

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

In Case ECS-8/11, Secretariat of the Energy Community against Bosnia and Herzegovina, the

ADVISORY COMMITTEE,

composed of
Wolfgang Urbantschitsch, Nikola Radovanović and Visar Hoxha,

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 9 July 2013 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in Case ECS-8/11 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.

In its Reasoned Request the Secretariat is seeking 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 transpose the *acquis communautaire* by leaving gaps or breaching provisions of Directive 2003/55/EC and Regulation (EC) No 1775/2005. The Reasoned Request covers 15 allegations related to the regulatory authorities; the legal, functional and accounting unbundling; third party access tariffs; third party access exemptions for new infrastructure; market opening and the access conditions to natural gas transmission systems.

Bosnia and Herzegovina has not submitted a reply to the Reasoned Request within the deadline ending 23 July 2013.

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 has not replied 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 (some issues of alleged non-compliance identified in the Reasoned Opinion were dropped from this case).

As the Opinion of the Advisory Committee is based on the Reasoned Request, the Advisory Committee is not in a position to go beyond the allegations made in that document and therefore no new allegations can be brought up in this Opinion. Therefore, the Advisory Committee does not give a statement in those fields where the Contracting Party (or one of its entities) has transposed the *acquis* correctly, with the exception of those allegations where the Advisory Committee is not of the opinion of the Reasoned Request.

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.

Finally, the Reasoned Request refers to the Draft Law on Gas in the Federation of Bosnia and Herzegovina and analyses whether the intended provisions would be compliant with the *acquis*. As only provisions with unquestionable binding force can be taken into account when proving the correct implementation by a Contracting Party, the Advisory Committee will not comment on this Draft Law on Gas and it should not be taken into account by the Ministerial Council.

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

Introduction

As Contracting Party to the Treaty establishing the Energy Community Bosnia and Herzegovina has to implement Directive 2003/55/EC which is listed in Article 11 of the Treaty. According to Article 10 and Annex I, 1(ii)¹ of the Treaty the implementation has to take place within 12 months after the entry in to force of the Treaty on 1 July 2006. Furthermore, in Decision No 2007/06/MC-EnC of 18 December 2007 the Ministerial Council decided that the Contracting Parties, and thus also Bosnia and Herzegovina, were to implement Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks before 31 December 2008.

It is an undisputed fact that there is no state-wide legislation in Bosnia and Herzegovina governing the gas sector. However, the two constitutional entities, Republika Srpska and Federation of Bosnia and Herzegovina, have adopted legislation concerning the gas sector. In Republika Srpska a law on gas in force since September 2007 was amended recently. The amendments came into force on 3 January 2013. In the Federation of Bosnia and Herzegovina the Government adopted the Decree on the Organization and Regulation of the Gas Sector ("Decree") which applies since November 2007. A law on gas in this entity has not yet been adopted.

¹ The specific deadlines under Annex I, 2. of the Treaty are not relevant in the case at hand.

The Advisory Committee shares the Secretariat's view that any failure of the authorities of Republika Srpska and/or the Federation of Bosnia and Herzegovina to comply with the Energy Community law has to be attributed to the State of Bosnia and Herzegovina as party of the Treaty [Point 48 of the Reasoned Request]. The Advisory Committee believes that both, state-wide legislation in Bosnia and Herzegovina and the legal framework of the constitutional entities have to be assessed and checked for compliance with the *acquis communautaire* [49].

In the following section the Advisory Committee therefore looks at the entities' legal framework on the gas sector and investigates whether the Secretariat's allegations about the contravention of Energy Community Law are justified. This assessment follows closely the structure of the Reasoned Request.

Regulatory Authorities [51ff]

It is not contested by the Contracting Party that Bosnia and Herzegovina that it has not established a Regulatory Authority for the gas sector which is responsible for the entire country.

In the Federation of Bosnia and Herzegovina in the absence of a regulatory authority the function of the regulator is performed by the Ministry of Energy, Mining and Industry (Article 57(2) of the Decree). However the Ministry does not fulfill the requirement of independency as stated in Article 25(1) of Directive 2003/55/EC: The Ministry as shareholder representative is responsible for the transmission system operator *BH Gas d.o.o. Sarajevo* and at least one other operator in the gas sector. Therefore it cannot fulfill the regulatory tasks in an independent way.

