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Proposal for a

COUNCIL DECISION

on the position to be taken 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 (Chisinau, 12 and 13 December 2019)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken 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, which these two bodies envisage adopting on 12 and 13 December 2019. It also includes items on the agendas of these two bodies, which do not fall within the scope of Article 218 (9) TFEU, but require a political approval by the Council.

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 1 and 3 (Art. 73 and 74 ECT in connection with Art. 88 ECT, Art. 92 (1) ECT).

Two third majority applies with respect to the envisaged other items listed below in Section 2.4, points 2 and 3) (Art. 83, Art. 87 ECT).

Simple majority vote applies with respect to the envisaged acts listed below under Section 2.3, point 2 (Art. 91 (1) (a) ECT).

Finally, as regards the envisaged act listed below under Section 2.3., point 4, as well as the other item listed under Section 2.4., point 1, the Ministerial Council or the PHLG vote with the majority of the votes cast, but in this case the EU does not have a voting right (Art. 80 and 81 ECT).

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 [...]'

The Decision of the Energy Community Ministerial Council D/2011/02/MC-EnC, which adopts the so-called "third energy package"², states in Art. 27 and 28 that (i) the Energy Community shall endeavour to apply Network Codes and Guidelines adopted by the

¹ OJ L198 of 20.7.2006, p. 15.

² Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

European Commission under the third energy package, and (ii) Network Codes and Guidelines shall be adopted by the Permanent High Level Group.

2.3. The envisaged acts of the Ministerial Council and the PHLG

The Ministerial Council, on 13 December 2019, and the PHLG, on 12 December 2019, 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**:

- (1) Decision adopting the Energy Community Budget and financial contributions for the period 2020-2021;
- (2) Decisions under Article 91(1) ECT establishing the existence of a breach of the ECT in the following cases:
 - (a) Decision 2019/.../Mc-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-10/17
 - (b) Decision 2019/.../Mc-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-13/17
 - (c) Decision 2019/.../Mc-EnC on the failure of Kosovo*³ to comply with the Energy Community Treaty in Case ECS-6/18
- (3) Decisions under Article 92(1) ECT:
 - (a) Decision on imposing and extending measures on Bosnia and Herzegovina under Article 92(1) of the Energy Community Treaty in Cases ECS-8/11 S, ECS-2/13 and ECS-6/16
 - (b) Decision on imposing and extending measures on the Republic of Serbia under Article 92(1) of the Energy Community Treaty in Cases ECS-3/08 and ECS-9/13.

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**:

- (4) Decision of the Permanent High Level Group of the Energy Community on the implementation of Regulation (EU) 312/2014 establishing a Network Code on Gas Balancing of Transmission Networks.

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

³ *This designation is without prejudice to positions on status, and is in line with UNSCR 1244 (1999) and the ICJ Opinion on the Kosovo declaration of independence

PHLG. With respect to those items, the Commission intends to express the following positions on behalf of the Union, as also reflected in Annex 3 to this proposal:

1. 2019 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 now fully enshrined in EU legislation.

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 13 December 2019 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.

The draft 2019 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 2019 General Policy Guidelines. Minor changes to the draft 2019 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 2018-2019

On behalf of the European Union, the Commission intends to support the adoption of the Annual Report for 2018-2019.

3. The Director's financial discharge for 2018 on the basis of the Audit Report for the year ended 31 December 2018, 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 Director's financial discharge for 2018.

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

3.1. Envisaged acts of the Ministerial Council

3.1.1. Decision adopting the Energy Community Budget for the years 2020-2021 and contributions by the Parties to the budget

The proposed Procedural Act of the Ministerial Council foresees an overall budget of EUR 4,812,073,- for each of the years 2020 and 2021. This level was also fixed for the year 2019. There will thus be no increase compared to 2019.

Within the overall budget, increases are foreseen in some fields, such as inflation-related salary adjustments for the staff (extra 2% for 2020 and 2021 respectively), the creation of two new permanent posts (one for a new expert for the Clean Energy Package and another one for a new expert on environmental matters) and the increase of expenses for office rent. These increases will be financed by redeployment of other budget allocations and savings. In addition, the Energy Community will focus more on its core tasks, as defined in the Energy Community legal framework.

94,78% of the overall budget will be paid by the European Union, the rest by the non-EU Parties to the Energy Community Treaty.

The position to be taken on behalf of the Union in the Ministerial Council should be to approve the decision adopting the Energy Community Budget for the years 2020-2021 and contributions by the Parties to the budget.

