

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-7/16

Submitted 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, the

SECRETARIAT OF THE ENERGY COMMUNITY

against

KOSOVO*¹

is seeking a Decision from the Ministerial Council that Kosovo*,

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 Secretariat, fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/MC-EnC.

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

I. Relevant Facts

a. Introduction

- (1) In July 2009, the European Union adopted the so-called third legislative liberalisation package ("the Third Energy Package"). This package consists of two directives and two regulations, that is Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, 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, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and 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. In the European Union, this legislation entered into force on 3 March 2011.

¹ *This designation 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) These legal acts were incorporated in the Energy Community *acquis communautaire* by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty (“Decision 2011/02/MC-EnC”).² Decision 2011/02/MC-EnC was preceded by Recommendation No 2010/02/MC-EnC of 24 September 2010 by the Ministerial Council on the implementation of amendments to the *acquis communautaire* on energy.³

b. Background

- (3) Following the adoption of Decision 2011/02/MC-EnC, the Secretariat initiated activities to structure transposition of the Third Energy Package in a timely manner for all Contracting Parties. For this purpose, a detailed Implementation Plan,⁴ outlining the different preparatory activities to be taken by the Contracting Parties as well as the institutions was adopted by the Permanent High Level Group on 14 December 2011.
- (4) At its meeting in December 2012, the Permanent High Level Group reviewed its Implementation Plan on the basis of the facts presented by the Secretariat and deplored the significant delay in preparatory work.⁵ The Permanent High Level Group further asked that the “*Contracting Parties will initiate the necessary amendments to primary laws during 2013 with the goal to adopt them in early 2014.*” Each Contracting Party was expected to send to the Secretariat a timeline for the law amendment process by the end of February 2013.⁶ Finally, the Permanent High Level Group also concluded that the Secretariat is expected to present an initial report on elements to be transposed in order to achieve compliance with the Third Energy Package at the next meeting of the Permanent High Level Group in March 2013.
- (5) On that ground, the Secretariat prepared a Background Paper on the main new elements of the Third Energy Package for implementation in the Contracting Parties presented to the Permanent High Level Group’s meeting on 14 March 2013.⁷ The Permanent High Level Group, at the same meeting in March 2013, discussed the need for the technical assistance and consultancy to draft amendments to the existing primary legislation and signaled the availability of support by the European Commission and other donors. Nonetheless, Kosovo* did not notify the Permanent High Level Group of need for sponsored technical assistance.⁸
- (6) Besides the discussions about the transposition and implementation of the Third Energy Package at institutional meetings, the Secretariat organized several workshops on addressing the challenges of implementation of the Third Energy Package in the Contracting Parties. The first workshop already took place on 15 April 2010, followed by the 3rd Joint Energy Community Regulatory Board and Permanent High Level Group meeting on 26 May 2011. These two events took place even before a legally binding decision on the Third Energy Package was adopted by the Energy Community institutions. Following those events, other dedicated workshops on implementation of the provisions of the Directives the Third Energy Package took place on 20 June 2012, in June 2013 and very recently in April 2016. Implementation of the gas *acquis* was also presented and discussed during the joint Energy Community and ENTSO-G workshop in February 2016.
- (7) In its Implementation Reports, the Secretariat has been continuously reminding the Contracting Parties about the deadline for transposition of Third Energy Package at national level and encouraging them to mobilize and speed up works on necessary legislative

² ANNEX 1

³ Ministerial Council Recommendation No 2010/02/MC-EnC of 24 September 2010

⁴ 23rd Permanent High Level Group meeting, PHLG/14/12/2011-Annex 1/30.11.2011, Implementation Plan: Structured Approach to Transposing the 3rd Package in the Energy Community

⁵ Conclusion 3 of 27th Permanent High Level Group meeting, 6 December 2012

⁶ Conclusions 5 and 6 of 27th Permanent High Level Group meeting, 6 December 2012

⁷ 28th Permanent High Level Group meeting, ANNEX1/28th PHLG/28-02-2013, Background Paper on the main new elements of the Third Package for implementation in the Contracting Parties

⁸ Conclusion 7 of the 28th Permanent High Level Group meeting, 14 March 2013

measures.⁹ The Secretariat has also analysed the yearly progress in transposing the Third Energy Package after the deadline set in Decision 2011/02/MC-EnC expired and measured the Contracting Parties' compliance against that yardstick.

