

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

In Case ECS-18/16, the Secretariat of the Energy Community against Serbia, 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 Energy Community Treaty') 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 as amended on 16 October 2015 ('Dispute Settlement Rules 2015'),

acting unanimously,
gives the following

OPINION

I. Procedure

By electronic 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-18/16 against 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 2015 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 on 12 January 2017 and is thus to be dealt with according to the Dispute Settlement Rules as amended on 16 October 2015.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Serbia failed to fulfil its obligations arising from the Energy Community Treaty, namely Article 6 thereof read in conjunction with Articles 18(1)(a) and 19. The Secretariat argues that Serbia ratified an agreement requiring undertakings to adopt anti-competitive conduct in the sense of Article 18(1)(a) of the Energy Community Treaty.

On 19 July 2017 Serbia submitted a reply to the Reasoned Request, asking to reject the case.

On 6 October 2017 the Advisory Committee held a public hearing in order to assess the facts, the applicable law and the legal assessment. Representatives of the Energy Community Secretariat participated, but Serbia did not send a representative. However, on the eve of the hearing, the Serbian government sent a letter to the Advisory Committee informing that Serbia had taken specific steps to find a solution to the case. At the request of the Serbian government, the letter was attached to the minutes of the hearing.

II. Relevant provisions of the Energy Community Treaty

Article 6 of the Energy Community Treaty

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 18 of the Energy Community Treaty reads:

1. The following shall be incompatible with the proper functioning of the Treaty, insofar as they may affect trade of Network Energy between the Contracting Parties:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition,

(b) abuse by one or more undertakings of a dominant position in the market between the Contracting Parties as a whole or in a substantial part thereof,

(c) any public aid which distorts or threatens to distort competition by favouring certain undertakings or certain energy resources.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community (attached in Annex III).

Article 19 of the Energy Community Treaty reads:

With regard to public undertakings and undertakings to which special or exclusive rights have been granted, each Contracting Party shall ensure that as from 6 months following the date of entry force of this Treaty, the principles of the Treaty establishing the European Community, in particular Article 86 (1) and (2) thereof (attached in Annex III), are upheld.

Article 41 of the Energy Community Treaty reads:

1. Customs duties and quantitative restrictions on the import and export of Network Energy and all measures having equivalent effect, shall be prohibited between the Parties. This prohibition shall also apply to customs duties of a fiscal nature.

2. Paragraph 1 shall not preclude quantitative restrictions or measures having equivalent effect, justified on grounds of public policy or public security, the protection of health and life of humans, animals or plants, or the protection of industrial and commercial property. Such restrictions or measures shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.

III. Facts

On 13 October 2012, the government of the Republic of Serbia and the government of the Russian Federation concluded an agreement for the supply of natural gas from the Russian Federation to the Republic of Serbia ('the Agreement'). The Agreement was ratified and entered into force in March 2013. Article 4(3) of the Agreement reads: "*Natural gas, which is supplied to the Republic of Serbia on the basis of this agreement is intended for use in the Serbian market.*"

This Agreement was concluded in the framework of another international treaty, concluded previously between Yugoslavia (of which Serbia accounts as legal successor) and Russia. Article 7 of this treaty also provides that the *gas delivered from Russia to consumers in Yugoslavia shall not be re-exported to third countries.*

IV. Legal Assessment

Such a destination clause will inhibit Serbian buyers to re-export Russian gas to other parts of the Energy Community and, thus, contradicts the fundamental objectives of market integration enshrined in the Treaty.

a) Justifications

The Reasoned Request of the Secretariat alleges that by ratifying an agreement requiring undertakings to adopt anti-competitive conduct in the sense of Article 18(1)(a) of the Treaty Serbia failed to comply with its obligations under the Treaty, namely Article 6 thereof read in conjunction with Articles 18(1)(a) and 19.

Serbia replied that the Agreement between Russia and Serbia was necessary for the safe supply of natural gas to Serbian consumers who, in accordance with Serbian law, were entitled to be supplied at regulated prices.

Serbia stressed in particular that the supply at regulated prices is an activity of general interest and that, according to “*Article 86, paragraph 2 of the Treaty establishing the Energy Community*”, undertakings entrusted with services of general economic interest should not be prevented by the competition rules to perform the tasks entrusted to them. Serbia complained the Secretariat never addressed Article 86.

Serbia also indicated that, given the limited number of pipelines, the Agreement did not compromise trade in natural gas in any way that would be contrary to the interests of the Energy Community.

