

REPORT OF THE ENERGY COMMUNITY SECRETARIAT ON ENFORCEMENT ACTIVITIES

SEPTEMBER 2017 – SEPTEMBER 2018

Part I: Dispute Settlement Report

At the moment there are 26 open dispute settlement cases at different stages of the dispute settlement procedure.

Fourteen of those cases are pending for a Ministerial Council Decision in 2018, seven of which under Article 91 of the Treaty and seven under Article 92 of the Treaty.

Reasoned Requests submitted to the Ministerial Council under Article 91 of the Treaty

On 18 May 2018, three Reasoned Requests have been submitted to the Ministerial Council for a Decision under Article 91 of the Treaty. They concern **Case ECS-1/15 against Bosnia and Herzegovina** for failing to carry out the proper environmental impact assessment in case of the planned thermal power plant Ugljevik 3 in compliance with the Environmental Impact Assessment Directive 2011/92/EU; **Case ECS-8/15 against Ukraine** for discriminatory allocation of cross-border capacity for transit of electricity in breach of Directive 2009/72/EC and Regulation (EC) 714/2009 and **Case ECS-1/18 against Ukraine** for failing to transpose the Energy Efficiency Directive 2012/27/EU.

On 22 June 2018, three more Reasoned Requests concerning lack of transposition and lack of notification to the Secretariat measures transposing the so-called TEN-E Regulation (EU) 347/2013 (**Case ECS-2/18 against Albania, Case ECS-3/18 against Bosnia and Herzegovina and Case ECS-4/18 against Ukraine**) have been submitted to the Ministerial Council. Those three cases have been initiated based on Article 11(3) of the Dispute Settlement Rules, without a preliminary procedure.

On 19 May 2017, the Secretariat submitted a set of seven Reasoned Requests in cases under Article 91 of the Treaty to the Ministerial Council for a Decision. In three of these cases (**Cases ECS-6/11 against Serbia, ECS-13/16 against Ukraine and Case ECS-11/14 against Serbia**), the Secretariat withdrew its Reasoned Requests. In **Cases ECS-1/12 against Ukraine, ECS-10/13 against Albania and ECS-1/14 against Bosnia and Herzegovina**, the Ministerial Council rendered a Decision in written procedure on 2 February 2018 confirming the respective breaches. In **Case ECS-18/16 against Serbia** concerning an inter-governmental agreement with the Russian Federation which requires gas undertakings to include a so-called destination clause in their supply contracts in contravention of Article 18 of the Treaty. On 28 November 2017, the Advisory Committee issued its Opinion upholding the Secretariat's Reasoned Request. The Reasoned Request has been withdrawn in the meantime.

Reasoned Requests submitted to the Ministerial Council under Article 92 of the Treaty

On 12 October 2017, the Secretariat had submitted nine Reasoned Requests to the Ministerial Council for Decision under Article 92 of the Treaty. Two of those (**Cases ECS-2/15 S and ECS-9/16 S against former Yugoslav Republic of Macedonia**) have been withdrawn on 28 May 2018, following the adoption of a new Energy Law by the Macedonian Parliament.

The remaining cases under Article 92 of the Treaty for Decision by the Ministerial Council at its meeting in 2018 concern: **Case ECS-3/08 S against Serbia** for failure to comply with Regulation (EC) 1228/2003 by not using correctly congestion revenues from the allocation of interconnection capacity (Ministerial Council Decision 2016/02/MC-EnC); **Cases ECS-2/13 against Bosnia and Herzegovina, ECS-4/13 against Serbia and ECS-5/13 against Ukraine** for failure to comply with the Sulphur in Fuels Directive 1999/32/EC (Ministerial Council Decisions 2016/03/MC-EnC, 2016/04/MC-EnC and 2016/05/MC-EnC); and **Case ECS-6/16 S against Bosnia and Herzegovina** for non-transposition of Directive 2009/72/EC, Directive 2009/73/, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks (Ministerial Council Decision 2016/07/MC-EnC).

