

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

REASONED REQUEST

in Case ECS-2/21

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (hereinafter: "the Treaty") and Articles 15 and 29 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter: "Dispute Settlement Rules"),¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

THE REPUBLIC OF SERBIA

seeking a Decision from the Ministerial Council that

due to the inaction of *JSC Elektromreza Srbije (EMS)* and the national energy regulatory authority AERS, the Republic of Serbia fails to comply with Articles 16(4) and 34(2) 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, and Articles 58 lit c) and 59(1) lit b) and u) 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, and thus fails to fulfil its obligations under Articles 6, 10 and 11 of the Treaty.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

1. Electricity transmission system operation in Serbia

- (1) The transmission network of Serbia operates at 400 kV, 200 kV and 110 kV voltage levels, with almost 10.000 km of lines, including 400 kV and 220 kV cross-border lines connecting Serbia with all neighbouring networks. Due to its geographical position, the Serbian transmission system forms a central part of the regional electricity system in the Balkans, which in principle allows for significant electricity trade in the whole region.

¹ Procedural Act No 2015/04/MC-EnC of 16.10.2015.

- (2) The following interconnection lines currently exist:²

Voltage level (kV)	Bus 1 (domestic)	Bus 2 (non-domestic)	From Serbia to	I _{max} (A)	S _n (MVA)	P _n (MW)
400	Sremska Mitrovica	Ernestinovo	Croatia	1920	1329	1196
400	Sremska Mitrovica	Ugljevik	BiH	1920	1329	1196
400	Nis	Kosova B	Kosovo*	1900	1317 ⁺	1185
400	Vranje	Stip	N. Macedonia	1760	1218 ⁺	1096
400	Nis	Sofia	Bulgaria	1920	1329	1196
400	Djerdap	Portile de Fiere	Romania	1840	1273	1146
400	Subotica	Sandorfalva	Hungary	1920	1329	1196
220	Vardiste	Visegrad	BiH	790	301 ⁺	271
220	Bajina Basta	Pljevlja	Montenegro	720	274 ⁺	247
220	Pozega	Pljevlja	Montenegro	720	274 ⁺	247
220	Krusevac	Podujeva	Kosovo*	790	300 ⁺	270
ALL (existing situation)					10273	9245

- (3) *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.

2. Electricity transmission system operation in Kosovo*

- (4) Based on a Connection Agreement dated 28 October 2020 between the TSO for Kosovo*, *KOSTT JSC* and 25 TSOs from the ENTSO-E Regional Group Continental Europe, as of 14 December 2020, *KOSTT* started operating a single bidding zone and a separate control area within the system of Continental Europe. A control area is a coherent part of the interconnected system, operated by a single system operator and including connected physical loads and/or generation units, if any.³ This agreement was initially concluded for the duration of two years. An extension for another two-year term was agreed upon on 25 August 2022. An amendment to the Connection Agreement is currently under negotiation.
- (5) *KOSTT* has entered into operational agreements with the neighbouring TSO of Albania (*OST*), Montenegro (*CGES*) and North Macedonia (*MEPSO*) in 2020, but not with *EMS* of Serbia due to the latter’s repeated refusal to sign any bilateral agreement to that effect. Prior to *KOSTT*’s operation of a separate control area under the Connection Agreement, a Framework Agreement on Cooperation in Transmission System of *KOSTT-EMS* applied as from December 2014 as a temporary solution. That agreement covered scheduling, primary, secondary, tertiary and time control, accounting, the N-1 security process and the capacity assessment procedure.

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

² ECS Study: EU Interconnection Targets in the Energy Community Contracting Parties, p. 44.

³ Article 2(6) of Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council.

3. Cross-border transmission capacity allocation

- (6) Pursuant to Articles 163 and 164 of the Energy Law of Serbia,⁴ the procedure and manner of allocation of cross-border capacity is determined by the TSO in agreement with the neighbouring TSOs and approved by the national regulatory authority. Generally, the net transfer capacity (hereinafter: “NTC”)⁵ is determined by each of the two TSOs involved on the basis of its respective load flow calculations. If EMS and the other TSOs involved do not agree on the NTC to be set at a specific interconnection point, the lower value resulting from their respective calculations applies and constitutes the NTC.⁶
- (7) At the interconnection lines between Niš (EMS control area) and Kosova B (KOSTT control area), and between Kruševac (EMS control area) and Podujeva (KOSTT control area), 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 NTC at zero.⁷ Since market participants can thus only (theoretically) nominate capacity with KOSTT, but not with EMS, effectively no capacity is made available to the market for trade.

