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Proposal for a

COUNCIL DECISION

**on the position to be adopted on behalf of the European Union in the Ministerial Council
of the Energy Community and in the Permanent High Level Group of the Energy
Community (Tivat, Montenegro, 16 and 17 December 2020)**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be adopted on the Union's behalf in the Ministerial Council of the Energy Community and in the Permanent High Level Group ('PHLG') of the Energy Community in connection with a number of acts having legal effects for the EU within the meaning of Article 218(9) TFEU, which these two bodies envisage adopting on 16 and 17 December 2020. In addition, it also includes items on the agenda of the Ministerial Council, which do not fall within the scope of Article 218 (9) TFEU, but of which some items require a political endorsement by the Council (this endorsement will be requested separately).

2. CONTEXT OF THE PROPOSAL

2.1. The Energy Community Treaty

The Energy Community Treaty ('ECT') aims to create a stable regulatory and market framework and a single regulatory space for trade in network energy by implementing agreed parts of the EU acquis on energy in the non-EU Parties. The agreement entered into force on 1 July 2006. The European Union is a party to the ECT.¹ The ECT refers to the non-EU Parties as 'Contracting Parties'.

2.2. The Ministerial Council and the PHLG of the Energy Community

The Ministerial Council ensures that the objectives set out in the ECT are attained. It provides general policy guidelines, takes Measures and adopts Procedural Acts. Each Party has one vote and the Ministerial Council acts by different voting rules depending on the subject matter. The EU is one of the nine Parties and has one vote, also depending on the subject matter concerned.

Unanimity vote applies with respect to the envisaged acts listed below under Section 2.3, points 2.3.1 and 2.3.2 (Article 100 ECT) and point 2.3.5 (Article 92 (1) ECT).

Two third majority applies with respect to the envisaged acts listed below in Section 2.3, point 2.3.3 and in Section 2.4, point 4 (Article 82 ECT, Article 83 ECT).

Simple majority vote applies with respect to the envisaged acts listed below under Section 2.3, point 2.3.4 (Article 91 (1) (a) ECT).

As regards the envisaged act listed below under Section 2.3, point 2.3.6, the Ministerial Council appoints members of the Advisory Committee by consensus.

As regards the envisaged act listed below under Section 2.4, point 1, 2 and 3 the Ministerial Council adopts the Decision by consensus.

The PHLG is an important subsidiary body of the Ministerial Council. It may, amongst other tasks, take Measures, if so empowered by the Ministerial Council. The EU is represented in the PHLG and has one vote.

Article 47 ECT provides: 'The Ministerial Council shall ensure that the objectives set out in this Treaty are attained. It shall: [...] (b) take Measures [...]'.

As regards the envisaged act listed below under Section 2.3, point 7, the Permanent High Level Group votes with the two-third majority of the votes cast.

¹ OJ L198 of 20.7.2006, p. 15.

2.3 The envisaged acts of the Ministerial Council and the PHLG

The Ministerial Council, on 17 December 2020, and the PHLG, on 16 December 2020, will each adopt a number of acts.

The present proposal for a decision under Article 218(9) TFEU concerns the position to be adopted on the Union's behalf with respect to the following envisaged acts of the **Ministerial Council**:

2.3.1. Decision 2020/.../MC-EnC on the implementation of the Commission Regulation (EU) 2019/2146 of 26 November 2019 amending Regulation (EC) No 1999/2008 of the European Parliament and of the Council on energy statistics, as regards the implementation of updates for the annual, monthly and short-term monthly energy statistics

2.3.2. Decision 2020/.../MC-EnC on the implementation of the Commission Implementing Regulation (EU) 2019/803 of 17 May 2019 concerning the technical requirements regarding the content of quality reports on European statistics on natural gas and electricity prices pursuant to Regulation (EU) 2016/1952 of the European Parliament and of the Council

2.3.3. Decision 2020/.../MC-EnC on the establishment of the list of Projects of Energy Community Interest

2.3.4. Decisions under Article 91(1) ECT establishing the existence of a breach of the ECT in the following cases:

- (a) Decision 2020/.../MC-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-13/17
- (b) Decision 2020/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-10/18

2.3.5. Decisions under Article 92(1) ECT:

- (a) Decision 2020/.../MC-EnC on the adoption of measures in response to serious and persistent breaches by Bosnia and Herzegovina under Article 92(1) of the Energy Community Treaty in Cases ECS-8/11S, ECS-2/13S and ECS-6/16S
- (b) Decision 2020/.../MC-EnC on establishing a serious and persistent breach against Ukraine under Article 92(1) of the Treaty in Case ECS-1/18S
- (c) Decision 2020/.../MC-EnC on establishing a serious and persistent breach against Serbia under Article 92(1) of the Treaty in Case ECS-10/17S.

2.3.6. Appointment of the Members of the Advisory Committee in accordance with Article 32 (3) of Procedural Act No 2008/01/MC-EnC on the Rules of Procedure for the Dispute Settlement as amended by Procedural Act 2015/04/MC-EnC.

