

Vienna, 12 October 2017  
UA-ECS-5\_13-S\_O\_01\_12-10-2017

**Subject: Request under Article 92 of the Treaty in Case ECS-5/13 S**

Excellency,

Please find attached the Request for Sanctions in reference to Case ECS-5/13 S.  
Please accept, the expression of my highest considerations.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač

H.E. MR. VALDRIN LLUKA  
MINISTER OF ECONOMIC DEVELOPMENT OF THE REPUBLIC OF KOSOVO\*

H.E. MR. DRITON KUQI, MINISTER OF ECONOMY  
OF THE REPUBLIC OF MACEDONIA

H.E. MR. IHOR NASALYK  
MINISTER OF ENERGY AND COAL INDUSTRY OF UKRAINE

ANNE-CHARLOTTE BOURNOVILLE  
EUROPEAN COMMISSION

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

**REQUEST**

in Case ECS-5/13 S

Submitted pursuant to Article 92 (1) of the Treaty establishing the Energy Community and Articles 39 to 42 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,<sup>1</sup> the

**SECRETARIAT OF THE ENERGY COMMUNITY**

seeking a Decision from the Ministerial Council that:

1. The failure of Ukraine to implement Ministerial Council Decision 2016/05/MC-EnC and thus to rectify the breaches identified therein constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. Ukraine shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/05/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2018.
3. The Secretariat is invited to monitor compliance of the measures taken by Ukraine with the *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

The Secretariat has the honour of submitting the following Request to the Ministerial Council under Article 92(1) of the Treaty:

**I. Relevant Facts**

- (1) On 11 February 2013, the Secretariat initiated dispute settlement procedures against Ukraine by way of an Opening Letter under Article 12 of the Dispute Settlement Procedures for failure to transpose and implement certain provisions of Directive 1999/32/EC of the European Parliament and of the Council of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC (hereinafter: "Directive 1999/32/EC").<sup>2</sup> Having not been satisfied by the respective replies sent by Ukraine, the Secretariat sent a Reasoned Opinion under Article 13 of the Dispute Settlement Procedures on 21 December 2015 and submitted a Reasoned Request to the Ministerial Council under Article 28 of the Dispute Settlement Procedures on 13 May 2016.

<sup>1</sup> Hereinafter: Dispute Settlement Procedures. 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 applied to Case ECS-3/08 and that case has been closed with adoption of Ministerial Council Decision 2016/02/MC-EnC on 14 October 2016. To cases initiated after 15 October 2015, including the present case ECS-3/08 S, the Dispute Settlement Procedures of 2015 apply. However, there is no difference in substance between the Dispute Settlement Rules of 2008 and 2015 in relation to cases initiated under Article 92 of the Treaty.

<sup>2</sup> OJ L 121, 11.5.1999, p. 13.

The Advisory Committee established under Article 32 of the Dispute Settlement Procedures delivered its Opinion on the Reasoned Request on 16 September 2016.

- (2) On 14 October 2016, the Ministerial Council adopted Decision D/2016/05/MC-EnC on the failure by Ukraine to comply with certain obligations under Title II of the Treaty.<sup>3</sup> This Decision reads as follows:

**Article 1**  
**Failure of Ukraine to comply with the Treaty**

1. By failing to ensure that heavy fuel oils are not used if their sulphur content exceeds 1.00 % by mass and that gas oils are not used if their sulphur content exceeds 0.10 % by mass, Ukraine has failed to fulfil its obligations under Articles 3(1) and 4(1) of Directive 1999/32/EC in conjunction with Article 16 of the Treaty and the Protocol concerning the Accession of Ukraine to the Treaty.
2. For the reasons sustaining these findings, reference is made to the Reasoned Request.

**Article 2**  
**Follow-up**

1. Ukraine shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law immediately. Ukraine shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.
2. If the breaches have not been rectified, the Secretariat is invited to initiate a procedure under Article 92 of the Treaty.

