

**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-4/14

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community and Article 28 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, the

**SECRETARIAT OF THE ENERGY COMMUNITY**

against

**BOSNIA AND HERZEGOVINA**

Seeking a Decision from the Ministerial Council that Bosnia and Herzegovina,

by failing to adopt and to notify to the Secretariat, within the prescribed time limit a National Renewable Energy Action Plan, has failed to comply with Article 20 of the Treaty establishing the Energy Community read in conjunction with Article 4(1) and 4(2) of Directive 2009/28/EC.

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

**I. Relevant Facts**

1. As a Contracting Party to the Treaty establishing the Energy Community (hereinafter: "the Treaty"), Bosnia and Herzegovina is under an obligation to implement the *acquis communautaire* on renewables as listed in Article 20 of the Treaty. This included, in the original version of the Treaty, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market<sup>1</sup> and Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport.<sup>2</sup>
2. On 23 April 2009, Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC<sup>3</sup> ("hereinafter: Directive 2009/28/EC") was adopted in the European Union, establishing a common framework for the promotion of energy from renewable

<sup>1</sup> OJ L 283, 27.10.2001, p. 33.

<sup>2</sup> OJ L 123, 17.5.2003, p. 42.

<sup>3</sup> OJ L 140, 5.6.2009, p. 16.

sources. The Directive sets mandatory national targets for the overall share of energy from renewable sources in the gross final consumption of energy and for the share of energy from renewable sources in transport. The Directive also lays down rules relating to statistical transfers between Member States, joint projects between Member States and with third countries, guarantees of origin, administrative procedures, information and training, and access to the electricity grid for energy from renewable sources. It also establishes sustainability criteria for biofuels and bioliquids.

3. On 18 October 2012, the Ministerial Council of the Energy Community decided to incorporate Directive 2009/28/EC into the Energy Community *acquis communautaire* on renewables by amending Article 20 of the Treaty.<sup>4</sup> The Directive, as adapted, is thus binding on the Contracting Parties to the Treaty, including Bosnia and Herzegovina. The overall deadline for the implementation of Directive 2009/28/EC for the Contracting Parties expired on 1 January 2014.<sup>5</sup>
4. Article 4 of the Directive requires the adoption of National Renewable Energy Action Plan to ensure that the mandatory national overall targets are achieved. In the case of Bosnia and Herzegovina, the overall target is set at 40%.<sup>6</sup>
5. On the basis of the National Renewable Energy Action Plan, Contracting Parties are expected to work towards an indicative trajectory towards the achievement of their final mandatory targets. The National Renewable Energy Action Plan requires information on sectoral targets and on measures to be taken to support their achievement as well as the overall implementation of the Directive.
6. The National Renewable Energy Action Plan must be presented in the form of a template adopted by the European Commission<sup>7</sup> and be submitted to the Secretariat. On this basis, the Secretariat shall evaluate the National Renewable Energy Action Plans and may issue recommendations.
7. By the date of submission of this Reasoned Request, the Secretariat has not been notified by Bosnia and Herzegovina of an adopted National Renewable Energy Action Plan.
8. Renewable Energy Action Plans were adopted by the Ministry of Industry, Energy and Mining of Republika Srpska in May 2014 and by the Ministry of Energy, Mining and Industry of the Federation of Bosnia and Herzegovina in June 2014 and submitted to the Secretariat. No Renewable Energy Action Plan was adopted in the Brčko District.
9. Moreover, the Secretariat has been informally made aware that at State level, the Ministry of Foreign Trade and Economic Relations has tasked consultants with preparing a National Renewable Energy Action Plan covering both entities as well as the Brčko District. This process, however, is still at a very early stage.

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<sup>4</sup> Decision D/2012/04/MC-EnC of the Ministerial Council of the Energy Community on the implementation of Directive 2009/28/EC and amending Article 20 of the Energy Community Treaty.

<sup>5</sup> Article 3(1)(i) of Decision 2012/04/EnC of Ministerial Council of 18 October 2012.

<sup>6</sup> Article 4(2) of Decision 2012/04/MC-EnC of the Ministerial Council of 18 October 2012.

<sup>7</sup> OJ L 182, 15.7.2009, p. 33–62.

## II. Relevant Energy Community Law

10. Energy Community Law is defined in Article 1 of Procedural Act No 2008/01/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 (hereinafter: "Dispute Settlement Procedures") as "a Treaty obligation or [...] a Decision addressed to [a Party]".

11. 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" (Article 2(1) Dispute Settlement Procedures).