The present proposal for a decision under Article 218(9) TFEU concerns the position to be adopted on the Union's behalf with respect to the following envisaged acts of the **PHLG**:

2.3.7. Procedural Act amending the Procedural Act No. 01/2011 PHLG-EnC of the Permanent High Level Group of the Energy Community of 23/03/2011 laying down the rules governing the arbitration procedure in staff matters under Article 14 of the Staff Regulations of the Energy Community.

The purpose of the envisaged acts of the Ministerial Council and the PHLG (hereafter collectively referred to as ‘the envisaged acts’) is to facilitate the achievement of the objectives of the ECT and the functioning of the Energy Community Secretariat (‘ECS’) in Vienna which, among other things, provides administrative support to the Ministerial Council.

2.4. Other items on the agenda

For the sake of completeness, it is noted that, in addition to the envisaged acts, there will be a number of other items on the agenda of the meetings of the Ministerial Council and the PHLG. With respect to those items, the Commission intends to express the following positions on behalf of the Union:

1. 2020 General Policy Guidelines on the 2030 Targets and Climate Neutrality for the Energy Community and its Contracting Parties

Among the main objectives of the ECT are the creation of an integrated and sustainable pan-European energy market based on a stable regulatory and market framework, attracting investment that is needed for economic development and social stability, improving the environmental situation, as well as fostering the use of renewable energy. Since the energy sector is one of the main contributors to the emissions of greenhouse gases, and given the strong links between energy policy and climate, it is important to strengthen the policy framework on energy efficiency, renewable energy and greenhouse gas emissions in the Energy Community.

The Ministerial Council of the Energy Community has adopted Recommendation 2016/02/MC-EnC on preparing for the implementation of Regulation (EU) 525/2013 on a mechanism for monitoring and reporting greenhouse gas emissions and Recommendation 2018/01/MC-EnC on preparing for the development of integrated national energy and climate plans by the Contracting Parties of the Energy Community.

The 2009 Renewable and 2012 Energy Efficiency Directives were adopted and became part of the Energy Community legal order through decisions of the Ministerial Council, including a 2020 target for the Energy Community as a whole for energy efficiency (expressed in both primary energy consumption and final energy consumption) and specific 2020 targets for each Contracting Party for renewable energy.

In November 2018, the Ministerial Council adopted General Policy Guidelines on 2030 Targets for the Contracting Parties of the Energy Community. The Guidelines represented the political consensus on the establishment of three distinct 2030 energy and climate targets: a target for energy efficiency, a target for the contribution of renewable energy sources, and a greenhouse gas emission reduction target. These targets should be in line with the EU targets for 2030, represent an equal ambition for the Contracting Parties and take into account relevant socio-economic differences, technological developments and the Paris Agreement on Climate Change.

The political agreements by the Council of the European Union and the European Parliament in 2018 and early 2019, enabled all of the rules introduced by the Clean Energy for all Europeans package to be in force from June 2019. The three 2030 energy and climate targets of reducing by at least 40% greenhouse gas emissions compared to 1990, energy efficiency target of at least 32.5% and a renewable energy target of at least 32% are fully enshrined in EU legislation but the upward revision of these targets will be proposed in 2021 following the Commission proposal of 17 September 2020 to reduce EU greenhouse emissions by at least 55% by 2030, compared to 1990 levels.

Following the adoption of Recommendation 2018/01/MC-EnC, and in view of Contracting Parties' obligations in the EU accession process and their commitments in the framework of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, along with their respective National Determined Contributions (NDCs), the Ministerial Council of the Energy Community on 17 December 2020 will further its discussion on energy efficiency, renewables and greenhouse gas emission reduction targets for 2030 that are equally ambitious compared to the 2030 targets in the European Union and are in line with the EU increased ambition as tabled in an amendment to the proposed European Climate Law, to include the 2030 emissions reduction target of at least 55% as a stepping stone to the 2050 climate neutrality goal.

The draft 2020 General Policy Guidelines on the 2030 Targets and Climate Neutrality for the Energy Community and its Contracting Parties will represent the political consensus reached in the Ministerial Council and offer political guidelines on establishing these.

On behalf of the European Union, the Commission intends to support the adoption of the draft 2020 General Policy Guidelines. Minor changes to the draft 2020 General Policy Guidelines may be agreed to, in the light of comments from the Energy Community Contracting Parties before or at the Ministerial Council, by the Commission, without a further decision of the Council.

2. The Annual Report on the activities of the Energy Community 2019-2020

On behalf of the European Union, the Commission intends to support the adoption of the Annual Report for 2019-2020.

3. The Director's financial discharge for 2019 on the basis of the Audit Report for the year ended 31 December 2019, the auditors' statement of assurance and the Budget Committee Report

On behalf of the European Union, the Commission intends to support the adoption of the Decision 2020/1/MC-EnC on Financial Discharge of the Director of the Secretariat of the Energy Community for 2019.