**Article 3**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.

- (3) In the aftermath of Decision 2016/05/MC-EnC, Ukraine was reminded several times of its obligations arising from the decision and the necessary measures to implement in order to rectify those breaches.
- (4) The Secretariat reminded the representatives of Ukraine at meetings of the Environmental Task Force held in 2017 about their obligations related to the implementation of the respective Ministerial Council Decisions.
- (5) When preparing its Annual Implementation Report for 2017, the Secretariat requested information from the Ukrainian authorities once again regarding the implementation of Ministerial Council Decision 2016/05/MC-EnC. Ukraine did not provide a reply to this request.
- (6) On 22 December 2016, Article 2 of Resolution No. 927 of 1 August 2013 was amended by Resolution No. 973 of the Cabinet of Ministers of Ukraine.<sup>4</sup> This amendment allows the placing on the market and circulation of boiler fuels (fuel oil) that do not meet the requirements of Resolution No. 927 (namely the obligation of 1.00% sulphur content for heavy fuel oil and 0.10% sulphur content for gas oil) and that are used in thermal power plants, combined heat and power plants and boiler houses, as well as boiler fuel (mazout) produced by refineries located on the territory of Ukraine. Resolution No. 973 allows the

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<sup>3</sup> Annex II.

<sup>4</sup> Annex III.

extension of non-compliance from 1 January 2017 to 31 December 2017, subject to compliance with the established thresholds for the emission of sulphur dioxide into the atmosphere.

- (7) In the Implementation Report 2017<sup>5</sup>, the Secretariat emphasized that Ukraine still fails to implement correctly the Sulphur in Fuel Directive into national legislation, recalled the infringement procedure opened against it in this respect, and noted in particular that amendments introduced in December 2016 are not sufficient to comply with the Ministerial Council Decision of October 2016.
- (8) Ukraine has not reported to the Secretariat or the Permanent High Level Group about any measures taken or any other steps undertaken with the aim to rectify the breaches of the Treaty as identified in Ministerial Council Decision 2016/05/MC-EnC.
- (9) While the expiry of the original provisions of Resolution No. 927 could have rectified the breach established by Decision 2016/05/MC-EnC, with the amendments enacted by Resolution No. 973 Ukraine actually extended the non-compliant situation with Energy Community law until after the adoption of Decision 2016/05/MC-EnC. The failure of Ukraine to comply with the *acquis communautaire* on environment as listed in Article 16 of the Treaty, remains thus completely unchanged.
- (10) As will be reasoned below, the violation by Ukraine of Article 1 of Decision 2016/05/MC-EnC continues to exist and is to be qualified as a serious and persistent breach. Therefore, the Secretariat decided to follow up on the Ministerial Council's request and submit this Request to the Ministerial Council for the determination of the existence of a serious and persistent breach under Article 92 of the Treaty.

## II. Relevant Energy Community Law

- (11) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “a Treaty obligation or [...] a Decision addressed to [a Party]”. According to Article 2(1) of the Dispute Settlement Procedures, a violation of Energy Community Law occurs if “[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law”.
- (12) 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”.*
- (13) 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.”*
- (14) At the time of initiating the present Dispute Settlement Procedure,<sup>6</sup> Article 16 of the Treaty read:

<sup>5</sup> Energy Community Secretariat's Annual Implementation Report for year 2017, Section 11 Ukraine 11.7 Environment.

<sup>6</sup> Article 16 of the Treaty was amended by Ministerial Council Decision 2013/06/MC-EnC on 24 October 2013, as well as by Ministerial Council Decisions 2016/12/MC-EnC and 2016/15/MC-EnC on 14 October 2016, which, however, do not bear any relevance for the present case.

