

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

In case ECS-6/18, 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 16 September 2019 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-6/18 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 not transposing into national law and by not implementing the provisions of Articles 4(1) and 4(3) as well as Parts A of Annexes III, IV, V, VI and VII of Directive 2001/80/EC and Article 30(3) as well as Part 2 of Annex V of Directive 2010/75/EU, failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

Kosovo did not reply in writing and both the Secretariat and Kosovo 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.

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 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 reads:

*The “acquis communautaire on environment”, for the purpose of this Treaty, shall mean (...)
(iii) Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, (...)
(v) Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control, (...)*

Article 4 of Directive 2001/80/EC reads:

*1. Without prejudice to Article 17 Contracting Parties shall take appropriate measures to ensure that all licences for the construction or, in the absence of such a procedure, for the operation of new plants which in the view of the competent authority are the subject of a full request for a licence before 27 November 2002, provided that the plant is put into operation no later than 27 November 2003 contain conditions relating to compliance with the emission limit values laid down in part A of Annexes III to VII in respect of sulphur dioxide, nitrogen oxides and dust.
2. (...)
3. Without prejudice to Directive 96/61/EC and Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, Contracting Parties shall, by 1 January 2018 at the latest, achieve significant emission reductions by:
(a) taking appropriate measures to ensure that all licences for the operation of existing plants contain conditions relating to compliance with the emission limit values established for new plants referred to in paragraph 1; or
(b) ensuring that existing plants are subject to the national emission reduction plan referred to in paragraph 6; and, where appropriate, applying Articles 5, 7 and 8.
4. – 8. (...)*

Article 30 (3) of Directive 2010/75/EU

All permits for installations containing combustion plants not covered by paragraph 2 shall include conditions ensuring that emissions into the air from these plants do not exceed the emission limit values set out in Part 2 of Annex V.

Parts A of Annexes III, IV, V, VI and VII of Directive 2001/80/EC and part 2 of Annex V of Directive 2010/75/EU contain graphs of emission limit values. They shall not be displayed, as their content is not relevant for the legal assessment undertaken in this Opinion.

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 not transposing into national law and by not implementing the provisions of Articles 4(1) and 4(3) as well as Parts A of Annexes III, IV, V, VI and VII of Directive 2001/80/EC and Article 30(3) as well as Part 2 of Annex V of Directive 2010/75/EU, Kosovo has failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

Kosovo 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 was no evidence that the provisions cited above had been transposed by Kosovo. The legal acts provided, namely Law No. 03/L-043 on integrated prevention pollution control and the administrative instructions on the rules and standards of the discharges on air by the stationary sources of pollution, entered into force in 2009 and 2007 respectively, several years before the current legal framework was introduced into Energy Community law by Decision D/2013/06/MC-EnC. In the absence of a reply by Kosovo, there is no indication that the Secretariat's information are incorrect or invalid.

IV. Conclusions

The Advisory Committee considers that Kosovo by not transposing into national law and by not implementing the provisions of Articles 4(1) and 4(3) as well as Parts A of Annexes III, IV, V, VI and VII of Directive 2001/80/EC and Article 30(3) as well as Part 2 of Annex V of Directive 2010/75/EU failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

Done in Vienna on 14 February 2020

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President