4. Recommendation 2020/1/MC-EnC on Projects of Mutual Interest between Contracting Parties and Member States of the European Union

On 16 October 2015 the Ministerial Council of the Energy Community adopted a Decision on the implementation of the Regulation (EU) No 347/2013 of the European

Parliament and of the Council on guidelines for trans-European energy infrastructure.² The purpose of this measure was to create a legal framework for prioritising key energy infrastructure projects among Contracting Parties and between Contracting Parties and EU Member States.

Regulation (EU) No 347/2013 as adopted in the Energy Community sets a comprehensive framework for streamlining the permitting, regulatory and cost-allocation procedures in Contracting Parties. It also requires, subject to a number of criteria, a Ministerial Council decision to establish under Title III of the Energy Community Treaty a list of priority infrastructure projects called projects of Energy Community interest (PECI). The Regulation gives also a possibility to apply its provisions to projects of mutual interest (PMI) i.e. projects that are recognised by two neighbouring states (a Contracting Party on one side, and a Member State on the other side) as important but which do not have the legal status of a PEGI. The final transposition deadline for main provisions of the Regulation and deadline for establishment of the list of PEGI was 31 December 2016.

As required by the provisions of Regulation (EU) No 347/2013, as adopted in the Energy Community, two working Groups were created in order to prepare PEGI list, and respectively the PMI list. Projects that have been submitted by project promoters have been consulted in a public consultation launched by the ECS on 30 March 2020. In the course of 2020, projects were assessed as regards their eligibility for the PEGI and PMI status.

A cost benefit analysis of each project was performed leading to the ranking of projects which was based on specific scores related to the level of the fulfilment of the criteria. At the end of the process, based on a consensus, a draft preliminary list of PMIs was proposed to the Permanent High Level Group (PHLG) and endorsed on 16 July 2020. Following the positive opinion of the Energy Community Regulatory Board received on 28 July 2020, the final list of PMIs has to be agreed by the Ministerial Council on 17 December 2020.

The PMI list is valid for two years since the date of its adoption and is limited to the framework of Regulation (EU) No 347/2013. Any future update of this list within the Energy Community should properly reflect the developments at EU and Energy Community levels, in particular in respect of 2030 targets and the reduction of greenhouse gas emissions as well as the future revision of Regulation (EU) 347/2013.

The position to be adopted on behalf of the Union in the Ministerial Council should be to approve the draft Recommendation.

Where necessary, the Commission will seek the Council's endorsement.

3. POSITION TO BE ADOPTED ON THE UNION'S BEHALF

3.1. Envisaged acts of the Ministerial Council

3.1.1. Decision 2020/.../MC-EnC on the implementation of the Commission Regulation (EU) 2019/2146 of 26 November 2019 amending Regulation (EC) No 1999/2008 of the European Parliament and of the Council on energy statistics, as regards the

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D/2015/09/MC-EnC

implementation of updates for the annual, monthly and short-term monthly energy statistics

The Commission identified several aspects of energy statistics collected under the Regulation 1099/2008 that needed to be updated and were subsequently modified in Regulation (EU) 2019/2146. Those changes concern notably greater disaggregation of the statistics on final energy consumption in industry, conceptual adjustments for natural gas trade definitions to improve consistency, rendering certain reporting items mandatory, and improving the timeliness of the monthly data collection for coal and electricity. For the purpose of adequate gathering of statistical data in the Energy Community Contracting Parties, it is appropriate that Regulation (EU) 2019/2146 be therefore transposed in the Energy Community acquis.

On behalf of the European Union, the Commission intends to support the adoption of the decision.

3.1.2. Decision 2020/.../MC-EnC on the implementation of the Commission Implementing Regulation (EU) 2019/803 of 17 May 2019 concerning the technical requirements regarding the content of quality reports on European statistics on natural gas and electricity prices pursuant to Regulation (EU) 2016/1952 of the European Parliament and of the Council

Regulation (EU) 2016/1952 sets out the framework for producing comparable European statistics on natural gas and electricity prices. Under this Regulation, every 3 years, Member States are to provide the Commission (Eurostat) with standard quality reports on the data. Those reports are to include information on the scope and collection of the data, the calculation criteria, the methodology and data sources used, and any changes thereto. For the purpose of adequate gathering of statistical data in the Energy Community Contracting Parties, it is appropriate that Regulation (EU) 2016/1952 be transposed in the Energy Community acquis.

On behalf of the European Union, the Commission intends to support the adoption of the decision.

3.1.3. Decision 2020/.../MC-EnC on the establishment of the list of Projects of Energy Community Interest

On 16 October 2015 the Ministerial Council of the Energy Community adopted a Decision on the implementation of the Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure.³ The purpose of this measure was to create a legal framework for prioritising key energy infrastructure projects among Contracting Parties and between Contracting Parties and EU Member States.

Regulation (EU) No 347/2013 as adopted in the Energy Community sets a comprehensive framework for streamlining the permitting, regulatory and cost-allocation procedures in Contracting Parties. It also requires, subject to a number of criteria, a Ministerial Council decision to establish under Title III of the Energy Community Treaty a list of priority infrastructure projects called projects of Energy Community interest (PECI). The final transposition deadline for main provisions of

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D/2015/09/MC-EnC

the Regulation and deadline for establishment of the first list of PEGI was 31 December 2016. The list shall be updated every two years.