Furthermore Directive 2003/55/EC requires in its Article 25 that the regulatory authority carry out specific tasks, such as being responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market monitoring as well as fixing or approving at least the methodologies used to calculate or establish the terms and conditions for connection and access to national networks. The regulatory authority must also have the right to require transmission, LNG and distribution system operators to modify the terms and conditions, including tariffs and methodologies, to ensure that they are proportionate and applied in a non-discriminatory manner. Of particular importance is the duty to take decisions in case of complaints of market participants.

The Decree does not assign these tasks from Article 25 of Directive 2003/55/EC to a competent authority. Therefore the Advisory Committee agrees with the Reasoned Request that Bosnia and Herzegovina has failed to adopt the measures necessary to implement Article 25 of Directive 2003/55/EC [65].

Legal unbundling [66ff]

Where the transmission system operator is part of a vertically integrated undertaking, as is the case in the two entities, it shall be independent at least in terms of its legal form, organization and decision making from other activities not relating to transmission (Article 9(1) of Directive 2003/55/EC).

As to the transmission system operator in Republika Srpska, *Gaspromet AD Istocno Sarajevo Pale*, the Reasoned Request argues that even though Article 24 of the law on gas in Republika Srpska foresees that gas transmission system operation has to be legally unbundled, in reality this obligation is still not fulfilled. The Reasoned Request brings forward

the argument that *Gaspromet AD Istocno Sarajevo Pale* continues to hold licences for transmission system operation as well as trade and supply. Even though supply activities are currently not exercised, the company cannot be considered fully legally unbundled as long as the license for trade and supply is not withdrawn. As to *Sarajevo-gas a.d Istocno Sarajevo* the Reasoned Request argues that this company also holds licenses for transportation² as well as supply and carries out both functions in practice. Finally, the Reasoned Request refers to Republika Srpska's comments on the Reasoned Opinion stating that the introduction of legal unbundling in the Law on Gas will have to be followed by secondary legislation changes and thereby further action to rectify the identified cases of non-compliance. The Reasoned Request continues to state that such secondary legislation has not been enacted.

The Advisory Committee considers that Article 9(1) of Directive 2003/55/EC prevents a transmission system operation licensee from also holding licenses for gas trade and/or supply and from performing trade and/or supply. Therefore, as long as the licenses for trade and supply are not withdrawn or transferred to another (vertically integrated) undertaking or the trade and supply activities are maintained, a company cannot be considered as fully legally unbundled. The Advisory Committee agrees with the conclusion of the Reasoned Request stating that Bosnia and Herzegovina has failed to comply with Article 9(1) of Directive 2003/55/EC. This is even confirmed by Republika Srpska's comment. Against this background it is not necessary anymore to examine the question of which functions are still carried out by the companies in practice [68, 69]. The ultimate conclusion of the Secretariat on non-compliance is correct. Directive 2003/55/EC does not make any differentiation between transmission and transmission system operation, but rather defines the transmission system operator as a natural or legal person who carries out the function of transmission (Article 2(3) and (4)), while there is a sui generis differentiation in the legislative framework of Republika Srpska. In this respect the holders of both the Transport and Transport System Operation licenses have to be screened against the requirements of Article 9(1) of the Directive. In points 68 and 69 of the Reasoned Request the Secretariat correctly points out the reasons why the unbundling has not occurred with respect to supply, but it goes too far in assessing that it considers *Sarajevo-gas a.d. Istocno Sarajevo* to be a transmission system operator from the perspective of Directive 2003/55/EC.

As to the Federation of Bosnia and Herzegovina the Reasoned Request argues that supply and transport/transmission of natural gas are carried out by one and the same company, *BH Gas d.o.o. Sarajevo*, with reference to Articles 10 and 31(2) of the Decree.

