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

In Case ECS-6/11, the Secretariat of the Energy Community against Serbia, the

ADVISORY COMMITTEE,

composed of
Rajko Pirnat, Helmut Schmitt von Sydow, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community and Article 32 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,

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 30 May 2017 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in Case ECS-6/11 against Serbia. The members of the Advisory Committee received a copy of all relevant documents of the case (including the replies of Serbia) from the Energy Community Secretariat. Pursuant to Article 46 (2) of the Dispute Settlement Rules cases initiated before 16 October 2015 shall be dealt with in accordance with the Dispute Settlement Rules applicable before the amendment adopted on that date. This case against Serbia was opened already on 20 January 2011 and is thus to be dealt with according to the original Dispute Settlement Rules as adopted on 27 June 2008.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Serbia failed to fulfill its obligations arising from Energy Community law. The Secretariat argues that Serbia failed to comply with its obligations under Articles 10 and 11 Energy Community Treaty as well as Articles 6 (3) Directive 2009/72/EC and Article 19 Regulation (EC) 714/2009 as well as point 3 (2) of the Congestion Management Guidelines as incorporated and adapted by Decision 2011/02/MC-EnC.

Serbia did not submit a reply to the Reasoned Request within the deadline ending 19 July 2017, but on 31 July 2017.

II. Preliminary Remarks

According to Article 32 (1) of the Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community on the Rules of Procedure for Dispute Settlement under the Energy Community Treaty (DSR), the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. Despite the late

submission of the reply to the Reasoned Request is has to be taken into account in this opinion as nothing in the DSR or the Rules of Procedure of the Advisory Committee stipulates otherwise.

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, including the Reasoned Opinion, 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.

III. Provisions allegedly violated by the Contracting Party concerned

Article 10 of the Treaty reads:

> *Each Contracting Party shall implement the acquis communautaire on energy in compliance with the timetable for the implementation of those measures set out in Annex I.*

Article 11 of the Treaty reads:

> *The "acquis communautaire on energy", for the purpose of this Treaty, shall mean the acts listed in Annex I of this Treaty.*

Article 6 (3) of Directive 2009/72/EC (as adapted by Decision 2011/02/MC-EnC) reads:

> *Contracting Parties shall ensure, through the implementation of this Directive, that transmission system operators have one or more integrated system(s) at regional level covering two or more Contracting Parties for capacity allocation and for checking the security of the network.*

Article 19 of Regulation (EC) 714/2009 (as adapted by Decision 2011/02/MC-EnC) reads:

> *The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18.7 Where appropriate to fulfil the aims of this Regulation the regulatory authorities shall cooperate with each other, with the Energy Community Secretariat and the Energy Community Regulatory Board in compliance with Chapter IX of Directive 2009/72/EC.*

Article 3.2 of the Annex (Congestion Management Guidelines) to Regulation (EC) 714/2009 (as adapted by Decision 2011/02/MC-EnC) reads:

> *A common coordinated congestion-management method and procedure for the allocation of capacity to the market at least annually, monthly and day-ahead shall be applied by 1 January 2007 between countries in the following regions:*
> *(a) Northern Europe (i.e. Denmark, Sweden, Finland, Germany and Poland),*
> *(b) North-West Europe (i.e. Benelux, Germany and France),*
> *(c) Italy (i.e. Italy, France, Germany, Austria, Slovenia and Greece),*

(d) Central Eastern Europe (i.e. Germany, Poland, Czech Republic, Slovakia, Hungary, Austria and Slovenia),
(e) South-West Europe (i.e. Spain, Portugal and France),
(f) UK, Ireland and France,
(g) Baltic states (i.e. Estonia, Latvia and Lithuania).
At an interconnection involving countries belonging to more than one region, the congestion-management method applied may differ in order to ensure the compatibility with the methods applied in the other regions to which those countries belong. In that case, the relevant TSOs shall propose the method which shall be subject to review by the relevant regulatory authorities.

IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that the state-owned electricity transmission system operator (TSO) of Serbia failed to participate in a common coordinated congestion management method and procedure for the allocation of capacity.

In 2011 the Second EU Energy Package was replaced in the Energy Community framework by its successor at EU level, the Third EU Energy Package, with an implementation deadline until 1 January 2015 (Decision 2011/02/MC-EnC). However, there is settled case-law of the European Court of Justice (ECJ) that '*the existence of a failure to fulfil obligations must be assessed in the light of the European Union legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion*' (Case C-52/08 Commission v Portugal, para 41). 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 DSR as amended on 16 October 2015 where Article 94 of the Treaty is named as being of particular importance for the work of the Advisory Committee. However, the DSR as amended on 16 October 2015 do not apply to this case and can only serve as interpretation guidelines. In the present case, the close of the period prescribed by the Secretariat for Serbia to comply with the Reasoned Opinion was 17 May 2017. It is clear that the legal acts comprising the Third EU Energy Package repealed the Second EU Energy Package from 1 January 2015, in other words more than two years before the expiry of the period prescribed in the Reasoned Opinion. The legal obligations to be looked at are thus those originating from the relevant legal acts included in the Third EU Energy Package.

