

**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-8/16

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

**REPUBLIC OF MOLDOVA**

is seeking a Decision from the Ministerial Council that Republic of Moldova,

by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 by 1 January 2015 pursuant to Article 3(1) of Ministerial Decision 2011/02/MC-EnC and by failing to forthwith notify those measures to the Secretariat, fails to comply with Article 6 and 89 of the Energy Community Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/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) In July 2009, the European Union adopted the so-called third legislative liberalisation package ("the Third Energy Package"). This package consists of two directives and two regulations, that is Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks. In the European Union, this legislation entered into force on 3 March 2011.
- (2) These legal acts were incorporated in the Energy Community *acquis communautaire* by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the

Energy Community Treaty (“Decision 2011/02/MC-EnC”).<sup>1</sup> Decision 2011/02/MC-EnC was preceded by Recommendation No 2010/02/MC-EnC of 24 September 2010 by the Ministerial Council on the implementation of amendments to the *acquis communautaire* on energy.<sup>2</sup>

## b. Background

- (3) At the meeting of the Permanent High Level Group in December 2011, following the adoption of Decision 2011/02/MC-EnC, Republic of Moldova made a unilateral statement related to the derogation concerning the unbundling under Directive 2009/73/EC which was attached to the conclusions of the meeting.<sup>3</sup> In view of the specific characteristics of its energy market, Moldova stated that it would need to derogate from the requirements for unbundling of its gas transmission system operator pursuant to Article 9 of Directive 2009/73/EC.<sup>4</sup>
- (4) At its meeting in October 2012, the Ministerial Council concluded that the Republic of Moldova may need longer than the deadline of 1 June 2016 to implement Article 9 of Directive 2009/73/EC due to its specific situation.<sup>5</sup> Subsequently, the Ministerial Council adopted Decision 2012/05/MC-EnC<sup>6</sup> on derogation from Article 8 of Ministerial Council Decision 2011/02/MC-EnC by written procedure. It adapted the deadline for implementation of Article 9(1) of Directive 2009/73/EC for Moldova to 1 January 2020.<sup>7</sup> However, the deadline for transposition and implementation of all the other provisions from the Third Energy Package remained unchanged, i.e. 1 January 2015.
- (5) Following the adoption of Decision 2011/02/MC-EnC, the Secretariat initiated activities to plan the phases of transposition of the Third Energy Package in a timely and structured manner. A detailed Implementation Plan,<sup>8</sup> outlining the different preparatory activities to be taken by the Contracting Parties as well as the institutions was adopted by the Permanent High Level Group on 14 December 2011.<sup>9</sup>
- (6) At its meeting in December 2012, the Permanent High Level Group reviewed its Implementation Plan on the basis of the facts presented by the Secretariat and deplored the significant delay in preparatory work.<sup>10</sup> The Permanent High Level Group further asked that the “*Contracting Parties will initiate the necessary amendments to primary laws during 2013 with the goal to adopt them in early 2014.*” Each Contracting Party was expected to send to the Secretariat a timeline for the law amendment process by the end of February 2013.<sup>11</sup> Finally, the Permanent High Level Group also concluded that the Secretariat is expected to present an initial report on elements to be transposed in order to achieve compliance with the Third Energy Package at the next meeting of the Permanent High Level Group in March 2013.
- (7) On that ground, the Secretariat prepared a Background Paper on the main new elements of the Third Energy Package for implementation in the Contracting Parties presented to the Permanent High Level Group’s meeting on 14 March 2013.<sup>12</sup> The Permanent High Level Group, at the same meeting in March 2013, discussed the need for the technical assistance and consultancy to draft amendments to the existing primary legislation and signaled the

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<sup>1</sup> ANNEX 1

<sup>2</sup> Ministerial Council Recommendation No 2010/02/MC-EnC of 24 September 2010

<sup>3</sup> Conclusion 4 of 23<sup>rd</sup> Permanent High Level Group meeting, 14 December 2011

