

**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- 11/16

Submitted 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, the

SECRETARIAT OF THE ENERGY COMMUNITY

against

KOSOVO*

is seeking a Decision from the Ministerial Council that Kosovo*,

by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings pursuant to Article 1(3)g of Ministerial Council Decision 2010/02/MC-EnC, and by failing to forthwith notify those measures to the Energy Community Secretariat ("the Secretariat"), Kosovo* fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 28(1) subparagraph 1 and paragraph (2) of the Directive 2010/31/EU as adapted by Article 1(3)(g) of Ministerial Council Decision 2010/02/MC-EnC.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

a. Introduction

- (1) On 19 May 2010, Directive 2010/31/EU was adopted in the European Union, establishing a common framework for the promotion and improvement of the energy performance of buildings, taking into account outdoor climatic and local conditions, as well as indoor climate requirements and cost-effectiveness. In the European Union, this legislation entered into force on 8 July 2010.²
- (2) This legal act was incorporated in the Energy Community *acquis communautaire* by Decision 2010/02/MC-EnC of 24 September 2010 amending Decision 2009/05/MC-EnC of 18

*This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence

² OJ L 153, 18.6.2010, p. 13

December 2009 of the Ministerial Council of the Energy Community on the implementation of certain Directives on energy efficiency (“Decision 2010/02/MC-EnC”).³

b. Background

- (3) In order to support Contracting Parties in the implementation of Directive 2010/31/EU, the Secretariat launched in 2011 a “Study on Energy Efficiency in Buildings in the Contracting Parties of the Energy Community.”⁴ The study was developed during the period May 2011 - February 2012 in cooperation with the Energy Efficiency Coordination Group (“EECG”), with the aim to support Governments in the preparation of national buildings inventories, climatic data base, as well as a methodology for setting reference building and implementing building certification. It also included a roadmap and an outline of by-laws and standards necessary for implementation of Directive 2010/31/EU.
- (4) The implementation of Directive 2010/31/EU was monitored by the Secretariat against the study’s recommendations and roadmap. A reporting template was prepared by the Secretariat and agreed by the EECG in 2012. Contracting Parties (through the work of the EECG members) reported on the progress in implementation of Directive 2010/31/EU in February 2013, June 2013, November 2013, June 2014, and November 2014.⁵
- (5) The status of implementation of Directive 2010/31/EU was presented by the Secretariat at the Permanent High Level Group (“PHLG”) meeting on 19 March 2014. The PHLG urged the Contracting Parties to finalise the legal framework in energy efficiency, especially by transposing the Energy Performance of Buildings Directive and its associated secondary legislation.⁶
- (6) In parallel, the Secretariat also worked with donors to develop a demand-based, regional technical assistance that can be used in the Contracting Parties, to prepare their implementation of energy efficiency *acquis*, including Directive 2010/31/EU. The most comprehensive support was provided through the Regional Energy Efficiency Program (“REEP”) for the Western Balkans funded by the European Commission, and implemented by the European Bank for Reconstruction and Development (“EBRD”) and the Secretariat, as well as through bilateral programmes in Moldova and Ukraine.
- (7) Following the incorporation of Directive 2010/31/EU in the Energy Community *acquis*, EBRD and the Secretariat organized assistance to the relevant institutions in Kosovo* to draft a Law on Energy Performance of Buildings (“the EPBD Law”) compliant with Directive 2010/31/EU. From May 2014 until January 2015, this assistance was provided under the REEP. Experts of Kosovo* institutions from the Technical Working Group have also been involved in the drafting process. Together with the development of the EPBD Law, the REEP provided capacity building for the Technical Working Group and developed a set of secondary legislation (on the minimum energy performance requirements of buildings, on the national calculation methodology, on energy performance certification of buildings and on inspection of heating and air-conditioning systems) as well as a supporting software for the calculation of minimum energy performance of buildings.
- (8) On 6 February 2015, the Secretariat sent the (draft) Law on Energy Performance of Buildings transposing the Directive 2010/31/EU, to the Minister of Environment and Spatial Planning and the Minister of Economic Development.⁷

³ ANNEX 1

⁴ Study on Energy Efficiency in Buildings in the Contracting Parties of the Energy Community, 24 February 2012

