

PROCEDURAL ACT

OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

PA/2015/04/MC-EnC: on amending Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty

THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY,

Having regard to the Treaty establishing the Energy Community, and in particular Articles 47(c), 82, 83, 86 and 87 thereof,

Having regard to the Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty,

Upon review as envisaged by Article 47 of this Procedural Act,

Whereas the High Level Reflection Group mandated by the Ministerial Council concluded that one of the major obstacles to implementation of the *acquis communautaire* in the Contracting Parties is the weak enforcement system,

Whereas the European institutions called for more effective implementation and enforcement of Energy Community law,

Whereas the Permanent High Level Group, at its meeting on 15 October 2015 endorsed the present Procedural Act,

Having regard to the proposal made by the Secretariat,

ADOPTS THE FOLLOWING PROCEDURAL ACT:

Article 1

The Preamble is amended as follows:

- In paragraph 2 after the word "Articles" and before the number "86", the number "47(c)" is added, and after the number 82, the following is added: "and 83."
- New paragraphs 13 and 14 are inserted as follows and the remaining paragraphs are renumbered:

"Whereas the institutions of the Energy Community shall interpret any term or other concept used in the Energy Community Treaty that is derived from European

Community law in conformity with the case-law of the Court of Justice of the European Union, including its General Court,

Upon review as envisaged by Article 47 of this Procedural Act”

- In the new paragraph 15, after the word Council, the word "already" is included and the word "will" in the second line is replaced by the word "would."
- New paragraphs 16 and 17 are added:

“Whereas the European Commission in 2011 demanded “more effective implementation and enforcement” in the Energy Community”¹; the European Parliament in 2013 requested “adapting [the Energy Community’s] decision-making to future challenges, including by setting up legal control mechanisms to deal with deficient *acquis* implementation”²; and the European Council in 2014 called for the Energy Community to “be reinforced so as to ensure the application of the *acquis* in those countries”³;

Whereas the High Level Reflection Group mandated by the Ministerial Council concluded that “Weak enforcement mechanism constitute one of the major obstacles to implementation of the *acquis communautaire* in the Contracting Parties”⁴ and considered that “a refurbishment of the institutional architecture is necessary, in particular to enable the enforcement of the far-reaching commitments the Parties accepted under the Treaty”⁵,

- In paragraph 18 the dates 11 March and 26 June 2008 are replaced by: “15 October 2015” and after the word Act, the text “as amended” is added.

Article 2

The words “Title I” is moved after Article 1. The remaining Titles are renumbered.

The words “General Provisions” are deleted.

Article 3

In Article 1:

- after the word “Decision” the words “or Procedural Act” are added.
- before the full stop, the following text is added:

¹ Commission Communication: The EU Energy Policy: Engaging with Partners beyond Our Borders, 7.9.2011, COM(2011) 539 final.

² European Parliament Resolution of 23 October 2013 on the European Neighborhood Policy: towards a strengthening of the partnership, (2013/2621(RSP)).

³ European Council Conclusions of 27 June 2014, EUCO 79/14.

⁴ An Energy Community for the Future, p. 19.

⁵ An Energy Community for the Future, p. 19.

“, Titles II-IV), as well as a cooperation mechanism between national authorities or courts and the Secretariat in cases concerning the interpretation or application of Energy Community law without prejudice to Article 94 of the Treaty (Title I)”

Article 4

After the words “Title I” the following text is added in a new line as a name of the Title:

“Cooperation between national authorities of the Contracting Parties and the Secretariat”

Article 5

New Article 2 is added:

“Cooperation between national authorities of the Contracting Parties and the Secretariat

(1) Where a question concerning the interpretation or application of Energy Community law is raised in proceedings before a national authority of a Contracting Party, such authority, upon request of a party to the procedure before it or on its own motion, notifies the Secretariat in writing at the earliest stage possible in the procedure. The Secretariat shall ensure the confidentiality of all information received.

(2) Contracting Parties shall ensure that, where a question concerning the interpretation or application of Energy Community law is raised in proceedings before a national court, such court, upon request of a party to the procedure before it or on its own motion, may notify the Secretariat in writing at the earliest stage possible in the procedure. The Secretariat shall ensure the confidentiality of all information received.

(3) Where the coherent interpretation or application of Energy Community law so requires, the Secretariat shall submit its opinion to the national authority or court of the Contracting Party in writing within the timelines set by national procedural rules, but not later than within four weeks. It may consult the Advisory Committee before submitting an opinion. The Secretariat’s opinion must be in conformity with the case-law of the Court of Justice of the European Union.

(4) In its final decision or judgment, the national authority or court of the Contracting Party takes into account of the opinion submitted by the Secretariat.

(5) The Secretariat shall submit to the Ministerial Council an annual report on the application and interpretation of Energy Community law by national authorities of the Contracting Parties.”