*“The “acquis communautaire on environment”, for the purpose of this Treaty, shall mean (i) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, (ii) Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, (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, and (iv) Article 4(2) of Directive 79/409/EEC of the Council of 2 April 1979 on the conservation of wild birds.”*

(15) Article 76 of the Treaty reads:

*“... A Decision is legally binding in its entirety upon those to whom it is addressed. ...”*

(16) 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.”*

(17) Article 92(1) of the Treaty reads:

*“At the request of a Party, the Secretariat or the Regulatory Board, the Ministerial Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its obligations under this Treaty and may suspend certain of the rights deriving from application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty.”*

(18) Article 37 of the Dispute Settlement Procedures (“Binding nature of the decision”) reads:

*“The decision by the Ministerial Council shall be binding on the Parties concerned from the date of its adoption.”*

(19) Article 38 of the Dispute Settlement Procedures (“Consequences of a decision establishing failure to comply”) reads:

*“(1) Where the Ministerial Council establishes the existence of a breach of a Party's obligation pursuant to Article 91 of the Treaty the Party concerned shall take all appropriate measures to rectify the breach and ensure compliance with Energy Community law.*

*(2) The Secretariat, in accordance with Article 67(b) of the Treaty, shall review the proper implementation by the Party concerned of the decision, and may bring the matter directly before the Ministerial Council on the grounds of a failure to take the necessary measures to comply with the decision.”*

(20) Article 39 of the Dispute Settlement Procedures (“Serious and persistent breach”) reads:

*“The Ministerial Council shall establish the existence of a serious and persistent breach by a Party of its obligations under the Treaty taking into account the particularities of each individual case.”*

(21) Article 40 of the Dispute Settlement Procedures (“Request”) reads:

*“(1) A Party, the Secretariat or the Regulatory Board may request the Ministerial Council to determine the existence of a serious and persistent breach without a preliminary procedure.*

*(2) The request may follow up on a prior decision taken by the Ministerial Council under Article 91 of the Treaty or raise a new issue.*

*(3) The request shall set out the allegations against the Party concerned in factual and legal terms. It shall also contain a proposal as to concrete sanctions to be taken in accordance with Article 92(1) of the Treaty.*

*(4) The request shall be submitted to the Presidency and the Vice-Presidency at least 60 days before the respective meeting. A copy shall be submitted to the Secretariat for registration. The request shall not be made public.”*

(22) Article 41 of the Dispute Settlement Procedures (“Decision-making procedure”) reads:

*“(1) The Presidency shall, within seven days after receiving it, forward the request to the Party concerned and ask it for a reply to the allegations made in the request.*

*(2) The Presidency and the Vice-Presidency may ask the Advisory Committee for its written opinion.*

*(3) The decision by the Ministerial Council on the existence of a serious and persistent breach shall be taken in accordance with Articles 92(1) and 93 of the Treaty.*

*(4) The decision taken by the Ministerial Council shall be made publicly available on the Secretariat’s website.”*

(23) Article 42 of the Dispute Settlement Procedures (“Measures under Article 92”) reads:

*“(1) In the decision establishing the existence of a serious and persistent breach, the Ministerial Council shall determine sanctions in accordance with Article 92(1) of the Treaty and specify a time-limit.*

*(2) The obligations of the Party concerned under the Treaty shall in any case continue to be binding on that Party.*

*(3) The Ministerial Council shall at each subsequent meeting verify that the grounds continue to apply on which the decision establishing the existence of a serious and persistent breach was made and sanctions were imposed.”*

### **III. Legal Assessment**

#### **1. Introduction**

##### **aa. The binding nature of a Ministerial Council Decision**

(24) A Decision taken by the Ministerial Council has binding effect vis-à-vis the Party concerned. This follows from Article 76 of the Treaty and Article 37 of the Dispute Settlement Procedures. As a consequence, Parties are under an obligation to implement Decisions in their domestic legal systems (Articles 6 and 89 of the Treaty).

(25) In the case of a Decision taken under Article 91 such as Decision 2016/05/MC-EnC, the obligation to implement amounts to an obligation to fully rectify the breaches identified and to ensure compliance with Energy Community law. This is expressly stipulated in Article 38(1) of the Dispute Settlement Procedures. Moreover, in Article 2 of Decision 2016/05/MC-



EnC, the Ministerial Council urged Ukraine to take all appropriate measures to rectify breaches identified in Article 1 and ensure compliance with the Energy Community law immediately, as well as report regularly to the Secretariat and the Permanent High Level Group about the measures taken.

