

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

In case ECS-5/22, the Secretariat of the Energy Community
against
Kosovo¹, the

ADVISORY COMMITTEE,

composed of
Rajko Pirnat, Alan Riley, 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 ('Dispute Settlement Rules 2015'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 21 July 2022 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-5/22 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 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as adapted and adopted by Ministerial Decision 2016/12/MC-EnC, by 1 January 2019, 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 with Article 2 of Ministerial Council Decision 2016/12/MC-EnC.

Kosovo replied to the Reasoned Request by letter dated 19 August 2022. They did not, however, reply to the Advisory Committee's inquiry about the necessity of a public hearing. The secretariat, however, agreed that a public hearing could be dispensed with according to Article 8 (1) of the Rules of Procedure of the Energy Community Advisory Committee as amended. Kosovo was informed about the Secretariat's position.

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.

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 2 of Decision 2016/12/MC-EnC reads:

- 1. Without prejudice to Article 3, Contracting Parties shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2011/92/EU as amended by Directive 2014/52/EU by 1 January 2019 with the exception of the provisions referring to Directives not covered by Article 16 of the Treaty establishing the Energy Community. They shall forthwith inform the Energy Community Secretariat thereof.*
- 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.*

III. Legal Assessment

According to Article 32 (1) Dispute Settlement Rules 2015, 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 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as adapted and adopted by Ministerial Decision 2016/12/MC-EnC, by 1 January 2019, 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 with Article 2 of Ministerial Council Decision Decision 2016/12/MC-EnC.

In its reply to the Reasoned Request, Kosovo did not dispute the delay in the transposition of Directive 2014/52/EU amending Directive 2011/92/EU but described the schedule envisaged for the necessary amendments in national law. In the absence of any counter-arguments in the reply to the Reasoned Request by Kosovo, the Advisory Committee's assessment is based on the arguments presented in the Reasoned Request.

In this documentation, there is no evidence that Kosovo **adopted and applied** the laws, regulations and administrative provisions necessary to comply with Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. There is no indication that the Secretariat's information are incorrect or invalid. It is undisputable that Directive 2014/52/EU was not transposed according

to Article 2 of Ministerial Council Decision 2016/12/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 Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as adapted and adopted by Ministerial Decision 2016/12/MC-EnC, by 1 January 2019, and by failing to forthwith notify those measures to the Secretariat, failed to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 2 of Ministerial Council Decision Decision 2016/12/MC-EnC.

Done in Vienna on 22 November 2022

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President