II. Relevant Energy Community Law

- (8) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “a Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party].” A violation of Energy Community Law occurs if “[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law”.⁸ Such failure by a Party may consist of “any measure by the public authorities of the Party (central, regional or local as well as legislative, administrative or judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable”.⁹
- (9) 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.”*
- (10) Article 10 of the Treaty reads:

⁴ Official Gazette of RS, No. 145/14, 95/18, and 40/21.

⁵ The European-wide recognised definition by ENTSO-E refers to NTC as the expected maximum volume of generation that can be wheeled through the interface between the two systems, which does not lead to network constraints in either system, respecting some technical uncertainties on future network conditions.

⁶ ENTSO-E, Principles for determining the transfer capacities in the Nordic power market, 8.2.2017, p. 7, available at <https://nordic-rcc.net/wp-content/uploads/2018/08/20170912-prin.pdf>; ETSO, NTC and ATC in the IEM, p. 4, available at https://eepublicdownloads.entsoe.eu/clean-documents/pre2015/ntc/entsoe_NTCusersInformation.pdf.

⁷ transparency.entsoe.eu.

⁸ Article 3(1) of the Dispute Settlement Rules.

⁹ Article 3(2) of the Dispute Settlement Rules.

“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.”

(11) 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.”

(12) Article 103 of the Treaty reads:

“Any obligations under an agreement between the European Community and its Member States on the one hand, and a Contracting Party on the other hand shall not be affected by this Treaty. Any commitment taken in the context of negotiations for accession to the European Union shall not be affected by this Treaty.”

(13) 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;

[...]”

(14) 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;

[...]"

- (15) 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 (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. [...]"

- (16) 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."

III. Preliminary Procedure

- (17) According to Article 90 of the Treaty, the Secretariat may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. Pursuant to Article 11 of the Dispute Settlement Rules, the Secretariat shall carry out a preliminary procedure before submitting a Reasoned Request to the Ministerial Council.
- (18) On 18 February 2021, a complaint was submitted to the Secretariat by *KOSTT* against the Republic of Serbia.¹⁰ The complaint alleges non-compliance by the Republic of Serbia through its TSO *EMS* with Energy Community law.
- (19) The complaint moreover argued that the undetermined NTCs and consequently lack of capacity allocation on the interconnection lines between Niš and Kosova B, and between Kruševac and Podujeva, leads to a price increase for cross-border capacity on other regional borders, by consequence increases end-consumer prices for electricity in Kosovo* and the neighbouring South East European countries and prevents *KOSTT* from collecting potential revenues resulting from the congestion management mechanism on this interconnectors.
- (20) The European Federation of Energy Traders (EFET) raised the same concerns to *KOSTT*, *EMS*, ENTSO-E and the Secretariat by letters dated 19 January 2021 and 22 February 2021.¹¹ In particular, EFET voiced concerns regarding cross-border transmission capacity allocation at the two interconnection lines and the overall decrease of the long-term capacity for electricity transmission North (Serbia) to South (Montenegro, Kosovo*, North Macedonia) in the South Eastern European region. According to EFET, the situation causes serious problems for a large number of traders with regard to the transport of electricity across the new bidding zone

¹⁰ ANNEX 1.

¹¹ ANNEX 1 and 2.

border (such as significant risk of imbalances, financial losses, non-optimal operations, and non-fulfilment of electricity delivery contracts). This affects both the competitiveness of the wholesale electricity markets and end-user prices throughout South East Europe.

