recast into four new acts and have been repealed with effect from 3 March 2011 and replaced by two new directives and two new regulations. It is appropriate to amend Article 11 of the Treaty accordingly.
4. The Energy Community should adapt its *acquis* on energy to the recent changes in the European Union law, taking into account its own institutional framework and the specific situation of each of its Contracting Parties.
5. By Recommendation No 2010/02/MC-EnC of 24 September 2010 on the implementation of amendments to the '*acquis communautaire* on energy', the Ministerial Council recommended that Contracting Parties should implement the *acquis* on energy defined in Article 11 of the Treaty, as amended and replaced by the above-mentioned pieces of European Union law.
6. With effect from 30 June 2011, the European Regulators Group for Electricity and Gas has ceased its activities, which have been taken over by the Agency for the Cooperation of Energy Regulators.
7. At its meetings on 29/06/2011 and 05/10/2011, the Permanent High Level Group finalised and endorsed this Decision,

HAS ADOPTED THIS DECISION:

*Article 1*

**Amendments to Article 11 of the Energy Community Treaty ('The *acquis* on energy')**

1. Article 11 of the Treaty establishing the Energy Community shall be replaced by the following text:

'The "acquis communautaire on energy", for the purpose of this Treaty, shall mean the acts listed in Annex I of this Treaty'.

2. Annex I shall be replaced by the following text:

'List of acts included in the "acquis communautaire on energy":

(1) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(2) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(3) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(4) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, as amended by Commission Decision 2010/685/EU of 10 November 2010, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(5) Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, as adopted by Decision No 2007/06/MC-EnC of the Ministerial Council of 18/12/2007.

(6) Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, as adopted by Decision No 2007/06/MC-EnC of the Ministerial Council of 18/12/2007.'

*Article 2*

**Amendments to the rules of the Energy Community Treaty relating to the Regulatory Board**

The second sentence of Article 59 of the Treaty establishing the Energy Community shall be replaced by the following text:

'The European Union shall be represented by the European Commission, assisted by one regulator of each Participant, and one representative of the Agency for the Cooperation of Energy Regulators.'

*Article 3*

**Implementation of the energy *acquis***

1. Each Contracting Party shall bring into force 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, as adapted by this Decision, by 1 January 2015. They shall forthwith inform the Energy Community Secretariat thereof.

The Contracting Parties shall apply the measures referred to in the previous paragraph with effect from 1 January 2015 with the following exceptions:

- Article 11 of Directive 2009/72/EC, which they shall apply from 1 January 2017;
- Article 11 of Directive 2009/73/EC, which they shall apply from 1 January 2017.

2. The Contracting Parties shall communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by this Decision.

#### *Article 4*

#### **General adaptations under Article 24 of the Energy Community Treaty**

1. Save where otherwise stated in this Decision, the text of the acts referred to in Article 1 shall be adapted to the Energy Community as follows:

- (a) the term 'Member States' shall be replaced by 'Contracting Parties';<sup>1</sup>
- (b) the term 'Community' shall be replaced by 'Energy Community';
- (c) references to EU law shall be replaced by references to the equivalent provisions under the Energy Community Treaty, if any, or shall not be applicable, as appropriate;
- (d) the term 'European Commission' shall be replaced by 'Energy Community Secretariat';
- (e) references to the Official Journal of the European Union shall be replaced by the expression 'a dedicated section of the website of the Energy Community';
- (f) references to the Agency for the Cooperation of Energy Regulators shall not be applicable;
- (g) references to the European Network for Transmission System Operators and to the establishment of network codes shall not be applicable;
- (h) references to the executive powers and reporting obligations of the European Commission under EU law shall not be applicable;
- (i) references to the Community-wide network development plan shall not be applicable;
- (j) the date '3 September 2009' shall read '6 October 2011'.

2. The adaptations referred to in Articles 5 to 24 of this Decision shall apply in addition to the adaptations referred to in paragraph 1 of this Article.

