

**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 - 05/22

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty ('Dispute Settlement Rules'),<sup>1</sup> the

### **SECRETARIAT OF THE ENERGY COMMUNITY**

against

**KOSOVO\***

is seeking a Decision from the Ministerial Council that

by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as adapted and adopted by Ministerial Decision 2016/12/MC-EnC, by 1 January 2019, and by failing to forthwith notify those measures to the Secretariat, Kosovo\* fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 2 of Ministerial Council Decision Decision 2016/12/MC-EnC.

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

### **I. Relevant Facts**

#### **1. Introduction**

- (1) In April 2014, the European Union adopted Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ('Directive 2014/52/EU').
- (2) Directive 2014/52/EU was incorporated in the Energy Community *acquis communautaire* by Decision 2016/12/MC-EnC of the Ministerial Council adapting and implementing Directive 2011/92/EU of the European Parliament and of the Council, and amending the Treaty establishing the Energy Community ('Decision 2016/12/MC-EnC').<sup>2</sup> Pursuant to Article 2(1) of that Decision, Contracting Parties were under an obligation to transpose and implement Directive 2014/52/EU and notify the Energy Community Secretariat of transposing measures by 1 January 2019.

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<sup>1</sup> Procedural Act No 2015/04/MC-EnC of 16.10.2015

<sup>2</sup> ANNEX 1

## 2. Factual background

- (3) On 22 March 2021, the Secretariat sent a letter to the Ministry of Economy and Environment of Kosovo\*,<sup>3</sup> informing the Ministry that the Secretariat may open dispute settlement procedures for non-compliance with the Treaty, and in particular, the obligations stemming from Decision 2016/12/MC-EnC, if legislation to transpose the amending Directive 2014/52/EU is not enacted.
- (4) Kosovo\* drafted a new Law on environmental impact assessment and on 14 April 2021 submitted the draft to the Secretariat for review.<sup>4</sup> Subsequently, the Secretariat provided comments on the draft and assisted the national authorities in aligning the draft provisions with Directive 2014/52/EU.
- (5) The draft Law on environmental impact assessment was finalized in March 2022.
- (6) To date, the Government has not proposed the draft Law on environmental impact assessment to the Assembly of Kosovo\* for adoption.
- (7) Since Directive 2014/52/EU has not been transposed by Kosovo\*, the Secretariat decided to submit this Reasoned Request to the Ministerial Council for a Decision in accordance with Article 91 of the Treaty.

### II. Relevant Energy Community Law

- (8) 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”.
- (9) 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.”*
- (10) 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.*
- (11) Annex II to the Treaty, entitled “Timetable for the Implementation of the Acquis on the environment”, reads:

*Each Contracting Party shall implement the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment by 14 October 2016. Each Contracting Party shall implement Directive 2014/52/EU by 1 January 2019, with the exception of the provisions referring to Directives not covered by Article 16 of this treaty.”*
- (12) Article 2 of the Ministerial Council Decision 2016/12/MC-EnC reads:

*„1. Without prejudice to Article 3, Contracting Parties shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2011/92/EU as amended by Directive 2014/52/EU by 1 January 2019 with the exception of the provisions referring to Directives not covered by Article 16 of the Treaty establishing the Energy Community. They shall forthwith inform the Energy Community Secretariat thereof.*

*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.“*

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<sup>3</sup> ANNEX 2.

<sup>4</sup> The Secretariat noted in the 2021 Annual Implementation Report that the draft proposal was not fully in compliance with the Directive 2014/52/EU, 1 November 2021 p. 87

(13) 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**

- (14) The present Reasoned Request concerns non-compliance of Kosovo\* with the obligation to adopt laws, regulations and administrative provisions necessary to comply with Directive 2014/52/EU, and to forthwith notify those measures to the Secretariat within the deadline specified in Decision 2016/12/MC-EnC, i.e. by 1 January 2019.
- (15) The Reasoned Request is based on Article 11(3) of the Dispute Settlement Rules. According to this provision, the Secretariat is to submit a Reasoned Request to the Ministerial Council directly, i.e. without performing a preliminary procedure, in cases 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.
- (16) As a Contracting Party to the Treaty, Kosovo\* is under an obligation to transpose and to apply the *acquis communautaire* on environment, including Decision 2016/12/MC-EnC, as referred to in Article 12 of the Treaty and defined by its Annex II.<sup>5</sup>
- (17) Article 2(1) of Decision 2016/12/MC-EnC requires the Contracting Parties to bring into force the laws and administrative provisions necessary to comply with Directive 2014/52/EU, and to apply them as from 1 January 2019.
- (18) Article 2(2) of Decision 2016/12/MC-EnC further requires Contracting Parties to communicate to the Secretariat the text of the main provisions of national law which they adopt in the field covered by Decision 2016/12/MC-EnC of the Ministerial Council.
- (19) 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 specifically requires Parties to implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.
- (20) The deadline for Kosovo\* to take measures necessary to comply with Article 2 of Decision 2016/12/MC-EnC, as required by Articles 6 and 89 of the Treaty, expired on 1 January 2019.
- (21) At the date of submitting this Reasoned Request, no measure transposing Directive 2014/52/EU has been taken. In the absence of any legal effect, draft legislation not yet adopted and entered into force cannot be considered as a measure necessary to comply with a Decision of the Ministerial Council.<sup>6</sup> Kosovo\* hence has not taken the measures necessary to comply with its obligations as set out above.
- (22) Under those circumstances, the Secretariat submits that by failing to take the measures necessary to comply with Article 2(1) of Decision 2016/12/MC-EnC, Kosovo\* fails to comply with Articles 6 and 89 of the Treaty, as well as with Articles 2(1) and 2(2) of Decision 2016/12/MC-EnC.

### **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:

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<sup>5</sup> As amended by Article 1 of Ministerial Council Decision 2015/09/MC-EnC.

<sup>6</sup> See, to that effect, Court of Justice of the European Union in Case C-430/98 *Commission v Luxembourg*, ECLI:EU:C:1999:520, paras. 8-13, Case C-648/13 *Commission v Poland*, ECLI:EU:C:2016:490, paras. 129-132.

by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as adapted and adopted by Ministerial Decision 2016/12/MC-EnC, by 1 January 2019, and by failing to forthwith notify those measures to the Secretariat, Kosovo\* fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 2 of Ministerial Council Decision Decision 2016/12/MC-EnC.

On behalf of the Secretariat of the Energy Community,

Vienna, 14 July 2022



Artur Lorkowski  
Director



Dirk Buschle  
Deputy Director / Legal Counsel

## List of Annexes

- ANNEX 1 Ministerial Council Decision 2016/12/MC-EnC
- ANNEX 2 Letter by the Secretariat to the Minister of Economy and Environment of Kosovo\*,  
dated 22.03.2021