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

In Case ECS-5/13, the Secretariat of the Energy Community against Ukraine, 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-5/13 against Ukraine. The members of the Advisory Committee received a copy of all relevant documents of the case (including the replies of Ukraine) 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 Ukraine 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 Ukraine failed to fulfill its obligations arising from Energy Community law. The Secretariat argues that Ukraine 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) Directive 1999/32/EC.

Ukraine has not submitted a reply to the Reasoned Request within the deadline ending 13 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

Ukraine 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.

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) […]*

Article 2 (1) of the Protocol concerning the accession of Ukraine to the Treaty establishing the Energy Community reads:

> *For the purposes of compliance with Title ll of the Treaty establishing the Energy Community and its related Annexes, the timetable for implementation of the acquis communautaire is defined as follows:*
> *[…]*
> *Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquid fuels*
> *By 1st January 2012*
> *[…]*

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 Ukraine did not transpose Articles 3 (1) and 4 (1) of Directive 1999/32/EC correctly. This was also confirmed by Ukraine in its reply to the Reasoned Opinion.

In this very document Ukraine asked the Secretariat to accept 1 January 2017 as a commencement date for the completion of the implementation of Directive 1999/32/EC. The reasons given for this delay are different for Article 3 (1) and Article 4 (1) of Directive 1999/32/EC. The justification for the delay in transposing Article 3 (1) of Directive 1999/32/EC correctly is the deterioration of Ukraine's energy security caused by foreign factors which led to an intensified use of non-traditional types of fuels including heavy fuel oil. The delay in the transposition of Article 4 (1) of Directive 1999/32/EC is justified by the prevention of adverse consequences for fuel manufacturers.

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 deal as interpretation guidelines.

The transposition of Directives is a fundamental principle of EU law enshrined in Article 288 (3) of the Treaty on the Functioning of the European Union. It stipulates that '[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' Their obligatory transposition into the national legal order of the EU Member States is a fundamental feature of EU directives. The Treaty itself does not get any more specific on how EU legal acts constituting the Energy Community's acquis communautaire have to be transposed by the Contracting Parties. The principles guiding the transposition of EU Directives for EU Member States are also applicable for the transposition of EU Directives in Contracting Parties. In this case the notion of justification for a non-transposition has to be looked at.

Ukraine brought forward that it did not transpose Article 3 (1) of Directive 1999/32/EC correctly due to foreign armed aggression which led to interruptions and deterioration of energy security in Ukraine. This required the use of non-traditional types of fuel including heavy fuel oil with a sulphur share of more than 1%. The time period mentioned in the response to the reasoned opinion was the year 2015. The dead line for the implementation of Directive 1999/32/EC was, however, 1 January 2012. Hence, at the time of armed aggression, the directive in question should have already been implemented completely and correctly.

Nevertheless, the situation in Ukraine as presented should be considered under the guidelines given by the Court of Justice as regards the notion of force majeure. It consistently held that, '*whilst that concept does not presuppose absolute impossibility, it nevertheless requires the non-performance of the act in question to be due to circumstances beyond the control of the person claiming force majeure, which are abnormal and unforeseeable and of which the consequences could not have been avoided despite the exercise of all due care*' (Case 296/86 McNicholl and Others [1988] ECR 1491, para 11). Only once has the ECJ

(almost) accepted the existence of force majeure in the context of a non-transposition of a directive (Case 101/84 Commission v Italy [1985] ECR 2629). While in this case it is undisputed that in the time between 1 January 2012 and the armed conflict, Ukraine was in breach of the Treaty by not implementing Article 3 (1) of Directive 1999/32/EC correctly, the question remains as to whether non-compliance during times of armed conflict can be justified by force majeure. In general armed aggression can be a reason for no or late implementation if it is proven that the reasons for the non-compliance are circumstances as defined by the ECJ. In this case, the non-implementation can be directly linked to the consequences of armed aggression, namely an abnormal increase in demand for heavy fuel oils. As long as these circumstances prevail, the non-compliance can be justified on grounds of force majeure. Hence, the assessment of this case requires a differentiation between the time before and after the incident brought up as force majeure happened.

The justification for the non-transposition of Article 4 (1) of Directive 1999/32/EC based on purely economic reasons cannot be accepted as the protection of the environment has to be ranked higher than the protection of companies' profits (Article 2 (1) lit d of the Treaty).

IV. Conclusions

The Advisory Committee considers that Ukraine failed to comply with Article 12 of the Treaty in conjunction with Article 3 (1) of Directive 1999/32/EC, but points out that the arguments given to justify this failure have to be considered before taking a decision pursuant to Article 91 (1)(a) of the Treaty.

The Advisory Committee considers that Ukraine failed to comply with Article 12 of the Treaty in conjunction with Article 4 (1) of Directive 1999/32/EC.

Done in Vienna on 16 September 2016

On behalf of the Advisory Committee

Wolfgang Urbantschitsch, Chairman