<sup>4</sup> Conclusions of the 23<sup>rd</sup> Permanent High Level Group meeting - Attachment 1 - Statement of Republic of Moldova regarding the implementation of the 3<sup>rd</sup> package

<sup>5</sup> Conclusions 6-7 of 10<sup>th</sup> Ministerial Council meeting, 18 October 2012

<sup>6</sup> Ministerial Council Decision 2012/05/EC-EnC of 5 December 2012

<sup>7</sup> The deadline for implementation of Article 9(1) of Directive 2009/73/EC for the other Contracting Parties is 1 June 2016 pursuant to Article 8 Ministerial Council decision 2011/02/MC-EnC

<sup>8</sup> 23<sup>rd</sup> Permanent High Level Group meeting, PHLG/14/12/2011-Annex 1/30.11.2011, Implementation Plan: Structured Approach to Transposing the 3<sup>rd</sup> Package in the Energy Community

<sup>9</sup> Conclusion of 23<sup>rd</sup> Permanent High Level Group meeting, 14 December 2011

<sup>10</sup> Conclusion 3 of 27<sup>th</sup> Permanent High Level Group meeting, 6 December 2012

<sup>11</sup> Conclusions 5 and 6 of 27<sup>th</sup> Permanent High Level Group meeting, 6 December 2012

<sup>12</sup> 28<sup>th</sup> Permanent High Level Group meeting, ANNEX1/28th PHLG/28-02-2013, Background Paper on the main new elements of the Third Package for implementation in the Contracting Parties

availability of support by the European Commission and other donors. Nonetheless, Republic of Moldova did not notify the Permanent High Level Group of need for sponsored technical assistance.<sup>13</sup>

- (8) Besides the discussions about the transposition and implementation of the Third Energy Package at institutional meetings, the Secretariat organized several workshops on addressing the challenges of implementation of the Third Energy Package in the Contracting Parties. The first workshop already took place on 15 April 2010, followed by the 3<sup>rd</sup> Joint Energy Community Regulatory Board and Permanent High Level Group meeting on 26 May 2011. These two events took place even before a legally binding decision on the Third Energy Package was adopted by the Energy Community institutions. Following those events, other dedicated workshops on implementation of the provisions of the Directives the Third Energy Package took place on 20 June 2012, in June 2013 and very recently in April 2016. Implementation of the gas *acquis* was also presented and discussed during the joint Energy Community and ENTSO-G workshop in February 2016.
- (9) In its Implementation Reports, the Secretariat has been continuously reminding the Contracting Parties about the deadline for transposition of Third Energy Package at national level and encouraging them to mobilize and speed up works on necessary legislative measures.<sup>14</sup> The Secretariat has also analysed the yearly progress in transposing the Third Energy Package after the deadline set in Decision 2011/02/MC-EnC expired and measured the Contracting Parties' compliance against that yardstick.
- (10) The Ministerial Council addressed the importance of timely implementation of the Third Energy Package regularly at its annual meetings since 2011.<sup>15</sup> At the meeting in 2014, the Ministerial Council "*urged all Contracting Parties to transpose the Third Package by 1 January 2015 with the assistance of the Secretariat, and invited the Secretariat to launch enforcement against those Contracting Parties lagging behind after that date.*"<sup>16</sup>

