

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

In case ECS-8/21, the Secretariat of the Energy Community  
against  
Kosovo<sup>1</sup>, the

ADVISORY COMMITTEE,

composed of  
Rajko Pirnat, Alan Riley, Helmut Schmitt von Sydow, Verica Trstenjak, and  
Wolfgang Urbantschitsch

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 of the Ministerial Council of the Energy Community of 16 October 2015 and by Procedural Act No 2022/03/MC-EnC of the Ministerial Council of the Energy Community of 15 December 2022 on amending Procedural Act 2008/01/MC-EnC ('Dispute Settlement Rules 2022'),

acting unanimously,

gives the following

OPINION

**I. Procedure**

By e-mail dated 18 July 2023 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-8/21 against Kosovo. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Kosovo by failing to achieve significant emission reductions with regard to the four large combustion plants falling under the scope of its National Emission Reduction Plan fails to comply with Articles 4(3), 4(6) and 16 of 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 read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

Kosovo replied to the Reasoned Request by letter dated 21 August 2023 included in their reply to the Advisory Committee's inquiry about the necessity of a public hearing. Both Kosovo and the secretariat agreed that a public hearing could be dispensed with according to Article 8 (1) of the Rules of Procedure of the Energy Community Advisory Committee as amended. Kosovo was informed about the Secretariat's position.

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<sup>1</sup> In the context of this Opinion this designation 'Kosovo' is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence.

The Georgian National Energy and Water Supply Regulatory Commission (GNERC) submitted written observations according to Article 31 (2) Dispute Settlement Rules 2022 to the Secretariat on 16 November 2023, which were forwarded to the Advisory Committee on 17 November 2023. GNERC stresses additional challenges in the transposition of Energy Community Law for smaller countries, refers to the challenges for Kosovo during the transposition process, such as the Covid pandemic, and emphasizes the efforts of Kosovo to transpose Directive 2001/80/EC into national law. GNERC did not dispute the legal assessment in the Reasoned Request.

## II. Provisions allegedly violated by the Contracting Party concerned

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.*

Article 16 of the Treaty reads:

*The “*acquis communautaire* on environment”, for the purpose of this Treaty, shall mean*  
*(i) – (ii) [...]*  
*(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,*  
*(iv) – (vii) [...]*

Article 4 of Directive 2001/80/EC reads:

*1. – 2. [...]*  
*3. Without prejudice to Directive 96/61/EC and Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, Contracting Parties shall, by 1 January 2018 at the latest, achieve significant emission reductions by:*  
*(a) taking appropriate measures to ensure that all licences for the operation of existing plants contain conditions relating to compliance with the emission limit values established for new plants referred to in paragraph 1; or*  
*(b) ensuring that existing plants are subject to the national emission reduction plan referred to in paragraph 6; and, where appropriate, applying Articles 5, 7 and 8.*  
*4. – 5. [...]*  
*6. Contracting Parties may, without prejudice to this Directive and Directive 96/61/EC, and taking into consideration the costs and benefits as well as their obligations under Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants and Directive 96/62/EC, define and implement a national emission reduction plan for existing plants, taking into account, inter alia, compliance with the ceilings as set out in Annexes I and II.*  
*The national emission reduction plan shall reduce the total annual emissions of nitrogen oxides (NO<sub>x</sub>), sulphur dioxide (SO<sub>2</sub>) and dust from existing plants to the levels that would have been achieved by applying the emission limit values referred to in paragraph 3 to the existing plants in operation in the year 2012, (including those existing plants undergoing a rehabilitation plan in 2012, approved by the competent authority, to meet emission reductions required by national legislation) on the basis of each plant’s actual annual operating time, fuel used and thermal input, averaged over the last five years of operation up to and including 2012.*

*The closure of a plant included in the national emission reduction plan shall not result in an increase in the total annual emissions from the remaining plants covered by the plan. The national emission reduction plan may under no circumstances exempt a plant from the provisions laid down in relevant Community legislation, including inter alia Directive 96/61/EC.*

*The following conditions shall apply to national emission reduction plans:*

*(a) the plan shall comprise objectives and related targets, measures and timetables for reaching these objectives and targets, and a monitoring mechanism;*

*(b) Contracting Parties shall communicate their national emission reduction plan to the Secretariat no later than 31 December 2015;*

*(c) within nine months of the communication referred to in point (b) the Secretariat shall evaluate whether or not the plan meets the requirements of this paragraph. When the Secretariat considers that this is not the case, it shall inform the Contracting Party and within the subsequent three months the Contracting Party shall communicate any measures it has taken in order to ensure that the requirements of this paragraph are met;*

*(d) the Secretariat shall, no later than 27 November 2002, develop guidelines to assist Contracting Parties in the preparation of their plans.*