The central disputed issue in this case is whether there is a legal obligation for Serbia – more precisely its TSO EMS – to join the Coordinated Auction Office in South East Europe (CAO SEE). It seems to be undisputed that from the entire design of the electricity market based on the Third EU Energy Package the idea was to have regional electricity markets, which – until 2014 – were to be merged into one big Internal Electricity Market. This is clearly spelled out in Point 3.5 of the Congestion Management Guidelines annexed to Regulation (EC) 714/2009 which provides that '*compatible congestion-management procedures shall be defined in all […] regions with a view to forming a truly integrated internal market in electricity*'. This is also reiterated in Article 6 (1) Directive 2009/72/EC as adapted by Decision 2011/02/MC-EnC and in Article 25 of said decision.

The argument brought forward by Serbia that the establishment of the so-called 8th region was not taken over when the Third EU Energy Package was introduced in Energy

Community Law (ANNEX 13 – Reply to Reasoned Opinion, p 2) is true. The 8th region was established by Article 2 of Decision 2008/02/MC-EnC which explicitly adapted Article 3.2 of the Annex to Regulation (EC) 1228/2003. This provision concerned only this Article 3.2 of the Annex to Regulation (EC) 1228/2003 and cannot have any continued effect on other pieces of EU legislation even if they were identical in substance or even wording. Article 24 of the Treaty explicitly requires the Energy Community to take measures '*to adapt the* acquis communautaire *[…] taking into account both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties*'. Where no such adaptations are introduced the original wording of the EU legal act is taken over and has to be applied. In the case of Article 3.2 of the Annex to Regulation (EC) 714/2009, the regulation repealing Regulation (EC) 1228/2003, this omission results in a provision inapplicable to the Contracting Parties of the Energy Community. The line of reasoning brought forward by the Secretariat in item 78 of the Reasoned Request cannot be followed. The Ministerial Council has never repealed any of its decisions concerning legal acts which were no longer in force, and there is no necessity to do so. With the implementation of a new set of rules the older ones are – unless indicated otherwise – replaced together with their adaptations. Hence, the Advisory Committee does not share the Secretariat's view that Serbia violated Article 3.2 of the Annex to Regulation (EC) 714/2009 based on the simple fact that it is not applicable to Serbia.

The other issue raised in the Reasoned Request is that the Serbian national regulatory authority, AERS, has not taken effective remedial action to ensure EMS' compliance in this matter. This is required by Article 19 Regulation (EC) 714/2009. This allegation cannot be dealt with in this Opinion as the Advisory Committee does not share the Secretariat's opinion on Serbia's violation of Article 3.2 of the Annex to Regulation (EC) 714/2009.

A violation of Article 6 (3) Directive 2009/72/EC was also raised by the Secretariat in its Reasoned Request, and only in its Reasoned Request; neither the Opening Letter nor the Reasoned Opinion brought up an alleged violation of this provision. The reason for not including it in the Opening Letter is that it was only inserted by the Third EU Energy Package. Unfortunately, both the Secretariat in the Reasoned Request and Serbia in its reply to it focus on Article 3.2 of the Annex to Regulation (EC) 714/2009 so that there is little information on the grounds of this allegation. The provision stipulates the obligation to ensure that TSOs have one or more integrated system(s) at regional level covering two or more Contracting Parties for capacity allocation and for checking the security of the network. There are more ways to fulfil this obligation, than having the TSO participate in one common coordinated congestion management method and procedure for the allocation of capacity. The materials provided, however, did not present or assess in detail what measures are currently in place in Serbia and its surrounding countries. It focused exclusively on membership in CAO (or JAO) and the measures taken by EMS to become a member of either of both. From what was presented to the Advisory Committee it is impossible to assess whether there this rather programmatic provision is complied with.

V. Conclusions

The Advisory Committee considers that Serbia did not violate Articles 10 and 11 Energy Community Treaty in conjunction with Article 19 Regulation (EC) 714/2009 as well as point 3 (2) of the Congestion Management Guidelines annexed to Regulation (EC) 714/2009 as incorporated and adapted by Decision 2011/02/MC-EnC. The Advisory Committee furthermore considers that the allegation of a violation of Article 6(3) Directive 2009/72/EC as adapted by Decision 2011/02/MC-EnC was not sufficiently prepared to give a well-founded opinion.

Done in Vienna on 12 September 2017

On behalf of the Advisory Committee

Wolfgang Urbantschitsch, Chairman