As required by the provisions of Regulation (EU) No 347/2013, as adopted in the Energy Community, two working Groups were created in order to prepare PEGI list. Projects that have been submitted by project promoters were subject of a public consultation launched by the ECS on 30 March 2020. In the course of 2020, projects were assessed as regards their eligibility for the PEGI status. A cost-benefit analysis of each project was performed leading to the ranking of projects which was based on specific scores related to the level of the fulfilment of the criteria. At the end of the process, based on a consensus, a draft preliminary list of PEGIs was proposed to the Permanent High Level Group (PHLG) and endorsed on 16 July 2020. Following the positive opinion of the Energy Community Regulatory Board on 28 July 2020, the final list of PEGIs has to be agreed by the Ministerial Council on 17 December 2020.

The PEGI list is valid for two years since the date of its adoption and is limited to the framework of Regulation (EU) No 347/2013. Any future update of this list within the Energy Community should properly reflect the developments at EU and Energy Community levels, in particular in respect of 2030 targets and the reduction of greenhouse gas emissions as well as the future revision of Regulation (EU) 347/2013.

The position to be adopted on behalf of the Union in the Ministerial Council should be to support the adoption of the decision.

3.1.4. Decisions under Article 91(1) ECT establishing the existence of a breach of the ECT in the following cases:

The dispute settlement proceedings are set out in Title III, Chapter 1, and Title IV, Chapter 1 of the Rules of Procedure on dispute settlement under the Treaty.⁴

(a) Decision 2020/.../Mc-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-13/17

As ruled by the Court of Justice of the European Union, third party access to transmission systems constitutes “one of the essential measures”⁵ which Contracting Parties must implement in order to discharge with their commitments under the ECT. Pursuant to Article 32(1) of the Gas Directive, Contracting Parties shall ensure the implementation of a system of third party access to the natural gas transmission system for all system users and applied objectively and without discrimination, based on published tariffs. Articles 16(1) and (2) of the Gas Regulation impose the obligation on the TSO to make available to market participants the maximum capacity at all relevant points, taking into account system integrity and efficient network operation, and to implement and publish non-discriminatory and transparent capacity allocation mechanisms. Under Article 18(3) of the Gas Regulation read in conjunction with paragraph 3.2(1)(a) of Annex I thereto, relevant points shall include all entry and exit points to and from the natural gas transmission network operated by the TSO. The obligations related to third party access to the natural gas transmission

⁴ Procedural Act 2008/01/MC-EnC on Rules of Procedure for dispute settlement under Treaty as amended by Procedural Act 2015/04/MC-EnC of 16 October 2015 on amending Procedural Act 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for dispute settlement under the Treaty.

⁵ Judgement of 22 May 2008, citiworks AG, C-439/06, ECLI:EU:C:2008:298, para. 44; judgment of 9 October 2008, Sabatauskas and Others, C-239/07, ECLI:EU:C:2008:551, para. 33; judgment of 29 September 2016, Essent Belgium NV, C-492/14, ECLI:EU:C:2016:732, para. 76

system stemming from the Energy Community acquis were transposed into Serbian national law by the Energy Law and must be implemented by the TSO in accordance with the Rules.

The ECS considers that Srbijagas, i.e. the company currently acting as the natural gas TSO in the Republic of Serbia and in charge of all entry and exit points to/from the Serbian natural gas transmission system, failed to implement these obligations by continuing to unilaterally exclude cross-border natural gas transmission capacities at the Horgoš entry point from open capacity allocation procedures and thus failing to ensure third party access at the respective entry point. It further challenges the failure of the Serbian authorities competent to enforce the respective obligations to actually do so.

The ECS preliminarily found that due to the unjustified exclusion by Srbijagas of the Horgoš entry point from unrestricted and non-discriminatory third party access and from open capacity allocation procedures, the Republic of Serbia violates Article 32 of Directive 2009/73/EC and Article 16 of Regulation (EC) 715/2009 and, therefore, fails to fulfil its obligations under Articles 6, 10 and 11 of the Energy Community Treaty. The ECS therefore submitted a Reasoned Request to the Ministerial Council.

In the light of the facts and arguments set out in the Reasoned Request, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-13/17, provided that the Advisory Committee of the Energy Community timely delivers an opinion supporting the findings of the ECS, i.e. prior to the meeting of the Ministerial Council.

This approval should, moreover, be made on condition that the justification in the Reasoned Request is modified by removing the obiter dictum in point (71) thereof which refers to a possible abuse of dominant position. This obiter dictum is not relevant for the establishment of the existence of a breach in the case at hand and risks to create legal uncertainty.

- (b) Decision 2020/.../MC-EnC on the failure of Bosnia and Herzegovina to comply with the Treaty in Case ECS-10/18

Article 18(1)(c) of the Energy Community Treaty contains a prohibition of State aid which according to Article 19 of the Treaty also applies to public undertakings and undertakings, to which special or exclusive rights have been granted. These provisions, together with Article 6 of the Treaty, require the Contracting Parties to introduce a corresponding prohibition of State aid into their national legal systems and ensure its enforcement.