3.1.2. *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 Treaty⁴.

- (a) Decision 2019/.../Mc-EnC on the failure of Serbia to comply with the Energy Community Treaty in Case ECS-10/17

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 Directive⁵ 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 Regulation⁶ were incorporated in the Energy Community acquis by Decision 2011/02/MC-EnC of the Ministerial Council of 6 October 2011.

The ECS preliminarily 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. 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 taken on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-10/17.

- (b) Decision 2019/.../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”⁷ 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

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 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.

⁶ 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.

⁷ 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

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 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 taken 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.

This approval should, however, 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.

- (c) Decision 2019/.../Mc-EnC on the failure of Kosovo* to comply with the Energy Community Treaty in Case ECS-6/18

Pursuant to Article 16(iii) of the ECT, Directive 2001/80/EC⁸, as amended by Decision 2013/05/MC-EnC of the Ministerial Council of the Energy Community of 24 October 2013 and by Decision 2015/07/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on amending Decision 2013/05/MC-EnC, is part of the Energy Community's *acquis communautaire* on environment.

Pursuant to Article 16(v) of the ECT, Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU⁹, as amended by Decision 2013/06/MC-EnC of the Ministerial Council of the Energy Community of 24 October 2013, is also part of the *acquis communautaire* on environment.

Article 12 of the ECT requires Contracting Parties to “implement the *acquis communautaire* on Environment in compliance with the timetable for the implementation of those measures set out in Annex II.”

⁸ Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

⁹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

The ECS considers that Kosovo* failed to comply with its obligations related to the transposition and implementation of the provisions of Directive 2001/80/EC (for existing plants) and Directive 2010/75/EU (for new plants) into national law and the implementation thereof. On account of this non-compliance, the emission limit values in the respective permits for Kosovo*'s five existing large combustion plants (three in the "Kosovo A" and two in the "Kosovo B" plant complex) are also exceeding those set by Directive 2001/80/EC. Furthermore, Kosovo* plans to construct a new thermal power plant ("Kosova e Re"), with a net electric power of 450 MW. In accordance with the applicable Energy Community legislation, this plant would fall under the category of "new plant" under Directive 2010/75/EU and its emission limit values have to be set in accordance with the emission limit values of Part 2 of Annex V of the same Directive. In the absence of national legislation transposing the requirements of Directive 2010/75/EU for new plants into national law, however, the emission limit values of the planned new thermal power plant cannot be set in a manner compliant with Energy Community law.

The currently applicable legal framework in Kosovo*, namely the IPPC Law and the Administrative Instruction, according to the ECS, fails to ensure compliance with several provisions of Directive 2001/80/EC by establishing incorrect emission limit values or other parameters for certain pollutants in one or more plant categories falling under the Directive's scope.

With regard to new plants, according to the ECS, Kosovo* fails to fulfil its obligations under Article 2 of Decision 2013/06/MC-EnC read in conjunction with Article 30(3) and Part 2 of Annex V of Directive 2010/75/EU by not adopting the laws, regulations and administrative provisions necessary to comply with Chapter III and Annex V of Directive 2010/75/EU, namely by not setting provisions for the limitation of emissions into the air from new large combustion plants, or, in any event, by failing to communicate the texts thereof to the ECS.

The ECS preliminarily found that by not transposing into national law and by not implementing the provisions of Articles 4(1) and 4(3) as well as Parts A of Annexes III, IV, V, VI and VII of Directive 2001/80/EC and Article 30(3) as well as Part 2 of Annex V of Directive 2010/75/EU, Kosovo* has failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof. 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 taken on behalf of the Union in the Ministerial Council should be to approve the decision establishing the existence of a breach in Case ECS-6/18.

3.1.3. Decisions under Article 92(1) ECT:

- (a) Decision on imposing and extending measures on Bosnia and Herzegovina under Article 92(1) of the Energy Community Treaty in Cases ECS-8/11, ECS-6/16 and ECS-2/13
 - (i) Extending the measures imposed on Bosnia and Herzegovina under Article 92(1) of the Energy Community Treaty in Case ECS-8/11

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 Third Energy Package) and

thus to rectify the serious and persistent breaches identified in these Decisions. 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 of the Treaty was suspended.
- 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. Based on a report by the ECS, the Ministerial Council reviewed the effectiveness and the need for maintaining these measures at its next meeting in 2016.