3. Points (f) and (g) of Article 4(1) are without prejudice to potential participation by the Energy Community Contracting Parties in the work of these organisations, in accordance with Article 31 of Regulation (EC) N° 713/2009 and with the statutes and rules of procedure of ENTSO-E and ENTSO-G.

---

<sup>1</sup> Republic of Serbia issued a reserve on this provision (in Annex).

*Article 5*

**Ad hoc adaptations concerning definitions**

1. In Article 2(26) and (27) of Directive 2009/72/EC, the year '1996' shall read '2006'.
2. In Article 2(g) of Regulation (EC) No 714/2009 and in Article 2(33) of Directive 2009/73/EC, the date '4 August 2003' shall read '1 July 2007'.

*Article 6*

**Ad hoc adaptations concerning measures on consumer protection**

1. Article 3(16) of Directive 2009/72/EC and Article 3(12) of Directive 2009/73/EC shall not be applicable. Article 26 of this Decision shall apply.
2. In the second paragraph of point 2 of Annex I to Directive 2009/72/EC and of Annex I to Directive 2009/73/EC, the date '3 September 2012' shall read '1 January 2014'.

*Article 7*

**Ad hoc adaptations concerning regional cooperation**

1. In Article 6(1) of Directive 2009/72/EC, the third and fourth sentences shall be replaced by the following: 'Such regional cooperation shall concern cooperation in the geographical area defined under Title III of the Treaty establishing the Energy Community. It may cover other geographical areas.'
2. In Article 7(1) of Directive 2009/73/EC, the third and fourth sentences shall not be applicable.
3. Article 12 of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009 shall not be applicable. Article 25 of this Decision shall apply.

*Article 8*

**Ad hoc adaptations concerning transmission system operators**

1. The dates referred to in Directive 2009/72/EC and in Directive 2009/73/EC shall be adapted as follows:
  - in Article 9(1), '3 March 2012' shall read '1 June 2016';
  - in Article 9(4), '3 March 2013' shall read '1 June 2017'.
2. In point 1.5 of Annex I to Regulation (EC) No 715/2009, the date '1 July 2006' shall read '1 January 2010'.

*Article 9*

**Ad hoc adaptations concerning the certification of transmission system operators**

1. In Article 3(1) of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009:
  - the period mentioned in the first subparagraph ('two months') shall read 'four months';
  - the second subparagraph shall read as follows: 'When preparing the opinion referred to in the first subparagraph, the Secretariat shall request the Energy Community Regulatory Board to provide its opinion on the national regulatory authority's decision.';
  - the last sentence of the second subparagraph shall not apply.
2. In Article 3(6) of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009:

– the expression ‘the Commission shall take a decision’ shall read ‘the Secretariat shall issue an opinion’;

– the last sentence shall be replaced by the following three sentences: ‘The regulatory authority shall take the utmost account of that opinion. Where the final decision diverges from the Secretariat’s opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying its decision. Diverging decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion’.

#### *Article 10*

#### **Ad hoc adaptations concerning certification in relation to third countries**

1. When assessing whether granting certification will not put at risk the security of energy supply of the Energy Community (Article 11(3) of Directive 2009/72/EC and of Directive 2009/73/EC), the regulatory authority or other competent authority designated shall also take into account the rights and obligations resulting from association or trade agreements between the Contracting Party and the European Union.

2. When preparing its opinion under Article 11(6) of Directive 2009/72/EC and of Directive 2009/73/EC, the Secretariat shall request the views of the Energy Community Regulatory Board. When assessing the risk under Article 11(7) of the same Directives, the Secretariat shall also take account of the rights and obligations referred to in paragraph 1.

#### *Article 11*

#### **Ad hoc adaptations concerning the independent system operator**

In Article 13(1) of Directive 2009/72/EC and in Article 14(1) of Directive 2009/73/EC, the expression ‘approval by the Commission’ shall read ‘the opinion of the Energy Community Secretariat’.