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 the Treaty.*

13. Article 20 of the Treaty, as amended reads:

*Each Contracting Parties shall implement Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/20/EC.*

14. Article 4 of Directive 2009/28/EC reads:

*1. Each Member State shall adopt a national renewable energy action plan. The national renewable energy action plans shall set out Member States' national targets for the share of energy from renewable sources consumed in transport, electricity and heating and cooling in 2020, taking into account the effects of other policy measures relating to energy efficiency on final consumption of energy, and adequate measures to be taken to achieve those national overall targets, including cooperation between local, regional and national authorities, planned statistical transfers or joint projects, national policies to develop existing biomass resources and mobilise new biomass resources for different uses, and the measures to be taken to fulfil the requirements of Articles 13 to 19.*

*2. Member States shall notify their national renewable energy action plans to the Commission by 30 June 2010.*

*(...)*

*5. The Commission shall evaluate the national renewable energy action plans, notably the adequacy of the measures envisaged by the Member State in accordance with Article 3(2). In response to a national renewable energy action plan or to an amended national renewable energy action plan, the Commission may issue a recommendation.*

15. Article 3 of Ministerial Council Decision 2012/04/MC-EnC reads:

*1. Save otherwise stated in the present Decision, the text of Directive 2009/28/EC shall be adapted to the Energy Community as follows:*

*a. The term "Member States" shall be replaced by "Contracting Parties";*

- b. *The term "Community" shall be replaced by "Energy Community";*
  - c. *References to EU Law shall be replaced by references to the equivalent provisions under the Energy Community Treaty, if any, or shall not be applicable, as appropriate;*
  - d. *The term "European Commission" shall be replaced by "Energy Community Secretariat"*
- (...)

16. Article 5 of Ministerial Council Decision 2012/04/MC-EnC reads:

(...)

- 2. *In Article 4(2) of the Directive, the date "30 June 2010" shall read "30 June 2013".*
- 3. *Contracting Parties shall present their National Renewable Energy Action Plans in the form of the template adopted by the Commission under the second subparagraph of Article 4(1) of the Directive.*<sup>8</sup>

### III. Preliminary Procedure

17. According to Article 90 of the Treaty, the Secretariat may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. Pursuant to Article 10 of the Dispute Settlement Procedures, the Secretariat shall carry out a preliminary procedure before submitting a reasoned request to the Ministerial Council.
18. On 11 February 2014, the Secretariat sent an Opening Letter under Article 12 of the Dispute Settlement Procedures to Bosnia and Herzegovina, preliminarily concluding that Bosnia and Herzegovina failed to comply with Articles 20 of the Treaty read in conjunction with Article 4 of Directive 2009/28/EC by not adopting the National Renewable Energy Action Plan according to the deadline set by Article 5(1) of Ministerial Council Decision 2012/04/MC-EnC, i.e. by 30 June 2013.<sup>9</sup>
19. The Ministry of Foreign Trade and Economic Relation of Bosnia and Herzegovina submitted a reply to the Opening Letter on 8 April 2014.<sup>10</sup> The letter provided information regarding several developments of the legal and regulatory framework at the level of entities, including the drafting status of the renewable energy action plans. However, no information was given as to any plans for the adoption of a National Renewable Energy Action Plan so as to rectify the state of non-compliance addressed by the Opening Letter.
20. As there was still no National Renewable Energy Action Plan adopted at national level, the Secretariat assumed that the preliminary legal assessment and the conclusions of the Opening Letter remained valid and issued a Reasoned Opinion against Bosnia and Herzegovina on 24 February 2015.<sup>11</sup>

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<sup>8</sup> Commission Decision 2009/548/EC of 30 June 2009 establishing a template for National Renewable Energy Action Plans under Directive 2009/28/EC of the European Parliament and of the Council, OJ L 182, 15.7.2009, p. 33–62.

<sup>9</sup> Annex 1.

<sup>10</sup> Annex 2.

<sup>11</sup> Annex 3.

21. In accordance with Article 13(2) of the Dispute Settlement Procedures, Bosnia and Herzegovina was given two months, i.e. by 24 April 2015, to rectify the breaches of Energy Community Law identified in the Reasoned Opinion, or at least to make clear and unequivocal commitments in that respect, and to notify the Secretariat of all steps undertaken. To date, no such steps have been undertaken and no written reply has been submitted to the Reasoned Opinion by the state authorities of Bosnia and Herzegovina.
22. Considering the extensive delay in implementation of the respective requirements deriving from Directive 2009/28/EC as adapted by Decision 2012/04/MC-EnC of the Ministerial Council, the Secretariat, in accordance with Article 28 of the Dispute Settlement Procedures, decided to submit the present Reasoned Request seeking a Decision from the Ministerial Council on the failure by Bosnia and Herzegovina to implement Energy Community Law with respect to the adoption and notification of a National Renewable Energy Action Plan.