Since Bosnia and Herzegovina did not take any measures to rectify the breach identified in Decision 2016/02/MC-EnC, on 12 September 2018, the ECS submitted a Reasoned Request to the Ministerial Council under Article 92 of the Treaty. On 29 November 2018, the Ministerial Council adopted Decision 2018/17/MC-EnC on extending the measures imposed on Bosnia and Herzegovina, declaring that Bosnia and Herzegovina had failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC, and 2016/16/MC-EnC, and thus to rectify the serious and persistent breaches identified in these Decisions. The Ministerial Council adopted the following measures under Article 92 ECT:

- The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC and Article 3(1) of Decision 2016/16/MC-EnC was extended for one year if, within six months of the present Decision, the breaches referred to in Article 1 of the present Decision were not rectified.
- In addition, the right of Bosnia and Herzegovina to participate in votes for Measures adopted under Title II of the Treaty related to adoption of new acquis in the gas sector by all Energy Community institutions, as well as the right to participate in votes for Measures under Article 91 of the Treaty will be suspended.
- Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2019.
- The Secretariat is invited to monitor compliance of the measures taken by Bosnia and Herzegovina with the *acquis communautaire*.

Since Bosnia and Herzegovina did not take any measures to rectify the breach identified in Decision 2018/17/MC-EnC, the ECS submitted a Reasoned Request dated 8 October 2019 to the Ministerial Council under Article 92 of the Treaty. In its Reasoned Request, the ECS requested the Ministerial Council to declare that:

- Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC, 2016/16/MC-EnC and 2018/17/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.
- The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC, Article 3(1) of Decision 2016/16/MC-EnC and Article 2 of Decision 2018/17/MC-EnC is extended for one year after the

adoption of the measures at the meeting of the Ministerial Council in the second half of 2020.

- In addition, the right of Bosnia and Herzegovina to participate in votes for Decisions under Article 91 and 92 of the Treaty is suspended.
- Based on a report by the ECS, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2020.

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

- (ii) Imposing measures on Bosnia and Herzegovina under Article 92(1) of the Energy Community Treaty in Case ECS-2/13

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 declaring that 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, 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-2/13 S 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 by declaring that the failure by Bosnia and Herzegovina to implement Ministerial Council Decision 2016/03/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty, but postponed the adoption of measures under Article 92 of the Treaty to 2019. At the same time, the Ministerial Council decided that Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/03/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken. Furthermore, the ECS was invited to request Measures under Article 92 of the Treaty in 2019, if Bosnia and Herzegovina failed to implement the Ministerial Council Decision 2016/03/MC-EnC by 1 July 2019.

Since Bosnia and Herzegovina did not take any measures to rectify the breach identified in Decision 2018/13/MC-EnC and the situation as regards the compliance of the national legislation of Bosnia and Herzegovina with Directive 1999/32/EC 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. In its Reasoned Request, the ECS requested the Ministerial Council to declare that:

- Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC, 2016/16/MC-EnC

and 2018/17/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.

- The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC, Article 3(1) of Decision 2016/16/MC-EnC and Article 2 of Decision 2018/17/MC-EnC is extended for one year after the adoption of the measures at the meeting of the Ministerial Council in the second half of 2020.
- In addition, the right of Bosnia and Herzegovina to participate in votes for Decisions under Article 91 and 92 of the Treaty is suspended.
- Based on a report by the ECS, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2020.

Therefore, the position to be taken 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) of the Energy Community Treaty in Case ECS-6/16

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 declaring 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 ECS, 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-6/16 S 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 declaring that the failure by Bosnia and Herzegovina to implement Ministerial Council Decision 2016/07/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty, but postponed the adoption of measures under Article 92 of the Treaty to 2019. At the same time, the Ministerial Council decided that Bosnia and Herzegovina shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/07/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken. Furthermore, the ECS was invited to request Measures under Article 92 of the Treaty in 2019, if Bosnia and Herzegovina failed to implement the Ministerial Council Decision 2016/07/MC-EnC by 1 July 2019.

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. In its Reasoned Request, the ECS requested the Ministerial Council to declare that:

- Bosnia and Herzegovina failed to implement Ministerial Council Decisions 2013/04/MC-EnC, 2014/04/MC-EnC, 2015/10/MC-EnC, 2016/16/MC-EnC and 2018/17/MC-EnC and thus to rectify the serious and persistent breaches identified in these Decisions.
- The duration of the measures under Article 92 imposed by Article 2(2) of Decision 2015/10/MC-EnC, Article 3(1) of Decision 2016/16/MC-EnC and Article 2 of Decision 2018/17/MC-EnC is extended for one year after the adoption of the measures at the meeting of the Ministerial Council in the second half of 2020.
- In addition, the right of Bosnia and Herzegovina to participate in votes for Decisions under Article 91 and 92 of the Treaty is suspended.
- Based on a report by the ECS, the Ministerial Council will review the effectiveness and the need for maintaining these measures further at its meeting in the second half of 2020.

