

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

In case ECS-5/17, the Secretariat of the Energy Community
against

Bosnia and Herzegovina, 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 27 May 2021 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-5/17 against Bosnia and Herzegovina. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that by **failing to legally and functionally separate the distribution activities from generation and supply** in both the Federation of Bosnia and Herzegovina and Republika Srpska, Bosnia and Herzegovina does not comply with the obligation to implement Article 26(1), (2) and (3) of Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, as adapted and adopted by Ministerial Decision 2011/02/MC-EnC, by 1 January 2015, and thereby fails to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 3 of Ministerial Council Decision 2011/02/MC-EnC.

The Advisory Committee by a letter of 12 July 2021 inquired the Secretariat and Bosnia and Herzegovina about the necessity of a public hearing. Both replied that a public hearing can be dispensed with. Therefore, according to Article 8 (1) of the Rules of Procedure of the Energy Community Advisory Committee, the public hearing has not been held.

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.

Article 3(1) of Decision 2011/02/MC-EnC reads:

Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation 2 (EC) No 714/2009 and Regulation (EC) No 715/2009, as adapted by this Decision, by 1 January 2015. They shall forthwith inform the Energy Community Secretariat thereof.

Article 2(21) of Directive 2009/72/EC reads:

'vertically integrated undertaking' means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity.

Article 2(35) of Directive 2009/72/EC reads:

'electricity undertaking' means any natural or legal person carrying out at least one of the following functions: generation, transmission, distribution, supply, or purchase of electricity, which is responsible for the commercial, technical or maintenance tasks related to those functions, but does not include final customers.

Article 26 of Directive 2009/72/EC reads:

1. Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking.

2. In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:

(a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated electricity undertaking responsible, directly, or indirectly, for the day-to-day operation of the generation, transmission, or supply of electricity.

(b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

(c) the distribution system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks

(d) the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded and ensure that

observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 35(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.

3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4. Contracting Parties may decide not to apply paragraphs 1, 2 and 3 to integrated electricity undertakings serving less than 100000 connected customers, or serving small isolated systems.

III. Relevant Facts

In the State Bosnia and Herzegovina (further called: BH) generation, supply and distribution of electricity is in the competence of the two entities, namely Federation of Bosnia and Herzegovina (further: FBH) and Republika Srpska (further (RS)). This relates to statutory legal regulation as well as to organisation and functioning of these electricity activities.

In FBH, the electricity sector is regulated by the Law on Electricity from 2013 which requires legal and functional unbundling of electricity distribution system operators. However, transposition of above cited requirement of the Directive 2009/72/EC is lacking in two respects: (a) it does not provide for establishment of compliance program in the distribution system operators and for appointment of compliance officer; and (b) it does not require for the distribution system operators to establish separate branding and communication identity.

In RS, the electricity sector is governed by the Law on Energy of 2009 and by the Electricity Law of 2020. While the Law on Energy just generally requires unbundling of the sector, the Electricity law provides detail regulation of unbundling of distribution from generation and supply activities. This law duly transposes the above cited requirements of the Directive 2009/72/EC on legal and functional unbundling of distribution system operation from generation and supply activities. It requires this unbundling to be implemented by 1 January 2022.

Regarding the actual organisation of the sector, electricity generation, distribution, distribution and supply are in FBH performed by two integrated electricity companies, namely *Javno preduzeće Elektroprivreda Bosne in Hercegovine d.d., Sarajevo* (further EPBIH) and *Javno preduzeće Elektroprivreda Hrvatske zajednice Herceg Bosne d.d. Mostar* (further EPHZHB). They are both joint stock companies which perform generation, distribution and supply activities in territorially separate areas of FBH. Each of these two companies, EPBIH and EPHZHB, perform generation, distribution and supply activities in organisational units called directorates, which do not have separate legal personality and operate under the same management, i.e. the management of the company. The Law on Electricity of FBH provides for a Program for restructuring of the electricity sector in FBH to be adopted by the Parliament of the FBH. The draft program has not been adopted, much less implemented.

In RS, the electricity generation, distribution and supply activities are performed by the company *Elektroprivreda Republike Srpske* (further ERS), which is a holding company incorporating 5 subsidiaries engaged in electricity generation and 5 subsidiaries, engaged in distribution system operation. All the subsidiaries have separate legal identity and are organised as joint stock companies with their own management. Two of the distribution subsidiaries, namely *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale*, also hold generation licence and perform generation activity, since each operates two small hydro power plants. The supply activity is performed directly by the holding company ERS.

