

**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-24/24

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 bring into force the laws, regulations and administrative provisions necessary to comply with Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, as adapted and adopted by Ministerial Council Decision 2021/14/MC-EnC and amended by Ministerial Council Decision 2022/02/MC-EnC, and by failing to forthwith notify those measures to the Secretariat by 31 December 2022, Bosnia and Herzegovina fails to comply with Articles 6, 20 and 89 of the Energy Community Treaty as well as with Articles 2(1) and (2) of Ministerial Council Decision 2021/14/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 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (hereinafter, "RED II"), which was subsequently amended.
- (2) RED II was adapted and adopted in the *acquis communautaire* of the Energy Community by Ministerial Council Decision 2021/14/MC-EnC of 30 November 2021², amended by Ministerial

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

² Decision 2021/14/MC-EnC of the Ministerial Council of the Energy Community of 30 November 2021 amending Article 20 and Annex I to the Treaty establishing the Energy Community and incorporating Directive

Council Decision 2022/02/MC-EnC, (hereinafter, "Decision 2021/14/MC-EnC"), which provided that each Contracting Party shall bring into force the laws, regulations, and administrative provisions to comply with RED II by 31 December 2022.

- (3) Pursuant to Articles 25 to 31 of RED II, Bosnia and Herzegovina was under an obligation to transpose into its national legislation the provisions of RED II regarding the use of renewable energy in the transport sector, including the provisions and relevant Annexes of RED II on the sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels, and to notify the transposing measures to the Energy Community Secretariat by 31 December 2022.

2. Factual background

- (4) To date, the Secretariat has received no further information from Bosnia and Herzegovina indicating that the national measures to comply with such obligations under RED II have been adopted and implemented, nor is it in possession of any other information enabling it to conclude that such measures have been taken.
- (5) On 21 June 2024, the Secretariat sent a letter to Bosnia and Herzegovina³ requesting Bosnia and Herzegovina to submit a copy of the legislation transposing Articles 25 to 31 of RED II or information as to the status of such transposition not later than Friday 5 July 2024. The Secretariat did not receive a reply from Bosnia and Herzegovina.
- (6) On that basis, the Secretariat decided to submit this Reasoned Request to the Ministerial Council for a decision.

II. Relevant Energy Community Law

- (7) Article 3(a) of the Treaty provides that:

"the activities of the Energy Community shall include: the implementation by the Contracting Parties of the acquis communautaire on energy, environment, competition and renewables, as described in Title II below, adapted to both the institutional framework of the Energy Community and the specific situation of each of the Contracting Parties."

- (8) Article 6 of the Treaty provides that:

"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."

- (9) Article 20 of the Treaty, which is Part of Title II of the Treaty, provides that:

"Each Contracting Party shall implement Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources."

- (10) Article 89 of the Treaty provides that:

"The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision."

(EU) 2018/2011, Directive (EU) 2018/2002, Regulation (EU) 2018/1999, Delegated Regulation (EU) 2020/1044, and Implementing Regulation (EU) 2020/1208 in the Energy Community acquis.

³ ANNEX 1

(11) Article 90 of the Treaty provides that:

“Failure by a Party to comply with a Treaty obligation or to implement a Decision addressed to it within the required period may be brought to the attention of the Ministerial Council by a reasoned request of any Party, the Secretariat or the Regulatory Board.”

(12) Article 25(1) of RED II provides that *“In order to mainstream the use of renewable energy in the transport sector, each Contracting Party shall set an obligation on fuel suppliers to ensure that the share of renewable energy within the final consumption of energy in the transport sector is at least 14 % by 2030 (minimum share) in accordance with an indicative trajectory set by the Contracting Party and calculated in accordance with the methodology set out in this Article and in Articles 26 and 27”*. Article 26 of RED II provides for *“specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops”*. Article 27 of RED II provides for *“Calculation rules with regard to the minimum shares of renewable energy in the transport sector”*. Article 29 of RED II provides for the *“Sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels”*. Article 30 of RED II provides for the *“Verification of compliance with the sustainability and greenhouse gas emissions saving criteria”*. Article 31 of RED II provides for the *“Calculation of the greenhouse gas impact of biofuels, bioliquids and biomass fuels”*.