- (21) On 21 July 2022, the Secretariat sent an Opening Letter to the Republic of Serbia in which it laid down its preliminary view that since commercial electricity capacity was not made available at the interconnection lines between Niš and Kosova B and between Kruševac and Podujeva due to its TSO's and its regulatory authority's lack of action, the Republic of Serbia failed to comply with Articles 16(3) and 12 of Regulation (EC) 714/2009, and Articles 36 and 37 of Directive 2009/72 (hereinafter "the Opening Letter").¹² The Republic of Serbia was requested to submit its observations on the points of fact and law raised in the Opening Letter by 21 September 2022.
- (22) The Ministry of Mining and Energy of the Republic of Serbia (hereinafter: "the Ministry"), representing the Republic of Serbia, provided a reply in response to the Secretariat's Opening Letter on 8 September 2022 (hereinafter: "the Reply to the Opening Letter"),¹³ alleging lack of competence of the Secretariat to address the issue identified in the Opening Letter, lack of adverse economic effects and raising concerns about the status of *KOSTT* and its bidding zone.
- (23) Considering the Reply to the Opening Letter, the Secretariat submitted a Reasoned Opinion on 1 March 2023.¹⁴ The Republic of Serbia was requested to rectify the breaches identified therein by 1 May 2023.
- (24) On 28 April 2023, the Republic of Serbia provided a reply to the Reasoned Opinion (hereinafter: "the Reply to the Reasoned Opinion"),¹⁵ arguing again the lack of competence of the Secretariat and legal basis as well as absence of adverse economic effects. The Secretariat will address these arguments below.
- (25) As the Republic of Serbia has not rectified the breach identified in the preliminary procedure, and in the absence of any further action, the Secretariat decided to refer this case to the Ministerial Council for its decision.

IV. Legal Assessment

- (26) According to Article 3(2) of the Dispute Settlement Procedures, a failure by a Party to comply with Energy Community law may consist of any measure (action or omission) by the public authorities of the Party, including undertakings within the meaning of Article 19 of the Treaty. 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.
- (27) 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

¹² ANNEX 3.

¹³ ANNEX 4.

¹⁴ ANNEX 5.

¹⁵ ANNEX 6.

Regulation into the Energy Community *acquis communautaire* in 2022. It is settled case-law of the Court of Justice of the European Union 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*”.¹⁶ Compliance must therefore be assessed on the basis of the equivalent provisions of the Electricity Directive and the Electricity Regulation, the substance of which did not change.

- (28) The predecessor of the Electricity Regulation, Regulation (EC) 714/2009, and of the Electricity Directive, Directive (EC) 2009/72/EC, were adapted and adopted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 which stated in its Article 4 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 issued a reserve 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’”. Adhering Parties are all Contracting Parties with the exception of Kosovo*. However, the legal grounds on which the Secretariat basis this case do not feature the term Member State or Contracting Party, the term to which the reservation pertains. Therefore, contrary to the argument of the Republic of Serbia in its Reply to the Reasoned Opinion,¹⁷ the unilateral declaration of the Republic of Serbia about its understanding and interpretation of the term ‘Member State’ is not relevant in the case at hand. Furthermore, such reservation was not made with regard to the Electricity Regulation and the Electricity Directive, adapted and adopted by Ministerial Council Decision 2022/03/MC-EnC of 15 December 2022.

1. Regional cooperation between TSOs

- (29) Article 34(2) of the Electricity Regulation¹⁸ provides that TSOs shall promote the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions. Promoting coordinated allocation of cross-border capacity requires constructive cooperation between neighbouring TSOs with a view to enable coordinated cross-border capacity allocation. This includes agreeing on a mechanism to determine how the NTC at the border is set.
- (30) In the case at hand, *KOSTT* contacted *EMS* for proposals for determination of NTCs and capacity allocation from 1 January 2021 onwards, in particular on 10 December 2020 and on 24 February 2021. Without giving any reasons, *EMS* did not accept any of *KOSTT*'s proposals to determine the NTC and to conclude agreements on Scheduling and Accounting, determination of NTC and capacity allocation, nor did it propose any agreement or alternative solutions from its side. This lack of action by *EMS* infringes the obligation to promote coordinated allocation of cross-border capacity pursuant to Article 34(2) of the Electricity Regulation: While Article 34(2) of the Electricity Regulation would require neighbouring TSOs

¹⁶ C-365/97 *Commission/Italy* [1999] ECR I-7773, para 32; C-275/04 *Commission/Belgium* [2006] ECR I-9883, para 34; C-270/07 *Commission/Germany* [2009] ECR I-1983, para 49; C-53/08 *Commission/Austria*, para 129.