IV. Alleged Infringements

Based on these facts, the Secretariat alleges the following failures of BH to comply with the unbundling requirements of the Directive 2009/72/EC:

1. Failure to correctly transpose the unbundling requirements in the Law on Electricity of FBH, specifically:
 - a. to include in this law an obligation to adopt a compliance program and appoint a compliance officer in line of Art. 26(2)(d) of Directive 2009/72/EC, and
 - b. an obligation to separate the corporate identity of the distribution system operator from the supply activities of the vertically integrated undertaking in line Art. 26(3) of Directive 2009/72/EC;
2. Failure to implement legal unbundling of the distribution system operation from the generation and supply, by
 - a. not establishing separate legal entity or entities for distribution system operation in companies EPBIH and EPHZHB contrary to Art. 26(1) of Directive 2009/72/EC;
 - b. operating generation facilities (small hydro power plants) inside two distribution daughter companies of ERS, *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale* contrary to Art. 26(1) of Directive 2009/72/EC;
3. Failure to implement functional unbundling of the distribution system operation from the generation and supply, by
 - a. performing generation, distribution and supply activities under the same management in EPBIH and EPHZHB contrary to Art. 26(2)(a), (b) and (c) of Directive 2009/72/EC;
 - b. performing generation and distribution activities under the same management in *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale* contrary to Art. 26(2)(a), (b) and (c) of Directive 2009/72/EC;
 - c. failing to adopt and implement compliance program and to appoint compliance officer in EPBIH and EPHZHB contrary to Art. 26(2)(d) of Directive 2009/72/EC;
 - d. failing to adopt and implement compliance program and to appoint compliance officer in all the five subsidiaries of ERS, engaged in distribution system operation, namely *ZP Elektrokrajina a.d. Banja Luka*, *ZP Elektro Dobož a.d. Dobož*, *ZP Elektro Bijeljina a.d. Bijeljina*, *ZP Elektrodistribucija Pale a.d. Pale* and *ZP Elektrohercegovina a.d. Trebinje*, all contrary to Art. 26(2)(d) of Directive 2009/72/EC;
 - e. using the same logo, postal address and advertisement on the distribution, generation and supply activities in EPBIH and EPHZHB and not using separate branding and communication contrary to Art. 26(3) of Directive 2009/72/EC;
 - f. failing to use separate branding and communication for distribution activities and generation activities in the two daughter companies of ERS, *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale* contrary to Art. 26(3) of Directive 2009/72/EC.

V. Legal Assessment

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. On the basis of this provision, 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.

BH did not reply to the Reasoned Request, however, it replied to the Reasoned Opinion on 8 December 2020. In its reply, BH did not refute the above established facts and dispute the findings of the Secretariat on the above mentioned infringements, but rather informed the Secretariat of the status of implementation of the unbundling of the distribution system operators in Bosnia and Herzegovina. In FBH, the reply informed that implementation of the activities on legal unbundling of distribution activities is planned to be completed within 36 months from the date of approval by both houses of the Parliament of the FBH of the Program on restructuring the energy sector in the FBH, which has not yet been adopted and implemented. Regarding RS, the reply contained an unspecified assertion that activities on unbundling of the distribution system operators are taking place and a detailed design of functional unbundling is being prepared. In the absence of any counter-arguments in the reply to the Reasoned Opinion, the Advisory Committee's assessment is based on the arguments presented in the Reasoned Request and attached documentation.

In this documentation, there is no evidence that BH rectified any of the above mentioned failures to put in place necessary measures for legal and functional unbundling of the distribution activities from generation and supply activities in the electricity undertakings in its territory. There is no indication that the Secretariat's information is incorrect or invalid. It is undisputable that BH does not comply with Art. 26 of the Directive 2009/72/EC, following Article 3 of Ministerial Council Decision 2011/02/MC-EnC. Based on the available documentation, the Advisory Committee finds that the Reasoned Request is well-founded.

VI. Conclusions

The Advisory Committee considers that

due to the failure to legally and functionally separate the distribution activities from generation and supply in both the Federation of Bosnia and Herzegovina and Republika Srpska, Bosnia and Herzegovina fails to comply with the obligation to implement Article 26(1), (2) and (3) of Directive 2009/72/EC, as adapted and adopted by Ministerial Decision 2011/02/MC-EnC, by 1 January 2015, and by not notifying forthwith the Secretariat thereof, failed to comply with Articles 6 and 89 of the Energy Community Treaty as well as with Article 3 of Ministerial Council Decision 2011/02/MC-EnC.

Done in Vienna on 22 November 2022

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President