- (8) The Ministerial Council addressed the importance of timely implementation of the Third Energy Package regularly at its annual meetings since 2011.¹⁰ At the meeting in 2014, the Ministerial Council *“urged all Contracting Parties to transpose the Third Package by 1 January 2015 with the assistance of the Secretariat, and invited the Secretariat to launch enforcement against those Contracting Parties lagging behind after that date.”*¹¹

c. Activities preparing transposition of the Third Energy Package in Kosovo*

- (9) Preparations for transposition of the Third Energy Package in Kosovo* started in 2014. On 5 September 2014, the Ministry of Economic Development shared with the Secretariat five legal acts, four of which aimed at transposing Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 pursuant to Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011. The draft primary laws prepared by Kosovo* authorities were:
- Draft law on electricity
 - Draft law on energy
 - Draft law on regulatory office
 - Draft law on natural gas and
 - Draft law on thermal energy
- (10) On 26 September 2014, the Secretariat sent a detailed review and comments to the Ministry and offered its further assistance with the drafting process.
- (11) On 13 November 2014 final versions of the draft Laws were shared with the Secretariat. The Ministry informed that the draft legislation was also sent to public consultation. On 21 November 2014, the Secretariat sent its comments to those final drafts. It considered the quality of the draft laws very good, as most of the Secretariat's earlier comments were accepted. Only couple of issues remained open for discussion and finalization and the Secretariat offered its assistance on those.
- (12) In December 2014, the Secretariat discussed the drafts at a dedicated mission to Kosovo* and agreed with the Ministry on all outstanding issues.
- (13) On 11 April 2016 the Secretariat sent a letter to the Minister of Economic Development,¹² informing him that the Energy Community Secretariat intends to submit to the Ministerial Council a case against Kosovo* for non-compliance with the Treaty, and in particular with Article 6 thereof as well as Article 3(1) of the Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of the Third Energy Package.
- (14) On 27 April 2016, the Secretariat received another set of draft legal acts (Draft law on electricity, Draft law on energy, Draft law on regulatory office and Draft law on natural gas) from the European Office in Pristina. The Secretariat was informed that these drafts are

⁹ Secretariat's Annual Implementation Report, 1 September 2013, p.10

¹⁰ Conclusion 5 of 10th Ministerial Council meeting, 18 October 2012: *“effectively start the preparations for the implementation of the Third Package should be in the focus of the activities over the next reporting period. The ministers noted the importance of implementation in the context of providing security of supply and adequate conditions for investments.”*; ¹⁰ Conclusion 13 of 11th Ministerial Council meeting, 24 October 2013: *„The Ministerial Council recognized the importance of the transposition and implementation of the Third Energy Package in the context of providing security of supply and adequate conditions for investments. In this context the Third Energy Package related activities should continue to be in the center of the activities over the next reporting period”*

¹¹ Conclusion 9 of 12th Ministerial Council meeting, 23 September 2014

¹² Letter sent to the Minister of Economy, dated 11 April 2015, ANNEX 2

already in parliamentary procedure, but they are not adopted yet. The Secretariat reviewed the draft legislation and provided its comments to the Ministry on 10 May 2016.

- (15) To date, the Secretariat has received no information from the Kosovo* authorities indicating that national measures to comply with the obligation to adopt 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 have been adopted and implemented, nor is it in possession of any other information enabling it to conclude that such measures have, nevertheless, been taken.
- (16) On that basis, the Secretariat decided to submit this Reasoned Request to the Ministerial Council for decision.