#### *Article 12*

#### **Ad hoc adaptations concerning the inter-transmission system operator compensation mechanism**

1. The following provisions in Article 13 of Regulation (EC) No 714/2009 shall not be applicable:

– The second subparagraph of Article 13(3);

– Paragraph 4.

2. The Energy Community shall endeavour to adopt as soon as possible Commission Regulation (EU) No 774/2010 of 2 September 2010 on laying down guidelines relating to inter-transmission system operator compensation and a common regulatory approach to transmission charging.

#### *Article 13*

#### **Ad hoc adaptations concerning the tasks of distribution system operators**

In Article 25(5) of Directive 2009/72/EC, the date ‘1 January 2002’ shall read ‘1 January 2006’.

*Article 14*

**Ad hoc adaptations concerning the unbundling of accounts**

In Article 31(3) of Directive 2009/72/EC and of Directive 2009/73/EC, the date '1 July 2007' shall read '1 January 2015'.

*Article 15*

**Ad hoc adaptations concerning access to storage facilities**

In Article 33(3) of Directive 2009/73/EC, the date '1 January 2005' shall read '1 January 2007'.

*Article 16*

**Ad hoc adaptations concerning new interconnectors and infrastructure**

1. In Article 17 of Regulation (EC) No 714/2009:

- the term 'Agency' shall read 'Energy Community Regulatory Board' throughout the Article;
- the first part of Article 17(1)(e) shall read 'since 1 July 2007,'.

2. In Article 36 of Directive 2009/73/EC, the word 'Agency' shall read 'Energy Community Regulatory Board' throughout the Article.

3. In Article 36(9) of Directive 2009/73/EC and in Article 17(8) of Regulation (EC) No 714/2009:

- in the first subparagraph, the expressions 'the Commission may take a decision requiring' and 'the Commission may take a decision requesting' shall read 'the Secretariat may issue an opinion inviting';
- the third subparagraph shall read 'The notifying bodies shall take the utmost account of a Secretariat opinion that recommends to amend or withdraw the exemption decision. Where the final decision diverges from the Secretariat's opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying its decision. Diverging decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion';
- in the fifth subparagraph: (a) the expression 'Commission's approval of' shall read 'Secretariat's opinion on'; and (b) the expression 'Commission decides' shall read 'Secretariat considers'.

*Article 17*

**Ad hoc adaptations concerning market opening and reciprocity**

1. In Article 33(1) of Directive 2009/72/EC and in Article 37 of Directive 2009/73/EC:

- subparagraph (a) shall not be applicable;
- the date '1 July 2004' shall read '1 January 2008';
- the date '1 July 2007' shall read '1 January 2015'.

2. Paragraph 1 of this Article shall apply without prejudice to special deadlines agreed in the Protocols of Accession to the Energy Community.

*Article 18*

**Ad hoc adaptations concerning the regulatory authorities**

1. In Articles 36 and 37 of Directive 2009/72/EC, 40 and 41 of Directive 2009/73/EC, 19 of Regulation (EC) No 714/2009 and 24 of Regulation (EC) No 715/2009, the term 'Agency' shall read 'Energy Community Regulatory Board'.

2. In Article 37(1)(d) and the third subparagraph of Article 37(2) of Directive 2009/72/EC and in Article 41(1)(d) and the third subparagraph of Article 41(2) of Directive 2009/73/EC, the reference to 'the Commission' is not applicable.

*Article 19*

**Ad hoc adaptations concerning penalties**

1. Article 22(1) of Regulation (EC) No 714/2009 and Article 27 of Regulation (EC) No 715/2009 shall read as follows: 'Contracting Parties shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that those provisions are implemented. The penalties provided for must be effective, proportionate and dissuasive. Contracting Parties shall notify these provisions to the Secretariat by 1 January 2015 and shall notify the Secretariat without delay of any subsequent amendment affecting them.'