The Advisory Committee has considered and examined the arguments of the Serbian government:

As to Serbia’s claim that the destination clause was necessary for Serbia’s security of gas supply, the Advisory Committee understands that the Agreement is part of Serbia’s policy to ensure supply of Russian gas to Serbia which, however, is part of the internal market of the Energy Community. The security of supply of all parties of the Energy Community depends on the solidarity and free circulation of gas inside the internal market. Derogation to the fundamental rules of free competition and free movement need to be justified with concrete arguments referring to concrete provisions of Energy Community law. Serbia has not indicated any such concrete concern or provision.

As concerns Article 86, the Advisory Committee supposes that Serbia refers to the Treaty establishing the *Energy Community* by error and in reality means the Treaty establishing the *European Community*; Article 86 of the former deals with decision making procedures, the latter with competition policy. The Committee also notes that the Energy Community Secretariat has referred to Article 86 of the European Community Treaty in both its Opening Letter dated 21 January 2017 and its Reasoned Opinion dated 16 March 2017. Moreover, the principles of Article 86 of the European Community Treaty are upheld by Article 19 Energy Community Treaty which is the very base of the Reasoned Request. Thus, Serbia’s claim that the Energy Community Secretariat has never addressed Article 86 of the European Community Treaty is not founded. As to substance, the fact that energy supply is an activity of general public interest does not justify per se derogations from the fundamental principles of the internal market and competition law. Serbia has not demonstrated any specific circumstances which would justify derogation from competition rules due to reasons of public service obligations.

As concerns Serbia’s reference to the limited number of interconnectors, the Advisory Committee recalls the jurisprudence of the European Court of Justice concerning both

competition law (Case 56/65 *Société La Technique Minière Ulm*, ECLI:EU:C:1966:388, par. 249) and internal market law (Case 8-74 *Dassonville*, ECLI:EU:C:1974:82, par. 5) confirming that is sufficient that the incriminated measure is capable of having an influence, direct or indirect, actual or potential, on trade. The limited number of pipelines is not a justification for an Agreement to limit the legal freedom of trade.

Thus, there is no justification for the destination clause.

b) State responsibility

If they are adopted by private undertakings, such destination clauses are incompatible with the competition rules of Articles 18 and 19 of the Energy Community Treaty. However, the infringement procedures of Articles 90ss of the Energy Community Treaty, under which the Ministerial Council has to decide in the present case ECS-18/16, deal only with the behaviour of the Parties, not with the behaviour of private undertakings.

In order to demonstrate the responsibility of the Republic of Serbia, the Energy Community Secretariat refers to Article 6 Energy Community Treaty which codifies the duty of loyal cooperation: “*The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.*” Thus the Energy Community Secretariat concludes that Serbia failed to comply with Article 6 read in conjunction with Article 18 Energy Community Treaty. The Advisory Committee recognizes that this line of argumentation corresponds to the jurisprudence of the Court of Justice of the European Union concerning barriers to trade that – although erected by private undertakings – are encouraged or even required by a state (see e. g. case 267/86 *Van Eycke*, ECLI:EU:C:2006:758, par. 46).

However, the Advisory Committee estimates that the detour via Article 6 is not necessary as the responsibility of the State can be established directly by Art. 41, par. 1: “*Customs duties and quantitative restrictions on the import and export of Network Energy and all measures having equivalent effect, shall be prohibited between the Parties.*” Indeed a State measure hindering citizens to sell the gas abroad is a measure having equivalent effect to a quantitative restriction on exports. The Advisory Committee drew the attention of the parties in its invitation to the public hearing

The Advisory Committee concludes that, by adopting the destination clause, Serbia has failed to comply both with Article 41 and with Article 6 read in conjunction with Articles 18 and 19 of the Treaty.

c) Serbian measures to end the infringement

In its reply to the Reasoned Request Serbia announced that it had initiated talks with the Russian government concerning, inter alia, the destination clause. In its letter addressed to the Advisory Committee on the eve of the hearing, Serbia further indicated that the government was preparing a new agreement with the Russian Federation which, once signed, should be ratified by the National Assembly of the Republic of Serbia. After the ratification of this agreement a new supply contract would be signed and would not contain the contested clause.

At the hearing of 6 October 2017, the Secretariat estimated that the letter was not part of the infringement procedure and that the intentions of Serbia had not yet changed the facts and not ended the infringement. As long as the destination clause was in force, the Secretariat would not withdraw the case.

The Advisory Committee welcomes the efforts of the Serbian government to find a solution and to delete the destination clause, but notes that the infringement existed on the date of the Reasoned Request and continues to exist.

V. Conclusions

The Advisory Committee considers that the Republic of Serbia, by concluding and ratifying the Agreement for the supply of natural gas from the Russian Federation to the Republic of Serbia, in particular the destination clause contained in Article 4 (3) thereof, has failed to comply with its obligation under the Treaty establishing the Energy Community, in particular Articles 6 in conjunction with Articles 18 and 41.

Done in Vienna on 28 November 2017

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, President