### **c. Activities for transposition of the Third Energy Package in Moldova**

- (11) Preparations for transposition of the Third Energy Package in Republic of Moldova started in 2014. A workshop related to the implementation of the Third Energy Package for gas, organised by the Ministry of Economy, took place in Chisinau on 22 October 2014, and for electricity on 11 June 2014. The Secretariat was asked by the Ministry of Economy for assistance in preparing the initial draft Law on Natural Gas and initial draft Law on Electricity.
- (12) Consequently, draft laws for the transposition of both electricity and gas *acquis* of the Third Energy Package were developed by the Secretariat and submitted to the Ministry on 27 June 2014 (electricity), and on 19 November 2014 (gas).
- (13) In March 2015, based on an agreement with the Ministry of Economy, the Secretariat engaged two Moldovan experts for alignment of the draft Law on Natural Gas with the national legislation of Moldova. The experts were continuously reporting to the Secretariat. In the meantime the draft Law was reviewed several times, and it was finalized and prepared for legislative procedures by the working group established by the Ministry.
- (14) The draft Law on Electricity has been dealt with by a working group established by the Ministry, external consultants, and the Secretariat. In February 2015 and June 2015, the

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<sup>13</sup> Conclusion 7 of 28<sup>th</sup> Permanent High Level Group meeting, 14 March 2013

<sup>14</sup> Secretariat's Annual Implementation Report, 1 September 2013, p.10

<sup>15</sup> Conclusion 5 of 10<sup>th</sup> Ministerial Council meeting, 18 October 2012: "*effectively start the preparations for the implementation of the Third Package should be in the focus of the activities over the next reporting period. The ministers noted the importance of implementation in the context of providing security of supply and adequate conditions for investments.*"; Conclusion 13 of 11<sup>th</sup> Ministerial Council meeting, 24 October 2013: "*The Ministerial Council recognized the importance of the transposition and implementation of the Third Energy Package in the context of providing security of supply and adequate conditions for investments. In this context the Third Energy Package related activities should continue to be in the center of the activities over the next reporting period*"

<sup>16</sup> Conclusion 9 of 12<sup>th</sup> Ministerial Council meeting, 23 September 2014

Secretariat performed a review of the versions at the time. The draft was finalized for further legislative procedures by the Ministry.

- (15) The draft Law on Electricity was approved by the Moldovan Government on 8 October 2015, and the draft Law on Natural Gas was approved on 28 October 2015. The two legal acts were subsequently submitted to Parliament for adoption. The draft Law on Natural Gas passed the first Parliamentary reading on 29 December 2015, followed by the draft Law on Electricity on 26 February 2016. The second reading of both laws took place on 27 April 2016. However, so far none of the two acts has been adopted. This was confirmed by the Ministry.<sup>17</sup>
- (16) A draft Law on Energy, which is mainly relevant for the status and competences of the national regulatory authority, was also prepared by the Ministry and reviewed by the Secretariat in the first half of 2014. It has neither been approved by Government nor been submitted to Parliament yet. In April 2016, the Ministry shared with the Secretariat a new draft. This draft was submitted to the Government at the end of April.
- (17) On 11 April 2016 the Secretariat sent a letter to the Minister of Economy,<sup>18</sup> informing him that the Secretariat intends to submit to the Ministerial Council a case against Republic of Moldova for non-compliance with the Treaty, and in particular with Article 6 thereof as well as Article 3(1) of the Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of the Third Energy Package.
- (18) On 25 April 2016, the Minister of Economy submitted a reply to the Secretariat's letter.<sup>19</sup> It informed about the activities undertaken in the country to prepare for adoption of Third Energy Package compliant legislation.
- (19) To date, the Secretariat has received no information from Republic of Moldova indicating that the national measures to comply with the obligation to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 by 1 January 2015 pursuant to Article 3(1) of Ministerial Decision 2011/02/MC-EnC have been adopted and implemented, nor is it in possession of any other information enabling it to conclude that such measures have, nevertheless, been taken.
- (20) On that basis, the Secretariat decided to submit this Reasoned Request to the Ministerial Council for decision.