2. Article 22(2) of Regulation (EC) No 714/2009 shall not be applicable.

*Article 20*

**Ad hoc adaptations concerning the regulatory regime for cross-border issues**

In Article 38(1) of Directive 2009/72/EC and in Article 42(1) of Directive 2009/73/EC, the expression 'Agency' shall read 'Energy Community Regulatory Board'.

*Article 21*

**Ad hoc adaptations concerning compliance with the Guidelines**

Article 39 of Directive 2009/72/EC and Article 43 of Directive 2009/73/EC shall not be applicable.

*Article 22*

**Ad hoc adaptations concerning safeguard measures**

The second and third paragraphs of Article 42 of Directive 2009/72/EC and paragraphs 2 and 3 of Article 46 of Directive 2009/73/EC shall not be applicable. Articles 36 to 39 of the Energy Community Treaty shall apply.

*Article 23*

**Ad hoc adaptations concerning measures to ensure a level playing field**

In Article 43(2) of Directive 2009/72/EC and in Article 47(2) of Directive 2009/73/EC, the expression 'following the notification to and approval by the Commission' shall read 'following notification to the Secretariat, which shall issue an opinion'.

*Article 24*

**Ad hoc adaptations concerning derogations**

1. In Article 44 of Directive 2009/72/EC, paragraph 1 and the first sentence of paragraph 2 shall not be applicable.

2. In Article 48(2) of Directive 2009/73/EC:



– the expression ‘the Commission may request that’ shall read ‘the Secretariat shall issue an opinion, inviting, as the case may be,’;

– the second subparagraph shall not be applicable.

3. In Article 48(3) of Directive 2009/73/EC, the date ‘4 August 2003’ shall read ‘1 July 2006’.

4. Article 49 of Directive 2009/73/EC (‘Emergent and isolated markets’) and subparagraph (a) of the first paragraph and the second subparagraph of Article 30 of Regulation (EC) No 715/2009 shall not be applicable.

#### *Article 25*

### **Regional cooperation of transmission system operators**

Transmission system operators shall promote operational arrangements in order to ensure the optimum management of the Energy Community network and shall promote the development of energy exchanges, the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions, paying due attention to the specific merits of implicit auctions for short-term allocations, and the integration of balancing and reserve power mechanisms.

#### *Article 26*

### **Energy consumer checklists**

1. Contracting Parties shall ensure that electricity and gas suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklists established by the European Commission under the acts referred to in Article 1.

2. The checklists shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty.

#### *Article 27*

### **Guidelines**

1. The Energy Community shall endeavour to apply the Guidelines adopted by the European Commission under Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

2. These Guidelines, which may need to be adapted to the institutional framework of the Energy Community, shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty.

3. The Permanent High Level Group shall adopt a Procedural Act on application of this article.

#### *Article 28*

### **Network codes**

1. The Energy Community shall endeavour to apply the network codes developed at European Union level under the acts referred to in Article 1.

2. The relevant network codes shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty. Before taking a decision, the Permanent High Level Group shall seek the opinion of the Energy Community Regulatory Board.

3. The Permanent High Level Group shall adopt a procedural act on application of this Article.

#### *Article 29*

### **Decisions of the Energy Community Regulatory Board**

1. Opinions and decisions of the Energy Community Regulatory Board in application of the acts referred to in Article 1, as adapted by this Decision, shall be adopted by a majority of its members, which must include a vote in favour by the European Union.

2. The annual report of the Energy Community Regulatory Board shall contain a summary of the opinions and decisions referred to in paragraph 1.

#### *Article 30*

### **General coordination by the Commission**

1. The Secretariat shall provide the European Commission with all information necessary for it to perform its role of coordinator under Article 4 of the Energy Community Treaty.

2. In particular, the Secretariat shall provide the Commission with a draft of the opinions to be issued in application of the acts referred to in Article 1, as adapted by this Decision.

3. In order to avoid delays, working arrangements on implementation of this Article shall be agreed between the Secretariat and the European Commission at operational level.