- (26) It follows from the above that the non-implementation of a Ministerial Council Decision under Article 91 by the Party concerned in itself constitutes a breach of Energy Community law. Once a Decision establishing a breach is taken it is not possible any longer for that Party to contest the validity or the lawfulness of that Decision. The Treaty does not foresee an appeal against Decisions of the Ministerial Council, the supreme decision-maker under the Treaty. If a Party wants to challenge the position taken by the Secretariat in the course of a dispute settlement procedure, it needs to do so during the procedure leading up to the Decision by the Ministerial Council under Article 91 of the Treaty. Once that Decision is taken, the Party is precluded from raising any arguments challenging the findings contained in the Decision. Otherwise legal certainty and the binding effect of decisions would be frustrated. The only pathway the Treaty envisages for setting aside a Decision by the Ministerial Council under Article 91 or 92 of the Treaty is a request for revocation under Article 91(2) or Article 92(2) of the Treaty respectively.
- (27) It follows from the binding effect of decisions under Energy Community law that Ukraine remains obliged to implement Ministerial Council Decision 2016/05/MC-EnC. Subsequent changes to domestic legislation or regulatory practice would thus affect the present Request only to the extent they result in effective rectification of breaches identified in Article 1 of that decision. At the date of this Request, this is not the case as the adoption of Resolution No. 973 on 22 December 2016 annulled the possibility of for national measures ensuring the proper implementation of Articles 3(1) and 4(1) of Directive 1999/32/EC to enter into force on 1 January 2017. Consequently, the breach of non-compliance with Decision 2016/05/MC-EnC persists.

*bb. Measures under Article 92 of the Treaty*

- (28) Besides triggering a self-standing obligation of the Party concerned to rectify any breaches identified in a previous Decision under Article 91(1) or Article 92(1) of the Treaty, Article 92(1) of the Treaty opens the possibility for further follow-up measures to be taken against the Party violating Energy Community law, namely (1) the determination of a serious and persistent breach of the obligations under the Treaty, and (2) the suspension of certain rights deriving from the application of the Treaty.
- (29) Article 42(1) of the Dispute Settlement Procedures links these two measures in the sense that a decision establishing the existence of a serious and persistent breach mandatorily “shall” include a decision on sanctions in accordance with Article 92(1) of the Treaty, leaving discretion only for the decision on the nature of the sanctions to be imposed. Contrary to this, in its case law in Cases ECS-8/11 and 9/13, the Ministerial Council has followed an approach of separating these two measures. It has first established a serious and persistent breach,<sup>7</sup> and only in cases where the serious and persistent breach has not been rectified, it has imposed measures related to suspension of certain rights deriving from the application of the Treaty.<sup>8</sup> Therefore, in the present Request the Secretariat requests a decision by the Ministerial Council on establishing the existence of a serious and persistent

<sup>7</sup> See: Ministerial Council Decision D/2014/04/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina in Case ECS-8/11, dated 23 September 2014; Ministerial Council Decision D/2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty in Case ECS-9/13, dated 14 October 2016.

<sup>8</sup> Ministerial Council Decision D/2015/10MC-EnC: on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty, in Case ECS-8/11, dated 16 October 2015.

breach only. The Secretariat reserves the right to request measures related to suspension of certain rights deriving from the application of the Treaty subject to another request under Article 92(1) of the Treaty.