The following articles are renumbered.

Article 6

After Article 2 new title text is added:

“Title II

Procedures under Articles 90 to 93”

Article 7

In new Article 8 paragraph 3, the word “authorization” is replaced by the word “authorisation.”

Article 8

In new Article 9, after the phrase “parties to” the text “or persons participating in” is added.

Article 9

The name of the Title III is amended by adding the phrase “dispute settlement” before “proceedings”.

Article 10

In new Article 11:

- in paragraph 1, the reference to “Article 28” is replaced by reference to “Article 29”.
- new paragraph 3 is added:

“(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.”

Article 11

In the heading of new Article 12, the term “by the Secretariat” is included at the end.

In new Article 12 paragraph 3, the hyphen between the words “subject” and “matter” is removed and these two words are separated by space.

Article 12

In new Article 15, reference to “Article 28” is replaced by reference to “Article 29.”

Article 13

In new Article 16, new paragraph 3 is added:

“(3) The Secretariat may ask national authorities of Contracting Parties to conduct inspections of undertakings and associations of undertakings in line with the respective authorities’ competences under national law.”

Article 14

In new Article 17:

- paragraph 1, the text after the word "Secretariat" is replaced by the following text:

"at any stage of the preliminary procedure."

Article 15

In new Article 18 paragraph 1, the text after the phrase "reasoned request" is replaced by the following text:

"directly to the next possible meeting of the Permanent High Level Group."

In Article 18 paragraph 2 the words "Ministerial Council" are replaced by the following text:

"Permanent High Level Group may take appropriate and proportionate interim measures upon request by the Secretariat. The Permanent High Level Group"

The following text is introduced as new paragraph 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."

Article 16

In new Article 21:

- paragraph 1, the reference to "Article 2" is replaced by reference to "Article 3".
- paragraph 2, the words "Ministerial Council" are replaced by the words "Permanent High Level Group".

Article 17

In new Article 24, the words "acts upon" are replaced by "is acting on the."

Article 18

The text of new Article 26 is replaced by the following two new paragraphs:

"(1) If the Secretariat takes the view that the subject matter of the complaint gives rise to a breach of Energy Community law, it shall initiate a preliminary procedure by way of an opening letter within six months upon registration of the complaint, with the aim to either resolve the dispute or to submit a reasoned request to the Ministerial Council.

(2) If the Secretariat takes the view that the subject matter of the complaint does not give rise to a breach of Energy Community law, it shall notify the complainant the reasons for not pursuing the case further. The complainant may bring its case to the Permanent High Level Group. The latter may request the Secretariat to initiate a preliminary procedure."

Article 19

In new Article 28, the term “21 to 25” shall be replaced by “22 to 27”.

Article 20

In new Article 29, paragraph 1, is amended as follows:

- In the second line, the word “by” in the phrase “by its own initiative” is replaced with the word “on”.
- The term “Title II” is replaced by “Title III”.
- before the full stop, the following text is added: “save as otherwise provided for in these Rules of Procedure.”

In paragraph 3:

- after the first sentence new sentence with the following text is added:

“The reasoned request including annexes shall be sent to the Party concerned, to the Presidency and the Vice-Presidency as well as to the President of the Advisory Committee.”

- The following sentence from old paragraph 4 is moved to paragraph 3:

“A copy of the reasoned request shall be sent to the Secretariat in case the latter is not the initiator.”

- The following sentence from old paragraph 3 becomes new paragraph 4:

“The reasoned request shall contain a proposal for the decision to be taken by the Ministerial Council pursuant to Article 91 of the Treaty.”

Article 21

Old Article 29 becomes new Article 30.

Article 22

The title of new Article 31 is amended by replacing the words “Notification of” by the words “Reply by”.

Paragraph 1 is deleted.

Paragraph 2 becomes paragraph 1 and is amended as follows:

- before the full stop, the text “to the Secretariat” is added.

New paragraph 2 is added with the following text:

“(2) The Secretariat shall notify all Parties and Participants, the Regulatory Board, the Advisory Committee as well as persons and bodies participating in the preliminary procedure of the reasoned request as well as any reply to it. Within two months of this

notification, they shall be entitled to submit written observations to the Secretariat. The Regulatory Board and the Secretariat may submit written observations where they are not the initiator of the case.”

Article 23

Old Article 31 is deleted.

Article 24

Old Article 32 is new Article 32.

The title of new Article 32 is amended by deleting the words “and Regulatory Board.”

In paragraph 1 the word “the” in the phrase “the reply” is replaced by the word “any.”

New paragraph 2 with the following text is added:

“(2) The Advisory Committee shall be independent from the authorities of the Parties and the institutions established under the Treaty. It shall be bound by Energy Community law, including these Rules, and in particular Article 94 of the Treaty.”