¹⁷ Reply to the Reasoned Opinion, p. 4.

¹⁸ Article 12 of Regulation (EC) 714/2009: “The maximum level of capacity of the interconnections and/or the transmission networks affecting cross-border flows [Electricity Regulation: “affected by cross-border capacity between Parties to the Energy Community”] shall be made available to market participants, complying with safety standards of secure network operation

such as *KOSTT* and *EMS* to cooperate with a view to enable coordinated cross-border capacity allocation, *EMS* does not only not promote coordinated cross-border capacity allocation, but *EMS*' lack of response, including any counter-proposal let alone an agreement on determination of NTC, renders nomination and allocation of cross-border capacity at the interconnection lines between Niš and Kosova B and between Kruševac and Podujeva impossible.

- (31) The Republic of Serbia in its Reply to the Opening Letter¹⁹ and in its Reply to the Reasoned Opinion²⁰ argues that due to the limitation of the Connection Agreement to two years, it constitutes a temporary solution and the status of *KOSTT* as an independent control area is uncertain and hence calls into question the need and purpose of capacity allocation at the border with the *KOSTT* trading zone. Moreover, it claims that *KOSTT* is not capable of balancing its system. However, as has been explained above, the Connection Agreements duration has been extended for another two years since its conclusion, and negotiations for amendments and further extension are ongoing. As regards balancing, the Secretariat notes that *KOSTT* is performing this function as any other transmission system operator. To the extent the Republic of Serbia refers to negative deviations in the balance within the Continental European electricity network over the last years resulting from *KOSTT*, it is to be recalled that they originated due to the lack of payment for electricity supply by customers in the North of Kosovo, for which *KOSTT* is liable for payment under the Financial, Settlement of KF, ACE and Ramping Period (FSKAR) mechanism towards the *Joint Allocation Office (JAO)*. Following an agreement between the distribution system operator in Kosovo and the Serbian supply company *Elektrosever* at the end of 2023, these negative deviations have ceased since. From a legal perspective, the Secretariat recalls that a TSO's balancing capabilities are not a condition for compliance with the obligation to agree on a mechanism to determine the NTC at the border for the purpose of enabling coordinated cross-border capacity allocation. Any deviations from its planned balance can be taken into account and reflected in the NTC methodology agreed between the TSOs.

2. Lack of capacity

- (32) Article 16(4) of the Electricity Regulation stipulates that the maximum capacity of the interconnections shall be made available to market participants by way of predefined allocation procedures.²¹ It follows that TSOs are under a clear and unambiguous obligation to make the maximum capacity of interconnections available. The Electricity Regulation does not provide for any derogation from this obligation, as long as “*the safety standards of secure network operation*” are complied with. This corresponds to the aims of the Electricity Regulation, namely to “*set fair rules for cross-border exchanges in electricity [...], including [...] the allocation of available capacities of interconnections between national transmission systems*” (Article 1(c) thereof).
- (33) In the case at hand, there is no agreement between *EMS* and *KOSTT* on the determination of the NTC. Since *EMS* does not provide any value for the capacity at the interconnection lines

¹⁹ Reply to the Opening Letter, p. 2.

²⁰ Reply to the Reasoned Opinion, p. 2.

²¹ Article 16(3) of Regulation (EC) 714/2009: “*Transmission system operators shall promote operational arrangements in order to ensure the optimum management of the [deleted in Electricity Regulation: “Energy Community”] 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.*”

between Niš and Kosova B and between Kruševac and Podujeva, the NTC at these interconnection lines effectively amounts to zero. It follows that nominations by market participants with *KOSTT* remain futile due to the impossibility to nominate any capacity with *EMS*. As a consequence of *EMS*' failure to comply with the obligation stipulated in Article 16(4) of the Electricity Regulation, no cross-border capacity is allocated and no commercial transactions are possible at the interconnection lines in question.