- (30) Decisions under Article 92 of the Treaty do not require a preliminary procedure. The fact that the present Request is a follow-up to the Ministerial Council's Decision concluding Case ECS-5/13 means that a comprehensive preliminary procedure has already been carried out during which Ukraine was given ample opportunity to be heard. The procedure under Article 91 of the Treaty also introduced the Ministerial Council to the subject-matter of the present Request.
- (31) Moreover, unlike Article 91 of the Treaty, Article 92 of the Treaty does not require a reasoning of the Request made to the Ministerial Council. Nevertheless, the Secretariat in accordance with Article 40(3) of the Dispute Settlement Procedures will set out the factual background and the main legal reasons for submitting the present Request.
- (32) Article 92(1) of the Treaty resembles Article 7 of the EU Treaty (TEU). This provision was introduced into the TEU by the Treaty of Amsterdam as an instrument of ensuring that EU Member States respect certain common values. In essence, it is a diplomatic or political rather than a legal procedure. Whether or not this procedure is suitable for the enforcement of the Treaty is not for the Secretariat to decide. It notes, however, that the European Commission considers that "*the procedure laid down by Article 7 of the Union Treaty (...) is not designed to remedy individual breaches*".<sup>9</sup> Similarly, the recent report by the Ministerial Council's High Level Reflection Group comes to the conclusion that "the current political approach of 'suspending certain rights' in reaction to a serious and persistent breach' does not satisfy the standards of an Energy Community based on the rule of law".<sup>10</sup>
- (33) As Article 7 TEU has so far not been used within the EU,<sup>11</sup> no precedence of relevance under Article 94 of the Treaty exists. In this situation, the Secretariat will base itself on the travaux préparatoires and the aforementioned interpretation issued by the European Commission when applying Article 92(1) of the Treaty to the present case. This was also the case in the Secretariat's Requests under Article 92 of the Treaty in Cases ECS-8/11 and 9/13.
- (34) In the following, the Secretariat will submit that the failure of Ukraine, at the date of this Request, to comply with the Energy Community Law constitutes a serious and persistent breach of Energy Community law.

## 2. *Continued existence of a breach*

- (35) The Secretariat submits that failure of Ukraine to ensure the proper transposition and implementation of Articles 3(1) and 4(1) of Directive 1999/32/EC continues to breach Article 1 of Ministerial Council Decision 2016/05/MC-EnC and the provisions of the *acquis communautaire* referred therein.

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<sup>9</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, p. 7, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>.

<sup>10</sup> Report of the High Level Reflection Group, page 20.

<sup>11</sup> The European Commission has recently issued a recommendation to Poland stating that in case the Polish authorities take any measures that will aggravate the systemic threat to the rule of law, the Commission is ready to immediately activate Article 7 TEU (Commission Recommendation of 26.7.2017 regarding the rule of law in Poland C(2017) 5320 final). Furthermore, in the case of Hungary, the European Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 TEU (European Parliament resolution of 17 May 2017 on the situation in Hungary 2017/2656(RSP)).



- (36) As described above, the Secretariat assumed a proactive role in helping Ukraine to draft and adopt the necessary measures for rectifying the breaches identified by the Ministerial Council.
- (37) In close cooperation with the Government, the Secretariat assisted Ukraine already prior to the adoption of Decision 2016/05/MC-EnC. Numerous meetings and exchanges have taken place between the Secretariat and the Ukrainian authorities, as detailed in the Reasoned Request in Case ECS-5/13 submitted by the Secretariat on 13 May 2016. In their official response to the Reasoned Request, the Ukrainian authorities had confirmed the factual information used by the Secretariat and had not disputed that their domestic legislation was not compliant with the requirements of Articles 3(1) and 4(1) of Directive 1999/32/EC.
- (38) As above noted, in October 2016, by Decision 2016/05/MC-EnC, the Ministerial Council urged Ukraine to take all appropriate measures to rectify breaches identified therein and ensure compliance with the Energy Community law immediately, as well as report regularly to the Secretariat and the Permanent High Level Group about measures taken. The Ministerial Council invited the Secretariat to initiate a procedure under Article 92 of the Treaty, if breaches identified in Article 1 were not immediately rectified by Ukraine.
- (39) Despite the Secretariat's assistance as well as numerous reminders and several meetings, more than a year after the Ministerial Council meeting in October 2016, no tangible results in compliance with Energy Community law have been achieved for Ukraine. Ukrainian authorities had explained in a letter of 7 October 2016 that the breach will cease to exist by 1 January 2017 given the entry into force of the relevant provisions of Resolution No. 927.12. Contrary to that and to the commitment of Ukraine in the letter, Ukraine has adopted Resolution No. 973 on 22 December 2016, thereby extending the breach already established by the Ministerial Council.
- (40) Therefore, the Secretariat concludes that the de facto situation as regards the compliance of the national legislation of Ukraine with Directive 1999/32/EC remained unchanged since the last decision of the Ministerial Council and the breaches identified in Decision 2016/05/MC-EnC have not been rectified.
- (41) Based on the above, the Secretariat submits that Ukraine, in the aftermath of Decision 2016/05/MC-EnC, failed to show that any sufficient progress was achieved in rectifying the breaches listed in Article 1 of the Decision 2016/05/MC-EnC since October 2016. In particular, the Contracting Party has still not:
- a. adopted within the prescribed time limit national measures to ensure that heavy fuel oils are not used if their sulphur content exceeds 1.00 % by mass in the entire territory of the Contracting Party under Article 3(1) of Directive 1999/32/EC in conjunction with Article 16 of the Treaty establishing the Energy Community;
  - b. adopted within the prescribed established timetable, national measures to ensure that gas oils are not used if their sulphur content exceeds 0.1 % by mass in the entire territory of the Contracting Party under Article 4(1) of