II. Relevant Energy Community Law

- (17) Energy Community law is defined in Article 1 of the Dispute Settlement Rules¹³ 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”.

- (18) 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.”

- (19) 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.

- (20) Annex I to the Treaty, entitled “Lists of Acts Included in the *Acquis Communautaire* on Energy”, reads:

“Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011
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, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011
Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011
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, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011”

- (21) Article 3 of the Ministerial Council Decision D/2011/02/MC-EnC, reads:

“1. Each Contracting Party shall bring into force the law, 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, as adapted by this Decision, by 1 January 2015. They shall forthwith inform the Energy Community Secretariat thereof.

The Contracting Parties shall apply the measures referred to in the previous paragraph with effect from 1 January 2015 with the following exceptions:

[...]

¹³ Dispute Settlement Rules, amended by Procedural Act 2015/04-MC-EnC of 16 October 2015 on amending Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty (“Dispute Settlement Rules”)

2. The Contracting Parties shall communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by this Decision.”

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

(3) 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

- (23) The present Reasoned Request concerns non-compliance of Kosovo* with the obligation to adopt and implement 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 to forthwith notify those measures to the Secretariat within the deadline specified in that Decision, i.e. by 1 January 2015 pursuant to Article 3(2) of Ministerial Decision 2011/02/MC-EnC.
- (24) 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 is obliged to submit a reasoned request to the Ministerial Council directly, without performing a preliminary procedure.
- (25) As a Contracting Party to the Treaty, Kosovo* is under an obligation to implement, i.e. to transpose at national level and to apply, the *acquis communautaire* on energy, including the Third Energy Package, as referred to in Article 11 of the Treaty and defined by its Annex I.¹⁴
- (26) Article 3(1) of Decision 2011/02/MC-EnC requires the Contracting Parties to bring into force the laws, regulations and administrative provisions necessary to comply with the Third Energy Package and to apply them as from 1 January 2015.
- (27) Article 3(2) Ministerial Council Decision 2011/02/MC-EnC also requires the Contracting Parties to communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by Decision 2011/02/MC-EnC.
- (28) 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.
- (29) The time limit for Kosovo* to take measures necessary to comply with Article 3 of Decision 2011/02/MC-EnC as well as Articles 6 and 89 of the Treaty expired on 1 January 2015.
- (30) Despite numerous invitations and constant reminders issued by all Energy Community institutions and the assistance offered by the Secretariat and other organizations, Kosovo* evidently has not taken the measures necessary to comply with its obligations. At the date of submitting this Reasoned Request, the four draft Laws meant to transpose the Third Energy Package are still pending in the Parliament. It is undisputed that Kosovo* to date has not adopted the measures necessary to implement Decision 2011/02/MC-EnC. In the absence of any legal effect, having draft legislation prepared but not yet adopted and entered into force cannot be considered as measures necessary to comply with a Decision of the Ministerial Council.
- (31) In any event, the Secretariat has not been notified of any measures necessary to transpose the Third Energy Package.

¹⁴ As amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC

(32) Under those circumstances, the Secretariat must conclude that by failing to take, or to notify the Secretariat of, the measures necessary to comply with the Article 3(1) of the Ministerial Council Decision 2011/02/MC-EnC, Kosovo* has failed to fulfill its obligations under Articles 6 and 89 of the Treaty as well as Article 3(1) and (2) of the Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of the Third Energy Package.

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 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 Secretariat, Kosovo* fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/MC-EnC.

On behalf of the Secretariat of the Energy Community

Vienna, 13 May 2016



Janez Kopač
Director



Dirk Buschle
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List of Annexes

ANNEX 1 Ministerial Council Decision D/2011/02/MC-EnC

ANNEX 2 Letter by the Secretariat to the Minister of Economic Development, dated 11 April 2016