The Advisory Committee shares the Reasoned Request's view. In accordance with the before mentioned Articles of the Decree *BH Gas d.o.o. Sarajevo* carries out the activities of transmission system operation and supply. Therefore Bosnia and Herzegovina failed to comply with Article 9(1) of Directive 2003/55/EC [76].

Functional unbundling [77ff]

Article 9(1) of Directive 2003/55/EC obliges the Contracting Parties to make sure that transmission system operators belonging to a vertically integrated undertaking are independent in terms of their organization and decision making from other activities not relating to transmission (functional unbundling).

Article 9(2) of Directive 2003/55/EC contains minimum criteria which the transmission system operator must fulfill. Persons responsible for the management of the transmission system operator may not participate in company structures of the integrated natural gas undertaking

² Articles 3(b), 3(c), and 13 of the Law on Amendments to the Law on Gas ("Official Journal of Republic of Srpska" No 121/12).

responsible, directly or indirectly, for the day-to-day operation of the production, distribution and supply of natural gas. Additional provisions govern effective decision-making rights, independent from the integrated gas undertaking and the adoption of a compliance programme which sets out measures taken to ensure that discriminatory conduct is excluded.

The Reasoned Request argues that *Gaspromet AD Istocno Sarajevo Pale* and *Sarajevo-gas a.d. Istocno Sarajevo* in Republika Srpska are organized in that way that the managers of the transmission sectors are at the same time members of the board of directors and therefore do participate in the company structures for the supply activities.

As to *BH Gas d.o.o. Sarajevo* the Reasoned Request argues that all the activities performed by the company are carried out within one unified organizational and management structure. Like in the companies in Republika Srpska no measures have been taken to ensure that the board of directors acts independently. Neither has a compliance programme been established.

Finally in the Federation of Bosnia and Herzegovina the Decree does not require that a compliance programme in accordance with Article 9(2) d of Directive 2003/55/EC has to be established.

The Advisory Committee considers it necessary in order to guarantee functional unbundling to make sure that the managers of the transmission sectors are not involved in the supply activities of the companies.

As to the situation in both entities of Bosnia and Herzegovina the Reasoned Request does not give reference to the source of information, i.e. the evidence that was assessed. Due to the lack of proven fact (except for the lack of establishing compliance programmes) it is not possible to give a decisive legal assessment. Under the assumption that the facts are as stated in the Reasoned Request and given that the allegations were not contested by the Contracting Party, the Advisory Committee is of the opinion that the current structures in the before mentioned companies in Republika Srpska and the Federation of Bosnia and Herzegovina leads to the conclusion that the Contracting Party Bosnia and Herzegovina is in violation of Article 9(1) and (2) of Directive 2003/55/EC [83, 84, 88].

Accounting unbundling [90ff]

Article 17 of Directive 2003/55/EC provides that Member States must take the necessary steps to ensure that the accounts of natural gas undertakings are unbundled in the sense that they meet the requirements of the detailed provisions in paragraphs 2 to 5 of that Article.

As to the situation in Republika Srpska, the Reasoned Request argues that Republika Srpska has managed to correctly transpose the requirements of Article 17 of Directive 2003/55/EC with the latest Law on Amendments to the Law on Gas (Article 19 thereof). This is further supported by relevant provisions of Republika Srpska secondary legislation: Rule Book on Reporting – (“Official Gazette of Republic of Srpska” no. 70/10) and Single Regulatory Account Plan (“Official Gazette of Republic of Srpska” no. 39/10). However, the unbundled accounts have not been audited nor published to date, thus creating the situation in which Republika Srpska still fall short of implementing the requirements of Article 17 of Directive 2003/55/EC [91].

Regarding the unbundling of accounts in the Federation of Bosnia and Herzegovina, the determined facts of the case show that it has failed to fully and correctly transpose, let alone implement the requirements set out in Article 17 of Directive 2003/55/EC. Namely, Articles 48-50 of the Decree fail to refer to the specific requirements of Directive 78/660/EEC or their national transposition or to those set out in Article 17 of Directive 2003/55/EC itself. Furthermore, Article 59(3) of the Decree exempted *BH Gas d.o.o. Sarajevo* from the obligation to unbundle its accounts and, regardless of the fact that this exemption has

expired in November 2012, *BH Gas d.o.o. Sarajevo* still does not publish its unbundled accounts in line with the requirements of Article 17(2) of Directive 2003/55/EC [93, 95].