Two cases in which long-standing breaches have been established by the Ministerial Council, both a breach under Article 91 and a serious and persistent breach under Article 92 of the Treaty, are also pending additional decisions under Article 92 of the Treaty. **Case ECS-8/11 S against Bosnia and Herzegovina** concerns lack of compliance with the provisions of the gas *acquis* from the Second Energy Package. The country continues to seriously infringe Energy Community law despite the Ministerial Council having already adopted four Decisions (one decision under Article 91 in Case ECS-8/11 - Ministerial Council Decision 2013/04/MC-EnC three decisions under Article 92 in Case ECS-8/11 S – Ministerial Council Decisions 2014/04/MC-EnC, 2015/10/MC-EnC and 2016/16/MC-EnC. The second **Case ECS-9/13 S against Serbia**, also concerning the gas sector is related to non-compliance with the requirement of legal and functional unbundling of its transmission system operators Srbijagas and Yugorosgaz Transport under Directive 2003/54/EC. The Ministerial Council has adopted a decision under Article 91 in Case ECS-9/13 - Ministerial Council Decision 2014/03/MC-EnC, and a decision under Article 92 in Case ECS-9/13 S – Ministerial Council Decision 2016/17/MC-EnC.

Other not-rectified breaches established by the Ministerial Council

There are also three cases in which a breach of Energy Community law has been established by a Decision of the Ministerial Council, but the breaches have not yet been rectified. Two cases concern lack of transposition and implementation of Directive 2006/32/EC on energy end-use efficiency and energy services (**Case ECS-10/13 against Albania and Case ECS-1/14 against Bosnia and Herzegovina**), and one case is related to maintaining and applying discriminatory cross-border capacity allocation in **Ukraine – Case ECS-1/12**.

Open dispute settlement cases in preliminary procedure

Twelve cases are open in a preliminary procedure under Article 91 of the Treaty. In those cases an Opening Letter has been sent to the Contracting Parties concerned. Three of those cases initiated in January 2018 concern lack of unbundling of electricity distribution operators (**Cases ECS-4/17 against Albania, ECS-5/17 against Bosnia and Herzegovina and ECS-6/17 against Ukraine**). Case **ECS-2/17 against Ukraine** initiated in August 2017 concerns non-compliance with Energy Community *acquis* on natural gas of some public service obligations imposed on natural gas market

participants. By supplementary Opening Letter in the same case in July 2018, the Secretariat extended the grounds for non-compliance. Two cases in which Opening Letters have been sent concern **Moldova – Case ECS-14/16** initiated in October 2017 relates to lack of correct transposition of Directive 2010/31/EU on the energy performance in buildings, whereas **Case ECS-9/17** relates to non-compliance with the principles of regulatory independence and cost-reflectivity of tariffs. Two recent cases have been initiated in July 2018 against **Serbia – Case ECS-10/17** concerns the certification by the Serbian regulatory authority of Yugorosgaz-Transport without fulfilling the requirements of the *acquis*, and **Case ECS-13/17** concerns non-compliance with the requirement on ensuring non-discriminatory third party access by excluding one interconnection point from allocation of capacity. New cases **Case ECS-6/18 against Kosovo*** and **Case ECS-7/18 against Moldova** have been initiated for lack of transposition of legislation related to the emissions of large combustion plants. Finally, three more open cases concern lack of effective enforcement of state aid rules to the energy sectors (**Case ECS-1/10 against Bosnia and Herzegovina**, **Case ECS-7/11 against Kosovo*** and **Case ECS-8/14 against Ukraine**).

Statistical information

In the previous years, 62 cases have been closed under Article 91 and two cases have been closed under Article 92 of the Treaty. In sixteen of those 62 cases, the Ministerial Council has adopted a decision under Article 91, and in two cases the Ministerial Council has adopted decisions under Article 92 of the Treaty.