⁵ Reports are available as EECG meeting materials: https://www.energy-community.org/portal/page/portal/ENC_HOME/INST_AND_MEETINGS?event_reg.category=C10504

⁶ Conclusion No. 20 of PHLG meeting of 19 March 2014

⁷ Letter sent to the Minister of Environment and Spatial Planning and the Minister of Economic Development, dated 6 February 2015, ANNEX 2

Together with the Letter, the Secretariat also sent the final draft of the EPBD Law

- (9) On 17 September 2015, a joint letter from EBRD and the Secretariat was sent to the Minister of Economic Development, reminding and requesting him to send the EPBD Law to the Parliament and offering further technical assistance for the preparation of secondary legislation, upon adoption of the EPBD Law.⁸
- (10) In its annual Implementation Reports of 2013,⁹ 2014¹⁰ and 2015¹¹ the Secretariat underlined that the first priority for Kosovo* should be the adoption of primary and secondary legislation required to transpose Directive 2010/31/EU.
- (11) The EECG discussed the implementation of REEP at all meetings held during 2013-2015, highlighting the concern with formal approval of its deliverables (laws and regulations) by Governments and Parliaments of beneficiary countries.¹²
- (12) At its 9th meeting held on 17 November 2015 in Vienna, the EECG discussed again the progress with implementation of REEP. It concluded that if transposition of Directive 2010/31/EU is not achieved, the Secretariat should initiate infringement actions against the countries concerned in the course of 2016.¹³
- (13) On 3 March 2016 the Secretariat sent a letter¹⁴ to the Minister of Environment and Spatial Planning and the Minister of Economic Development informing about its intention to submit to the Ministerial Council a case against Kosovo* for non-compliance with the Treaty, and in particular with Article 28 of Directive 2010/31/EU, as adapted by Ministerial Council Decision 2010/02/MC-EnC.
- (14) The Minister of Environment and Spatial Planning replied by email on 14 March 2016, notifying the Secretariat about ongoing activities. i.e. preliminary consultations organised by the Ministry of Environment and Spatial Planning from 23 November 2015 to 9 December 2015, and ongoing inter-ministerial consultation process. The Minister further informed that these procedures shall be completed by the end of April 2016 and the draft EPBD Law would be ready for approval by the Government, and sent to the Assembly during May 2016.¹⁵
- (15) To date, the Secretariat has received no information from Kosovo* indicating that the national measures to comply with the obligation to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2010/31/EU have already been adopted, nor is it in possession of any other information enabling it to conclude that such measures have, nevertheless, been taken.
- (16) On that basis, the Secretariat decided to submit this Reasoned Request to the Ministerial Council for decision.

II. Relevant Energy Community Law

- (17) Energy Community Law is defined in Article 1 of the Dispute Settlement Rules as “a *Treaty obligation or to implement a Decision or Procedural Act addressed to it within the required period*”. A violation of Energy Community Law occurs if “a *Party fails to comply with its obligation under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community*”.

⁸ Letter sent by EBRD and the Secretariat to the Minister of Economic Development a, dated 17 September 2015, ANNEX 3

⁹ Secretariat’s Annual Implementation Report, 9 October 2013, p.184

¹⁰ Secretariat’s Annual Implementation Report, 29 August 2014, p.82

¹¹ Secretariat’s Annual Implementation Report, 1 September 2015, p. 98

¹² For all relevant meetings and documents see: https://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Instruments/Energy_Efficiency/Task_Force_Coordination_Group

¹³ Conclusion No 5.2 of 9th EECG meeting of 17 November 2015

¹⁴ Letter sent to the to the Minister of Environment and Spatial Planning and the Minister of Economic Development Minister dated 3 March 2016, ANNEX 4

¹⁵ Email from the Ministry of Environment and Spatial Planning as response to the Secretariat’s letter of 3 March 2016, dated 11 March 2016, ANNEX 5

(18) 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 the Treaty.”

(19) 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.

(20) Article 28 of Directive 2010/31/EU, as incorporated and adapted by Ministerial Council Decision 2010/02/MC-EnC, reads:

1. Contracting Parties shall adopt and publish, by 30 September 2012 at the latest, the laws, regulations and administrative provisions necessary to comply with Articles 2 to 18, and with Articles 20 and 27.