#### *Article 31*

### **Reporting**

1. The Secretariat shall monitor and review application of this Decision in the Contracting Parties.

2. The Secretariat shall submit an overall progress report to the Ministerial Council for the first time by 30 June 2012, and thereafter on an annual basis. The progress report shall reflect the progress made on creating a complete and fully operational internal market in electricity and gas and the obstacles that remain in this respect, including aspects of market dominance, market concentration, predatory or anti-competitive behaviour and the effect thereof in terms of market distortion. It shall in particular consider:

– the implementation by each Contracting Party of the provisions on unbundling, certification and on independence of the national regulatory authorities and application of these provisions in practice,

– the existence of non-discriminatory network access,

– effective regulation,

– the development of interconnection infrastructure and the security of supply situation in the Energy Community,

– the extent to which the full benefits of the opening of markets are accruing to small enterprises and household customers, notably with respect to public service and universal service standards,

– the extent to which markets are in practice open to effective competition, including aspects of market dominance, market concentration and predatory or anti-competitive behaviour,

– the extent to which customers are actually switching suppliers and renegotiating tariffs,

– price developments, including supply prices, in relation to the degree of opening of the markets, and

– the experience gained from application of this Decision as far as effective independence of system operators in vertically integrated undertakings is concerned and whether other measures in addition to functional independence and separation of accounts have been developed which have effects equivalent to legal unbundling.

3. The Secretariat shall present a report to the Ministerial Council for the first time by 30 June 2012, and thereafter on an annual basis, summarising the opinions issued by the Secretariat in application of the acts referred to in Article 1, as adapted by this Decision.

*Article 32*

This Decision enters into force upon its adoption and is addressed to the Contracting Parties.

Done in Chisinau on 06<sup>th</sup> October 2011

For the Ministerial Council

.....

Presidency

## ANNEX

"On all issues pertaining to the definition of "interconnectors and cross border exchanges of energy" the term "Member States" shall be construed as "Adhering Parties".

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

|       |                              |
|-------|------------------------------|
| Phone | +43 (0)1 535 2222            |
| Email | contact@energy-community.org |
| Web   | www.energy-community.org     |

Vienna, 11<sup>th</sup> of April 2016  
DIV/O/dbu/09/11-04-2016

EXCELLENCY,

With this letter, I am informing you that the Energy Community Secretariat intends to submit to the Ministerial Council a case against Bosnia and Herzegovina for non-compliance with the Treaty establishing the Energy Community (hereinafter: "the Treaty"), and in particular with Article 6 thereof as well as Article 3(2) of the Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 (hereinafter: "Third Energy Package").

The deadline for the Third Energy Package transposition under Article 3(1) of the Ministerial Council Decision 2011/02/MC-EnC was 1 January 2015. To date, the Secretariat has not been notified of any transposing measures, nor does it have any other information from which it can conclude that Bosnia and Herzegovina has complied with its obligation to implement the necessary measures.


Consequently, and in the light of the information in its possession, the Energy Community Secretariat considers that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Article 3(1) of Ministerial Decision 2011/02/MC-EnC and failing to notify any such measure to the Secretariat, Bosnia and Herzegovina has failed to fulfil its obligations under Article 3(2) Decision 2011/02/MC-EnC.

Should your Government consider that the legislation in force in Bosnia and Herzegovina already complies with the provisions of the Directives in question a notification should be submitted to the Secretariat pursuant to Article 3(2) of Decision 2011/02/MC-EnC. The Secretariat therefore invites your Government to provide it with a comprehensive and detailed table listing the various national provisions which, in its view, implement each of the provisions of the Third Energy Package. Alternatively, the Secretariat has no other choice but to submit a Reasoned Request directly to the Ministerial Council for decision pursuant to Article 11(3) of the Dispute Settlement rules as amended in October 2015.

Against this background and to avoid such actions, we urge your services to be in touch with the Secretariat immediately, but not later than 22 April 2016, and notify the relevant measures taken to implement the Third Energy Package.

In the meantime, I also remain at your disposal for any questions you might have.

Yours sincerely,



Dirk Buschle  
Deputy Director

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