

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

**In case ECS-16/24, the Secretariat of the Energy Community
Against
Kosovo*¹, the**

ADVISORY COMMITTEE,

composed of

Rajko Pirnat, Helmut Schmitt von Sydow, Verica Trstenjak, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 and by Procedural Act No 2022/03/MC-EnC of the Ministerial Council of the Energy Community of 15 December 2022 on amending Procedural Act 2008/01/MC-EnC ('Dispute Settlement Rules 2022'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 19 July 2024 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-16/24 against Kosovo*. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Kosovo* by **failing to adopt and apply** the laws, regulations and administrative provisions necessary to comply with Council Directive 2009/119/EC² of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, as adapted and adopted by Decision 2012/03/MC-EnC, by 1 January 2023, and by **failing to forthwith notify those measures** to the Secretariat, fails to comply with Article 1 of Decision 2012/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

Pursuant to Article 32 (4) Dispute Settlement Rules 2022 the Advisory Committee has to conduct a public hearing before giving its opinion. According to Article 8 (1) Rules of Procedure of the Energy Community Advisory Committee as amended (RoP) such a public hearing shall take place unless both parties to the case agree that it can be dispensed with. On 23 July 2024 the Advisory Committee asked the parties whether they consider holding a public hearing necessary. In its e-mail from 23 July 2024 the Secretariat stated that there is no need for a hearing, while Kosovo* did not answer. Therefore, the Advisory Committee assumed that a

¹ In the context of this Opinion this designation 'Kosovo' is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence.

² OJ L 265, 9.10.2009, p. 9.

hearing is not necessary and informed the parties that a hearing can be dispensed with in this case.

II. Provisions allegedly violated by the Contracting Party concerned

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 this Treaty.

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.

Article 1 of the Dispute Settlement Rules 2022 reads:

These rules specify the procedure to be followed in cases of failure by a Party [...] to comply with a Treaty obligation or to implement a Decision or Procedural Act addressed to it within the required period (hereinafter "Energy Community law") [...]

Article 3 paragraph 1 of the Dispute Settlement Rules 2022 reads:

A Party fails to comply with its obligations under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law.

Article 1 of the Ministerial Council Decision 2012/03/MC-EnC of 18 October 2012 reads:

Each Contracting Party shall implement Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products not later than 1 January 2023.

III. Legal Assessment

According to Article 32 (1) Dispute Settlement Rules 2022, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. On the basis of this provision, the Advisory Committee assessed the Reasoned Request and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

The Reasoned Request of the Secretariat alleges that by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Council Directive 2009/119/EC of 14 September 2009, imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, as adapted and adopted by Decision 2012/03/MC-EnC, by 1 January 2023, and by failing to forthwith notify those measures to the Secretariat, Kosovo* fails to comply with Article 1 of Decision 2012/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

Kosovo* did not reply to the Reasoned Request according to Article 31 (1) Dispute Settlement Rules 2022. Hence, the Advisory Committee's assessment is based on the procedural documents provided by the Energy Community Secretariat and the arguments presented therein.

In this documentation, there is no evidence that Kosovo* **adopted and applied** the laws, regulations and administrative provisions necessary to comply with legal acts mentioned in paragraph two of this opinion.

The Secretariat correctly points out in the Reasoned Request that – in the absence of any legal effect - draft legislation cannot be considered as a measure necessary to comply with a Decision of the Ministerial Council (to that effect see Court of Justice of the European Union in Case C-648/13 *Commission v Poland*, ECLI:EU:C:2016:490, paras. 129-132). This also applies to the draft Oil Stockholding Act of Kosovo*, which is mentioned in the Reasoned Request.

There is no indication that the Secretariat's information is incorrect or invalid. It is undisputable that Kosovo* did not bring into force the laws, regulations and administrative provisions necessary to comply with Council Directive 2009/119/EC of 14 September 2009, imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, by 1 January 2023 as required by Decision 2012/03/MC-EnC.

Based on the available documentation, the Advisory Committee finds that the request is well-founded.

IV. Conclusions

The Advisory Committee considers that

Kosovo* by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Council Directive 2009/119/EC of 14 September 2009, imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, as adapted and adopted by Decision 2012/03/MC-EnC, by 1 January 2023, and by failing to forthwith notify those measures to the Secretariat, **failed to comply** to comply with Article 1 of Decision 2012/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

Done in Vienna on 28 November 2024

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President