2. Contracting Parties shall communicate to the Secretariat the text of the main provisions of national law which they adopt in the field covered by this Directive.

(21) Article 11(3) of the Dispute Settlement Rules reads:

(3) 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

(22) The present Reasoned Request concerns non-compliance of Kosovo* with the obligation to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings by 30 September 2012 pursuant to Article 1(3)g of Ministerial Decision 2010/02/MC-EnC and to forthwith notify those measures to the Secretariat within the deadline specified in that Decision, i.e. by 30 September 2012, pursuant to Article 28(2) of Directive 2010/31/EU as adapted by Decision 2010/02/MC-EnC.

(23) 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 case where a Party has failed to fulfill 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 is obliged to submit a reasoned request to the Ministerial Council directly, without performing a preliminary procedure.

(24) As a Contracting Party to the Treaty, Kosovo* is under an obligation to implement, i.e. to transpose at national level and to apply, the Directive 2010/31/EU, as adapted by Ministerial Council Decision 2010/02/MC-EnC.

(25) Article 1(3)g of Decision 2010/02/MC-EnC adapting Article 28(1) of Directive 2010/31/EU requires the Contracting Parties to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 30 September 2012.

(26) Article 28(2) of Directive 2010/31/EU as adapted by Ministerial Council Decision 2010/02/MC-EnC also requires the Contracting Parties to communicate to the Secretariat the text of the main provisions of national law which they adopt in the field covered by the Directive.

(27) 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.

- (28) The time limit for Kosovo* to take measures necessary to comply with Article 28(1) subparagraph 1 of Directive 2010/31/EU as adapted by Ministerial Council Decision 2010/02/MC-EnC expired on 30 September 2012.
- (29) Despite numerous invitations and constant reminders issued by the Energy Community institutions and the assistance offered by the Secretariat and other organizations, Kosovo* evidently has not taken the measures necessary to comply with its obligations. At the date of submitting this Reasoned Request, the draft law meant to transpose the Directive 2010/31/EU is still pending adoption. It is undisputed that Republic of Kosovo* to date has not adopted the measures necessary to implement Decision 2011/02/MC-EnC. In the absence of any legal effect, having draft legislation prepared but not yet adopted and entered into force cannot be considered as measures necessary to comply with a Decision of the Ministerial Council.
- (30) In any event, the Secretariat has not been notified of any measures necessary to transpose the Directive 2010/31/EU.
- (31) Under those circumstances, the Secretariat must conclude that by failing to take, or to notify the Secretariat of, the measures necessary to comply with Article 28(1) subparagraph 1 of Directive 2010/31/EU as adapted by Ministerial Council Decision 2010/02/MC-EnC Kosovo* has failed to fulfill its obligations under Articles 6 and 89 of the Treaty as well as Article 28 of Directive 2010/31/EU as adapted by Ministerial Council Decision 2010/02/MC-EnC on the implementation of certain Directives on Energy Efficiency.

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 the laws, regulations and administrative provisions necessary to comply with Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings: pursuant to Article 1(3)(g) of Ministerial Council Decision 2010/02/MC-EnC, and by failing to forthwith notify those measures to the Energy Community Secretariat ("the Secretariat"), Kosovo* fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 28(1) subparagraph 1 and paragraph (2) of the Directive 2010/31/EU as adapted by Article 1(3)(g) of Ministerial Council Decision 2010/02/MC-EnC.

On behalf of the Secretariat of the Energy Community

Vienna, 13 May 2016



Janez Kopač
Director



Dirk Buschle
Deputy Director / Legal Counsel

List of Annexes

- ANNEX 1 Ministerial Council Decision 2010/02/MC-EnC
- ANNEX 2 Letter sent to the Minister of Environment and Spatial Planning and the Minister of Economic Development, dated 6 February 2015
- ANNEX 3 Letter sent by EBRD and the Secretariat to the Minister of Economic Development, dated 17 September 2015
- ANNEX 4 Letter sent to the to the Minister of Environment and Spatial Planning and the Minister of Economic Development Minister, dated 3 March 2016
- ANNEX 5 Email from the Ministry of Environment and Spatial Planning as response to the Secretariat's letter of 3 March 2016, dated 11 March 2016