The ECS preliminarily found that the State Aid Council of Bosnia and Herzegovina wrongly decided that a guarantee issued by the Federation of Bosnia and Herzegovina in favour of the Export-Import Bank of China to secure a loan of the public utility company Elektroprivreda Bosne i Hercegovine for the Tuzla 7 project does not constitute State aid within the meaning of Article 18(1)(c) of the Energy Community Treaty. The Secretariat assessed the State Aid Council's decision in terms of its compliance with the definition of State aid under Article 107(1) TFEU, covering the following elements: (1) an undertaking is granted an advantage, (2) by the State or through State resources, (3) which favours certain undertakings or certain energy resources, (4) is liable to distort competition, and (5) may affect trade of network energy between the Contracting Parties. The Secretariat preliminarily

concluded that the State Aid Council's decision does not comply with the definition of State aid and the public guarantee does constitute State aid. As the State Aid Council is a State body, its actions are attributable to Bosnia and Herzegovina which thereby fails to fulfil its obligations under Article 18 of the Energy Community Treaty. The ECS submitted to the Ministerial Council a Reasoned Request to declare a failure by Bosnia and Herzegovina to fulfil its obligations under Article 18 of the Energy Community Treaty.

In the light of the facts and arguments set out in the Reasoned Request, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-10/18, once the Advisory Committee of the Energy Community, following the hearing on 9 December 2020, has delivered an opinion supporting the findings of the ECS and subject to new developments on the case.

3.1.5. Decisions under Article 92(1) ECT:

- (a) Decision on the adoption of measures in response to serious and persistent breaches by Bosnia and Herzegovina under Article 92(1) ECT in Cases ECS-8/11S, ECS-2/13S and ECS-6/16S
 - (i) Imposing measures on Bosnia and Herzegovina under Article 92(1) of the ECT in Case ECS-8/11S

On 16 October 2015, the Ministerial Council adopted Decision 2015/10/MC-EnC declaring that Bosnia and Herzegovina had failed to implement Ministerial Council Decisions 2013/04/MC-EnC and 2014/04/MC-EnC in Case ECS-8/11 related to non-compliance by Bosnia and Herzegovina with the Second Energy Package (gas) and thus to rectify the serious and persistent breaches identified in these Decisions. The non-compliance covered at the time the lack of a regulatory entity with competences on State level, of a regulatory entity competent for gas in the Federation of Bosnia and Herzegovina, the lack of proper legal, functional and account unbundling in either entity, the lack of properly set and published network tariffs, issues related to exemptions for new infrastructure, the lack of market opening and a failure to transpose the provisions of the then Gas Regulation 1775/2005 and the then Security of Supply Directive 2004/67/EC. The Ministerial Council adopted the following measures under Article 92 ECT:

- The right of Bosnia and Herzegovina to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V (related to budget) of the Treaty was suspended and the ECS was requested to suspend the application of its Reimbursement Rules to the representatives of Bosnia and Herzegovina for all meetings organized by the Energy Community.

The effect of the measures under Article 92 was limited to one year and suspended between October 2016 and 31 March 2017 in order to enable Bosnia and Herzegovina to implement the "Agreement on Removal of Serious and Persistent Breach under the Energy Community Treaty in the gas sector" which was signed in the margins of the Ministerial Council of 14 October 2016.

Since Bosnia and Herzegovina did not take any steps to rectify the breach, the measures adopted under Decision 2015/10/MC-EnC took effect again on 1 April 2017. On 29 November 2018 the Ministerial Council adopted Decision 2018/17/MC-EnC on extending the measures imposed on Bosnia and

Herzegovina so far by one year. In addition, it suspended the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty concerning the adoption of new acquis in the gas sector by all Energy Community institutions. It further suspended the right of Bosnia and Herzegovina to participate in votes for Measures under Article 92 of the Treaty (sanctioning of infringements of the Treaty).

Since Bosnia and Herzegovina did not take any measures to rectify the breach identified in Decision 2018/17/MC-EnC, the ECS submitted 8 October 2019 a Reasoned Request to the Ministerial Council under Article 92 of the Treaty for a further extension of sanctions. This request was not accepted by the Ministerial Council of 2019 due to lack of unanimity and measures in place were not extended as a result. In 2019, the Union position adopted for the Ministerial Council was to support the request of the ECS for an extension.

In a new Reasoned Request of 22 September 2020 to the Ministerial Council, the ECS asks to reconfirm the existence of a serious and persistent breach of Treaty obligations by Bosnia and Herzegovina in the absence of any demonstrated evidence of efforts to rectify those. As regards the Measures, it proposes:

- to extend the duration of Measures previously taken under Decision 2015/10/EnC and Decision 2016/16/MC-EnC (suspension of voting rights in budgetary matters and suspension of reimbursement rules) for two years since the day of adoption of the Decision.
- to add a Measure consisting of suspending the right of Bosnia and Herzegovina to participate in votes for Decisions under Article 91 of the Treaty until the meeting of the Ministerial Council in 2022.
- to prolong the application of the Measure consisting of suspending the right of Bosnia and Herzegovina to participate in votes for Decisions under Article 92 ECT until the meeting of the Ministerial Council in 2022.

