

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

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

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,

Having regard to the proposal submitted by the Secretariat,

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

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

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', 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 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 [SJ1]: If the actual purpose of this provision is to allow a CP to imlement the Decision, the allowed time period shall be at least two months

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.

Commented [ZC2]: In this article defining the principles of penalty calculation should be added the principle of absorbtion that is to sey if the several penalties are imposed due to several infringements for example during the year only biggest one should be used.

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.
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 [ZC3]: After „equal“ should be added „and proportional“. The different features of the countries and share of their contribution in common market should be taken into account.

Commented [ZC4]: It might have a sense use the symbolic penalties as a first warning.

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.
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.

Commented [ZC5]: There should be set the reasonable upper limit for penalty payment, above which the daily payments will not be imposed, e.g. 1 million USD...

Commented [SJ6]: It shall be clearly stated that the day the implementation is achieved, penalties will no longer accrue

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.

Commented [ZC7]: Should be added one more coefficient to this formula considering the share of the CP and influence of the infringement in common market

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.

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.

Commented [SJ8]: The flat-rate is unrealistically high for most of the CPs

Commented [ZC9]: It is needed to receive an additional information about the criteria that were used for setting the fixed amount of 690 Euro. Is this amount standard for every contracting party, or can we consider possibility of defining an individual amount? Why we can't use different fixed amount for contracting parties (like 100 EUR?) and not to copy directly from EU Countries that are much more in advance than for example Georgia?

Commented [ZC10]: It should be indicated whether this considers inflation of the contracting party or the average inflation rate of EU.

Commented [ZC11]: It will be better to reduce the range of coefficient for seriousness at least up to 1-10 instead of 1-20. In addition, the relevant coefficient for each type infringement shall be determined as in advance as possible. For those types of infringements that cannot be determined in advance, like general coefficient should also be determined in advance.

Commented [SJ12]: The range is too big and will result in the arbitrary application of the coefficient.

Commented [SJ13]: The word „directly“ shall also be added to this part of the sentence

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.
3. 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 [SJ14]: Shall be at least 3 months. Otherwise, shall be moved to the next financial year

Commented [ZC15R14]: Since the penalty should be payed from the budget of the country there should be found another approach. For example in Georgia planing of the new budget starst from the begining of the August of the previous year.

Article 10 **Cessation of penalty payments**

1. The Contracting Party concerned may submit evidence of compliance with the 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.

Commented [SJ16]: This all takes time and when we are talking about thousands of Euro per day, even a delay of one day is not acceptable

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 2019

For the Presidency

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