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<sup>12</sup> Annex I.

Directive 1999/32/EC in conjunction with Article 16 of the Treaty establishing the Energy Community;

in breach of Articles 6 and 89 of the Energy Community Treaty and, in any event, has failed to notify those measures to the Secretariat.

- (42) In conclusion, the Secretariat respectfully submits that Ukraine, in the aftermath of Decision 2016/05/MC-EnC, failed to rectify the breaches of its obligations under the Treaty as listed in Article 1 of that Decision.

*aa. Serious breaches*

- (43) In a Communication of 2005 concerning the EU pre-Lisbon infringement action procedure, the Commission stated that “[a]n infringement concerning non-compliance with a judgment is always serious”.<sup>13</sup> It can be argued that this statement is applied by analogy to the situation at hand. Given that Article 92 of the Treaty was modelled on Article 7 TEU, the Secretariat also considers the Commission’s Communication of 2003 as relevant, which offers a view on what qualifies a breach as serious. Within this procedure, the breach in question must go beyond specific situations and concern a more systematic problem. In order to determine the seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach.
- (44) There is scientific consensus on the fact that sulphur which is naturally present in oil and coal is the dominant source of sulphur dioxide emissions which are one of the main causes of ‘acid rain’ and one of the major causes of the air pollution experienced in many urban and industrial areas.<sup>14</sup> Setting legally binding thresholds for the sulphur content of liquid fuels is one of the key requirements of the Directive 1999/32/EC, the implementation of which is indispensable for reaching the objectives of the Directive, namely to reduce the negative effects of emissions of sulphur dioxide into the air. Emissions of sulphur dioxide contribute significantly to the problem of acidification and sulphur dioxide also has a direct effect on human health and on the environment. Acidification and atmospheric sulphur dioxide damages sensitive ecosystems as well as buildings and the culture heritage and can have significant effects on human health, particularly among those sectors of the populations suffering from respiratory diseases. Therefore, these requirements constitute a substantial part of the *acquis communautaire* on environment, and rank amongst the Energy Community’s primary objectives, as laid down in Article 16 of the Treaty.
- (45) The Secretariat considers that transposing and implementing into national legislation measures that ensure that heavy fuel oils are not used if their sulphur content exceeds 1.00% by mass, in compliance with requirements of Article 3(1) of and 0.1% by mass in compliance with requirements of Article 4(1) of Directive 1999/32/EC, constitute fundamental provisions of Directive 1999/32/EC, as extended to Contracting Parties by Article 16 of the Treaty. Therefore, failure to comply with this requirement must be considered a breach affecting a crucial aspect of the *acquis communautaire* on environment.
- (46) Furthermore, taking into account its persistent non-compliance far beyond the established timetable, *i.e.* far beyond 1 January 2012, it is of vital importance for Ukraine to immediately transpose and implement the abovementioned requirements into national legislation.

