

PROCEDURAL ACT
OF THE PERMANENT HIGH LEVEL GROUP
OF THE ENERGY COMMUNITY

PA 2018/02/PHLG-EnC: on a procedure in case of urgency and interim measures under Article 18(3) of Procedural Act 2015/04/MC-EnC

THE PERMANENT HIGH LEVEL GROUP OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community, and in particular Articles 2, 53, 82, 83 and 87 thereof,

Whereas:

- (1) On 16 October 2015 the Ministerial Council of the Energy Community adopted Procedural Act 2015/04/MC-EnC on amending Procedural Act 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for dispute settlement under the Treaty,
- (2) Article 18(3) of Procedural Act 2015/04/MC-EnC calls upon the Permanent High Level Group to adopt guidelines determining the criteria for urgency, the procedure for adoption as well as the scope and limits of interim measures,
- (3) Under Article 82 of the Treaty measures are to be proposed by a Party or the Secretariat,
- (4) Having regard to the proposal submitted by the Secretariat,

ADOPTS THE FOLLOWING PROCEDURAL ACT:

Article 1

The Energy Community Guidelines for a Procedure in Case of Urgency and Interim Measures are adopted as set out in the Annex to this Procedural Act.

Article 2

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

Done in Skopje, on 2018

For the Presidency

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EXPLANATORY MEMORANDUM

The Energy Community Dispute Settlement Rules contain the deadlines applicable throughout the dispute settlement procedure. These deadlines have proved reasonable in practice: the Secretariat needs time for fact-finding and legal analysis once a complaint is lodged, and the Contracting Party concerned needs to be granted the opportunity to submit its observations, in accordance with the principle of fair trial and the right to be heard.

However, there are cases when these deadlines are simply too long and their observance may pose a risk of irreparable damage to an objective of the Treaty. By way of example, one of the main objectives of the Treaty is the creation of a stable regulatory and market framework so that all Contracting Parties have access to stable and continuous energy supply that is essential for economic development and social stability.¹ Recent experience has shown that national measures such as export bans endanger seriously the security of supply in the region. When such an event, which has a direct and immediate impact on the consumers, complying with the deadlines prescribed in the Energy Community Dispute Settlement Rules may defeat the purpose of any adverse decision by the Ministerial Council, as a decision would probably be issued almost two years after the breach occurred. Such a situation may also, depending on the actual facts of the case, call for preliminary measures to be imposed on the Contracting Party until the decision by the Ministerial Council reaches a decision (such a temporarily lifting the export ban).

The somewhat long deadlines in the Energy Community Dispute Settlement Rules, though justified, may represent in some cases like an export ban a weakness of the system. The need for a more flexible approach and an improved enforcement system has been noticed also by European institutions. The Energy Council in 2011 concluded that the Energy Community should be enhanced notably by “encouraging full and timely implementation and enforcement of the *acquis*,” as well as “adapting the decision-making and organisational structures of the Energy Community to future challenges.” In 2013, the Council requested that “possible ways of improving the institutional settings and the enforcement mechanism should be considered”.

The possibility of commencing a special procedure in urgent cases is such an improvement of the current dispute settlement system, as it would allow a faster resolution of disputes and the possibility of imposing interim measures would preserve the *status quo* and prevent any irreparable harm. However, any expedited procedure and the imposition of interim measures should be used by the Energy Community institutions on an exceptional basis, and only after careful balancing of the interests of those affected by the national measure at stake, on the one hand, and of the Contracting Party concerned, on the other.

¹ Article 2(1)(a) of the Treaty.

Article 18 of the Dispute Settlement Rules of the Energy Community provide for a procedure in case of urgency: *“(1) In cases of urgency due to the risk of serious and irreparable damage to an objective of the Treaty, the Secretariat may, on the basis of a prima facie finding of non-compliance, refer a reasoned request directly to the next possible meeting of the Permanent High Level Group. (2) The Permanent High Level Group may take appropriate and proportionate interim measures upon request by the Secretariat. The Permanent High Level Group shall review the existence of urgency. (3) For the application of this article, the Permanent High Level Group shall adopt guidelines determining the criteria for urgency, the procedure for adoption as well as the scope and limits of interim measures.”*

In order for this provision to take effect, the Permanent High Level Group should adopt guidelines describing the procedure in case of urgency, defining the parties which may initiate or take part in such procedure, setting clear deadlines, and describing the steps to be taken throughout the procedure. Such guidelines should be adopted under Article 53(e) of the Treaty, according to which the Permanent High Level Group shall adopt Procedural Acts, not involving the conferral of tasks, powers or obligations on other institutions of the Energy Community.

