

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

In Case ECS-2/13, 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 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-2/13 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 11 February 2013 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 fulfill its obligations arising from Energy Community law. The Secretariat argues that Bosnia and Herzegovina failed to ensure that certain liquid fuels are not used if their sulphur content exceeds the thresholds defined in Articles 3 (1) and 4 (1) of Directive 1999/32/EC.

Bosnia and Herzegovina 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 Bosnia and Herzegovina did not reply either to the Reasoned Opinion or to the Reasoned Request, the Advisory Committee takes into account the response of the Contracting Party to the Opening Letter of the Secretariat, insofar as it is still relevant for the present case.

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.

Article 4 (1) of Directive 1999/32/EC reads:

Member States shall take all necessary steps to ensure that gas oils, including marine gas oils, are not used within their territory as from:
- July 2000 if their sulphur content exceeds 0,20 % by mass,
- 1 January 2008 if their sulphur content exceeds 0,10 % by mass.

According to the Reasoned Request the legal acts introduced by Bosnia and Herzegovina did not transpose Articles 3 (1) and 4 (1) of Directive 1999/32/EC correctly. This was also confirmed by Bosnia and Herzegovina in its reply to the Opening Letter.

In this very document Bosnia and Herzegovina argued that their extent of non-compliance with Article 3 (1) of Directive 1999/32/EC is limited by submitting that the exemption given in the legal framework stated only applies to the territory of one of its entities and thus only to a rather limited amount of heavy oil. It is clear, however, that the obligations of the Treaty are addressed to the Contracting Parties and not parts of it. Even if 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 and/or the Federation of Bosnia and Herzegovina to comply with Energy Community law has to be attributed to Bosnia and Herzegovina as Contracting Party to the Treaty.

As regards Article 4 (1) of Directive 1999/32/EC Bosnia and Herzegovina indicated that it did not transpose the requirements of this legal norm, but that it was going to improve a certain set of standards to be in compliance. Hence, it is undisputed that currently Bosnia and Herzegovina fails to comply with a Treaty obligation. The plans laid out by Bosnia and Herzegovina as to how they are going to transpose any parts of the Directive are not subject to the Advisory Committee's assessment.

IV. Conclusions

The Advisory Committee considers that Bosnia and Herzegovina failed to comply with Article 12 of the Treaty in conjunction with Articles 3 (1) and 4 (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 flourish extending to the right.

Wolfgang Urbantschitsch, Chairman