

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

In Case ECS-10/13, the Secretariat of the Energy Community against Albania, 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-10/13 against Albania. The members of the Advisory Committee received a copy of all relevant documents of the case (including the replies of Albania) 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 Albania was opened already on 25 November 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 Albania failed to fulfil its obligations arising from Energy Community law. The Secretariat argues that Albania 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

Albania 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 5 (1) of Directive 2006/32/EC (as adapted by Decision 2009/05/MC-EnC) reads:

*Contracting Parties shall ensure that the public sector fulfils an exemplary role in the context of this Directive. To this end, they shall communicate effectively the exemplary role and actions of the public sector to citizens and/or companies, as appropriate.*

*Contracting Parties shall ensure that energy efficiency improvement measures are taken by the public sector, focussing on cost-effective measures which generate the largest energy savings in the shortest span of time. Such measures shall be taken at the appropriate national, regional and/or local level, and may consist of legislative initiatives and/or voluntary agreements, as referred to in Article 6(2)(b), or other schemes with an equivalent effect. Without prejudice to national and Community public procurement legislation:*

- *at least two measures shall be used from the list set out in Annex VI;*
- *Contracting Parties shall facilitate this process by publishing guidelines on energy efficiency and energy savings as a possible assessment criterion in competitive tendering for public contracts.*

*Contracting Parties shall facilitate and enable the exchange of best practices between public sector bodies, for example on energy-efficient public procurement practices, both at the national and international level; to this end, the organisation referred to in paragraph 2 shall cooperate with the Secretariat with regard to the exchange of best practice as referred to in Article 7(3).*

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

*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.*

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.*

Article 18 (2) of Directive 2006/32/EC (as adapted by Decision 2009/05/MC-EnC) reads:

*Contracting Parties shall communicate to the Secretariat the text of the main provisions of national law which they adopt in the field covered by this Directive.*

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

***List of eligible energy efficient public procurement measures***

*Without prejudice to national and Community public procurement legislation, Member States shall ensure that the public sector applies at least two requirements from the following list in the context of the exemplary role of the public sector as referred to in Article 5:*

- (a) requirements concerning the use of financial instruments for energy savings, including energy performance contracting, that stipulate the delivery of measurable and pre-determined energy savings (including whenever public administrations have outsourced responsibilities);*
- (b) requirements to purchase equipment and vehicles based on lists of energy-efficient product specifications of different categories of equipment and vehicles to be drawn up by the authorities or agencies referred to in Article 4(4), using, where applicable, minimised life-cycle cost analysis or comparable methods to ensure cost-effectiveness;*
- (c) requirements to purchase equipment that has efficient energy consumption in all modes, including in standby mode, using, where applicable, minimised life-cycle cost analysis or comparable methods to ensure cost-effectiveness;*
- (d) requirements to replace or retrofit existing equipment and vehicles with the equipment listed in points (b) and (c);*

(e) requirements to use energy audits and implement the resulting cost-effective recommendations;

(f) requirements to purchase or rent energy-efficient buildings or parts thereof, or requirements to replace or retrofit purchased or rented buildings or parts thereof in order to render them more energy-efficient.

#### IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that Albania failed to adopt the laws, regulations and administrative provisions necessary to comply with Articles 5 (1), 9 (2), 12 (1), 14 (2), and 18 (2) as well as Annex VI of Directive 2006/32/EC as adapted by Article 1 of Decision 2009/05/MC-EnC.

In the reply to the Opening Letter of 24 January 2014 Albania confirmed its lack of 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 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 Albania to comply with the Reasoned Opinion was 15 May 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.

Regarding the alleged incomplete implementation of Articles 9 (2), 12 (1), 14 (2) and 18 (2) of Directive 2006/32/EC, the documents provided suggest that there is a lack of secondary legislation implementing this provision correctly. The findings of the Secretariat were not challenged in the reply to the Opening Letter and as the procedure for the establishment of Albania's Energy Efficiency Agency is still ongoing, a complete transposition is impossible as this very authority is responsible for defining the specific format of carrying out an energy audit (Articles 16 (8) and 18 (5) Law on Energy Efficiency, No. 124, 12 November 2015).

Article 5 (1) of Directive 2006/32/EC provides for an obligation of the public sector to fulfil an exemplary role in the context of this directive. Article 9 Law on Energy Efficiency requires the Council of Ministers to include in the public procurement rules the obligation for the contracting authority to determine minimal energy efficiency requirements in their tendering documents. However, the Law on Public Procurement does not include any such obligation and neither does any other piece of legislation provided to the AC (No 9643 of 20 November

2006 as amended by Laws No. 9800 (10 September 2007), No.9855 (26 December 2007), No. 10170 (22 October 2009), No.10309 (22 July 2010), No. 22/2012, No. 131/2012 and No. 182/2014). Furthermore, the obligation to use at least two measures of the list of eligible energy efficient public procurement measures (Annex VI of Directive 2006/32/EC) was not transposed in any of the laws provided to the AC. The findings of the Secretariat had not been challenged in the entire procedure neither was any piece of legislation or evidence provided which would indicate that the obligation had been complied with.

#### **IV. Conclusions**

The Advisory Committee considers that Albania failed to transpose Articles 5 (1), 9 (2), 12 (1), 14 (2), and 18 (2) as well as Annex VI of Directive 2006/32/EC as adapted by Article 1 of Decision 2009/05/MC-EnC.

Done in Vienna on 12 September 2017

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, Chairman