

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

**In case ECS-10/23, the Secretariat of the Energy Community
Against
Bosnia and Herzegovina, 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-10/23 against Bosnia and Herzegovina. 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 Bosnia and Herzegovina 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.

Bosnia and Herzegovina did not declare the necessity of a public hearing. 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. Bosnia and Herzegovina was informed about the Secretariat's position.

Bosnia and Herzegovina did not reply to the Reasoned Request within the two-month period foreseen in Article 31 (1) of the Dispute Settlement Rules 2022. On 16 November 2023 Bosnia

and Herzegovina submitted 'written observations' to the Secretariat with reference to Article 31 (2) of the Dispute Settlement Rules 2022. These 'written observations' were forwarded to the Advisory Committee on 17 November 2023. In this statement the Contracting Party confirmed that Directive 2004/35/EC is only partially transposed into national law but that it is planned to fully transpose Directive 2004/35/EC.

The Georgian National Energy and Water Supply Regulatory Commission (GNERC) submitted written observations according to Article 31 (2) of the Dispute Settlement Rules 2022 to the Secretariat on 16 November 2023, which were forwarded to the Advisory Committee on 17 November 2023. GNERC agrees to the legal assessment in the Reasoned Request but emphasizes the efforts of Bosnia and Herzegovina to comply with the rules in the near future. According to GNERC the complexity of setting up effective liability measures should be taken into account and an adequate timeframe should be provided.

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.

As to the procedure under Article 91 of the Treaty the amended rules of procedure on dispute settlement under the Treaty (Procedural Act 2008/01/MC-EnC of 27 June 2008, amended by by Procedural Act 2022/03/MC-EnC of 15 December 2022) state in its Article 31:

(1) Within two months following receipt of a copy of the reasoned request, the Party concerned may reply in writing to the Secretariat.

(2) The Secretariat shall notify all Parties and Participants, the Regulatory Board, the Advisory Committee as well as persons and bodies participating in the preliminary procedure of the reasoned request as well as any reply to it. Within two months of this notification, they shall be entitled to submit written observations to the Secretariat. The Regulatory Board and the Secretariat may submit written observations where they are not the initiator of the case.

Article 31 (2) of the Dispute Settlement Rules 2022 reads:

Before taking the decision pursuant to Article 91 of the Treaty, the Presidency and the Vice-Presidency shall ask an [the] Advisory Committee for its opinion on the reasoned request, taking into account any reply by the Party concerned. The Ministerial Council shall not be bound by the opinion of the Advisory Committee.

III. Legal Assessment

According to Article 32 (1) of the 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, Bosnia and Herzegovina 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.

Bosnia and Herzegovina did not reply to the Reasoned Request according to Article 31 (1) of the Dispute Settlement Rules 2022.

Bosnia and Herzegovina's 'written observations' from 16 November 2023 cannot be taken into consideration: Article 31 (1) states that the Party concerned may reply in writing to the Secretariat within two months following receipt of a copy of the Reasoned Request. Article 31 (2) is addressed to other Parties and Participants who have the right to submit written observations, having received the Reasoned Request and any reply to it. Also Article 32 (1) refers to the reply of the Party concerned which has to be taken into account by the Advisory Committee. Therefore, the Party concerned is not entitled to submit 'written observations' according to Article 31 (2) of the Dispute Settlement Rules 2022 and by this way prolong the time limit for a reply stated in Article 31 (1). In consequence the 'written observation' of Bosnia and Herzegovina cannot be taken into consideration. This is not altered by the fact that the Secretariat has sent – with regard to the rights of the Party concerned – an unclear email in which by quoting Article 31 (2) 1st sentence the recipients of this email were invited to submit written observations by 16 November 2023. The Dispute Settlement Rules 2022 specify the procedure to be followed in cases of failure by a Party to comply with a Treaty obligation and therefore cannot be changed by the Secretariat. (It should be noted that the plea of Bosnia and Herzegovina in its 'written observations' would not affect the present conclusions as Bosnia and Herzegovina concedes that Directive 2004/35/EC has not been fully transposed into national law.)

Hence, the Advisory Committee's assessment is based on the procedural documents provided by the Energy Community Secretariat and the arguments presented therein.

In this documentation, there is no evidence that Bosnia and Herzegovina **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 the Ministry of Economic Trade and Foreign Relations submitted a letter dated 31 May 2021 that included information from the entity ministries. According to this information, Directive 2004/35/EC is partially transposed in both entities of the Contracting Party. The Secretariat considers that those provisions cannot be considered as transposing the provisions of Directive 2004/35/EC.

According to the Reasoned Request of the Secretariat Chapter XI of the Law on Environmental Protection of Republika Srpska and Chapter XII of the Law on Environmental Protection in the Federation of Bosnia and Herzegovina contain only provisions related to the polluter pays principle and civil responsibilities for environmental damage. The provisions of the laws of both entities relate to legislation on the civil obligations and establish civil liability schemes. The Secretariat argues that they are not covered by the Directive on account of the exclusion clause stipulated in Article 3 (3) of Directive 2004/35/EC.

In its written observations GNERC agrees to the legal assessment in the Reasoned Request.

Based on the available documentation, the Advisory Committee finds that the request is well-founded.

IV. Conclusions

The Advisory Committee considers that

Bosnia and Herzegovina 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