*National emission reduction plans shall be in use up to 31 December 2027 at the latest. The ceilings for the year 2018 shall be calculated on the basis of the applicable emission limit values at the time of submission of the plan as set out in Part A to Annexes III to VII to Directive 2001/80/EC or, where applicable, on the basis of the rates of desulphurisation set out in Annex III to Directive 2001/80/EC. In the case of gas turbines, the emission limit values for nitrogen oxides set out for such plants in Part B of Annex VI to Directive 2001/80/EC shall be used.*

*The ceilings for the year 2023 shall be calculated on the basis of the applicable emission limit values in that year set out in Part A to Annexes III to VII to Directive 2001/80/EC or, where applicable, on the basis of the rates of desulphurisation set out in Annex III to Directive 2001/80/EC. In the case of gas turbines, the emission limit values for nitrogen oxides set out for such plants in Part B of Annex VI to Directive 2001/80/EC shall be used. The ceilings for the years 2019 to 2022 shall be set providing a linear trend between the ceilings of 2018 and 2023.*

*The ceilings for the year 2026 and 2027 shall be calculated on the basis of the relevant emission limit values set out in Part 1 of Annex V to Directive 2010/75/EU or, where applicable, the relevant rates of desulphurisation set out in Part 5 of Annex V to Directive 2010/75/ EU. The ceilings for the years 2024 and 2025 shall be set providing a linear decrease of the ceilings between 2023 and 2026.*

*7. – 8. [...]*

Article 16 of Directive 2001/80/EC reads:

*The Contracting Parties shall determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.*

### **III. Legal Assessment**

According to Article 32 (1) Dispute Settlement Rules 2022, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. On the basis of this provision, the Advisory Committee assessed the Reasoned Request and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

The Reasoned Request of the Secretariat alleges that by failing to achieve significant emission reductions with regard to the four large combustion plants falling under the scope of its National

Emission Reduction Plan Kosovo fails to comply with Articles 4(3), 4(6) and 16 of 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 read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

In its reply to the Reasoned Request, Kosovo did not dispute its failure to achieve significant emission reductions with regard to the four large combustion plants falling under the scope of the National Emission Reduction Plan (NERP). The arguments brought forward by Kosovo to justify the implementation of the NERP, were the COVID-19 pandemic, technical barriers, and the energy crisis, which had been unforeseen at the time of its adoption in 2018 and should be considered a force majeure.

These legal arguments could only justify Kosovo's breach after the time span ranging from the outbreak of the COVID 19 pandemic in 2020 until now. By raising such a plea, Kosovo contends in substance a *force majeure* releasing it temporary from the obligation to perform the Treaty. While it might be correct that Covid-19 presents certain elements of *force majeure*, it is also true that it is an epidemic that came to Europe in January and February 2020. Kosovo on the other hand did not dispute that the breach of the ceilings established by the NERP started already in the 2018 reporting year. That deadline was not complied with at least two years before Covid-19 came to Europe. Thus, the plea of *force majeure* is inoperative. Kosovo cannot rely on unforeseeable circumstances or *force majeure* in circumstances in this case where a diligent and prudent Contracting Party would have been able to avoid the expiry of the period for implementation. Thus, Kosovo's breach of Article 4(3) and 4(6) Directive 2001/80/EC cannot be considered the result of events – and this applies similarly to the energy crisis starting in 2022 – originating after 2018.

As regards Article 16 Directive 2001/80/EC, both the Secretariat and Kosovo submit in the Reasoned Request and the reply to it respectively, that a law, namely Law No. 08/L-025 on Protection of Air from Pollution, was adopted in summer 2022. However, according to settled case law of the European Court of Justice '*the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the Court being unable to take account of any subsequent changes*' (Case C-632/18 Commission v Slovenia, para 24). According to Article 94 of the Treaty, '*[t]he institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities*'. The Advisory Committee acts on request of the Ministerial Council and is bound by Energy Community law pursuant to Article 5 (3) of its Rules of Procedure. Hence, despite the Advisory Committee not being explicitly named in Article 94 of the Treaty, it is bound by the interpretation of EU terms and concepts if adopted by Energy Community law. This interpretation is also confirmed by Article 32 (2) of the Dispute Settlement Rules 2022 where Article 94 of the Treaty is named as being of particular importance for the work of the Advisory Committee. In the present case, the close of the period prescribed by the Secretariat for Kosovo to comply with the reasoned opinion was 21 April 2022. Hence, there is also no justification for Kosovo's breach of Article 16 Directive 2001/80/EC.

#### **IV. Conclusions**

The Advisory Committee considers that

Kosovo by failing to achieve significant emission reductions with regard to the four large combustion plants falling under the scope of its National Emission Reduction Plan failed to comply with Articles 4(3), 4(6) and 16 of 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 read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

Done in Vienna on 4 December 2023

On behalf of the Advisory Committee

A handwritten signature in blue ink, appearing to read 'W. Urbantschitsch', with a stylized flourish at the end.

Wolfgang Urbantschitsch, President