The Secretariat has developed Guidelines for a Procedure in Case of Urgency and Interim Measures to be applied in a situation of urgency, upon a *prima facie* finding of non-compliance of a national measure with the Energy Community *acquis*.

The Procedure in Case of Urgency and Interim Measures is not a different, parallel dispute settlement procedure. It simply permits that in certain cases, in which there is a risk of serious and irreparable damage to an objective of the Treaty, a reasoned request is decided upon as a matter of priority by the Ministerial Council. This procedure also allows the Permanent High Level Group the possibility to impose interim measures against the Contracting Party concerned, provided that a number of conditions are fulfilled. The Contracting Party concerned is given the opportunity to submit its position.

The Guidelines set out the scope of the Procedure in Case of Urgency in Section I. Section II of the Guidelines spells out the criteria which must be fulfilled in order for a particular situation to be qualified as one of “urgency”. Section III of the Guidelines sets the ways in which a reasoned request may be submitted to the Permanent High Level Group in cases of urgency, and who has the standing to do so. Section IV contains the conditions to be fulfilled by a reasoned request and the application to impose interim measures in the cases of urgency. Section V sets the procedure for the adoption of interim measures, while Section VI sets the scope and the limits of such interim measures. Section VII provides the possibility for the Permanent High Level Group to request an opinion from the Advisory Committee. Section VIII addresses a situation when a change in circumstances may occur. According to Section IX, refusal of a request to commence the procedure in case of urgency should not bar the party who made it from making another application based on new facts. Section X describes further procedures before the

Permanent High Level Group and the Ministerial Council. Finally, Section XI contains the sanction for non-compliance with the interim measures imposed by the Permanent High Level Group.

ANNEX

Energy Community Guidelines for a Procedure in Case of Urgency and Interim Measures

I. Scope of the procedure in case of urgency

- (1) In cases of urgency, the Secretariat may refer a reasoned request directly to the next possible meeting of the Permanent High Level Group without a preliminary procedure due to the risk of serious and irreparable damage to an objective of the Treaty.
- (2) The Secretariat may submit a reasoned request pursuant to paragraph 1 of this Article at the request of a private body, by a Party or by the Regulatory Board, or *ex officio* by its own initiative.
- (3) Upon review of the existence of urgency, the Permanent High Level Group may impose interim measures upon request by the Secretariat.

II. Urgency

- (1) The urgency shall be assessed by the Permanent High Level Group on a case by case basis.
- (2) The criteria for determining the urgency are the following:
 - a. The need to avoid serious and irreparable damage to one of the objectives of the Treaty; such objectives may include: protection of investments made in the energy field, security of supply, environment protection, fighting climate change;
 - b. The need to avoid imminent risk for private bodies not reparable by monetary compensation, or
 - c. The need to avoid imminent risk for private bodies not reparable by the final decision by the Energy Community Ministerial Council under Article 91 of the Treaty.
- (3) With regard to paragraph 2 above, the damage must not be hypothetical, and it must entail a sufficient degree of probability.
- (4) With regard to any of the situations described in paragraphs 2(a) – (c) above, a casual link between the contested act and the claimed damage must be established.

III. Submission of reasoned request in case of urgency

- (1) The Secretariat can submit a reasoned request to the Permanent High Level Group proposing interim measures at any stage of the preliminary procedure of cases initiated with a submission of an Opening Letter, or it can submit a reasoned request directly to the Permanent High Level Group without a preliminary procedure due to the risk of serious and irreparable damage to an objective of the Treaty.
- (2) If a case has been initiated upon a complaint, the complainant may request a procedure in case of urgency at the same time with the submission of its complaint under Article 90 of the Treaty, or anytime during the procedure. In the former case, a reference shall be made to the case number.
- (3) The applicant shall set out, together with all relevant documentation, the circumstances giving rise to urgency.