<sup>13</sup> Communication from the European Commission, SEC(2005) 1658, section 16. See, to that effect, also Case C-169/13 *Commission v Italy*, paragraph 100 and Case C-378/13 *Commission v Greece*, paragraphs 37 and 72.

<sup>14</sup> WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulfur dioxide (2006).

- (47) At the date of this Request, Resolution No. 927, as amended by Resolution No. 973 on 22 December 2016 allows the placing on the market of fuel oils until 31 December 2017 that do not meet the requirements of the same Resolution if they are produced in refineries located on the territory of Ukraine, subject to compliance with ambient air quality limits on sulphur dioxide, which is in breach of Articles 3(1) and 4(1) of the Directive. Justification provided from Ukraine that such exemption applies only in a limited time was already rejected by the Ministerial Council in Decision 2016/05/MC-EnC.<sup>15</sup>
- (48) Finally, the Communication by the European Commission on Article 7 TEU from 2003<sup>16</sup> - upon which Article 92 of the Treaty was modelled - suggests that, as in the European Union, the Ministerial Council of the Energy Community disposes of a discretionary power to determine that there is a serious and persistent breach.
- (49) In this respect the Secretariat recalls that it was invited by the Ministerial Council in Decision 2016/05/MC-EnC to initiate a procedure under Article 92 of the Treaty if the breaches have not been rectified immediately. This presupposes as well the existence of a serious (and persistent) breach.

*bb. Persistence of the breaches*

- (50) According to the European Commission, for a breach to be persistent, it must last some time.<sup>17</sup> Ukraine has failed to comply by the established deadline with requirements of Articles 3(1) and 4(1) of Directive 1999/32/EC read in conjunction with Articles 12 and 16 of the Treaty, as well as the deadline set by point 2 of Annex II of the Treaty which amounts already to a total non-compliance period of almost six years.
- (51) The Secretariat recalls that Ukraine has been constantly reminded of its breach in the Secretariat's Implementation Reports as well as by various Ministerial Council, Permanent High Level Group, Environmental Task Force and bilateral meetings and communications, without any result.
- (52) As noted above, despite the Decision of the Ministerial Council 2016/05/MC-EnC, Ukraine has not yet rectified the breach subject to this Request. Failure to comply with legally binding decisions of the Ministerial Council amounts to a persistent breach.

## **ON THESE GROUNDS**

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community in accordance with Article 92(1) of the Treaty to declare that:

1. The failure by Ukraine to implement Ministerial Council Decision 2016/05/MC-EnC and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. Ukraine shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/05/MC-EnC in cooperation with the Secretariat and

<sup>15</sup> According to settled case-law of the European Court of Justice, apprehension of internal difficulties cannot justify a failure to apply Community law correctly. Therefore, the justifications offered and the timeline in which compliance would be achieved as provided by the Rulebook, have to be dismissed. See, to that effect, Case 128/78 *Commission v United Kingdom* ("Tachographs"), paragraph 10; Case C-52/95 *Commission v France*, paragraph 38 and Case C-265/94 *Commission v France*, paragraph 55.

<sup>16</sup> Communication of the European Commission on Article 7 of the Treaty on European Union, pp. 3 and 7.

<sup>17</sup> Communication of the European Commission on Article 7 of the Treaty on European Union, p. 8.

shall report to the Ministerial Council about the implementation measures taken in 2018.

3. The Secretariat is invited to monitor compliance of the measures taken by Ukraine with the *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

On behalf of the Secretariat of the Energy Community

Vienna, 12 October 2017



Janez Kopač

Director



Dirk Buschle

Deputy Director / Legal Counsel

## List of Annexes

- Annex I Letter of 7 October 2016 of the Ministry of Energy and Coal Industry of Ukraine to the Energy Community Secretariat
- Annex II Ministerial Council Decision 2016/05/MC-EnC
- Annex III Resolution No. 973 of the Cabinet of Ministers of Ukraine of 22 December 2016