

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

REASONED REQUEST

in Case ECS-04/21

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (hereinafter, the Treaty) and Article 11(3) of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter, "Dispute Settlement Rules"),¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

UKRAINE

is seeking a Decision from the Ministerial Council that

by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency, as adapted and adopted by the Energy Community by 29 November 2019 pursuant to Article 1(1) of Ministerial Decision 2018/10/MC-EnC and by failing to forthwith notify those measures to the Secretariat, Ukraine fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 1(1) and (3) of the Ministerial Council Decision 2018/10/MC-EnC.

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

I. Relevant Facts

1. Introduction

- (1) The European Union adopted Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (hereinafter "REMIT Regulation").
- (2) The REMIT Regulation was incorporated in the Energy Community *acquis communautaire* by Decision 2018/10/MC-EnC of the Ministerial Council of the Energy Community of 29 November 2018.²
- (3) The Contracting Parties were under an obligation to transpose the REMIT Regulation and notify the Energy Community Secretariat of transposing measures by 29 November 2019, as well as to implement the REMIT Regulation by 29 May 2020.

¹ Procedural Act No 2015/04/MC-EnC of 16.10.2015.

² ANNEX 1.

2. Factual background

- (4) Following the adoption of Decision 2018/10/MC-EnC, the Secretariat initiated a number of activities to assist Ukraine with the transposition of the REMIT Regulation in a timely manner.
- (5) In 2020, the Secretariat provided technical assistance under the EU4 Energy program on alignment of Ukrainian legislation with the REMIT requirements to the National Energy and Utilities Regulatory Commission (hereinafter, "NEURC") as the main beneficiary and the Verkhovna Rada of Ukraine as well as the Ministry of Energy and Environmental Protection of Ukraine as secondary beneficiaries.
- (6) Following the finalisation of the project, NEURC in September 2020 published draft legislation for public consultation. The draft received a negative opinion of the Ministry of Justice related to the applicable procedural requirements for NEURC to propose legislative acts.
- (7) Meanwhile, two draft laws (law No.4503 and law No.4503-1) have been registered in the Verkhovna Rada in December 2020 and January 2021 respectively. None of the draft laws has been adopted so far.
- (8) In February 2021, the Secretariat sent a letter to the Minister for Energy, recalling the obligation to transpose the REMIT Regulation, which expired on 29 November 2019.³
- (9) On 2 March 2021, the Ministry replied to the Secretariat's letter confirming that several draft laws are under discussion with the central executive authorities, but that none has been adopted yet.⁴
- (10) To date, the Secretariat has received no information from Ukraine indicating that the national measures to comply with the obligation to adopt the laws, regulations and administrative provisions necessary to comply with the REMIT Regulation, have been adopted and implemented, nor is it in possession of any other information enabling it to conclude that such measures have been taken.
- (11) On that basis, the Secretariat decided to submit this Reasoned Request to the Ministerial Council for decision.

II. Relevant Energy Community Law

- (12) Energy Community law is defined in Article 1 of the Dispute Settlement Rules as "*a Treaty obligation or to implement a Decision or Procedural Act addressed to it within the required period*". A violation of Energy Community Law occurs if "*a Party fails to comply with its obligation under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community*".
- (13) Article 6 of the Treaty reads:

"The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty."
- (14) Article 89 of the Treaty reads:

"The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision."
- (15) Article 1 of the Ministerial Council Decision 2018/10/MC-EnC, reads:

"1) Each Contracting Party shall transpose Regulation (EU) No 1227/2011 as adapted by this Decision by [12] months from the date of the adoption of this Decision."

³ ANNEX 2.

⁴ ANNEX 3.

2) Each Contracting Party shall implement Regulation (EU) No 1227/2011, as adapted by this Decision by [18] month from the date of adoption of this Decision.

3) Each Contracting Party shall notify the Energy Community Secretariat of the measures transposing this Decision, and any subsequent changes made to those measures, within two weeks following the adoption of such measures.