(13) Article 1 of the Dispute Settlement Rules provides that:

“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 (“Energy Community law”) as established by Articles 90 to 93 of the Treaty”.

(14) Article 11(3) of the Dispute Settlement Rules provides that:

“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.”

(15) Article 2 of Ministerial Council Decision 2021/14/MC-EnC provides that:

“1) Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2018/2001, Directive (EU) 2012/27/EU as amended by Directive (EU) 2018/2002, Regulation (EU) 2018/1999 [...] as adapted by this Decision, by 31 December 2022.

[...]

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.”

III. Legal Assessment

(16) The present Reasoned Request is submitted pursuant to Article 90 of the Treaty and Article 11(3) of the Dispute Settlement Rules. It concerns non-compliance of Bosnia and Herzegovina with the obligation to adopt the laws, regulations and administrative provisions necessary to comply with the provisions on the sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels of the RED II and to inform the Secretariat thereof within the deadline specified in the Ministerial Council Decision, i.e. by 31 December 2022 pursuant to Article 2(1) of Ministerial Council Decision 2021/14/MC-EnC.

- (17) As a Contracting Party to the Treaty, Bosnia and Herzegovina is under an obligation to implement, i.e. to transpose at national level and to apply, the *acquis communautaire* on energy, including articles 25 to 30 of RED II.
- (18) Article 2(1) of Decision 2021/14/MC-EnC requires the Contracting Parties to bring into force the laws, regulations and administrative provisions necessary to comply with RED II by 31 December 2022, including the provisions referred to above.
- (19) Article 2(2) of Ministerial Council Decision 2021/14/MC-EnC also requires the Contracting Parties to communicate to the Energy Community Secretariat the measures transposing the RED II, including the provisions referred to above.
- (20) 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 20 of the Treaty specifically obliges Contracting Parties to implement Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, including the provisions on the sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels. 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.
- (21) The time limit for Bosnia and Herzegovina to take measures necessary to comply with Article 2(1) of Decision 2021/14/MC-EnC, as well as Articles 6, 20 and 89 of the Treaty, expired on 31 December 2022.
- (22) Pursuant to the case-law of the Court of Justice of the European Union⁴, draft legislation which is not yet adopted, has not yet entered into force, and thus does not have any legal effect, cannot be considered as sufficient measures to transpose a Directive⁵.
- (23) Despite several reminders by the Secretariat, Bosnia and Herzegovina to date has not taken the measures necessary to comply with its obligations to transpose the provisions on the mandatory minimum share of 14% for renewable energy within the final consumption of energy in the transport sector by 2030, including provisions on the sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels outlined in the RED II. In particular, the following articles are not transposed: Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2). Bosnia and Herzegovina to date has not adopted the measures necessary to implement Decision 2021/14/MC-EnC.
- (24) Under those circumstances, the Secretariat concludes that by failing to take the measures necessary to comply with the Article 2(1) of the Ministerial Council Decision 2021/14/MC-EnC, and to notify those measures, Bosnia and Herzegovina has failed to fulfill its obligations under Articles 6, 20 and 89 of the Treaty, as well as with Article 2(1) and (2) of the Ministerial Council Decision 2021/14/MC-EnC.

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:

⁴ Article 94 of the Energy Community Treaty provides that: “*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.*”

⁵ Case C-430/98 *Commission v Luxembourg*, ECLI:EU:C:1999:520, paras. 8-13, Case C-648/13 *Commission v Poland*, ECLI:EU:C:2016:490, paras. 129-132

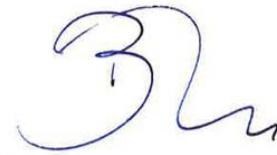
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On behalf of the Secretariat of the Energy Community,

Vienna, 12 July 2024

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

Artur Lorkowski
Director

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

Dirk Buschle
Deputy Director / Legal Counsel

List of Annexes

ANNEX 1 Warning Letter sent by the Secretariat to Bosnia and Herzegovina on 21 June 2024