

The Advisory Committee
of the Energy Community
Chairman

To the
Presidency and the Vice-Presidency of the Energy Community
c/o the Energy Community Secretariat
Am Hof 4
1010 Vienna

Dear Presidency, dear Vice-Presidency,

The Advisory Committee received the Reasoned Requests on cases ECS 6-11/16 on 31 May 2016. Two of these cases have been closed and the Reasoned Requests withdrawn in the meantime. Before the substantive analysis of the materials submitted, the Advisory Committee has to scrutinise the eligibility of the cases in question including the abidance by formal rules.

As a conclusion of this scrutiny the Advisory Committee believes that according to the Dispute Settlement Rules as amended on 16 October 2015 (DSR 2015) the composition of the Advisory Committee seems to be deficient. As a consequence, it is questionable whether the Advisory Committee can give an opinion on the cases initiated in 2016.

The Ministerial Council appointed three members and two alternate members of the Advisory Committee based on Article 32 of the old Dispute Settlement Rules of 2008 (DSR 2008) in its meeting on 16 October 2015. At the same meeting the dispute settlement rules were amended, but the appointment decision did not take the amendments into consideration. Hence, in line with the DSR 2008, only three members (and two alternate members) were appointed for a term of only two years. The Advisory Committee thus appointed is eligible and competent to give opinions on cases initiated before the amendment of the dispute settlement rules.

The cases initiated after 16 October 2015, however, have to follow the rules stipulated in the DSR 2015 (Article 48 para. 2 DSR 2015). Those rules require the Advisory Committee to be composed of five members (Article 32 DSR 2015). Hence, the number of members of the current Advisory Committee falls short of the requirement stipulated in Article 32 DSR 2015. The fact that two alternate members were appointed cannot remedy this deficiency as alternate members only step in if a member cannot (for whatever reason) participate. Where there is no member in the first place, s/he cannot be replaced by an alternate member. The rules of procedure of the Advisory Committee clearly make a difference between members and alternate members. 'Upgrading' alternate members to members would contradict the wording of those rules of procedure and probably also the intention of the Parties.

Furthermore, the Ministerial Council did not explicitly appoint a member of the Advisory Committee representing the European Union (Article 32 para. 3 DSR 2015). Under the current rules of procedure of the Advisory Committee (Article 3 para. 4) the person representing the European Union also acts as the chairperson of the Advisory Committee. Hence, under the current rules it is clear that the

chairperson is also the person representing the European Union. However, this rule cannot apply for any Advisory Committee appointed under the DSR 2015 as they provide for the election of the president (Article 32 para. 6 DSR 2015).

To sum up there are formal flaws to the appointment of the Advisory Committee. The Ministerial Council did not appoint new members of the Advisory Committee eligible to give opinions on cases initiated on a day later than 16 October 2015. An appointment under the DSR 2015 has never taken place. As a result, it is highly doubtful whether the Advisory Committee is eligible to give opinions on the cases initiated in 2016. It would have been necessary to provide for transitional provisions to deal with this situation that basically requires two Advisory Committees; their composition, however, does not have to be entirely different.

It would be rather unfortunate if the new dispute settlement procedure were to be challenged due to such formal mistakes. Furthermore, the entire refurbishment of the enforcement procedure would be jeopardised if the new cases were also decided by the Committee whose composition was based on the DSR 2008. Therefore, the Advisory Committee in office has come to the conclusion that it was not appointed correctly to give opinions on cases initiated under the DSR 2015. It has concluded that it is not eligible to give opinions on cases ECS 6-11/16. However, it would be available to provide opinions to the Ministerial Council before its next meeting in October if the Ministerial Council appointed the Advisory Committee members pursuant to the DSR 2015.

Vienna, 22 July 2016

A handwritten signature in black ink, appearing to read 'W. Urbantschitsch', with a long horizontal flourish extending to the right.

Wolfgang Urbantschitsch
Chairman of the Advisory Committee