

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

In Case ECS-4/13, the Secretariat of the Energy Community against the Republic of 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 31 May 2016 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in Case ECS-4/13 against the Republic of 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 11 February 2013 and is thus to be dealt with according to the original Dispute Settlement Rules 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 ensure that certain liquid fuels are not used if their sulphur content exceeds the thresholds defined in Article 3 (1) of Directive 1999/32/EC.

Serbia submitted a reply to the Reasoned Request on 21 July 2016.

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, 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, 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. Legal Assessment

Article 12 of the Treaty reads:

Each Contracting Party shall implement the acquis communautaire on Environment in compliance with the timetable for the implementation of those measures set out in Annex II.

Article 16 of the Treaty as amended reads:

The “acquis communautaire on environment”, for the purpose of this Treaty, shall mean
(i) [...]
(ii) Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC,
(iii) – (v) [...]

Annex II of the Treaty reads:

1. [...]
2. Each Contracting Party shall implement Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC by 31 December 2011.
3.-5. [...]

Article 3 (1) of Directive 1999/32/EC reads:

Member States shall take all necessary steps to ensure that as from 1 January 2003 within their territory heavy fuel oils are not used if their sulphur content exceeds 1,00 % by mass.

According to the Reasoned Request the legal acts introduced by Serbia did not transpose Article 3 (1) of Directive 1999/32/EC correctly. This was also confirmed by Serbia in its reply to the Reasoned Request.

In this very letter Serbia indicated that the complete transposition of Directive 1999/32/EC was expected by the end of 2019 the latest. This date is determined considering necessary investments into the Pancevo Oil Refinery as a precondition for the complete implementation as it is currently unable to produce fuel oil with a sulphur level of up to 1%. Hence, until the completion of this investment, fuel oil with a sulphur level of up to 1% would have to be imported. This would adversely affect public sector expenditure, Serbia's balance of payments and security of supply.

As a legal argument Serbia puts forward that Article 3 (a) of the Treaty provides that '*[f]or the purposes of Article 2, the activities of the Energy Community shall include: (a) the implementation by the Contracting Parties of the *acquis communautaire* on energy, environment, competition and renewables, as described in Title II below, adapted to both the institutional framework of the Energy Community and the specific situation of each of the Contracting Parties [...]*'. Pursuant to Articles 3 (a), 5 and 24 of the Treaty the extension of the *acquis communautaire* is subject to adaptations to both the institutional framework of the Energy Community and the specific national situations of the Contracting Parties. However, such adaptations can only be adopted by the Energy Community institutions and not by the Contracting Parties. Furthermore, adaptations can only be considered before the Contracting Parties are required to implement certain pieces of EU legislation.

Hence, the obligations in the Treaty are unconditional and the Treaty itself does not provide for any unilateral derogations. According to Article 94 of the Treaty, however, '[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 Dispute Settlement Rules 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 Dispute Settlement Rules as amended on 16 October 2015 do not apply to this case and can only serve as interpretation guidelines.

The transposition of Directives is a fundamental principle of EU law enshrined in Article 288 (3) of the Treaty on the Functioning of the European Union. It stipulates that '[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' Their obligatory transposition into the national legal order of the EU Member States is a fundamental feature of EU directives. The Treaty itself does not get any more specific on how EU legal acts constituting the Energy Community's *acquis communautaire* have to be transposed by the Contracting Parties. The principles guiding the transposition of EU Directives for EU Member States are also applicable for the transposition of EU Directives in Contracting Parties. In this case the notion of justification for a non-transposition has to be looked at. The Secretariat rightly submitted that according to settled case law of the Court of Justice of the EU apprehension of internal difficulties – in this case a deterioration of Serbia's budget and its balance of payments – cannot justify a failure to apply Community law correctly. However, these circumstances are not so much the reason for the delay as is the outstanding investment in the refinery; and this is an omission on the part of Serbia.

IV. Conclusions

The Advisory Committee considers that the Republic of Serbia failed to comply with Article 12 of the Treaty in conjunction with Article 3 (1) of Directive 1999/32/EC.

Done in Vienna on 16 September 2016

On behalf of the Advisory Committee

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

Wolfgang Urbantschitsch, Chairman