- (34) While the precise level of maximum capacity to be made available to market participants in order to ensure compliance with the safety standards of secure network operation may be debatable, it is to be noted that the Republic of Serbia does not claim safety standards of secure network operation as justification for not making any capacity available. In fact, there is no network safety-related justification for zero capacity being made available to market participants. By making no capacity at all available at the interconnection lines between Niš and Kosova B and between Kruševac and Podujeva, *EMS* fails to comply with the obligation under Article 16(4) of the Electricity Regulation.

3. Obligations of the national regulatory authority

- (35) Articles 58 lit. c)²² and 59(1) lit. b),²³ and u)²⁴ of the Electricity Directive stipulate a duty of the national regulatory authority to take all reasonable measures to eliminate restrictions in electricity trade and to ensure compliance of TSOs with their obligations under Energy Community law, including as regards cross-border issues.
- (36) As has been demonstrated above, *EMS* is under an obligation to cooperate with *KOSTT* and determine NTCs for cross-border capacity allocation and to make maximum capacity available at the interconnection lines between Niš and Kosova B and between Kruševac and Podujeva. Under the provisions quoted, it is the regulatory authority's duty to ensure compliance of the TSO with its obligations and hence to ensure that *EMS* complies with the above obligations. In the case at hand, the national regulatory authority, AERS, has not taken any action to ensure *EMS*' compliance with its obligations under the Energy Regulation. Contrary to Serbia's claim,²⁵ it cannot rely on the absence of effective powers being bestowed upon the regulatory authority to comply with its obligations under the Electricity Directive (namely imposing measures such as reprimands and warnings, initiating misdemeanour proceedings or proceedings for economic offences). The Court of Justice of the European Union has repeatedly found that a Member State cannot rely on provisions or issues pertaining to its national legal order in order to justify non-compliance with the *acquis*.²⁶ It follows that the national regulatory authority's inaction results in a breach of Article 58 lit. c) and 59(1) lit. b) and u) of the Electricity Directive.

²² The wording corresponds to Article 36 lit. c) of Directive 2009/72/EC.

²³ The wording corresponds to Article 37(1) lit. b) of Directive 2009/72/EC.

²⁴ The wording corresponds to Article 37(1) lit. q) of Directive 2009/72/EC.

²⁵ Reply to the Reasoned Opinion, p. 3.

²⁶ C-658/10 *Commission/Spain* ECLI:EU:C:2021:138, para 19, 77; C-240/89 *Commission/Italy* ECLI:EU:C:1990:474, para 6; 68/81 *Commission/Belgium* ECLI:EU:C:1988:206, para 10.

4. Competence of the Energy Community and the Secretariat

- (37) In its Reply to the Opening Letter²⁷ and its Reply to the Reasoned Opinion,²⁸ the Republic of Serbia contests the Energy Community's jurisdiction by reference to Article 103 of the Treaty²⁹ and the political dialogue conducted under the auspices of the European External Action Service.
- (38) In this respect, the Secretariat firstly recalls that by becoming a signatory to the Treaty establishing the Energy Community, the Republic of Serbia took upon itself the rights and obligations enshrined therein. According to Articles 10 and 11 of the Treaty, the Republic of Serbia is obliged to implement the *acquis communautaire* on energy, including the Electricity Directive and the Electricity Regulation.
- (39) Moreover, the lack of availability of cross-border transmission capacity allocation at the interconnection lines between Niš and Kosova B and between Kruševac and Podujeva obstructs the achievement of the aims of the Energy Community, as enshrined in Article 2 of the Treaty, in particular the development of Network Energy market competition on a broader geographic scale as well as the creation of a stable regulatory and market framework so that all Parties have access to the stable and continuous energy supply that is essential for economic development and social stability.
- (40) The Secretariat further recalls that the Advisory Committee, in its Opinion in Case ECS-3/08 concerning the failure of using revenues resulting from the allocation of interconnection capacity on the interconnectors of Kosovo* with neighbouring Contracting Parties in line with the *acquis communautaire*, found 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 in the perspective of accession and full incorporation of the acquis communautaire. The mere fact of ongoing accession negotiations is not sufficient to suspend all application of the existing law.*"³⁰ In this Opinion, which was upheld by the Ministerial Council, the Advisory Committee requested Serbia to substantiate "*which specific commitment of its accession negotiations would authorise a derogation from the acquis communautaire*" in question.
- (41) The Secretariat respectfully submits that the obligation to implement the Electricity Regulation, in particular Articles 16(4) and 34(2), and the Electricity Directive, in particular Articles 58 and 59, does not affect any obligation under the Stabilization and Association Agreement between the European Communities and their Member States and the Republic of Serbia. Furthermore, Article 103 of the Treaty provides that any commitment taken in the context of negotiations for accession to the European Union shall not be affected by this Treaty. The full and correct implementation of Articles 16(4) and 34(2) of the Electricity Regulation and Articles 58 and 59 of the Electricity Directive can and does not affect any commitments taken in this context.
- (42) Likewise, the political dialogue established under the auspices of the European External Action Service does not contain any specific commitment in accession negotiations which would be negatively affected by the implementation of the electricity *acquis*., Contrary to the Republic of

