

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-10/23

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

BOSNIA AND HERZEGOVINA

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 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as adapted and adopted by Ministerial Decision 2016/14/MC-EnC by 1 January 2021, and by failing to forthwith notify those measures to the Secretariat, Bosnia and Herzegovina fails to comply with Articles 6, 12 and 89 of the Energy Community Treaty.

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) In April 2004, the European Union adopted Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage² (hereinafter: "Directive 2004/35/EC").
- (2) Directive 2004/35/EC was incorporated in the Energy Community *acquis communautaire* by Decision 2016/14/MC-EnC of the Ministerial Council on amending the Treaty establishing the Energy Community and adapting and implementing Directive 2004/35/EC of the European Parliament and of the Council (hereinafter: "Decision

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

² OJ L 143, 30.4.2004, p. 56

2016/14/MC-EnC").³ Contracting Parties were under an obligation to transpose and implement Directive 2004/35/EC and notify the Energy Community Secretariat thereof by 1 January 2021.

2. Background

- (3) Following the adoption of Decision 2016/14/MC-EnC, the Secretariat initiated activities to assist the Contracting Parties with the transposition of the Directive 2004/35/EC in a timely manner.
- (4) The Secretariat presented the requirements applicable under Directive 2004/35/EC, and the actions that needed to be taken by the Contracting Parties to transpose and implement its provisions at meetings of the Environmental Task Force held on 7 December 2021 and 13 June 2022.
- (5) In its annual Implementation Reports of 2021⁴ and 2022,⁵ the Secretariat recalled that the deadline for the transposition of Directive 2004/35/EC had expired, and that Bosnia and Herzegovina failed to take the necessary measures to transpose and implement them.
- (6) On 3 May 2021, the Secretariat sent a letter⁶ to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina, informing the Ministry that the Secretariat may open dispute settlement procedures for non-compliance with the Treaty, and in particular, the obligations stemming from Decision 2016/14/MC-EnC.
- (7) By a letter dated 31 May 2021, the Ministry of Economic Trade and Foreign Relations forwarded information submitted by the entity ministries to the Secretariat.⁷ According to this information, Directive 2004/35/EC is partially transposed in both entities of the Contracting Party. As the Secretariat will explain below, those provisions, however, cannot be considered as transposing the provisions of Directive 2004/35/EC, as required by Decision 2016/14/MC-EnC.
- (8) On that basis, the Secretariat decided to submit the present Reasoned Request to the Ministerial Council for decision.

II. Relevant Energy Community Law

- (9) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as "*a Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party]*". A violation of Energy Community Law occurs if "*[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law*".⁸
- (10) 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

³ ANNEX 1

⁴ Annual Implementation Report of the Energy Community Secretariat, 1 November 2021, pp. 48-49.

⁵ Annual Implementation Report of the Energy Community Secretariat, 1 November 2022 pp 46-47.

⁶ Ref. no. KS-MC/O/jko/08/03-05-2021, ANNEX 2.

⁷ Ref. no. 09-1-28-1664-3/21, ANNEX 3.

⁸ Article 3(1) Dispute Settlement Procedures.

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.

- (11) Article 12 of the Treaty reads:

Each Contracting Party shall implement the acquis communautaire on Environment in compliance with the timetable for the implementation of those measures set out in Annex II.

- (12) Article 16 of the Treaty reads:

The "acquis communautaire on environment", for the purpose of this Treaty, shall mean (...)

(vi) Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU⁹ (...)

- (13) Article 94 of the Treaty reads:

The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the acquis communautaire by the Court of Justice or the Court of First Instance at a later stage.

- (14) Point 6 of Annex II of the Treaty¹⁰ reads:

Each Contracting Party shall implement Directive 2004/35/EU of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU by 1 January 2021.

- (15) Article 3 of Decision 2016/14/MC-EnC reads:

1. Contracting Parties shall inform the Energy Community Secretariat of the laws, regulations and administrative provisions brought into force to comply with the relevant provisions of Directive 2004/35/EU, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU, in accordance with Article 12 of the Treaty establishing the Energy Community by 1 January 2021.

When Contracting Parties adopt those provisions, they shall contain a reference to this Decision and Directive 2004/35/EC, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU, or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Contracting Parties.

⁹ As amended by Decision 2016/14/MC-EnC.

¹⁰ As introduced by Article 1(2) of Decision 2016/14/MC-EnC.

2. 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 and Directive 2004/35/EC, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU.

