

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

**In case ECS-2/21, the Secretariat of the Energy Community
Against
Republic of Serbia, the**

ADVISORY COMMITTEE,

composed of

Rajko Pirnat, Helmut Schmitt von Sydow, Verica Trstenjak, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) 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 as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 and by Procedural Act No 2022/03/MC-EnC of the Ministerial Council of the Energy Community of 15 December 2022 on amending Procedural Act 2008/01/MC-EnC ('Dispute Settlement Rules 2022'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 19 July 2024 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-2/21 against Republic of Serbia, dated 12 July 2024. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that the Republic of Serbia due to the inaction of *JSC Elektromreza Srbije (EMS)* and the national energy regulatory authority AERS, **fails to comply with** Articles 16(4) and 34(2) of Regulation (EU) 2019/943¹ of 5 June 2019 on the internal market for electricity, as adapted and adopted by Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022, and Articles 58 lit c) and 59(1) lit b) and u) of Directive (EU) 2019/944² of 5 June 2019 on common rules for the internal market for electricity, as adapted and adopted by Ministerial Council Decision 2021/13/MC-EnC of 30 November 2021, and amended by Decision 2022/03/MC-EnC of 15 December 2022, and thus fails to fulfil its obligations under Articles 6, 10 and 11 of the Treaty.

¹ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.6.2019, p. 54.

² Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019, p. 125.

Pursuant to Article 32 (4) Dispute Settlement Rules 2022 the Advisory Committee has to conduct a public hearing before giving its opinion. According to Article 8 (1) Rules of Procedure of the Energy Community Advisory Committee as amended (RoP) such a public hearing shall take place unless both parties to the case agree that it can be dispensed with. On 23 July 2024 the Advisory Committee asked the parties whether they consider holding a public hearing necessary. In its e-mail from 13 August 2024 the Secretariat stated that there is no need for a hearing, while the Contracting Party responded by a letter dated 14 August 2024 whereby it considers the public hearing is not necessary. Therefore, the Advisory Committee decided that a hearing is not necessary and informed the parties that a hearing can be dispensed with in this case.

II. 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 10 of the Treaty reads:

"Each Contracting Party shall implement the acquis communautaire on energy in compliance with the timetable for the implementation of those measures set out in Annex I."

Article 11 of the Treaty reads:

"The "acquis communautaire on energy", for the purpose of this Treaty, shall mean the acts listed in Annex I to this Treaty."

Article 16 of Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity, as adapted and adopted by Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022 (hereinafter: "the Electricity Regulation") reads:

"4. The maximum level of capacity of the interconnections and the transmission networks affected by cross-border capacity between Parties to the Energy Community shall be made available to market participants complying with the safety standards of secure network operation. [...]"

Article 34 of the Electricity Regulation reads:

"2. Transmission system operators shall promote operational arrangements in order to ensure the optimum management of the network and shall promote the development of energy exchanges, the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions, paying due attention to the specific merits of implicit auctions for short-term allocations, and the integration of balancing and reserve power mechanisms."

Article 58 of Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity, as adapted and adopted by Ministerial Council Decision 2021/13/MC-EnC of 30 November 2021, and amended by Decision 2022/03/MC-EnC of 15 December 2022 (hereinafter: "the Electricity Directive") reads:

“In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers laid down in Article 59, in close consultation with other relevant national authorities including competition authorities, as well as authorities, including regulatory authorities, from neighbouring Contracting Parties and neighbouring third countries, as appropriate, and without prejudice to their competence: [...]

(c) eliminating restrictions on trade in electricity between Contracting Parties, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate electricity flows across the Energy Community;

[...]”

Article 59 of the Electricity Directive reads:

“1. The regulatory authority shall have the following duties:

(b) ensuring the compliance of transmission system operators and distribution system operators, and, where relevant, system owners, as well as the compliance of any electricity undertakings and other market participants, with their obligations under this Directive, Regulation (EU) 2019/943 as adopted and adapted by Ministerial Council Decision 2022/03/MC-EnC, the network codes and the guidelines adopted pursuant to Article 58 of Regulation (EU) 2019/943 as adopted and adapted by Ministerial Council Decision 2022/03/MC-EnC, and other relevant Energy Community law, including as regards cross-border issues, as well as with Energy Community Regulatory Board’s decisions;

[...]

(u) monitoring the implementation of rules relating to the roles and responsibilities of transmission system operators, distribution system operators, suppliers, customers and other market parties pursuant to Regulation (EU) 2019/943 as adopted and adapted by Ministerial Council Decision 2022/03/MC-EnC;

[...]”