It is the view of the Advisory Committee that the assessment that Article 17 of Directive 2003/55/EC has not been implemented by Bosnia and Herzegovina, to which actions and non-actions of its entities and public companies are imputable, is correct, regardless of the individually different level of non-compliance within the entities themselves (Republika Srpska with correct and full transposition but failure in implementation, and the Federation of Bosnia and Herzegovina failing to both transpose and implement the requirements) [96].

Third party access tariffs [97ff]

Article 18 of Directive 2003/55/EC prescribes the obligation of the Contracting Parties to ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs applicable to all eligible customers and applied objectively and without discrimination between system users. The Contracting Parties are obliged to ensure that these tariffs, or the methodologies underlying their calculation are approved, prior to their entry into force, by a regulatory authority referred to in Article 25(1) and that these tariffs, and the methodologies, where only methodologies are approved, are published prior to their entry into force. The basic requirements for the tariffs or the methodologies for calculating tariffs to be applied by transmission system operators are stipulated in Article 3 of Regulation 1775/2005.

The Reasoned Request finds that, in Republika Srpska, the legal framework provides for the existence of access to the transmission system on the basis of transparent and published tariffs, which are to be determined by the "transport system operator" (*Gaspromet AD Istocno Sarajevo Pale* is the only licensed transport system operator) in line with the tariff system and methodology to be adopted by the entity energy regulator RERS and then published in the Official Gazette of Republika Srpska (Articles 4(2)(c), 43(3), and 43(4)).

The Secretariat however misreads the provisions of Article 13 amending the Law on Gas³. Read in conjunction these two provisions lead to the conclusion that the legal framework attempts to stipulate who is to grant access and in what manner to the respective part of the transmission (transport) network, and establishes the responsibilities of the transporter and transport system operator. In this respect, the provisions of the law are unclear and need revision. However, the claims of the Secretariat are related to the third party access tariffs. Although both *Sarajevo-gas a.d. Istocno Sarajevo* and *Gaspromet AD Istocno Sarajevo Pale* have to be screened in terms of the unbundling requirements (see above regarding points 68 and 69 of the Reasoned Request), they are separate license holders and subject to different requirements in the tariff setting procedure. Namely, as set out in Article 22(2) of the amended Law on Gas, it is the "transport system operator" (only *Gaspromet AD Istocno Sarajevo Pale*) who has the duty to pass the network code ("rules of operation of the transport network"), with regulatory approval, which shall be applied on the basis of public tariffs published in advance in an open, non-discriminatory manner, providing for an equal status of transport network users and while preserving business secrets [98]. As explained above, given the ambiguous provisions of the law, it is impossible to assess whether the conclusion of the Secretariat that the implementation of the transmission tariffs depends on *both* "transmission operators" (or just *Gaspromet AD Istocno Sarajevo Pale* as the licensed transport system operator) is valid.

The Secretariat further states that the respective methodology (Tariff Methodology for Transmission, Distribution, Storage and Supply of Natural Gas) was passed by RERS in 2009, but that separate tariffs for access to and usage of the transmission system have not been formally adopted or published. This was confirmed by Republika Srpska in the replies both to the Opening Letter and the Reasoned Opinion [99]. The Reasoned Request properly

³ Article 21(5)(c) and Article 21(3)(c) of the Law on Amendments to the Law on Gas.

calls upon the case law of the Court of Justice of the European Union (from the electricity sector, but applicable) [100] and points out the violation of Article 3(1) of Regulation 1775/2005 – in the opinion of the Advisory Committee, the mere fact that the separate transmission tariffs have not been applied *per se* means that the requirements of Article 3(1) have nothing to be assessed against. This is however, not the case in terms of the Methodology – the Reasoned Request fails to demonstrate the points of non-compliance with Article 3(1) of Regulation 1775/2005 [101]. The justification provided by Republika Srpska on why the separate transmission tariffs have not been set up was, in the view of the Advisory Committee, rightfully not accepted by the Reasoned Request and this is fully in line with the well-established case law of the Court of Justice of the European Union according to which a Contracting Party may not plead internal circumstances to justify a failure to comply with obligations and time-limits laid down by Energy Community law⁴ [102-105].