²⁷ Reply to the Opening Letter, p. 1.

²⁸ Reply to the Reasoned Opinion, p. 1.

²⁹ Reply to the Reasoned Opinion, p. 1.

³⁰ Opinion of 10 October 2016 in Case ECS-3/08.

Serbia's allegation in its Reply to the Reasoned Opinion,³¹ the case addresses the lack of compliance of the Republic of Serbia with its obligations under the Treaty.

- (43) In this respect, the Secretariat also recalls that the so-called "Arrangement regarding energy" agreed upon between Serbia and Kosovo* under the auspices of the EEAS-led political dialogue in 2013, "*both parties confirm their commitment to meeting all their obligations under the Energy Community Treaty, and to apply the EU energy acquis.*"³²
- (44) Contrary to Serbia's argumentation,³³ neither Article 103 of the Treaty nor any other provisions stipulates a prevalence of resolution of political issues over the dispute resolution mechanism of the Energy Community. In practice, this would render the Treaty inapplicable in any situation where discussions on a political level take place or where the issue at hand is be considered by the Party concerned of being of a political nature. The dispute settlement mechanism on which this case rests is enshrined in the Treaty (Article 90 thereof) and may be used in case of failure of a Party to comply with a Treaty obligation. The argumentation put forward by the Republic of Serbia would effectively render compliance with a Party's obligations under the Treaty and its dispute settlement mechanisms under Articles 90 *et seq.* nugatory.

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully proposes that the Ministerial Council of the Energy Community declares in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community that

due to the inaction of *JSC Elektromreza Srbije (EMS)* and the national energy regulatory authority AERS, the Republic of Serbia fails to comply with Articles 16(4) and 34(2) 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, and Articles 58 lit c) and 59(1) lit b) and u) 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, and thus fails to fulfil its obligations under Articles 6, 10 and 11 of the Treaty.

On behalf of the Secretariat of the Energy Community

³¹ Reply to the Reasoned Opinion, p. 1.

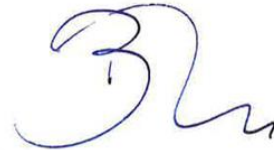
³² <https://normalizacija.rs/wp-content/uploads/2021/06/Sporazum-o-energetici-ENG-final.pdf>.

³³ Reply to the Reasoned Opinion, p. 1.

Vienna, 12 July 2024

A handwritten signature in blue ink that reads "Artur Lorkowski".

Artur Lorkowski
Director

A stylized handwritten signature in blue ink, appearing to be "DB".

Dirk Buschle
Deputy Director / Legal Counsel

List of Annexes

- ANNEX 1 Complaint, dated 18 February 2021
- ANNEX 2 Letter by European Federation of Energy Traders (EFET) to the Secretariat, dated 22 February 2021
- ANNEX 3 Opening Letter in Case ECS-2/21, dated 21 July 2022
- ANNEX 4 Reply to the Opening Letter by the Republic of Serbia, dated 8 September 2022
- ANNEX 5 Reasoned Opinion in Case ECS-2/21, dated 1 March 2023
- ANNEX 6 Reply to the Reasoned Opinion by the Republic of Serbia, dated 28 April 2023