Given the persistence and importance of the breaches identified, the proposed measures are appropriate and proportionate in so far as they are based on Article 92(1) ECT. The position to be adopted on behalf of the Union in the Ministerial Council should therefore be to approve the draft Decision, with the exception of measures under Article 3(1) of Decision 2016/16/MC-EnC, whose extension should not be approved.

- (ii) Imposing measures on Bosnia and Herzegovina under Article 92(1) ECT in Case ECS-2/13S

On 14 October 2016, the Ministerial Council adopted Decision 2016/03/MC-EnC in Case ECS-02/13 establishing a breach of Energy Community law by Bosnia and Herzegovina, by failing to ensure that heavy fuel oils are not used if their sulphur content exceeds 1.00 % by mass on its entire territory and failing to ensure that gas oils are not used if their sulphur content exceeds 0.1 % by mass on its entire territory. This way Bosnia and Herzegovina failed to comply with Article 3(1) and Article 4(1) of Directive 1999/32/EC in conjunction with Article 16 of the Treaty.

Since Bosnia and Herzegovina did not take any measures to rectify the breach identified in Decision 2016/03/MC-EnC, on 12 September 2018 the ECS submitted a Reasoned Request to the Ministerial Council initiating Case ECS-2/13S under Article 92 of the Treaty. By its Decision 2018/13/MC-EnC of 29 November 2018,

the Ministerial Council established a serious and persistent breach of the Energy Community law within the meaning of Article 92(1) of the Treaty by Bosnia and Herzegovina which failed to rectify the breaches identified in the 2016 Decision of the Ministerial Council. However, it postponed the adoption of measures under Article 92 of the Treaty to 2019. Due to lack of progress, the ECS submitted a Reasoned Request to the Ministerial Council of 2019 requesting the imposition of Measures under Article 92 of the Treaty. However, the Ministerial Council did not adopt a decision due to lack of unanimity and Measures were not imposed. The European Union supported in 2019 the imposition of such measures.

To date, Bosnia and Herzegovina maintains the need for a general and unconditional exemption to the provisions of Directive 1999/32/EC. Whereas it announced the establishment in July 2020 of a dedicated working group on the quality of liquid petroleum fuels, the ECS does not consider this to be a sufficient step to rectify the existing breach of the legal framework. The ECS submitted on this basis on 22 September 2020 a Reasoned Request to the Ministerial Council requesting:

- a confirmation that a serious and persistent breach of the Treaty under its Article 92(1) ECT continues to exist.
- that Measures be imposed under Article 92 ECT, notably to suspend the right of Bosnia and Herzegovina to participate in votes for Decisions under Article 91 and 92 ECT until the meeting of the Ministerial Council in 2022.

Given the persistence and importance of the breaches identified, the proposed measures are appropriate and proportionate. Therefore, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the draft Decision.

- (iii) Imposing measures on Bosnia and Herzegovina under Article 92(1) ECT in Case ECS-6/16S

On 14 October 2016, the Ministerial Council adopted Decision 2016/07/MC-EnC in Case ECS-06/16 establishing a breach of Energy Community law by Bosnia and Herzegovina, by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Third Energy Package in gas and electricity sectors⁶ 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 ECS. It thereby failed to comply with Articles 6 and 89 of the Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/MC-EnC.

Since Bosnia and Herzegovina did not take any measures to rectify the breach identified in Decision 2016/07/MC-EnC, on 12 September 2018 the ECS submitted a Reasoned Request to the Ministerial Council initiating Case ECS-6/16S under Article 92 of the Treaty. By its Decision 2018/16/MC-EnC of 29 November 2018, the Ministerial Council established a serious and persistent breach of the Energy Community law by Bosnia and Herzegovina in that it failed to implement Ministerial Council Decision 2016/07/MC-EnC and thus to rectify the breaches identified in this Decision. However, it postponed the adoption of measures under Article 92 of the Treaty to 2019.

⁶ Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

Since Bosnia and Herzegovina did not take any measures to rectify the breach identified in Decision 2018/16/MC-EnC and the situation as regards the compliance of Bosnia Herzegovina with their above mentioned obligations remained in breach of the Energy Community acquis, the ECS submitted a Request for Measures under Article 92 of the Treaty to the Ministerial Council dated 8 October 2019. However, the Ministerial Council did not adopt a Decision in this respect due to the absence of unanimity. The European Union supported in its position the 2019 the adoption of Measures as proposed by the ECS. On 22 September 2020, the Secretariat submitted a new Reasoned Request to the Ministerial Council based on the continued non-compliance by Bosnia and Herzegovina with the Third Energy Package in either gas or electricity sector. It requests:

- a confirmation that a serious and persistent breach of the Treaty under its Article 92(1) ECT continues to exist.
- that Measures be imposed under Article 92 of the Treaty, notably to suspend the right of Bosnia and Herzegovina to participate in votes for Decisions under Articles 91 and 92 ECT until the meeting of the Ministerial Council in 2022.