4) In transposing this Decision Contracting Parties shall task national regulatory authorities with the monitoring of and enforcing compliance with this Decision.”

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

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

III. Legal Assessment

- (17) The present Reasoned Request concerns non-compliance of Ukraine with the obligation to adopt the laws, regulations and administrative provisions necessary to comply with the REMIT Regulation and to forthwith notify those measures to the Secretariat within the deadline specified in the Ministerial Council Decision, i.e. by 29 November 2019 pursuant to Article 1(1) and (3) of Ministerial Decision 2018/10/MC-EnC.
- (18) The Reasoned Request is based on Article 11(3) of the Dispute Settlement Rules in force. In October 2015, the Ministerial Council amended the Dispute Settlement Rules and abolished the preliminary procedure in dispute settlement proceedings for non-transposition, i.e. in case where a Party has failed to fulfill its obligations to notify measures transposing a Decision addressed to it within the deadline specified in that Decision. Hence, in cases such as the one at issue, the Secretariat submits a reasoned request to the Ministerial Council directly, without performing a preliminary procedure.
- (19) As a Contracting Party to the Treaty, Ukraine is under an obligation to implement, i.e. to transpose at national level and to apply, the *acquis communautaire* on energy, including the Regulation (EU) No 1227/2011, as adapted.
- (20) Article 1(1) of Decision 2018/10/MC-EnC requires the Contracting Parties to bring into force the laws, regulations and administrative provisions necessary to comply with the REMIT Regulation by 29 November 2019 and to apply them as of 29 May 2020.
- (21) Article 1(3) of Ministerial Council Decision 2018/10/MC-EnC also requires the Contracting Parties to communicate to the Energy Community Secretariat the measures transposing the Regulation, and any subsequent changes made to those measures.
- (22) 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.
- (23) The time limit for Ukraine to take measures necessary to comply with Article 1(1) of Decision 2018/10/MC-EnC, as well as Articles 6 and 89 of the Treaty expired on 29 November 2019.
- (24) Despite numerous reminders and the assistance offered by the Secretariat, Ukraine to date has not taken the measures necessary to comply with its obligations. At the date of submitting this Reasoned Request, no other legislative measure meant to transpose the REMIT Regulation has been adopted.
- (25) Ukraine to date has not adopted the measures necessary to implement Decision 2018/10/MC-EnC. In the absence of any legal effect, draft legislation not yet adopted and entered into force cannot be considered as a measure necessary to comply with a Decision of the Ministerial Council.⁵

⁵ See, to that effect, Case C-430/98 *Commission v Luxembourg*, paragraphs 8-13, Case C-648/13 *Commission v Poland*, paragraphs 129-132.

(26) Under those circumstances, the Secretariat concludes that by failing to take the measures necessary to comply with the Article 1(1) of the Ministerial Council Decision 2018/10/MC-EnC, and to notify those measures, Ukraine has failed to fulfill its obligations under Articles 6 and 89 of the Treaty as well as with Article 1(1) and (3) of the Ministerial Council Decision 2018/10/MC-EnC on the implementation of the REMIT Regulation.

ON THESE GROUNDS

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

by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency, as adapted and adopted by the Energy Community by 29 November 2019 pursuant to Article 1(1) of Ministerial Decision 2018/10/MC-EnC and by failing to forthwith notify those measures to the Secretariat, Ukraine fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 1(1) and (3) of the Ministerial Council Decision 2018/10/MC-EnC.

On behalf of the Secretariat of the Energy Community,

Vienna, 26 March 2021



Janez Kopač
Director



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List of Annexes

- ANNEX 1 Ministerial Council Decision 2018/10/MC-EnC
- ANNEX 2 Letter by the Secretariat to the Minister for Energy of Ukraine, dated 2 February 2021
- ANNEX 3. Letter by the Ministry for Energy to the Secretariat, dated 2 March 2021