

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

In case ECS-4/21, the Secretariat of the Energy Community against Ukraine, 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 7 April 2021 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-4/21 against Ukraine. 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 Ukraine by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency, as adapted and adopted by the Energy Community by 29 November 2018 pursuant to Article 1(1) of Ministerial Decision 2018/10/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 with Article 1(1) and (3) of the Ministerial Council Decision 2018/10/MC-EnC.

Ukraine did not reply in writing to either the Reasoned Request or the 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. Ukraine was informed about the Secretariat's position.

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 Decision 2018/10/MC-EnC reads:

- (1) Each Contracting Party shall transpose Regulation (EU) No 1227/2011 as adapted by this Decision by 121 months from the date of the adoption of this Decision.*
- (2) Each Contracting Party shall implement Regulation (EU) No 1227/2011, as adapted by this Decision by [18] month from the date of adoption of this Decision.*
- (3) Each Contracting Party shall notify the Energy Community Secretariat of the measures transposing this Decision, and any subsequent changes made to those measures, within two weeks following the adoption of such measure*

III. Preliminary Remarks

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.

The Advisory Committee, exercising its duty to give an Opinion on the Reasoned Request does not duplicate the procedure and therefore does not collect evidence itself. The Advisory Committee gives its Opinion on the basis of undisputed facts. Where the facts are not sufficiently determined by the Secretariat, the Advisory Committee is not in a position to give its decisive legal opinion on these allegations; instead, such cases of incomplete determination of facts are pointed out in the Opinion of the Advisory Committee.

On the basis of these principles 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.

IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency, as adapted and adopted by the Energy Community by 29 November 2018 pursuant to Article 1(1) of Ministerial Decision 2018/10/MC-EnC and by failing to forthwith notify those measures to the Secretariat, Ukraine fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 1(1) and (3) of the Ministerial Council Decision 2018/10/MC-EnC.

Ukraine did not reply in writing to either of the procedural documents and did not insist on a public hearing. Hence, the Advisory Committee's assessment is entirely based on the

procedural documents provided by the Energy Community Secretariat and the arguments presented therein.

In this documentation, there is no evidence that Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency was transposed by Ukraine. In the absence of a reply by Ukraine, there is no indication that the Secretariat's information are incorrect or invalid. It is undisputable that Regulation (EU) No 1227/2011 was not transposed according to Article 1 of Decision 2018/10/MC-EnC.

V. Conclusions

The Advisory Committee considers that Ukraine by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency, as adapted and adopted by the Energy Community by 29 November 2018 pursuant to Article 1(1) of Ministerial Decision 2018/10/MC-EnC 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 1(1) and (3) of the Ministerial Council Decision 2018/10/MC-EnC.

Done in Vienna on 20 July 2021

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President