#### IV. Legal Assessment

23. The subject-matter of the present case consists of non-compliance of Bosnia and Herzegovina with the Energy Community *acquis communautaire* related to the adoption and submission to the Secretariat of a National Renewable Energy Action Plan, as already identified in the Opening Letter and the Reasoned Opinion, issued on 11 February 2014 and 24 February 2015, respectively.
24. As mentioned above, Renewable Energy Action Plans were adopted by the two entities of Bosnia and Herzegovina, Republika Srpska and the Federation of Bosnia and Herzegovina. The adoption of two separate entity action plans, however, does not fulfill the requirements of Directive 2009/28/EC.
25. According to Article 4(1) of Directive 2009/28/EC, as adapted by the Ministerial Council, each Contracting Party shall adopt a National Renewable Energy Action Plan. The insistence of the Directive on this qualification is owed to the fact that Directive 2009/28/EC envisages binding targets which need to be achieved at national level.
26. Article 4(1) of Directive 2009/28/EC, as adapted, clearly sets out that

*The national renewable energy action plans shall set out Contracting Parties' national targets for the share of energy from renewable sources consumed in transport, electricity and heating and cooling in 2020, taking into account the effects of other policy measures relating to energy efficiency on final consumption of energy, and adequate measures to be taken to achieve those national overall targets, including cooperation between local, regional and national authorities, planned statistical transfers or joint projects, national policies to develop existing biomass resources and mobilise new biomass resources for different uses, and the measures to be taken to fulfil the requirements of Articles 13 to 19.<sup>12</sup>*

27. Since national renewable energy targets are established at national level, Directive 2009/28/EC requires Contracting Parties to develop a coordinated document at national level, i.e. addressing the Contracting Party as a whole and being adopted by that Contracting Party. In the case of Bosnia and Herzegovina, this requires State level action, which would then have to elaborate on

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<sup>12</sup> Emphasis added.

the required cooperation between local, regional, entity and national authorities. The non-coordinated adoption and notification of two entities' action plans does thus not suffice to satisfy the very objective of Directive 2009/28/EC, namely to achieve a national target and to make sure that the measures necessary to achieve this target are taken in a coordinated manner by the authorities responsible according to the constitutional structure of Bosnia and Herzegovina.

28. The Secretariat is aware of and respects the constitutional structure of Bosnia and Herzegovina and its division into two entities. At the same time, the State of Bosnia and Herzegovina as a Contracting Party to the Treaty, not its entities, assumes full responsibility for compliance with the *acquis*. Under Article 2(2) of the Dispute Settlement Procedures, this includes „*any measure by the public authorities of the Party (central, regional or local [...]) [...]*“. Any failure of the (legislative, administrative, regulatory or judicative) authorities Republika Srpska and/or the Federation of Bosnia and Herzegovina to comply with the *acquis* is thus attributable to the State of Bosnia and Herzegovina as a Contracting Party to the Treaty.
29. The Secretariat further recalls that EU Member States with decentralized administrative systems have complied with their obligation under Article 4 of Directive 2009/28/EC by adopting National Renewable Energy Action Plans. Belgium, Germany, Italy, Spain and the United Kingdom, for instance, while establishing certain responsibilities for different administrative levels in their National Renewable Energy Action Plans with respect to the implementation of that plan, all adopted action plans at national level.
30. Finally, given the fact that no Renewable Energy Action Plan was adopted in the Brčko District, it cannot be considered that the existing Renewable Energy Action Plans cover the whole territory of Bosnia and Herzegovina.
31. The National Renewable Energy Action Plan “*shall be presented in the form of the template adopted by the Commission under the second subparagraph of Article 4(1) of the Directive*” as stipulated in Article 5(2) of Ministerial Council Decision 2012/04/MC-EnC, and be submitted to the Secretariat under Article 4(2) of Directive 2009/28/EC.
32. To date, Bosnia and Herzegovina has not adopted a National Renewable Energy Action Plan at State level. Furthermore, the Secretariat has not been notified by Bosnia and Herzegovina of its National Renewable Energy Action Plan.
33. The Secretariat thus concludes that Bosnia and Herzegovina failed to fulfill its obligations under Article 4(1) and 4(2) of Directive 2009/28/EC, namely to adopt and to notify to the Secretariat a National Renewable Energy Action Plan.

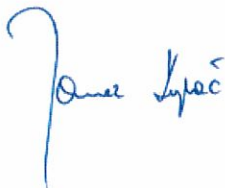
## ON THESE GROUNDS

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 and to notify to the Secretariat, within the prescribed time limit a National Renewable Energy Action Plan, Bosnia and Herzegovina has failed to comply with Article 20 of the Treaty read in conjunction with Article 4(1) and 4(2) of Directive 2009/28/EC.

On behalf of the Secretariat of the Energy Community

Vienna, 12 May 2015



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