Old paragraph 2 becomes paragraph 3 and is amended as follows:

- the word “three” is replaced by the word “five”
- the word “two” is replaced by the word “four”
- the words “nominated by” are replaced by the word “representing”
- the word “Community” is replaced by the word “Union”

Old paragraph 3 is deleted.

New paragraphs 4 and 5 are inserted with the following text:

“(4) The procedure before the Advisory Committee shall not last longer than five months upon being tasked in accordance with paragraph 1 of this Article. Based on the reasoned request and taking into account a reply by the Party concerned as well as the written observations received and after having conducted a public hearing, the Advisory Committee of the Energy Community shall adopt an opinion on the reasoned request.

(5) The Advisory Committee shall adopt its opinion by majority of its members. The opinion shall propose to uphold or dismiss the reasoned requests entirely or partially. The President of the Advisory Committee shall forward it to the President of the Permanent High Level Group the Party concerned and the Secretariat within five working days upon its adoption.”

Old paragraph 4 becomes new paragraph 6 and is amended as follows:

- the words “with the assistance of the Secretariat” before the full stop are deleted.
- After the full stop of the first sentence, new sentence is included with the following text:

“The members of the Advisory Committee shall elect among themselves a President for the period of two years.”

Old paragraph 5 is deleted.

Article 25

New Article 33 is included as follows:

Proceedings of the Permanent High Level Group

(1) The President of the Permanent High Level Group shall circulate the opinion of the Advisory Committee to the members of the Permanent High Level Group. The opinion of the Advisory Committee shall be made publicly available on the Energy Community website not later than three days upon its adoption.

(2) At the next meeting after the adoption of the Advisory Committee’s opinion, the Permanent High Level Group shall hear both parties to the dispute as well as the President of the Advisory Committee. The Permanent High Level Group shall include the reasoned request on the agenda of the next meeting of the Ministerial Council. If it agrees with the reasoned request, it may include it as an “A” item on the agenda of the Ministerial Council in line with its Rules of Procedure.

Article 26

Old Article 33 is deleted.

Article 27

Old Article 34 is also new Article 34.

In paragraph 1, reference to Article 29(2) is amended with reference to Article 30(2).

In paragraph 3, the text “or the Regulatory Board” is deleted.

Article 28

Article 35 is amended as follows:

- the phrase “in due time” is replaced by the words “on time”
- the phrase “available to the Ministerial Council at the time of its deliberations” after the word “facts” is replaced by “submitted in the reasoned request alone.”

Article 29

In Article 38 paragraph 2, the word “directly” is inserted after the word “matter” and before the word “before.”

Article 30

The Title of Article 42 is replaced by "Measures under Article 92".

In paragraph 1 of new Article 41, the term "sanctions" is replaced by "measures".

Article 31

In Article 43 after paragraph 1 new paragraph 2 is inserted with the following text:

"(2) Before taking the decision to revoke decisions taken under Articles 91(1) or 92(1) of the Treaty, the Ministerial Council shall ask the Secretariat and the Party concerned for their reports on the factual circumstances, as well as a legal opinion by the Advisory Committee based on the two reports."

Old paragraph 2 becomes paragraph 3.

Article 32

In Article 46, the following second paragraph is included:

"(2) Cases initiated already before 16 October 2015 shall be dealt with in accordance with the Procedural Act applicable before the amendments adopted on that date."

The existing text shall become paragraph 1.

Article 33

The text of Article 47, is amended by adding the following after "the Secretariat":

"in 2016. The review shall include the approach towards measures under Article 92 of the Treaty and the institutional set up for dispute resolution."

Article 34

In Article 48, the word "after" is replaced by the word "of".

Article 35

This Procedural Act shall enter into force upon adoption.

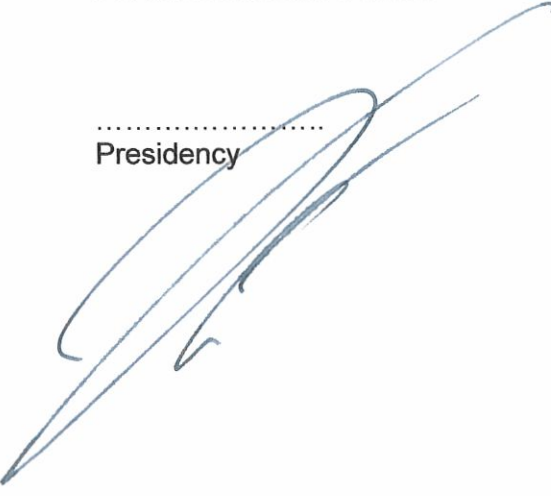
Article 36

The Director of the Energy Community Secretariat shall publish the amended Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty on the Energy Community website within seven days of adoption of this Procedural Act.

Done in Tirana on 16 October 2015

For the Ministerial Council

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Presidency

A large, stylized handwritten signature in blue ink, written over the signature line and extending upwards and to the right.