- (4) To the extent possible, the applicant shall also provide the Secretariat, for its consideration, a list of interim measures suitable for that particular case. The Secretariat shall examine the proposed interim measures, but it shall not be bound by them.

IV. The Reasoned Request and the application to Impose Interim Measures

- (1) If the Secretariat finds a *prima facie* case of non-compliance with Energy Community law, and if it considers the situation to be one of urgency, the Secretariat shall address a reasoned request pursuant to Article 29 of the Energy Community Dispute Settlement Rules, together with an application to impose interim measures to the Permanent High Level Group.
- (2) The reasoned request shall also contain a proposal for specific interim measures and all the evidence available to justify the respective interim measures.
- (3) The reasoned request referred to in paragraph 1 shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing the necessity for imposing interim measure, as well as the *prima facie* finding of non-compliance with Energy Community law.

V. The procedure for adoption of interim measures

- (1) The reasoned request shall be sent to the party to the case, at the same time when submitted to the Permanent High Level Group.
- (2) The party concerned may submit written observations within two weeks from receipt of the reasoned request and the application to impose interim measures.
- (3) In case the party concerned fails to submit observations within the time-limit prescribed in paragraph 1, the Permanent High Level Group shall nevertheless take a decision within one month after receipt of the reasoned request and the request for imposing interim measures.
- (4) The Permanent High Level Group shall communicate the decision simultaneously to the Secretariat, the Ministerial Council and the Party concerned.
- (5) Unless the decision fixes the date on which the interim measure is to lapse, the measure shall lapse upon delivery of the decision by the Ministerial Council on the substance of the case.
- (6) The decision on interim measures shall have only an interim effect, and shall be without prejudice to the decision of the Ministerial Council on the substance of the case.

VI. Scope and limits of the interim measures

- (1) The Permanent High Level Group may order one of the following not-exhaustive interim measures: a request to suspend the contested national measure, measures restoring or preserving the *status quo*, or any other measures the Secretariat may propose.

VII. The Advisory Committee

- (1) Before imposing interim measures, the Permanent High Level Group may request the Advisory Committee for its opinion on the reasoned request, taking into account any reply by the party to the case.

- (2) The opinion of the Advisory Committee shall address the following aspects: the existence of a prima facie case, the existence of urgency, and the appropriateness of the interim measures proposed by the Secretariat, and any other issue the Permanent High Level Group deems important for rendering its decision.
- (3) The Permanent High Level Group shall not be bound by the opinion of the Advisory Committee.
- (4) The Advisory Committee shall adopt its opinion within one week upon being requested in accordance with paragraph 1 of this Article.

VIII. Change in circumstances

- (1) On application by the party concerned or the Secretariat, the decision on interim measures may at any time be varied or cancelled on account of a change in circumstances.

IX. New application

- (1) Refusal of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts.

X. Further procedures before the Permanent High Level Group and the Ministerial Council

- (1) The decision on the reasoned request submitted according to paragraph (1) of Section IV of the present Procedural Act shall be added to the agenda of the next scheduled meeting of the Ministerial Council. At this next meeting, the Ministerial Council, after having heard the Advisory Committee, shall also decide on whether or not to uphold any interim measure imposed.
- (2) In adopting the decision on the reasoned request submitted according to paragraph (1) of Section IV of the present Procedural Act, Article 34 of the Energy Community Consolidate Rules for Dispute Settlement shall apply.
- (3) At any subsequent meeting before the meeting of the Ministerial Council, the Permanent High Level Group shall review the need to maintain the interim measures imposed.
- (4) Before any such Permanent High Level Group meeting, the Secretariat and the Party concerned shall submit their position regarding interim measures imposed.

XI. Non-compliance with the Interim Measures imposed

- (1) Non-compliance by a Party concerned with the interim measures imposed by the Permanent High Level Group, the Secretariat will submit a reasoned request directly to the Ministerial Council without a preliminary procedure.