As far as the Federation of Bosnia and Herzegovina is concerned, the Reasoned Request properly assesses that the provisions of the Decree (Article 22(1) and (3) thereof) are fully non-compliant with Directive 2003/55/EC (Article 18(1) thereof) and Regulation 1775/2005 (Article 3(1) thereof) which rule out the possibility of negotiated third party access to the transmission system. Article 22(4) of the Decree prescribes that regulated access shall be based on a published tariff system, or methodology and tariffs that are applied in an objective manner and are equal for all participants in the gas market. The Reasoned Request further argues that, in the absence of a regulatory authority, the respective ministries set bundled transmission-supply and distribution-supply tariffs, and that thus currently neither the network tariffs for gas transmission and distribution, nor the methodology for their calculation, are adopted, published or applied in the Federation of Bosnia and Herzegovina.

The Advisory Committee finds that the lack of formally establishing separate transmission tariffs inevitably leads to non-compliance with the requirements of Articles 18(1), read in conjunction with 25(2) of Directive 2003/55/EC, as well as the transparency requirements of Article 3 of Regulation 1775/2005 [106, 109, 110, 111, 112].

It is the view of the Advisory Committee that the assessment that Article 18(1) and 25(2) of Directive 2003/55/EC, as well as Article 3 of Regulation 1775/2005 have not been implemented by Bosnia and Herzegovina, to which actions and non-actions of its entities and public companies are imputable, is correct, regardless of the individually different level of non-compliance within the entities themselves (Republika Srpska failing to apply and publish tariffs for access to and usage of the transmission system, and the Federation of Bosnia and Herzegovina failing to apply and publish both transmission and distribution tariffs or the corresponding methodology) [114].

Third party access exemptions for new infrastructure [115ff]

Article 22 of Directive 2003/55/EC prescribes the conditions and the procedure for, *inter alia*, granting third party access exemptions for new infrastructure. Insofar as the procedure is concerned, Article 22 (3)(a) prescribes the involvement of the regulatory authority, either in terms of deciding on the exemption or by submitting its opinion on the request for an exemption to the relevant body in the Contracting Party. In the latter case, the opinion of the regulator is to be published together with the decision. Part of point 115 is given in the form of a statement expressed by the Secretariat which is of no relevance for either monitoring or assessing compliance, as the obligations to implement Directive 2003/55/EC are set out in the Treaty establishing the Energy Community.

The Reasoned Request correctly establishes that the existing Decree in the Federation of Bosnia and Herzegovina, specifically Article 26 thereof, fails to envisage the participation of

⁴ Case C-387/197 Commission v Greece [2000] ECR I-5047, paragraph 70.

the regulatory authority in the exemption procedure, which is prescribed as mandatory in Article 22(3)(a) of Directive 2003/55/EC. It correctly determines that there is no transposition of the requirement to publish the reasoned exemption decision [116,117,119].

It is the view of the Advisory Committee that the assessment that Article 22 of Directive 2003/55/EC, has not been properly transposed by Bosnia and Herzegovina, to which actions and non-actions of its entities (in this case the Federation of Bosnia and Herzegovina) are imputable, is correct. [121].

Finally, the Advisory Committee notes that the Reasoned Request omits whether and how Republika Srpska has managed to transpose the requirements of Article 22 of Directive 2003/55/EC; therefore it can only be presumed that the transposition of the requirements of the Directive has been conducted properly by Republika Srpska.

Market opening and reciprocity [122ff]

Article 23(1) of Directive 2003/55/EC, read in conjunction with Article 2(i) of Annex I to the Treaty, requires Bosnia and Herzegovina to ensure that all non-household customers are eligible customers, i.e. have the right to purchase gas from the supplier of their choice⁵, by 1 January 2008. Article 23(2) of Directive 2003/55/EC allows an eligible customer to be supplied by a supplier from another Contracting Party to the Energy Community if the customer is eligible in both systems involved.