- (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 Bosnia and Herzegovina with the obligation to adopt and implement the laws and administrative provisions necessary to comply with Decision 2016/14/MC-EnC by 1 January 2021 pursuant to Article 3(1) thereof, and to forthwith notify those measures to the Secretariat within the deadline specified in that Decision.
- (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 a case where a Party has failed to fulfil 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) According to the Treaty, Bosnia and Herzegovina is under an obligation to implement, *i.e.* to transpose at a national level and to apply, the *acquis communautaire* on the environment, including Decision 2016/14/MC-EnC, as referred to in Article 12 of the Treaty and defined by its Annex II.
- (20) Article 3(1) of Decision 2016/14/MC-EnC requires Contracting Parties to bring into force the laws and administrative provisions necessary to comply with Directive 2004/35/EC and to apply them as from 1 January 2021.
- (21) Article 3(2) of Ministerial Council Decision 2016/14/MC-EnC also requires 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 2016/14/MC-EnC of the Ministerial Council.
- (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 Bosnia and Herzegovina to take measures necessary to comply with Article 3 of Decision 2016/14/MC-EnC, as well as Articles 6 and 89 of the Treaty expired on 1 January 2021.

- (24) Despite reminders and the assistance offered by the Secretariat, Bosnia and Herzegovina to date has not taken the measures necessary to comply with its obligations. At the date of submitting this Reasoned Request, neither new legislation nor amendments to the existing legislation meant to transpose Directive 2004/35/EC were adopted.
- (25) Directive 2004/35/EC establishes a common framework for the prevention and remediation of environmental damage by requesting Contracting Parties to set up a framework of administrative liability for the assessment of environmental damage caused by certain occupational activities and the remediation of such damage.
- (26) Article 2(1) of Directive 2004/35/EC stipulates the three categories of environmental damage to which it is applicable, namely damage to protected species and natural habitats, water damage and land damage. The application of Directive 2004/35/EC is triggered by occupational activities listed in its Annex III in the field of Network Energy that cause damage, or an imminent threat of such damage occurring by reason of any of those activities. In accordance with point (a) of Article 3(1) of Directive 2004/35/EC, operators of such occupational activities in the field of Network Energy bear strict liability for the damage or the imminent threat of damage caused by the activity. In case the occupational activity is not included in the list provided by Annex III, operators still are expected to bear fault-based liability under point (b) of Article 3(1) of Directive 2004/35/EC, but only for damage to protected species and habitats. According to its Article 11, Contracting Parties shall designate the competent authority(ies) responsible for fulfilling the duties stemming from Directive 2004/35/EC.
- (27) According to its Article 3(3), civil liability schemes are explicitly excluded from the scope of Directive 2004/35/EC.
- (28) Chapter XI of the Law on Environmental Protection of Republika Srpska¹¹ and Chapter XII of the Law on Environmental Protection in the Federation of Bosnia and Herzegovina,¹² referred to by Bosnia and Herzegovina as partial transposing legislation, contain only provisions related to the polluter pays principle and civil responsibilities for environmental damage. The provisions of the laws of both entities relate to legislation on civil obligations, and establish civil liability schemes. As mentioned above, they are not covered by the Directive on account of the exclusion clause stipulated in Article 3(3) of Directive 2004/35/EC.
- (29) Consequently, the provisions referred to by Bosnia and Herzegovina as (partial) transposing legislation cannot be considered as national measures transposing the provisions of Directive 2004/35/EC.
- (30) Under those circumstances, the Secretariat submits that by failing to take the measures necessary to comply with Ministerial Council Decision 2016/14/MC-EnC, Bosnia and Herzegovina has failed to fulfil its obligations under Articles 6, 12 and 89 of the Treaty as well as Articles 3(1) and 3(2) of Ministerial Council Decision 2016/14/MC-EnC of 14 October 2016 amending the Treaty establishing the Energy Community and adapting and implementing Directive 2004/35/EC of the European Parliament and of the Council.

¹¹ ANNEX 4.

¹² ANNEX 5.

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 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as adapted and adopted by Ministerial Decision 2016/14/MC-EnC by 1 January 2021, and by failing to forthwith notify those measures to the Secretariat, Bosnia and Herzegovina fails to comply with Articles 6, 12 and 89 of the Energy Community Treaty and Article 3 of Ministerial Council Decision 2016/14/MC-EnC.

On behalf of the Secretariat of the Energy Community,

Vienna, 13 July 2023

A handwritten signature in blue ink, reading "Artur Lorkowski".

Artur Lorkowski
Director

A handwritten signature in blue ink, reading "Dirk Buschle".

Dirk Buschle
Legal Counsel/Deputy Director

List of Annexes

- ANNEX 1 Decision 2016/14/MC-EnC of the Ministerial Council on amending the Treaty establishing the Energy Community and adapting and implementing Directive 2004/35/EC of the European Parliament and of the Council
- ANNEX 2 Letter of the Secretariat to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina, dated 3 May 2021
- ANNEX 3 Letter of the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina to the Secretariat, dated 31 May 2021
- ANNEX 4 Chapter XI of the Law on Environmental Protection of Republika Srpska
- ANNEX 5 Chapter XII of the Law on Environmental Protection of the Federation of Bosnia and Herzegovina