

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

In case ECS-1/18, the Secretariat of the Energy Community against Ukraine, 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 ('Dispute Settlement Rules 2015'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 28 May 2018 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-1/18 against Ukraine. The members of the Advisory Committee received the Reasoned Request and its annexes. Article 11 (3) Dispute Settlement Rules 2015 provides for a simplified procedure for cases where a Party has failed to fulfil its obligation to notify measures transposing a decision addressed to it within the deadline. In such cases the Secretariat shall submit a Reasoned Request to the Ministerial Council without preliminary procedure.

In its Reasoned Request pursuant to Article 11 (3) Dispute Settlement Rules 2015 the Secretariat seeks a Decision from the Ministerial Council declaring that Ukraine by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Directive 2012/27/EU, as adapted and adopted by Energy Community by 15 October 2017 pursuant to Article 1 of Ministerial Decision 2015/08/MC-EnC and by failing to forthwith notify those measures to the Secretariat, Ukraine fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 1 of Ministerial Council Decision 2015/08/MC-EnC.

Ukraine submitted a reply to the Reasoned Request on 5 June 2018 within the two months' deadline. Ukraine agreed with the Secretariat that a public hearing can be dispensed with. As a consequence, the Advisory Committee did not hold a public hearing in this case according to Article 8 (1) of its Rules of Procedure.

II. Provisions allegedly violated by the Contracting Party concerned

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 this Treaty.

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.

Article 1 of Decision 2015/08/MC-EnC reads:

Each Contracting Party shall transpose and implement Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC by 15 October 2017.

They shall forthwith inform the Energy Community Secretariat thereof.

Transposition shall be made without changes to the structure and text of Directive 2012/27/EU other than translation.

Article 11 (3) of the Treaty reads:

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. Preliminary Remarks

According to Article 32 (1) Dispute Settlement Rules 2015, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned.

The Advisory Committee, exercising its duty to give an Opinion on the Reasoned Request does not duplicate the procedure and therefore does not collect evidence itself. The Advisory Committee gives its Opinion on the basis of undisputed facts. Where the facts were not sufficiently determined by the Secretariat, the Advisory Committee is not in a position to give its decisive legal opinion on these allegations; instead, such cases of incomplete determination of facts are pointed out in the Opinion of the Advisory Committee.

On the basis of these principles 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.

IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that Ukraine by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Directive 2012/27/EU, as adapted and adopted by Energy Community by 15 October 2017 pursuant to

Article 1 of Ministerial Decision 2015/08/MC-EnC and by failing to forthwith notify those measures to the Secretariat, Ukraine fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 1 of Ministerial Council Decision 2015/08/MC-EnC.

In cases where the Reasoned Request is based on Article 11 (3) Dispute Settlement Rules 2015, the entire dispute settlement procedure is shortened as the entire preliminary procedure is omitted. There is no Opening Letter, no Reasoned Opinion and no replies to either of them. Hence, the Advisory Committee's Opinion is solely based on the Reasoned Request and replies to it in writing or during a public hearing. Neither Ukraine nor the Secretariat opted for a public hearing, so the assessment is entirely based on the Reasoned Request.

In the documentation provided by the Secretariat there was no evidence that Directive 2012/27/EU had been transposed by Ukraine. As a reply to the Reasoned Request Ukraine sent a letter describing its current state of transposition of the said Directive. While there seems to be considerable progress in the transposition process, it is undisputed that the directive had not been transposed by the deadline of 15 October 2017 set in Article 1 of Ministerial Council Decision 2015/08/MC-EnC.

IV. Conclusions

The Advisory Committee considers that Ukraine by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with the Directive 2012/27/EU, as adapted and adopted by Energy Community by 15 October 2017 pursuant to Article 1 of Ministerial Decision 2015/08/MC-EnC and by failing to forthwith notify those measures to the Secretariat, Ukraine failed to comply with Articles 6 and 89 of the Energy Community Treaty as well as Article 1 of Ministerial Council Decision 2015/08/MC-EnC.

Done in Vienna on 23 October 2018

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President