

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

In Case ECS-1/14, the Secretariat of the Energy Community against Bosnia and Herzegovina,
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-1/14 against Bosnia and Herzegovina. The members of the Advisory Committee received a copy of all relevant documents of the case (including the replies of Bosnia and Herzegovina) 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 Bosnia and Herzegovina was opened already on 3 March 2014 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 Bosnia and Herzegovina failed to fulfil its obligations arising from Energy Community law. The Secretariat argues that Bosnia and Herzegovina failed to implement certain provisions of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC ('Directive 2006/32/EC') correctly.

Bosnia and Herzegovina did not submit a reply to the Reasoned Request within the deadline ending 19 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, 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. 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 4 (1) of Directive 2006/32/EC (as adapted by Decision 2009/05/MC-EnC) reads:

Contracting Parties shall adopt and aim to achieve an overall national indicative energy savings target of 9 % for the ninth year of application of this Directive, to be reached by way of energy services and other energy efficiency improvement measures. Contracting Parties shall take cost-effective, practicable and reasonable measures designed to contribute towards achieving this target.

This national indicative energy savings target shall be set and calculated in accordance with the provisions and methodology set out in Annex I. For purposes of comparison of energy savings and for conversion to a comparable unit, the conversion factors set out in Annex II shall apply unless the use of other conversion factors can be justified. Examples of eligible energy efficiency improvement measures are given in Annex III. A general framework for the measurement and verification of energy savings is given in Annex IV. The national energy savings in relation to the national indicative energy savings target shall be measured as from 1 January 2008.

Article 9 (2) of Directive 2006/32/EC (as adapted by Decision 2009/05/MC-EnC) reads:

Contracting Parties shall make model contracts for those financial instruments available to existing and potential purchasers of energy services and other energy efficiency improvement measures in the public and private sectors. These may be issued by the authority or agency referred to in Article 4(4).

Article 12 of Directive 2006/32/EC (as adapted by Decision 2009/05/MC-EnC) reads:

1. Contracting Parties shall ensure the availability of efficient, high-quality energy audit schemes which are designed to identify potential energy efficiency improvement measures and which are carried out in an independent manner, to all final consumers, including smaller domestic, commercial and small and medium-sized industrial customers.

2. Market segments that have higher transaction costs and non-complex facilities may be reached by other measures such as questionnaires and computer programmes made available on the Internet and/or sent to customers by mail. Contracting Parties shall ensure the availability of energy audits for market segments where they are not sold commercially, taking into account Article 11(1).

3. Certification in accordance with Article 7 of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings (1) shall be regarded as equivalent to an energy audit meeting the requirements set out in paragraphs 1 and 2 of this Article and as equivalent to an energy audit as referred to in Annex VI(e) to this Directive. Furthermore, audits resulting from schemes based on voluntary agreements between organisations of stakeholders and an appointed body, supervised and followed up by the Member State concerned in accordance with Article 6(2)(b) of this Directive, shall likewise be considered as having fulfilled the requirements set out in paragraphs 1 and 2 of this Article.

Article 14 (2) of Directive 2006/32/EC (as adapted by Decision 2009/05/MC-EnC) reads:

Contracting Parties shall submit to the Secretariat the following EEAPs:

- a first EEAP not later than 30 June 2010;
- a second EEAP not later than 30 June 2013;
- a third EEAP not later than 30 June 2016.

All EEAPs shall describe the energy efficiency improvement measures planned to reach the targets set out in Article 4(1) and (2), as well as to comply with the provisions on the exemplary role of the public sector and provision of information and advice to final customers set out in Articles 5(1) and 7(2) respectively.

The second and third EEAPs shall:

- include a thorough analysis and evaluation of the preceding EEAP;
- include the final results with regard to the fulfilment of the energy savings targets set out in Article 4(1) and (2);
- include plans for — and information on the anticipated effects of — additional measures which address any existing or expected shortfall vis-à-vis the target;
- in accordance with Article 15(4), use and gradually increase the use of harmonised efficiency indicators and benchmarks, both for the evaluation of past measures and estimated effects of planned future measures;
- be based on available data, supplemented with estimates.

IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that Bosnia and Herzegovina failed to adopt the laws, regulations and administrative provisions necessary to comply with Articles 4 (1), 9 (2), 12, and 14 (2) as well as Annexes I and IV of Directive 2006/32/EC as adapted by Article 1 of Decision 2009/05/MC-EnC.¹

In the reply to the Opening Letter of 7 May 2014 Bosnia and Herzegovina confirmed deficits in its transposition of Directive 2006/32/EC but promised improvement.

