

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

In Case ECS-2/15, the Secretariat of the Energy Community against Former Yugoslav
Republic of Macedonia, 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-2/15 against the Former Yugoslav Republic of Macedonia. The members of the Advisory Committee received a copy of all relevant documents of the case (including the replies of the Former Yugoslav Republic of Macedonia) 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 the Former Yugoslav Republic of Macedonia 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 the Former Yugoslav Republic of Macedonia failed to fulfill its obligations arising from Energy Community law. The Secretariat argues that the Former Yugoslav Republic of Macedonia failed to ensure that the customers eligible for the purchase of electricity from the supplier of their choice comprise all non-household and household customers according to Article 33 (1) of Directive 2009/72/EC.

The Former Yugoslav Republic of Macedonia has not submitted a reply to the Reasoned Request within the deadline ending 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. As in the present case the Former Yugoslav Republic of Macedonia did not reply to the Reasoned Request, the Advisory Committee takes into account the response of the Contracting Party to the Reasoned Opinion of the Secretariat, insofar as it is still relevant for the present case. The reply to the Opening Letter was not provided in English.

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 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 as amended reads:

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

Annex I of the Treaty as amended reads:

*(1) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.
(2) – (7) [...]*

Article 33 (1) of Directive 2009/72/EC reads:

Member States shall ensure that the eligible customers comprise:
(a) until 1 July 2004, the eligible customers as specified in Article 19(1) to (3) of Directive 96/92/EC. Member States shall publish by 31 January each year the criteria for the definition of those eligible customers;
(b) from 1 July 2004, all non-household customers;
(c) from 1 July 2007, all customers.

Article 17 of Ministerial Council Decision 2011/02/MC-EnC reads:

1. In Article 33(1) of Directive 2009/72/EC and in Article 37 of Directive 2009/73/EC:
- subparagraph (a) shall not be applicable;
- the date '1 July 2004' shall read '1 January 2008';
- the date '1 July 2007' shall read '1 January 2015.'

2. Paragraph 1 of this Article shall apply without prejudice to special deadlines agreed in the Protocols of Accession to the Energy Community.

According to the Reasoned Request the legal acts introduced by the Former Yugoslav Republic of Macedonia did not transpose Articles 33 (1) of Directive 2009/72/EC correctly. This was also confirmed by the Former Yugoslav Republic of Macedonia in its reply to the Reasoned Opinion.

In October 2014 the Energy Law of the Former Yugoslav Republic of Macedonia was amended introducing new timelines for the complete opening of the electricity market. In the reply to the Reasoned Opinion the Former Yugoslav Republic of Macedonia put forward several arguments to justify the amendments made. It was, however, not disputed that the schedule introduced was not in line with Energy Community law.

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 justifications brought forward by the Former Yugoslav Republic of Macedonia were manifold. The main motive for the amendment was the protection of households from a substantial increase in electricity prices and the functioning of the electricity sector in general. The Reasoned Request rightly dismisses these two attempts for a justification as being quite contrary to the entire system of the liberalization of electricity markets.

Similarly, the Former Yugoslav Republic of Macedonia's attempt to justify its delay in transposing Article 33 (1) of Directive 2009/72/EC by bringing up similar delays of other Contracting Parties or EU Member States cannot be successful. The transposition of Directive 2009/72/EC is an obligation imposed on each and every Contracting Party and it is in no way conditional on the transposition of this very piece of legislation by any other Contracting Party or EU Member State. This conclusion follows settled case law of the ECJ, which stated that '*a Member State cannot, in any event, plead the principle of reciprocity and rely on a possible infringement of the Treaty by another Member State in order to justify its own default*' (Case C-266/03 Commission v Luxembourg [2005] ECR 4805, para 35).

Raising Article 24 of the Treaty on taking 'special national situations' into account is also not going to be successful as this would have had to be raised at a much earlier stage, namely the Ministerial Council where the incorporation of Directive 2009/72/EC into Energy Community Law was decided. Article 24 of the Treaty cannot be used as a justification as it does not grant any specific rights but rather spells out an obligation on the Energy Community to consider its own and the Contracting Parties' specifics. Adaptations according to Article 24 of the Treaty can only be adopted by the Energy Community institutions and not by the Contracting Parties. Furthermore, they can only be considered before the Contracting Parties are required to implement certain pieces of EU legislation.

The principles of subsidiarity and proportionality were also brought up by the Former Yugoslav Republic of Macedonia as a means for justifying their non-compliance with Energy

Community law. Both of these principles are rooted in the law of the European Union. Whether or not a certain principle of EU law can be applied in the Energy Community framework will have to be decided by the Ministerial Council – on the one hand via Treaty amendments and on the other via decisions in the dispute settlement procedure. In this case, however, neither of the two principles can be invoked as a justification: subsidiarity and proportionality are clearly issues of law-making and not a means of justification in a case of violating basic rules. A directive itself could be challenged on grounds of violating both of these principles, but a national transposition or rather non-transposition cannot be justified by them.

To sum up, all the justifications brought forward might provide room for discussion on the development of Energy Community law, but they are not suitable to justify the restrictions on the opening of the electricity market in the Former Yugoslav Republic of Macedonia.

IV. Conclusions

The Advisory Committee considers that the Former Yugoslav Republic of Macedonia failed to comply with Article 11 of the Treaty in conjunction with Article 33 (1) of Directive 2009/72/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 flourish extending to the right.

Wolfgang Urbantschitsch, Chairman