

DISPUTE SETTLEMENT REPORT for the Permanent High Level Group at its meeting on 19 June 2013

1. Background

The present dispute settlement report reflects the situation on 27 May 2013 and summarizes the open cases. Cases closed or not yet opened by this date are not reflected in this report. The present report is also without prejudice to bilateral discussions and negotiations currently taking place between the Secretariat and individual Contracting Parties (still) outside the scope of a dispute settlement procedure.

2. Open dispute settlement cases upon complaints

a) Case ECS-3/08 was initiated with an Opening Letter sent by the Secretariat to the Republic of Serbia on 17 September 2010. Following Serbia's reply, the Secretariat issued a Reasoned Opinion on 7 October 2011. The case was initiated by a complaint from the operator of the electricity transmission system located in Kosovo*, KOSTT. In the Secretariat's assessment, the lack of compensation to KOSTT for costs incurred as a result of electricity transit on the network operated by it violates Article 3 of Regulation (EC) 1228/2003 in cases where the electricity flow originates or ends on the system operated by the Serbian EMS. Moreover, revenues resulting from the allocation of interconnection on the interconnectors with countries adjacent to Kosovo* seem not to be used for one of the reasons stipulated by Article 6 of Regulation (EC) 1228/2003. Attempts to solve this case through bilateral negotiations between the two companies or the Governments involved have not succeeded so far.

b) On 26 February 2013, the Secretariat sent an Opening Letter in Cases ECS-6/13 to Ukraine. The Secretariat, takes the preliminary view that the Auction Rules adopted for the allocation of capacity on the country's electricity interconnectors with its Western neighbours and Moldova, as well as their appliance in practice by the system operator, fails to respect relevant Energy Community rules, namely Regulation (EC) 1228/2003 and the so-called Congestion Management Guidelines. The view that the Secretariat takes in the Opening Letter is that different treatment of electricity imports and exports by distinguishing between different directions of electricity flow and maintaining different procedures for the allocation of capacity in both directions is incompliant with the Energy Community law. In addition, the Secretariat found that the access to interconnectors for electricity exports is limited by maintaining requirements for participation to the auctions that are falling short of respecting the *acquis*. The Secretariat also took the preliminary view that the procedure for capacity allocation in case of non-congested interconnectors as well as the prohibition of secondary trading encroach upon several provisions and principles of the Energy Community law.

3. Open dispute settlement cases on Secretariat's own motion

a) On 21 September 2010, the Secretariat sent an Opening Letter to Bosnia and Herzegovina in Case ECS-1/10. The Secretariat takes the preliminary view that Bosnia and Herzegovina failed to fulfil its obligations under the Energy Community Treaty by not adopting legislation prohibiting State aid and enforcing that prohibition, as required by Articles 6 and 18 of the Treaty. In February 2012, Bosnia and Herzegovina adopted the Law on System of State aid in Bosnia and Herzegovina which follows the principles of the *acquis* on State aid and transposes Article 18(c) of the Treaty. However, its effective implementation in practice is still pending.

b) On 20 January 2011, the Secretariat sent Opening Letters to Albania, Bosnia and Herzegovina, Croatia, former Yugoslav Republic of Macedonia, Montenegro and Serbia in accordance (Article 12 of the Rules of Procedure for Dispute Settlement) in Cases ECS-1–6/11. The Secretariat challenges that these six Contracting Parties have not yet adopted a common coordinated congestion management method and procedure for the allocation of capacity to the market, according to their obligation from a decision by the Ministerial Council of 2008. The transmission system operators of Albania, Bosnia and Herzegovina, Croatia, former Yugoslav Republic of Macedonia, Greece, Montenegro, Romania, Slovenia, Kosovo* and Turkey on 13 June 2012 signed an agreement for establishing a company tasked with preparing the establishment of a Coordinated Auction Office in South East Europe within 12 months. Until this Office is operational, the cases remain open.

c) On 7 October 2011, the Secretariat initiated dispute settlement proceedings against Bosnia and Herzegovina for noncompliance with several provisions of Directive 2003/55/EC and Regulation (EC) No 1775/2005 by an Opening Letter in Case ECS-8/11. Having taken into account the reply of the Government to the Opening Letter the Secretariat sent a Reasoned Opinion on 24 January 2013, and submitted the case to the Ministerial Council for decision by way of a Reasoned Request on 21 May 2013.

d) On 11 February 2013, the Secretariat sent Opening Letters to Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Serbia and Ukraine in accordance with Article 12 of the Rules of Procedure for Dispute Settlement. The Secretariat comes to the preliminary conclusion that these five Contracting Parties have not yet transposed and implemented the requirements of Directive 1999/32/EC as required by Article 16 and Annex II of the Treaty. Directive 1999/32/EC aims to reduce emissions of SO₂ resulting from combustion of heavy fuel oils and gas oils.

*This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and ICJ Advisory opinion on the Kosovo declaration of independence.