Given the persistence and importance of the breaches identified, the proposed measures are appropriate and proportionate. Therefore, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the draft Decision.

- (b) Decision 2020/.../MC-EnC on establishing a serious and persistent breach against Ukraine under Article 92(1) ECT in Case ECS-1/18S

The Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency was incorporated in the Energy Community acquis communautaire by Decision 2015/08/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015.

Article 1 of Decision 2015/08/MC-EnC requires the Contracting Parties to transpose the Directive 2012/27/EU in the national legal framework and to implement it as of 15 October 2017. Article 1 of Ministerial Council Decision 2015/08/MC-EnC also requires the Contracting Parties to communicate to the ECS the text of the main provisions of national law, which they adopt in the field covered by Decision 2015/08/MC-EnC. 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.

The Ministerial Council Decision 2018/06/MC-EnC of 29 November 2018 established a failure by Ukraine to comply with the Energy Community Treaty by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2012/27/EU on energy efficiency by 15 October 2017. Ukraine thereby failed to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 1 of Ministerial Council Decision 2015/08/MC-EnC. The Ministerial Council Decision invited Ukraine to rectify this failure by 1 July 2019 and to report regularly to the Secretariat and the Permanent High Level Group. The ECS finds that, to date, Ukraine has not taken the measures necessary to comply with its obligations under Directive 2012/27/EU, as established in the Ministerial

Council Decision 2018/06/MC-EnC. It therefore submitted a Request to the Ministerial Council for a Decision determining the existence of a serious and persistent breach of the ECT by Ukraine within the meaning of Article 92(1) of the Treaty.

The position to be adopted on behalf of the Union in the Ministerial Council should take into account the progress already made by Ukraine on this topic as well planned EU technical assistance to Ukraine on energy efficiency, to be deployed as of 1 December 2020 for a two-year period. This technical assistance should enable Ukraine to effectively align its domestic legislation with Directive 2012/27/EU. Therefore, the deadline for reporting and for rectification of the identified breaches should elapse by the date of the Ministerial Council 2021 instead of 1 July 2021 as proposed by the ECS.

The position to be adopted on behalf of the Union in the Ministerial Council should be to approve the decision of the Ministerial Council determining the existence of a serious and persistent breach in Case ECS-1/18S, on condition that the deadline for reporting to the Ministerial Council by Ukraine and for the rectification of the breach by Ukraine be set on the date of the Ministerial Council 2021.

- (c) Decision 2020/.../Mc-EnC on the failure of Serbia to comply with the ECT in Case ECS-10/17S

Unbundling of TSOs constitutes one of the key concepts enshrined in the Third Energy Package. It requires the effective separation of activities of energy transmission from production and supply interests. In case of certification of a TSO which is controlled by a person or persons from a third country or third countries, Article 11 of the Gas Directive⁷ applies. Article 10 of the Gas Directive provides that before an undertaking is approved and designated as TSO, it needs to be certified. In order to be certified, the undertaking needs to comply with the unbundling requirements of the Third Energy Package, i.e. with Article 9 of the Gas Directive.

The Gas Directive as well as the Gas Regulation⁸ were incorporated in the Energy Community acquis by Decision 2011/02/MC-EnC of the Ministerial Council of 6 October 2011.

The ECS found that by certifying Yugorosgaz-Transport under the ISO-model, the Republic of Serbia has failed to comply with its obligations under Articles 10, 14(2)(a), 14(2)(b), 14(2)(d), 15 and 11 of Directive 2009/73/EC as well as Article 24 of Regulation 715/2009, as incorporated in the Energy Community. In 2019, the Ministerial Council declared in its Decision 2019/02/MC-EnC that the Republic of Serbia failed to fulfil its obligations arising from the Gas Directive and the Gas Regulation. The Secretariat submits that the Republic of Serbia has to date not implemented Decision 2019/02/MC-EnC and has not rectified the said breach of Energy Community acquis. The ECS therefore submitted to the Ministerial Council a request to determine a serious and persistent breach of obligations under the ECT within the meaning of Article 92(1) thereof.

⁷ 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 and repealing Directive 2003/55/EC.

⁸ 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 and repealing Regulation (EC) No 1775/2005.

In the light of the facts and arguments set out in the Request of the ECS, the position to be adopted on behalf of the Union in the Ministerial Council should be to approve the decision determining the existence of a serious and persistent breach in Case ECS-10/17S.

3.1.6. Appointment of the Members of the Advisory Committee in accordance with Article 32 (3) of the rules under Procedural Act No 2008/01/MC-EnC on the Rules of Procedure for the Dispute Settlement as amended by Procedural Act 2015/04/MC-EnC

With the proposed appointments, the mandates of the current members and alternate members of the Advisory Committee would be extended for an additional term until 31 December 2024, in accordance with Article 32 (3) the rules under Procedural Act No 2008/01/MC-EnC on the Rules of Procedure for the Dispute Settlement as amended by Procedural Act 2015/04/MC-EnC.

