

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

In case ECS-4/18, 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 29 June 2018 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-4/18 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 Regulation (EU) 347/2013, as adapted and adopted by Energy Community by 31 December 2016 pursuant to Article 3(1) of Ministerial Decision 2015/09/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 3(1) and (2) of Ministerial Council Decision 2015/09/MC-EnC.

Ukraine did not submit a reply to the Reasoned Request within the deadline ending 29 August 2018. It did, however, agree 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.

Item 7 of the "Lists of Acts included in the 'Acquis Communautaire on Energy'" included in Annex I of the Treaty reads:

Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure, as adopted by Decision D/2015/09/MC-EnC of the Ministerial Council of 16 October 2015.

Article 3 of Decision D/2015/09/MC-EnC reads:

1. *Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Regulation (EU) No 347/2013, as adapted by this Decision, by 31 December 2016. They shall forthwith inform the Energy Community Secretariat thereof.*

The Contracting Parties shall apply those measures from 1 January 2017.

2. *The 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.*

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 failed to adopt and apply the laws, regulations and administrative provisions necessary to comply with Regulation (EU) 347/2013, as adapted and adopted by the Energy Community pursuant to Article 3 (1) Decision 2015/09/MC-EnC. By failing to forthwith notify those measures to the Secretariat, Ukraine fails to comply with Articles 6 and 89 of the Treaty as well as Article 3 (1) and (2) Decision 2015/09/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 Regulation (EU) 347/2013 had been transposed by Ukraine. In the absence of a reply of Ukraine, there is no indication that the Secretariat's information are incorrect or invalid.

IV. Conclusions

The Advisory Committee considers that Ukraine by failing to adopt and apply the laws, regulations and administrative provisions necessary to comply with Regulation (EU) 347/2013, as adapted and adopted by Energy Community by 31 December 2016 pursuant to Article 3(1) of Ministerial Decision 2015/09/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 3(1) and (2) of Ministerial Council Decision 2015/09/MC-EnC.

Done in Vienna on 23 October 2018

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President