III. Legal Assessment

According to Article 32 (1) Dispute Settlement Rules 2022, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. On the basis of this provision, the Advisory Committee assessed the Reasoned Request, the Contracting Party’s response of 12 September 2024 and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

The relevant facts of the case are undisputed. EMS is the only transmission system operator (hereinafter: “TSO”) for electricity in Serbia. The founder and only shareholder of EMS is the Republic of Serbia; the shareholding rights are exercised by the Government. It operates among other parts of the network interconnection lines with Kosovo transmission system, namely the interconnection Nis – Kosova B and Krusevac - Podujeva³. Kosovo transmission system is operated by KOSTT JSC (hereinafter: KOSTT), the only TSO in Kosovo. KOSTT has entered into Connection Agreement with 25 TSOs from the ENTSO-E Regional Group Continental Europe, and as of 14 December 2020, KOSTT started operating a single bidding zone and a separate control area within the system of Continental Europe. The Connection Agreement has been twice prolonged for a period of two years, so it is still in force, however, a new extension is under negotiation. KOSTT has entered into operational agreements with the neighbouring TSO of Albania (OST), Montenegro (CGES) and North Macedonia (MEPSO)

³ The letters not pertaining to English language have been changed to similar letters of English alphabet.

in 2020, but not with EMS of Serbia due to the latter's repeated refusal to sign any bilateral agreement to that effect. The consequence of this is that EMS has not agreed with KOSTT on how the cross-border capacity is evaluated and allocated, nor has EMS determined any value at all for the available interconnection capacity. Consequently, EMS considers the value of the Net Transmission Capacity (NTC) at zero, which means that no capacity is made available to the market for trade. In addition, the national regulatory authority, AERS, has not taken any action to ensure EMS' compliance of EMS with its obligations under the Energy Regulation, which by itself represents infringement of Articles 58 lit. c) and 59(1) lit. b), and u) of the Electricity Directive. In this context, the Secretariat points out that the actions and omissions of the regulatory authority as part of the State governance as well as the actions and omissions of the fully-state owned TSO are attributable to the Republic of Serbia and may constitute an infringement of Energy Community law by that Party.

In its response to the Reasoned Request, Republic of Serbia fully contests it and remains with the arguments presented in its responses to the Introductory Letter and to the Reasoned Opinion. These arguments can be summarised in four points:

- inapplicability of Electricity Directive and Electricity Regulation
- uncertain status of KOSTT and its trading zone;
- the lack of jurisdiction of the Energy Community and the Secretariat;
- the lack of powers of AERS.

Inapplicability of Electricity Directive and Electricity Regulation

Republic of Serbia argues that alleged omissions of EMS should be considered in relation to previous Regulation (EC) 714/2009 Directive (EC) 2009/72/EC, which were adapted and adopted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011. Article 4 of this Decision stated that “[s]ave otherwise stated in this Decision, the text of the acts referred to in Article 1 shall be adapted to the Energy Community as follows: (a) the term ‘Member States’ shall be replaced by ‘Contracting Parties’”. The Republic of Serbia grounds its objections to the Reasoned Request on the fact that it issued a reservation on this Article 4 of Ministerial Council Decision 2011/02/MC-EnC, attached as annex: “On all issues pertaining to the definition of “interconnectors and cross border exchanges of energy” the term ‘Member States’ shall be construed as ‘Adhering Parties’⁴”. Adhering Parties are all Contracting Parties with the exception of Kosovo. Due to this reservation, the Republic of Serbia maintains that it is not under any obligation in relation to interconnection with Kosovo. Serbia also claims in its response to the Reasoned Request that Electricity Directive and Electricity Regulation have not yet been transposed into national legislation and that they will produce legal effect when they are transposed.

The Reasoned Request rightly states that while the breach subject to the present case started at a time when Directive (EC) 2009/72/EC and Regulation (EC) 714/2009 were applicable in the Energy Community, the breach still persists as of today, i.e. following the incorporation of the Electricity Directive and Electricity Regulation into the Energy Community *acquis communautaire* in 2022. The Secretariat is right to argue that compliance must be assessed on the basis of the equivalent provisions of the Electricity Directive and the Electricity Regulation, citing the settled case-law of the Court of Justice of the European Union, that a failure to fulfil obligations must be assessed in the light of the European Union legislation in force at the close of the period for which the compliance was required. The Republic of Serbia cannot ground its objections to the Reasoned Request on its reservation to the Directive (EC) 2009/72/EC and Regulation (EC) 714/2009, while its unilateral statement during the adoption of the new package of electricity legislation at the meeting of the Ministerial Council cannot have the legal effect of exempting the Republic of Serbia from obligations stemming from Electricity Directive and Electricity Regulation as they were adapted and adopted by Ministerial

⁴ The response of the Republic of Serbia uses the term »Associated Parties« with the same meaning.

Council decisions. Also, non-transposition of Electricity Directive and Electricity Regulation into national legislation cannot have the effect of exempting the Republic of Serbia from these obligations, since the deadline for their transposition has passed on 31 December 2023.

The Advisory Committee holds therefore, that Serbia's statement on inapplicability of Electricity Directive and Electricity Regulation is not founded and that the Republic of Serbia is fully bound by the provisions of Electricity Regulation and Electricity Directive regarding interconnection with Kosovo transmission system.

Uncertain status of KOSTT and its trading zone

The Republic of Serbia states that the Connection Agreement between KOSTT and ENTSO-E Regional Group of Continental Europe has limited duration and even the negotiations for extension are only for two years. Additionally, Serbia claims that KOSTT is unable to balance the system in its control area and that unauthorised taking of energy from interconnection was going on.