Therefore, the position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Decision.

- (b) Decision on imposing and extending measures on the Republic of Serbia under Article 92(1) of the Energy Community Treaty in Cases ECS-3/08 and ECS-9/13
 - (a) Imposing measures on the Republic of Serbia under Article 92(1) of the Energy Community Treaty in Case ECS-3/08

On 14 October 2016 the Ministerial Council adopted Decision 2016/02/MC-EnC in Case ECS-03/08 establishing a breach of Energy Community law by declaring that the Republic of Serbia failed to comply with Article 6 of Regulation 1228/2003 by not using the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, the Republic of North Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of the Regulation.

The Republic of Serbia was required to take all appropriate measures to rectify the identified breaches and to ensure compliance with the Energy Community law by December 2016 and to report regularly to the ECS and the Permanent High Level Group.

Since the Republic of Serbia did not take any measures to rectify the breach identified in Decision 2016/02/MC-EnC, on 12 September 2018, the ECS submitted a Reasoned Request to the Ministerial Council initiating Case ECS-3/08 S under Article 92 of the Treaty.

By its Decision 2018/12/MC-EnC of 29 November 2018, the Ministerial Council established a serious and persistent breach of the Energy Community law by declaring that unless the Republic of Serbia rectifies the breaches identified in Ministerial Council Decision 2016/02/MC-EnC within six months of the present Decision, the failure by Serbia to implement Decision 2016/02/MC-EnC will be considered a serious and persistent breach within the meaning of Article 92(1) of the Treaty, but postponed the adoption of measures under Article 92 of the Treaty to 2019. At the same time, the Ministerial Council decided that the Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial

Council Decision 2016/02/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council in 2019 about the implementation measures taken. Furthermore, the ECS was invited to request Measures under Article 92 of the Treaty in 2019, if the Republic of Serbia failed to implement the Ministerial Council Decision 2016/02/MC-EnC by 1 July 2019.

The Republic of Serbia did not rectify the breaches identified in Ministerial Council Decision 2016/02/MC-EnC within six months of Decision 2018/12/MC-EnC.

Since the Republic of Serbia did not take any measures to rectify the breach identified in Decision 2018/12/MC-EnC and the situation as regards the compliance of the Republic of Serbia with their obligation to use the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, the former Yugoslav Republic of Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003 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. In its Reasoned Request, the ECS requested the Ministerial Council to declare that:

- Republic of Serbia continues with a serious and persistent breach of its obligations within the meaning of Article 92(1) of the Treaty, as established by the Ministerial Council, by failing to implement Ministerial Council Decisions
 - 2016/02/MC-EnC in Case ECS-3/08 of 14 October 2016 and 2018/12/MC-EnC of 29 November 2018 in Case ECS-3/08 S,
 - 2014/03/MC-EnC of 23 September 2014 in Case ECS-9/13 and 2016/17/MC-EnC of 14 October 2016 in Case ECS-9/13 S

and rectifying the breaches established therein.

- The right of Republic of Serbia to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty, as well as the right to participate in votes for Decisions under Article 91 of the Treaty are suspended.
- The ECS is requested to suspend the application of its Reimbursement Rules to the representatives of Republic of Serbia for all meetings organized by the Energy Community.
- The European Union, in line with Article 6 of the Treaty, is invited to take the appropriate measures for the suspension of financial support granted to Serbia in the sectors covered by the Treaty.
- The effect of the measures adopted by this Decision is limited for one year upon their adoption at the meeting of the Ministerial Council in the second half of 2019. Based on a report by the Secretariat, the Ministerial Council will review the effectiveness and the need for maintaining these measures at its next meeting 2020.
- Republic of Serbia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decisions 2016/02/MC-EnC and 2018/12/MC-EnC in Cases ECS-3/08 and ECS-3/08 S, and 2014/03/MC-EnC and 2016/17/MC-EnC in Cases ECS-9/13 and ECS-9/13 S in cooperation with the Secretariat and shall report to the Ministerial Council in 2020 about the implementation measures taken.

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

Therefore, the position to be taken on behalf of the Union in the Ministerial Council should be to approve the draft Decision.