The Secretariat properly determines the relevant Articles of the Decree in the Federation of Bosnia and Herzegovina, namely Articles 5, 58(1), 34 and 37 as those dealing with the topic of market opening [124]. There is a correct reference to Article 58(2) of the Decree which itself makes references to Articles 23 and 28 of Directive 2003/55/EC [124,125].

Although it is undisputable that Bosnia and Herzegovina has never been granted a derogation under Article 28 of Directive 2003/55/EC, it is the view of the Advisory Committee that the Reasoned Request goes beyond the existing legal and institutional framework applicable to the "second energy package" when claiming that Bosnia and Herzegovina never notified the derogation to the Commission or the Secretariat as required by the relevant provision. Namely, in the view of the Advisory Committee, the gap in the institutional framework (i.e. the lack of clarity as to how derogations would be granted to the Contracting Parties) was never covered in line with the possibilities provided by the Treaty under Article 24 of the Treaty ("Adaptation and evolution of the Acquis"⁶). In this respect, even if Bosnia and Herzegovina had fulfilled all of the requirements to be granted derogation, the institutional gap (which could not be removed by invitations at workshops or written statements by respective ministries⁷) would still remain. However, regarding the substance on potential derogations, the Secretariat correctly and with sound argumentation assesses that Bosnia and Herzegovina does not satisfy the criteria to be considered an emerging market or an isolated market as defined under Article 28 of Directive 2003/55/EC [124,125,126].

The Reasoned Request goes on to properly determines that Articles 29 of the Decree in the Federation of Bosnia and Herzegovina foresees that eligibility is to be exercised in line with respective secondary legislation which has never been passed, and that Article 34(1) of the Decree contravenes the requirements of Article 23(1)(b) of Directive 2003/55/EC as it sets eligibility criteria related to type of consumption or annual consumption quantity [127, 128].

⁵ Art.1(28) of Directive 2003/55/EC.

⁶ Decision of the Ministerial Council D/2011/02/MC-EnC.

⁷ Footnotes 74 and 75 of the Reasoned Request.

The Advisory Committee is of the opinion that the Reasoned Request is on firm ground when assessing that Article 34(4) of the Decree in the Federation of Bosnia and Herzegovina goes beyond what is envisaged in Article 23(1)(b) by extending the reciprocity requirement, in terms of eligibility, to internal gas transactions, i.e. transactions with no cross-border relevance [130].

The Advisory Committee does not share the opinion of the Reasoned Request that Article 34(3) of the Decree goes beyond the reciprocity requirements of the Directive. The latter option foreseen in the Decree (a gas supply contract between a non-domestic supplier and a domestic customer) provides for the same possibilities as stipulated in Article 23(2)a of the Directive.

It is the view of the Advisory Committee the assessment that the Decree in Federation of Bosnia and Herzegovina is in non-compliance with Article 23(1)(b) of Directive 2003/55/EC insofar as it defers market opening and links it to uncertain events in the future (the setting up of a regulatory authority and the adoption of secondary legislation by the latter), as well as the conditions for obtaining eligibility, insofar as they require the fulfillment of criteria additional to those in the Directive, is correct. This is also the case in terms of the reciprocity requirements related to inner-Bosnian transactions (those between the two entities) which constitutes a violation of Article 23(2) of the Directive. In this respect the Advisory Committee shares the view of the Reasoned Request that Bosnia and Herzegovina, to which actions and non-actions of its entities are imputable (in this instance the Federation of Bosnia and Herzegovina) contravenes Article 23 of Directive 2003/55/EC read together with Item 2(i) of Annex I to the Treaty [131,134].

Finally, the Advisory Committee notes that the Reasoned Request omits whether and how Republika Srpska has managed to transpose the requirements of Article 23 of Directive 2003/55/EC; therefore it can only be presumed that the transposition of the requirements of the Directive has been conducted properly by Republika Srpska.