## II. Relevant Energy Community Law

- (21) Energy Community law is defined in Article 1 of the Dispute Settlement Rules<sup>20</sup> 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”.
- (22) 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.”*
- (23) 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.*

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<sup>17</sup> Letter sent by the Ministry of Economy of 25 April 2016, ANNEX 3

<sup>18</sup> Letter sent to the Minister of Economy, dated 11 April 2016, ANNEX 2

<sup>19</sup> Letter sent by the Ministry of Economy 11 April 2016, 25 April 2016, ANNEX 3

<sup>20</sup> Dispute Settlement Rules, amended by Procedural Act 2015/04-MC-EnC of 16 October 2015 on amending Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty (“Dispute Settlement Rules”)



(24) Annex I to the Treaty, entitled “Lists of Acts Included in the *Acquis Communautaire* on Energy”, reads:

*“Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011*

*Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011*

*Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011*

*Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011”*

(25) Article 3 of the Ministerial Council Decision D/2011/02/MC-EnC, reads:

*“1. Each Contracting Party shall bring into force the law, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009, as adapted by this Decision, by 1 January 2015. They shall forthwith inform the Energy Community Secretariat thereof.*

*The Contracting Parties shall apply the measures referred to in the previous paragraph with effect from 1 January 2015 with the following exceptions:*

*[...]*

*2. The 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.”*

(26) 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**

(27) The present Reasoned Request concerns non-compliance of Republic of Moldova with the obligation to adopt and implement the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 by 1 January 2015 pursuant to Article 3(1) of Ministerial Decision 2011/02/MC-EnC and to forthwith notify those measures to the Secretariat within the deadline specified in that Decision, i.e. by 1 January 2015 pursuant to Article 3(2) of Ministerial Decision 2011/02/MC-EnC.

(28) 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.

(29) As a Contracting Party to the Treaty, Republic of Moldova is under an obligation to implement, i.e. to transpose at national level and to apply, the *acquis communautaire* on energy, including the Third Energy Package, as referred to in Article 11 of the Treaty and defined by its Annex I.<sup>21</sup>

<sup>21</sup> As amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC

- (30) Article 3(1) of Decision 2011/02/MC-EnC requires the Contracting Parties to bring into force the laws, regulations and administrative provisions necessary to comply with the Third Energy Package and to apply them as from 1 January 2015.
- (31) Article 3(2) Ministerial Council Decision 2011/02/MC-EnC also requires the Contracting Parties to communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by Decision 2011/02/MC-EnC.<sup>22</sup>
- (32) 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.
- (33) The time limit for Republic of Moldova to take measures necessary to comply with Article 3 of Decision 2011/02/MC-EnC as well as Articles 6 and 89 of the Treaty expired on 1 January 2015.
- (34) Despite numerous invitations and constant reminders issued by all Energy Community institutions and the assistance offered by the Secretariat and other organizations, Republic of Moldova evidently has not taken the measures necessary to comply with its obligations. At the date of submitting this Reasoned Request, the three draft Laws meant to transpose the Third Energy Package are still pending in Parliament. It is undisputed that Republic of Moldova 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.
- (35) In any event, the Secretariat has not been notified of any measures necessary to transpose the Third Energy Package.
- (36) Under those circumstances, the Secretariat must conclude that by failing to take, or to notify the Secretariat of, the measures necessary to comply with the Article 3(1) of the Ministerial Council Decision 2011/02/MC-EnC, Republic of Moldova has failed to fulfill its obligations under Articles 6 and 89 of the Treaty as well as Article 3(1) and (2) of the Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of the Third Energy Package.

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<sup>22</sup> Article 3(3) Ministerial Council Decision 2011/02/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:

by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 by 1 January 2015 pursuant to Article 3(1) of Ministerial Decision 2011/02/MC-EnC and by failing to forthwith notify those measures to the Secretariat, Republic of Moldova fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 3(1) and (2) of Ministerial Council Decision 2011/02/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 D/2011/02/MC-EnC
- ANNEX 2 Letter by the Secretariat to the Minister of Economy, dated 11 April 2016
- ANNEX 3 Letter sent by the Ministry of Economy as response to the Secretariat's letter of 11 April 2016, dated 25 April 2016