Part II: Report on Cooperation with National Administration and Courts

Article 2 of the Dispute Settlement Procedures provides for a cooperation mechanism between national authorities and the Secretariat by which national authorities (including courts) ask the Secretariat for assistance regarding questions of interpretation or application of Energy Community law. In the past year, this mechanism has been used three times and resulted in assistance to national authorities.

In Albania, the Secretariat was consulted by the State aid authority regarding the notification of a guarantee given by the Government of Albania to a loan provided by KfW to the transmission system operator (OST) for the “400 kv Albania-Macedonia transmission line Fier-Elbasan-Qafthana”. The Secretariat assisted the State Aid Commission with its opinion including an overview of the relevant case-law. The State Aid Commission came to the conclusion that the guarantee constitutes State aid, but is compatible and therefore legal. Furthermore, the Albanian State aid authority asked for the Secretariat’s opinion regarding the proposed amendments to the reverse-charge VAT regime of the TAP project.

In Serbia, the Commission for State Aid Control asked for the Secretariat’s assistance with regard to the assessment of the character of guarantees granted by the Republic of Serbia for loans from international financial institutions to EPS for the Kolubara B power plant project. In particular, it raised the question whether such guarantees have to be considered State aid. The Secretariat has provided the authority with an extensive opinion on the issue. The State aid authority aligned its final decision with the Secretariat’s opinion and found the guarantees to be State aid which is compatible.

In Ukraine, the Secretariat was requested by the Antimonopoly Committee of Ukraine to assist with the preliminary assessment of a number of potential State aid measures in the electricity sector. The Secretariat has provided an assessment of the measures brought to its attention and their

qualification as State aid or not and the possible grounds for justification. This analysis will assist the authority when taking the next steps to enforce the State aid rules in Ukraine.

Part III: Report on the activity of the Energy Community Secretariat's Dispute Resolution and Negotiation Centre

One year after its establishment, the Energy Community Secretariat's Dispute Resolution and Negotiation Centre keeps being entrusted with the mediation of complex energy disputes.

The most recent dispute brought before the Centre is the one between Ashta, a project company of Verbund and EVN, and various state authorities from Albania (the Albanian Government, regulator, generator, TSO and DSO). The dispute relates to the balancing liabilities for the deviations from the scheduled energy production. Dirk Buschle, the Deputy Director of the Secretariat and Chair of the Energy Community Secretariat's Dispute Resolution and Negotiation Centre, has been appointed as mediator in this case. The proceedings will commence in September 2018.

Earlier in 2018, JSC Ukrtransgaz (the Ukrainian gas TSO) asked, and the Ukrainian National Energy and Utilities Regulatory Commission agreed, for Centre to facilitate their negotiations over implementation of the amendments to the Ukrainian Gas Transmission Code which are supposed to enter into the force in autumn 2018. Predrag Grujicic, the Head of the Gas Unit in the Secretariat, has been appointed as facilitator. The proceedings are ongoing.

After the successful mediation of a dispute arising out of tariff deviations in the Moldovan electricity sector, Gas Natural Fenosa and the Moldovan regulator, ANRE, called upon the Centre once again, this time with regard to the amount of penalties imposed on the DSO for not complying with the mandatory level of investments. Dirk Buschle, the Deputy Director of the Secretariat and Chair of the Energy Community Secretariat's Dispute Resolution and Negotiation Centre, was appointed as facilitator in this dispute, which was settled in June 2018.

In spring 2018, Prof Dr Klaus Töpfer was engaged by the Energy Community Secretariat's Dispute Resolution and Negotiation Centre to mediate the process between the Transmission System Operators of Kosovo* and Serbia as part of a wider framework of the Kosovo*-Serbia Dialogue. The dispute essentially relates to the question of who should allocate transmission capacity on the electricity interconnectors between Kosovo* and the adjacent countries (Albania, FYR of Macedonia and Montenegro). The proceedings are ongoing.

At the same time, an increasing number of highly qualified energy specialists and mediators have been applying to be part of the Energy Community Panel of Mediators. So far, the Panel of Mediators comprises of 26 mediators.