

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

**In case ECS-11/23, 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 and by Procedural Act No 2022/03/MC-EnC of the Ministerial Council of the Energy Community of 15 December 2022 on amending Procedural Act 2008/01/MC-EnC ('Dispute Settlement Rules 2022'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 18 July 2023 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-11/23 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** 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, 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.

Kosovo replied to the Reasoned Request by letter dated 24 August 2023. Therein, Kosovo declared that a public hearing is not necessary. The Secretariat 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 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.*

Article 16 of the Treaty (as introduced by the Ministerial Council Decision 2016/14/MC-EnC of 14 October 2016) reads:

*The “*acquis communautaire* on environment”, for the purpose of this Treaty, shall mean*
(i) – (v) [...]
(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/EU⁷, and,
(vii) [...]

⁷*Amended by the Ministerial Council Decision 2016/14/MC-EnC of 14 October 2016 on amending the Treaty establishing the Energy Community and adapting and implementing Directive 2004/35/EC of the European Parliament and of the Council.*

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.

Annex II of the Treaty (as introduced by the Ministerial Council Decision 2016/14/MC-EnC of 14 October 2016) reads:

1. – 5. [...]
6. 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.
7. [...]

Article 3 of the Ministerial Council Decision 2016/14/MC-EnC of 14 October 2016 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/EU, 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.

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

Article 3 (3) of Directive 2004/35/EC reads:

Without prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage.

III. Legal Assessment

According to Article 32 (1) Dispute Settlement Rules 2022, 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 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, Kosovo 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.

In its reply to the Reasoned Request, Kosovo did not dispute the delay in the transposition of Directive 2004/35/EC. Kosovo stated that limited capacities hindered the transposition of Directive 2004/35/EC and declared to continue its efforts to transpose this Directive. 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 legal acts mentioned in paragraph two of this opinion.

According to the Reasoned Request of the Secretariat Chapter VIII of the Law on Environmental Protection in Kosovo contains only general provisions related to the polluter pays principle and civil responsibilities for environmental damages. The Secretariat argues that these provisions are subject to the exclusion clause stipulated in Article 3 (3) of Directive 2004/35/EC and thus cannot be considered as satisfactory national measures for transposing the provisions of Directive 2004/35/EC, the subject matter of which the establishment of an administrative liability scheme.

There is no indication that the Secretariat's information are incorrect or invalid. It is undisputable that Directive 2004/35/EC was not transposed according to Article 3 of Ministerial Council Decision 2016/14/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 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, **failed to comply** with Articles 6, 12 and 89 of the Energy Community Treaty and Article 3 of Ministerial Council Decision 2016/14/MC-EnC.

Done in Vienna on 29 November 2023

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President