In 2015 Directive 2006/32/EC was replaced in the Energy Community framework by its successor at EU level, Directive 2012/27/EU with a transposition deadline until 15 October

¹ In the interest of readability Annexes I and IV are not copied in this Opinion. Furthermore, their specific content is only of minor importance in this very case.

2017 (Decision 2015/08/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 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. In the present case, the close of the period prescribed by the Secretariat for Bosnia and Herzegovina to comply with the Reasoned Opinion was 15 April 2017. It is clear that Directive 2012/27/EU will repeal Directive 2006/32/EC only from 17 October 2017, in other words after the expiry of the period prescribed in the Reasoned Opinion. The legal obligations to be looked at are thus those originating from Directive 2006/32/EC.

In its reply to the Reasoned Opinion of 26 April 2017 Bosnia and Herzegovina describes its progress and concludes that it believes the breaches rectified. The Reasoned Request takes that into account but concludes that the transposition was not entirely successful.

The specialities of the legal framework in Bosnia and Herzegovina require a multi-level assessment of compliance with Directive 2006/32/EC. The two entities, Republika Srpska and the Federation of Bosnia and Herzegovina, as well as the Brčko District have their own sets of legislation which (also) have to be looked at before deciding on whether Bosnia and Herzegovina as a whole complies with certain pieces of legislation. It is clear, however, that the obligations of the Treaty are addressed to the Contracting Parties and not parts of it. Even if only a single entity is not in compliance, the entire Contracting Party is in default of the Treaty. Any failure of the authorities of Republika Srpska, the Federation of Bosnia and Herzegovina and/or the Brčko District to comply with Energy Community law has to be attributed to Bosnia and Herzegovina as Contracting Party to the Treaty.

In the documentation provided by the Secretariat there was no evidence that Article 4 (1) Directive 2006/32/EC or Annexes I and IV had been transposed by the Federation of Bosnia and Herzegovina. Hence, there is no indication that the allegations of the Secretariat in this respect would be wrong.

For the correct transposition of Article 9 (2) Directive 2006/32/EC the Contracting Parties are required to *'make model contracts for those financial instruments available to existing and potential purchasers of energy services and other energy efficiency improvement measures in the public and private sectors. These may be issued by the authority or agency referred to in Article 4(4) [of Directive 2006/32/EC]'*. Article 42 (5) Law on Energy Efficiency in the Federation of Bosnia and Herzegovina (Official Gazette No. 22/2017) provides that such a draft contract model shall be passed by the minister. The documents submitted to the Advisory Committee did not include information about such a piece of secondary legislation. Hence, it has to be concluded that Bosnia and Herzegovina is in violation of Article 6 of the Treaty in conjunction with Article 9 (2) Directive 2006/32/EC.

The alleged failure to transpose Article 12 Directive 2006/32/EC concerning energy audits incorrectly is based on an assessment of the Federation of Bosnia and Herzegovina's Law on Energy Efficiency. The said piece of legislation transposes Directive 2006/32/EC but

requires on several occasions that secondary legislation is adopted by the Government. This concerns in particular the transposition of Article 12 Directive 2006/32/EC, where Articles 26 (4), 26 (9), 27 (3) and 29 (3) include such a requirement. As long as such secondary legislation has not been passed, Bosnia and Herzegovina is in breach of Article 6 of the Treaty in conjunction with Article 12 Directive 2006/32/EC as the performance of energy audits is contingent upon this legal specification.

As regards the adoption of Energy Efficiency Action Plans pursuant to Article 14 (2) Directive 2006/32/EC, it remains undisputed by Bosnia and Herzegovina that neither a first nor a second Energy Efficiency Action Plan covering the entire territory of this Contracting Party had been adopted. Thus, the obligation to adopt Energy Efficiency Action Plans is not fulfilled by Bosnia and Herzegovina.

Furthermore, the undisputed failure of the Brčko District as the competent legislator in one part of Bosnia and Herzegovina to adopt any piece of legislation transposing Directive 2006/32/EC causes the entire Contracting Party Bosnia and Herzegovina to be in default.

IV. Conclusions

The Advisory Committee considers that Bosnia and Herzegovina failed to comply with Article 6 of the Treaty in conjunction with Articles 4 (1), 9 (2), 12, 14 (2) and Annexes I and IV Directive 2006/32/EC.

Done in Vienna on 12 September 2017

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, Chairman