Requirements following from Regulation (EC) No 1775/2005 [135ff]

Regulation 1775/2005 aims at setting non-discriminatory rules for access conditions to natural gas transmission systems. Transmission system operators are obliged to comply with several provisions relating to the tariffs for access to networks, third-party access services and capacity allocation. Furthermore the Regulation foresees transparency requirements and provisions on balancing rules and imbalance charges as well as trading of capacity rights. The Contracting Parties have to lay down the rules on penalties applicable to infringements of the provisions of the Regulation and must take all measures necessary to ensure that they are implemented. The regulatory authorities must ensure compliance with the Regulation and their guidelines annexed thereto.

The Reasoned Request argues that in Republika Srpska the transmission system operator *Gaspromet AD Istocno Sarajevo Pale* adopted a Rulebook on the operation of the transmission network ("Rulebook") which fails to fully transpose Articles 4 to 8, 10 and 13 of Regulation 1775/2005:

According to the Reasoned Request the Rulebook does not envisage any obligation on the transmission system operator to provide for firm and interruptible services and to offer those services on a long and short term basis. In practice, *Gaspromet AD Istocno Sarajevo Pale* provides only firm services and only for one year ahead. The guidelines annexed to Regulation 1775/2005 require transmission system operators to offer firm and interruptible services down to a minimum period of one day. Furthermore the Reasoned Request argues that the Guidelines' requirements transmission system operators to implement standardized nomination/re-nomination procedures, and develop information systems and electronic communication means to provide adequate data to network users, are not met.

The Reasoned Request compares the Rulebook with the provisions of the Regulation and comes to the following conclusions:

Gaspromet AD Istocno Sarajevo Pale in practice is not involved in the balancing of the network in the entity of Republika Srpska. The Reasoned Request also argues that the "balancing gas price" is not clearly determined. Therefore the Rulebook contravenes Article 7(3) of Regulation 1775/2005 which requires imbalance charges to be cost-reflective. Furthermore, the calculation methodology for imbalance charges and the final tariffs was not published. Finally the Reasoned Request argues that neither the law nor the Rulebook lays down rules on effective, proportionate and dissuasive penalties for non-compliance with the obligations under the Regulation.

The Reasoned Request comes to the conclusion that the network code of *Gaspromet AD Istocno Sarajevo Pale* therefore fails to fully implement Regulation 1775/2005.

As to the Federation of Bosnia and Herzegovina the Reasoned Request argues, that none of the provisions of Regulation 1775/2005 have been transposed. Only Article 11 of the Decree requires the transmission system operator to give precise information to market participants directly connected to the transport system, sufficiently in advance, about the quantity and the day of gas transport termination and expected degrees of transport capacities. The Reasoned Request considers this provision to be too general as transposition of these specific obligations required by Regulation 1775/2005.

As to *Gaspromet AD Istocno Sarajevo Pale* the Advisory Committee takes into account, that Republika Srpska in its comment to the Reasoned Opinion agrees that performing activities within the jurisdiction of the transmission system operator in terms of capacity allocation, congestion management and balancing mechanism are not properly set out in the Rulebook in order to further specify and fully comply with the requirements of Regulation 1775/2005. Insofar as the incorrect transposition was confirmed by the Contracting Party, the Advisory Committee takes the opinion that the obligations of Regulation 1775/2005 have not been met. However the Advisory Committee indicates that the requirements of Regulation 1775/2005 can be met in various ways.

As to the failure to provide for effective, proportionate and dissuasive penalties for non-compliance with the obligations under the Rulebook on the Operation of Transmission Network in Republika Srpska, the Advisory Committee is of the opinion that the penalties foreseen in the legislation are not effective as they do not cover all infringements of the provisions of Regulation 1775/2005.

As to the Decree in the Federation of Bosnia and Herzegovina the Advisory Committee shares the opinion of the Reasoned Request that the only provision (Article 11 of the Decree) cannot be seen as implementation of the requirements of Regulation 1775/2005. It is the view of the Advisory Committee that the assessment that Articles 4 to 8, 10 and 13 of Regulation 1775/2005 have not been properly transposed by Bosnia and Herzegovina is correct [146].