However, as the Secretariat rightly points out, neither duration of the Connection Agreement nor the TSOs balancing capabilities are valid reasons for refusing to conclude operational agreement and to define the NTC at the interconnection point. Legally, the uncertain status of KOSTT and its lack of balancing capability cannot present grounds for Serbia not fulfilling its obligations in relation to interconnection with Kosovo transmission system.

In connection with this, the Republic of Serbia also argues that there have been no negative economic consequences of the absence of commercial transactions at the border of the EMS/KOSTT trading zones. The reasons for this assertion are not clear since any failure to offer NTC at the interconnection points clearly effects electricity trading and has negative economic effects. It seems that Serbia is still referring to negative deviations in the balance within the Continental European electricity network over the last years resulting from KOSTT. These deviations originated due to the lack of payment for electricity supply by customers in the North of Kosovo, for which KOSTT is liable for payment towards the Joint Allocation Office (JAO). These negative deviations have ceased since an agreement between the distribution system operator in Kosovo and the Serbian supply company Elektrosever has been concluded at the end of 2023, so clearly negative economic consequences presently exist. Anyway, this argument is legally irrelevant, since the alleged absence of negative economic consequences cannot justify Serbia not to fulfil its obligations in relation to interconnection with Kosovo transmission system.

The lack of jurisdiction of the Energy Community and the Secretariat

In its response to the Reasoned Request, the Republic of Serbia also repeats its arguments about the lack of competence of the Energy Community and the Secretariat. The reasoning in the response is not very clear, however, it seems that Serbia refers to negotiations with Kosovo, conducted under the auspices of the European External Action Service. Recalling Article 103 of the Treaty Serbia claims that application of Electricity Regulation and Electricity Directive would "prejudice the position of the Republic of Serbia in terms of its sovereignty and territorial integrity". There is no specific explanation how that could happen, except that it regards controversial issues in the field of energy, such as interconnectors and cross-border energy exchanges.

This reasoning is not acceptable. The Republic of Serbia has, by signing the Treaty, undertaken to implement fully the *acquis communautaire* on energy, including the Electricity Directive and the Electricity Regulation. As Secretariat rightly points out, the Advisory Committee has already stated that Article 103 of the Treaty "is not a general derogation from obligations arising from the law of the Energy Community but allows Contracting Parties to

*enter into commitments which go beyond the acquis of the Energy Community*⁵. Article 103 of the Treaty cannot justify non-compliance with Articles 16(4) and 34(2) of the Electricity Regulation and Articles 58 and 59 of the Electricity Directive.

The Advisory Committee therefore is of the opinion that the present case clearly falls within the application of the Treaty and the Dispute Settlement Rules 2022, and therefore within the jurisdiction of the Secretariat and other Energy Community bodies.

The lack of powers of AERS

Finally, the Republic of Serbia contests the statements in the Reasoned Request that Serbia has not complied with the Electricity Directive and Electricity Regulation through inactivity of its energy regulatory authority, the AERS. Serbia claims that the present Law on Energy of the Republic of Serbia does not give to AERS the powers to adopt any measures due to non-fulfilment of obligations of TSO regarding transmission capacity at the interconnection points. This is due to the fact that Electricity Directive and Electricity Regulation have not yet been transposed into Serbian national law.

The Advisory Committee considers this argument to be void. The time for transposition of this EU legislation into Serbian law has expired on 31 December 2023 and Serbia cannot rely on its omission to timely transpose the Electricity Directive and Electricity Regulation as valid grounds not to comply with them. The Republic of Serbia has omitted to arrange for the adequate powers of the AERS in its national legislation, which by itself represents its failure to implement the Electricity Directive and Electricity Regulation. In any case, the actions of AERS are attributable to the Republic of Serbia, since it is a part of its administrative setup, so inactivity of AERS is failure of the Republic of Serbia.

Based on the documentation of the case, the Advisory Committee finds that the Reasoned Request is well-founded.

⁵ Opinion in Case ECS-3/08, 10 October 2016

IV. Conclusions

The Advisory Committee therefore considers that

the Republic of Serbia due to the inaction of *JSC Elektromreza Srbije (EMS)* and the national energy regulatory authority AERS, **fails to comply with** Articles 16(4) and 34(2) of Regulation (EU) 2019/943⁶ of 5 June 2019 on the internal market for electricity, as adapted and adopted by Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022, and Articles 58 lit c) and 59(1) lit b) and u) of Directive (EU) 2019/944⁷ of 5 June 2019 on common rules for the internal market for electricity, as adapted and adopted by Ministerial Council Decision 2021/13/MC-EnC of 30 November 2021, and amended by Decision 2022/03/MC-EnC of 15 December 2022, and thus fails to fulfil its obligations under Articles 6, 10 and 11 of the Treaty.

Done in Vienna on 25 November 2024

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President

⁶ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.6.2019, p. 54.

⁷ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019, p. 125.