- (ii) Extending the measures imposed on the Republic of Serbia under Article 92(1) of the Energy Community Treaty in Case ECS-9/13

On 29 November 2018, the Ministerial Council agreed to extend by six more months the deadline by which the Republic of Serbia was expected to rectify the breaches identified in Ministerial Council Decisions 2014/03/MC-EnC and 2016/17/MC-EnC in Case ECS-9/13 (related to non-compliance by the Republic of Serbia with the unbundling of natural gas transmission systems operators) and thus to rectify the serious and persistent breaches identified in these Decisions.

Since the Republic of Serbia did not take measures to rectify the breaches identified in Decisions 2014/03/MC-EnC and 2016/17/MC-EnC, the ECS submitted a Reasoned Request to the Ministerial Council under Article 92 of the Treaty dated 8 October 2019. In its Reasoned Request, the ECS requested the Ministerial Council to declare that:

- The right of Republic of Serbia to participate in votes for Measures and Procedural Acts adopted under Chapter VI of Title V of the Treaty, as well as the right to participate in votes for Decisions under Article 91 of the Treaty are suspended.
- The ECS is requested to suspend the application of its Reimbursement Rules to the representatives of Republic of Serbia for all meetings organized by the Energy Community.
- The European Union, in line with Article 6 of the Treaty, is invited to take the appropriate measures for the suspension of financial support granted to Serbia in the sectors covered by the Treaty.
- The effect of the measures adopted by this Decision is limited to one year upon its adoption.

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

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 EU Third Energy Package was adopted by the Energy Community and a simplified procedure for the adoption of EU Network Codes (NCs) and Guidelines (GLs) was established¹⁰.

NCs and GLs are a set of technical rules aiming to harmonise and improve the management of cross border energy flows. A number of EU NCs and GLs have been already adopted in the

¹⁰ Procedural Act 01/2012/PHLG-EnC

Energy Community, including the gas GLs on congestion management procedures¹¹, the gas NC on interoperability and data exchange rules¹², the electricity NC on grid connection of generators¹³, the electricity NC on demand connection¹⁴, and the electricity NC on grid connection of HVDC systems and DC-connected power park modules¹⁵.

In 2018 the PHLG adopted the Network Codes on capacity allocation mechanisms in gas transmission systems¹⁶ and on harmonised transmission tariff structures for gas.¹⁷

The present Decision of the PHLG covers the Network Codes contained in Regulation (EU) 312/2014.¹⁸

Commission Regulation (EU) 312/2014 establishing a Network Code on Gas Balancing of Transmission Networks aims to set out gas balancing rules, including network-related rules on nomination procedures, imbalance charges, settlement processes associated with the daily imbalance charge and operational balancing between transmission system operators' networks.

In April 2019, the ad-hoc Energy Community working group assessing the possible uptake of the gas balancing NC agreed on an adapted version of the NC on "gas balancing of transmission networks".

On this basis, the position to be taken on behalf of the European Union in the PHLG should be to approve the draft PHLG Decision to implement Regulation (EU) 312/2014 in the Energy Community.

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'¹⁹.

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.

¹¹ Decision 2018/01/PHLG-EnC

¹² Decision 2018/02/PHLG-EnC

¹³ Decision 2018/03/PHLG-EnC

¹⁴ Decision 2018/05/PHLG-EnC

¹⁵ Decision 2018/04/PHLG-EnC

¹⁶ Decision 2018/06/PHLG-EnC

¹⁷ Decision 2018/07/PHLG-EnC

¹⁸ Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks, OJ L 91, 27.3.2014, p. 15–35.

¹⁹ 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.

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 of the Energy Community Treaty, 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.

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 taken 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 taken 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 (Chisinau, 12 and 13 December 2019)

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 2006²⁰ 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 17th session on 13 December 2019, is to adopt a number of acts listed in Annex 1 to this Decision.
- (4) The Permanent High Level Group, during its 55th meeting on 12 December 2019, is to adopt an act listed in Annex 2 to this Decision.
- (5) It is appropriate to establish the position to be taken 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 taken on the Union's behalf in the 17th session of the Ministerial Council to be held in Chisinau on 13 December 2019 regarding the issues falling under the scope of Article 218(9) TFEU is set out in Annex 1 to this Decision.

²⁰ OJ L198 of 20.7.2006, p. 15.

Article 2

The position to be taken on the Union's behalf in the 55th meeting of the Permanent High Level Group to be held in Chisinau on 12 December 2019 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