On behalf of the European Union, the Commission intends to support the proposed appointments.

3.2. Envisaged acts of the PHLG

An item mentioned above (Section 2.3) requires a Decision by the PHLG, in which the position of the European Union will be expressed by the representative of the European Commission.

In 2011, the PHLG adopted the Procedural Act No. 01/2011 PHLG-EnC laying down the rules governing the arbitration procedure in staff matters under Article 14 of the Staff Regulations of the Energy Community. The experience gained with the implementation of this Procedural Act has shown that the current procedural rules need to be improved in order to safeguard the principle of fair trial and contribute to a productive working environment within the ECS. Against this backdrop, the proposed PHLG Decision amends the rules governing the procedure before the Arbitration Committee as laid down in Procedural Act No. 01/2011 PHLG-EnC. The main elements of the envisaged amendments are:

- enable the Commission and the other Contracting Parties to appoint permanent representatives to the Arbitration Committee which would stand ready to address arbitration requests at short notice;
- enable the Arbitration Committee to take up its functions if some representatives have not been appointed on time;
- empower the Arbitration Committee to refuse to endorse a settlement if that settlement results in financial consequences for the budget of the Energy Community that are manifestly incompatible with the principle of sound financial management; and
- enable the Arbitration Committee to address recommendations to the ECS and inform the Ministerial Council accordingly in case an arbitration proceeding points to the existence of structural deficiencies in the ECS.

For the sake of efficiency and subject to the adoption of the proposed amendment of Procedural Act No. 01/2011 PHLG-EnC by the PHLG, the Commission has appointed Mr

Manuel Kellerbauer as a permanent member of the Arbitration Committee representing the European Commission and Mr Lars Albath as a permanent alternate member of the Arbitration Committee representing the European Commission. These two Commission officials have the appropriate expertise to carry out their functions and are beyond reasonable doubts as to their impartiality or independence. They would act in full independence and would not be subject to any instruction in their capacity as members of the Arbitration Committee.

On this basis, the position to be adopted on behalf of the European Union in the PHLG should be to approve the draft Procedural Act of the PHLG amending the Procedural Act No. 01/2011 PHLG-EnC of the Permanent High Level Group of the Energy Community of 23/03/2011 laying down the rules governing the arbitration procedure in staff matters under Article 14 of the Staff Regulations of the Energy Community. Minor changes to the draft PHLG Decision may be agreed to, in the light of comments from the Energy Community Contracting Parties or the ECS before or at the PHLG meeting.

The Council should also confirm, subject to the adoption by the PHLG of the proposed amendment of Procedural Act No. 01/2011 PHLG-EnC, the appointment by the European Commission of the indicated two Commission officials as permanent and permanent alternate members of the Arbitration Committee representing the European Commission.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

The concept of ‘acts having legal effects’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature’⁹.

4.1.2. Application to the present case

The Ministerial Council and the PHLG are bodies set up by an agreement, namely the Energy Community Treaty.

The acts which the Ministerial Council and the PHLG are called upon to adopt constitute acts having legal effects. The envisaged act will be binding under international law in accordance with Article 76 ECT, according to which a decision is legally binding upon those to whom it is addressed.

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

⁹ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to energy.

Therefore, the substantive legal basis of the proposed decision is Article 194 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 194, in conjunction with Article 218(9) TFEU.

Proposal for a

COUNCIL DECISION

on the position to be adopted on behalf of the European Union in the Ministerial Council of the Energy Community and in the Permanent High Level Group of the Energy Community (Tivat, Montenegro, 16 and 17 December 2020)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Energy Community Treaty ('the Treaty') was concluded by the Union by Council Decision 2006/500/EC of 29 May 2006¹⁰ and entered into force on 1 July 2006.
- (2) Pursuant to Articles 47 and 76 of the Treaty, the Ministerial Council may adopt Measures taking the form of a Decision or a Recommendation.
- (3) The Ministerial Council, during its 18th session on 17 December 2020, is to adopt a number of acts listed in Annex 1 to this Decision.
- (4) The Permanent High Level Group, during its 59th meeting on 16 December 2020, is to adopt an act listed in Annex 2 to this Decision.
- (5) It is appropriate to establish the position to be adopted on the Union's behalf in the Ministerial Council and the Permanent High Level Group, as the envisaged acts will have legal effects for the Union.
- (6) The purpose of the envisaged acts is to facilitate the achievement of the objectives of the Treaty and the functioning of the Energy Community Secretariat in Vienna which, among other things, provides administrative support to the Ministerial Council.

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on the Union's behalf in the 18th session of the Ministerial Council to be held in Tivat, Montenegro on 17 December 2020 regarding the issues falling under the scope of Article 218(9) TFEU is set out in Annex 1 to this Decision.

¹⁰ OJ L198 of 20.7.2006, p. 15.

Article 2

The position to be adopted on the Union's behalf in the 59th meeting of the Permanent High Level Group to be held in Tivat, Montenegro on 16 December 2020 regarding the issues falling under the scope of Article 218(9) TFEU is set out in Annex 2 to this Decision.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*