

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

**In case ECS-8/24, the Secretariat of the Energy Community
Against
Kosovo*¹, the**

ADVISORY COMMITTEE,

composed of

Rajko Pirnat, Nikola Radovanovic, 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 6 June 2024 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-8/24 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 Directive (EU) 2019/944² and Regulation (EU) 2019/941³, as adapted and adopted by Decision 2021/13/MC-EnC, as well as with Regulation (EU) 2019/942⁴, Regulation (EU) 2019/943⁵, Regulation (EU) 2015/1222⁶, Regulation (EU)

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 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019, p. 125.

³ Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, OJ L 158, 14.6.2019, p. 1.

⁴ Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, OJ L 158, 14.6.2019, p. 22.

⁵ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.6.2019, p. 54.

⁶ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24.

2016/1719⁷, Regulation (EU) 2017/2195⁸, Regulation (EU) 2017/2196⁹, Regulation (EU) 2017/1485¹⁰, as adapted and adopted by Decision 2022/03/MC-EnC, by 31 December 2023, and by **failing to forthwith inform or notify those measures** to the Secretariat, fails to comply with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

By an e-mail letter sent on 20 February 2024 to the Secretariat (Annex 4 of the Reasoned Request) the Minister of Economy of Kosovo* informed the Secretariat that the laws to transpose the Electricity Integration Package are in advanced stages of drafting.

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 15 July 2024 the Advisory Committee asked the parties whether they consider holding a public hearing necessary. In its e-mail from 13 August 2024 the Secretariat stated that there is no need for a hearing, while Kosovo* did not answer. Therefore, the Advisory Committee assumed that a 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.

⁷ Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation, OJ L 259, 27.9.2016, p. 42.

⁸ Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, OJ L 312, 28.11.2017, p. 6.

⁹ Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration, OJ L 312, 28.11.2017, p. 54.

¹⁰ Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation, OJ L 220, 25.8.2017, p. 1.

Article 2 of the Ministerial Council Decision 2021/13/MC-EnC of 30 November 2021 reads:

- 1. Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/944 and Regulation (EU) 2019/941 by 31 December 2023.*
- 2. Upon transposition, Contracting Parties shall immediately inform the Energy Community Secretariat thereof and communicate to the Energy Community Secretariat the text of the provisions of national law which they adopt in the field covered by this Decision.*

Article 2 of the Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022 reads:

- (1) Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation [EU] 2017/2195, Regulation (EU) 2017/2196 and Regulation (EU) 2017/1485 by 31 December 2023.*
- (2) Each Contracting Party shall notify the Energy Community Secretariat of completed transposition by sending the text of the provisions of national law which they adopt in the field covered by this Decision and of any subsequent changes within two weeks following the adoption of such measures.*

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 Directive (EU) 2019/944 and Regulation (EU) 2019/941, as adapted and adopted by Decision 2021/13/MC-EnC, as well as with Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485, as adapted and adopted by Decision 2022/03/MC-EnC, by 31 December 2023, and by failing to forthwith inform or notify those measures to the Secretariat, Kosovo* fails to comply with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/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. In fact, Kosovo* admitted in its e-mail letter of 20 February 2024 that it has not yet adopted the necessary laws, regulations and administrative provisions necessary to comply with the legal acts mentioned in paragraph two of this opinion.

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 Directive (EU) 2019/944 and Regulation (EU) 2019/941 by 31

December 2023 as required by Ministerial Council Decision 2021/13/MC-EnC. It is also undisputable that Kosovo* did not bring into force the laws, regulations and administrative provisions necessary to comply with Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196 and Regulation (EU) 2017/1485 by 31 December 2023 as required by Ministerial Council Decision 2022/03/MC-EnC.

As 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).

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 Directive (EU) 2019/944 and Regulation (EU) 2019/941, as adapted and adopted by Decision 2021/13/MC-EnC, as well as with Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015/1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485, as adapted and adopted by Decision 2022/03/MC-EnC, by 31 December 2023, and by failing to forthwith inform or notify those measures to the Secretariat, **failed to comply** with Articles 2 of Decisions 2021/13/MC-EnC and 2022/03/MC-EnC, as well as Articles 6 and Article 89 of the Treaty.

Done in Vienna on 24 November 2024

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President