



**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'),¹ 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').² 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.

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

² ANNEX 1

2. Factual background

- (3) On 22 March 2021, the Secretariat sent a letter to the Ministry of Economy and Environment of Kosovo*,³ 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.⁴ 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.“

³ ANNEX 2.

⁴ 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.⁵
- (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.⁶ 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:

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

⁶ 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

DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

D/2016/12/MC-EnC adapting and implementing Directive 2011/92/EU of the European Parliament and of the Council, and amending the Treaty establishing the Energy Community

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

Having regard to the Treaty establishing the Energy Community, and in particular Articles 24, 25, 79 and Article 100(i) thereof,

Having regard to the proposal from the European Commission,¹

Whereas:

- (1) Article 12 of the Treaty requires each Contracting Party to implement the *acquis communautaire* on environment¹ in compliance with the timetable for the implementation of those measures set out in Annex II to that Treaty.
- (2) In accordance with Article 16 of the Treaty establishing the Energy Community, *acquis communautaire* on environment means, *inter alia*, Council Directive 85/337/EEC², as amended by Council Directive 97/11/EC³ and Directive 2003/35/EC of the European Parliament and of the Council⁴.
- (3) Directive 2009/31/EC of the European Parliament and of the Council⁵ amended Directive 85/337/EEC in order to include projects related to the geological storage of carbon dioxide. That amendment has not yet been incorporated in the legal framework of the Energy Community.
- (4) Directive 2011/92/EU of the European Parliament and of the Council⁶ codified Directive 85/337/EEC and replaced it with effect from 17 February 2012.
- (5) Directive 2011/92/EU was amended by Directive 2014/52/EU of the European Parliament and of the Council⁷ with a view to simplify and improve environmental impact assessment procedures.

¹ C(2016) 1411 final, 11.3.2016

² Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, 5.7.1985, p. 40)

³ Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ L 73, 14.3.1997, p. 5)

⁴ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17)

⁵ Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide (OJ L 140, 5.6.2009, p. 114)

⁶ 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 (OJ L 26, 28.1.2012, p. 1)

- (6) It is therefore necessary to implement and adapt Directive 2011/92/EU as amended by Directive 2014/52/EU for the purposes of the Treaty establishing the Energy Community.
- (7) It is also necessary to align the *acquis communautaire* on environment set out in Article 16 and the timetable for implementation set out in Annex II to the Treaty with the recent evolution of Union law concerning environmental impact assessment.
- (8) The Treaty establishing the Energy Community should therefore be amended accordingly.
- (9) The Environmental Task Force, at its meetings on 28 October 2015 and 12 May 2016, analysed the proposal in detail and recommended a number of adaptations to it which are reflected in this Decision.
- (10) The Permanent High Level Group, at its meetings of 15 March 2016 and 22 June 2016 elaborated and proposed to adopt this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The Treaty establishing the Energy Community is amended as follows:

(1) in Article 16, point (i) is replaced by the following:

“(i) 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 as amended by Directive 2014/52/EU,”

(2) in Annex II, point 1 is replaced by the following:

“1. Each Contracting Party shall implement 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.”

Article 2

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.

⁷ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJ L 124, 25.4.2014, p. 1).

Article 3

For the purposes of the Treaty establishing the Energy Community the dates set in Article 3(1) and (2) of Directive 2014/52/EU shall be read as 1 January 2019.

Article 4

1. In case of projects of Energy Community interest, the Contracting Party in whose territory the project is intended to be carried out shall send the following information to the Secretariat as soon as possible and no later than when informing its own public:

(a) a description of the project, together with any available information on its impacts on the environment;

(b) information on the nature of the decision which may be taken for authorisation of the project.

2. The Secretariat shall ensure that the environmental impact assessments of the projects referred to in paragraph 1 of this Article fulfil the requirements of Directive 2011/92/EU as amended by Directive 2014/52/EU.

Article 5

For the purposes of the Treaty establishing the Energy Community, references to "Member States" and to "Commission" throughout Directive 2011/92/EU as amended by Directive 2014/52/EU shall be read as "Contracting Parties" and "Secretariat", respectively.

Article 6


This Decision shall enter into force on the day of its adoption.

Article 7

This Decision is addressed to the Contracting Parties to the Treaty establishing the Energy Community.

Done in Sarajevo, on 14 October 2016

For the Ministerial Council


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Presidency

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

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Vienna, 22 March 2021
KS-MC/O/jko/05/22-03-2021

Subject: Transposition of Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

Excellency,

We are writing to you with regard to the Environmental Impact Assessment Directive (EIA Directive) as part of the legal obligations Kosovo* entered into in the framework of the Energy Community Treaty. Directive 2011/92/EU¹ of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment was amended in the European Union by Directive 2014/52/EU in 2014. By Decision 2016/12/MC-EnC of the Ministerial Council, it became part of the environmental *acquis* of the Energy Community.

The deadline for transposing Directive 2014/52/EU into national legislation by Kosovo* was 1 January 2019.²

The Law on Environmental Impact Assessment (EIA Law) in Kosovo* adopted in 2009³ transposed the Directive 85/337/EEC and its three amendments – codified by the later Directive 2011/92/EU.

Since 2009, no new legislation, or amendments to existing legislation was adopted or drafted in order to transpose the amending Directive 2014/52/EU by Kosovo*.

This omission was mentioned in the 2019⁴ and 2020⁵ Implementation Reports and discussed during the last Environmental Task Force meeting⁶ in November 2020.

H.E. MR. BLERIM KUÇI
MINISTER OF ECONOMY AND ENVIRONMENT
KOSOVO*

*This designation is without prejudice to positions on status, and is in line with the UNSCR 1244 (1999) and the ICJ Opinion on the Kosovo declaration of independence

¹ The initial EIA Directive 85/337/EEC and its three amendments have been codified by the Directive 2011/92/EU

² Article 2 of the Decision D/2016/12/MC-EnC of the Ministerial Council concerning the amendments to Directive 2011/92/EU introduced by Directive 2014/52/EU

³ Law No.03/L-024 on Environmental Impact Assessment adopted on 23 February 2009

⁴ Annual Implementation Report of the Energy Community Secretariat, 1 November 2019 p. 85

⁵ Annual Implementation Report of the Energy Community Secretariat, 1 November 2020 p. 93

⁶ XXI Meeting of the Environmental Task Force 25 November 2020

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We would like to recall that adoption of new legislation necessary to comply with Directive 2011/92/EU as amended by Directive 2014/52/EU is required by Article 2 of Ministerial Council Decision 2016/12/MC-EnC, as well as Articles 6 and Article 89 of the Energy Community Treaty.

To avoid dispute settlement procedures under Article 91 of the Treaty, we would kindly like to ask your services to submit any information you may deem relevant to the above preliminary conclusions of the Secretariat as soon as possible, but not later than **22 April 2021**.

For any questions, your services are invited to contact our Environmental Expert, Ms Aleksandra Bujaroska (aleksandra.bujaroska@energy-community.org).

Thanking you in advance for your cooperation, we remain sincerely yours,



Janez Kopač
Director



Dirk Buschle
Deputy Director / Legal Counsel