IV. Conclusions

The Advisory Committee considers that Bosnia and Herzegovina failed to comply with

1. Article 25 of Directive 2003/55/EC by failing to designate one or more competent bodies with the function of regulatory authorities to cover the entire gas sector in Bosnia and Herzegovina;
2. Article 9(1) of Directive 2003/55/EC by failing to implement the requirement of legal unbundling of transmission system operators from other activities not relating to transmission;
3. Article 9(2) (d) of Directive 2003/55/EC by failing to obligate the transmission system operator of the Federation of Bosnia and Herzegovina to establish a compliance programme;
4. Article 17(2) of Directive 2003/55/EC by failing to implement the obligation to audit and publish the accounts of natural gas undertakings;
5. Articles 18(1) and 25(2) of Directive 2003/55/EC, as well as Article 3 of Regulation 1775/2005 by failing to set and apply separate transmission tariffs in Republika Srpska;
6. Article 18(1) of Directive 2003/55/EC by maintaining a possibility for negotiated access to the transmission system in the Federation of Bosnia and Herzegovina;
7. Article 18(1) and Article 25 (2) of Directive 2003/55/EC and Article 3 of Regulation 1775/2005 by failing to approve and to publish transmission and distribution tariffs (or a corresponding methodology) in the Federation of Bosnia and Herzegovina;
8. Article 22 of Directive 2003/55/EC by failing to require the involvement of a regulatory authority in the procedure for exempting major new gas infrastructures from certain provisions of Directive 2003/55/EC, and by not requiring an exemption decision to be reasoned and published in the Federation of Bosnia and Herzegovina;
9. Article 23(1)(b) of Directive 2003/55/EC by failing to grant eligibility to all non-household customers in the Federation of Bosnia and Herzegovina;
10. Article 23 (specifically 23(2)) of Directive 2003/55/EC by maintaining a reciprocity requirement in cases of inner-Bosnian transactions
11. Article 13 of Regulation 1775/2005 by failing to provide for effective, proportionate and dissuasive penalties for non-compliance with the obligations under the Rulebook on the Operation of Transmission Network in Republika Srpska;
12. Articles 4, 5, 6, 7, 8 and 13 of Regulation 1775/2005 by failing to adopt appropriate legislation and to apply it by the transmission system operator of the Federation of Bosnia and Herzegovina.

As to the compliance with Articles 9(1) and (2) of Directive 2003/55/EC, the Advisory Committee considers due to the shortcomings as to the determination of facts it is not possible to give a decisive legal assessment on functional unbundling. Under the assumption that the facts are as stated in the Reasoned Request the Advisory Committee is of the opinion that the current structures of the transmission system operators in Bosnia and Herzegovina leads to the conclusion that Bosnia and Herzegovina is in violation of Articles 9(1) and (2) of Directive 2003/55/EC.

As to the requirements stemming from Regulation 1775/2005 in Republika Srpska related to the failure to offer third party access services other than firm services and only for one year

ahead (Article 4(1)(b) and (c)), the failure to balance the gas system in accordance with balancing rules, and to set cost-reflective imbalance charges and publish them (Article 7(1) and (3)) and the failure to provide for effective, proportionate and dissuasive penalties for non-compliance with the obligations under the Rulebook on the Operation of Transmission Network in Republika Srpska, the Advisory Committee considers that insofar as the incorrect transposition was confirmed Bosnia and Herzegovina fails to comply with Article 13 of Regulation 1775/2005 by the Contracting Party the obligations of Regulation 1775/2005 were not met.

As to Article 23(2)a of the Directive 2003/55/EC the Advisory Committee does not share the opinion of the Reasoned Request that Article 34(3) of the Decree on the organization and regulation of the gas sector in the Federation of Bosnia and Herzegovina goes beyond the reciprocity requirements of the Directive.

Done in Vienna on 11 September 2013

On behalf of the Advisory Committee

A handwritten signature in blue ink, appearing to read 'W. Urbantschitsch', with a stylized flourish at the end.

Wolfgang Urbantschitsch, Chairman