

Vienna, 12 October 2017  
SR-ECS-3\_08-S\_O\_03\_12-10-2017

**Subject: Request under Article 92 of the Treaty in Case ECS-3/08 S**

Excellency,

Please find attached the Request for Sanctions in reference to Case ECS-3/08 S.  
Please accept, the expression of my highest considerations.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač

H.E. MR. VALDRIN LLUKA  
MINISTER OF ECONOMIC DEVELOPMENT OF THE REPUBLIC OF KOSOVO\*

H.E. MR. DRITON KUQI, MINISTER OF ECONOMY  
OF THE REPUBLIC OF MACEDONIA

H.E. MR. ALEKSANDAR ANTIĆ  
MINISTER OF MINING AND ENERGY OF THE REPUBLIC OF SERBIA

MS ANNE-CHARLOTTE BOURNOVILLE  
EUROPEAN COMMISSION

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

**REQUEST**

In Case ECS-3/08 S

Submitted pursuant to Article 92(1) of the Treaty establishing the Energy Community and Articles 39 to 42 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,<sup>1</sup> the

**SECRETARIAT OF THE ENERGY COMMUNITY**

seeking a Decision from the Ministerial Council that:

1. The failure by the Republic of Serbia to implement Ministerial Council Decision 2016/02/MC-EnC and thus to rectify the breach identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. The Republic of Serbia shall take all appropriate measures to rectify the breach identified in Ministerial Council Decision 2016/02/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2018.
3. The Secretariat is invited to monitor compliance of the measures taken by the Republic of Serbia with the Energy Community *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

has the honour of submitting the following Request to the Ministerial Council under Article 92(1) of the Treaty:

**I. Relevant Facts**

- (1) On 17 September 2010, the Secretariat initiated dispute settlement procedures against the Republic of Serbia by way of an Opening Letter under Article 12 of the Dispute Settlement Procedures for alleged failures of the Republic Serbia to comply with Articles 3 and 6 of Regulation 1228/20032 (Case ECS-3/08). Having not been convinced by the reply of the

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<sup>1</sup> Hereinafter: Dispute Settlement Procedures. 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 applied to Case ECS-3/08 and that case has been closed with adoption of Ministerial Council Decision 2016/02/MC-EnC on 14 October 2016. To cases initiated after 15 October 2015, including the present case ECS-3/08 S, the Dispute Settlement Procedures of 2015 apply. However, there is no difference in substance between the Dispute Settlement Rules of 2008 and 2015 in relation to cases initiated under Article 92 of the Treaty.

<sup>2</sup> Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ 2003 L 176/1.

Ministry of Mining and Energy of the Republic of Serbia, the Secretariat sent a Reasoned Opinion under Article 13 of the Dispute Settlement Procedures on 7 October 2011. Subsequently, on 13 May 2016, the Secretariat submitted a Reasoned Request to the Ministerial Council under Article 28 of the Dispute Settlement Procedures, which thereafter was partially withdrawn and a reduced version was submitted by the Secretariat on 20 July 2016. The Advisory Committee established under Article 32 of the Dispute Settlement Procedures delivered its Opinion on the Reasoned Request on 10 October 2016.

- (2) On 14 October 2016, the Ministerial Council adopted Decision 2016/02/MC-EnC on the failure by the Republic of Serbia to comply with the Energy Community Treaty in ECS-3/08.<sup>3</sup> This Decision reads as follows:

**Article 1**  
**Failure by the Republic of Serbia to comply with the Treaty**

1. By not using the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, the former Yugoslav Republic of Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003, the Republic of Serbia, to which actions and non-actions of its state-owned transmission system operator are imputable, has failed to comply with Article 6 of Regulation 1228/2003.

For the reasons sustaining these findings, reference is made to the Reasoned Request.

**Article 2**  
**Follow-up**

2. The Republic of Serbia shall take all appropriate measures to rectify the breach identified in Article 1 and ensure compliance with Energy Community law by December 2016. The Republic of Serbia shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.
3. If the breaches have not been rectified, the Secretariat is invited to initiate a procedure under Article 92 of the Treaty.

**Article 3**  
**Addressees and entry into force**

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption.”

- (3) In the abovementioned decision, the Ministerial Council invited the Secretariat to initiate a procedure under Article 92 of the Treaty, if the identified breach was were not rectified by the Republic of Serbia by December 2016.
- (4) In the aftermath of Decision 2016/02/MC-EnC, the Secretariat reminded the Republic of Serbia several times of its obligations and recalled the necessary implementation measures in order to rectify the breach.
- (5) In its Western Balkans 6 Electricity Monitoring Report of March 2017<sup>4</sup> and of July 2017,<sup>5</sup> the Secretariat reiterated that transmission system operators of the Republic of Serbia and Kosovo\* have failed to make progress in finalizing agreements on compensation of past congestion management and ITC for an interim period.

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<sup>3</sup> Annex I.

<sup>4</sup> Available at [https://www.energy-community.org/dam/jcr:ffed9ec9-229a-4f98-a925-d54e0e52bbba/WB6\\_EL\\_032017.pdf](https://www.energy-community.org/dam/jcr:ffed9ec9-229a-4f98-a925-d54e0e52bbba/WB6_EL_032017.pdf).

<sup>5</sup> Available at [https://www.energy-community.org/dam/jcr:751f707d-5eb8-4d6c-afde-d29c111e8dc1/EnC\\_WB6\\_EL\\_072017.pdf](https://www.energy-community.org/dam/jcr:751f707d-5eb8-4d6c-afde-d29c111e8dc1/EnC_WB6_EL_072017.pdf).

- (6) The Republic of Serbia has also been reminded by a letter sent by the Secretariat on 1 March 2017 to the Minister of Mining and Energy of the Republic of Serbia, where the Secretariat requested a report on the measures taken for rectifying the breach identified in Ministerial Council Decision 2016/02/MC-EnC not later than 15 March 2017.<sup>6</sup> The Republic of Serbia has neither replied to the Secretariat's letter nor submitted a report as requested.
- (7) At the time of this Request, the Republic of Serbia has not taken any measure to rectify the breach identified in Decision 2016/02/MC-EnC. In substance, the failure of the Republic of Serbia to ensure that the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, former Yugoslav Republic of Macedonia and Montenegro are used for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003, persists.
- (8) As will be reasoned below, the violation by the Republic of Serbia of its obligations under the Treaty established by Article 1 of Decision 2016/02/MC-EnC continues and is to be qualified as a serious and persistent breach. Therefore, the Secretariat decided to follow-up on the Ministerial Council's request and to initiate a procedure under Article 92 of the Treaty.

## II. Relevant Energy Community Law

- (9) 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 its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law" (Article 3(1) Dispute Settlement Procedures).
- (10) 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".*
- (11) Article 76 of the Treaty reads:

*"... A Decision is legally binding in its entirety upon those to whom it is addressed. ..."*
- (12) Article 89 of the Treaty reads:

*"The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision."*
- (13) Article 92(1) of the Treaty reads:

*"At the request of a Party, the Secretariat or the Regulatory Board, the Ministerial Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its obligations under this Treaty and may suspend certain of the rights deriving from application of*

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<sup>6</sup> Annex II.

*this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty.”*

- (14) Article 37 of the Dispute Settlement Procedures (“Binding nature of the decision”) reads:

*“The decision by the Ministerial Council shall be binding on the Parties concerned from the date of its adoption.”*

- (15) Article 38 of the Dispute Settlement Procedures (“Consequences of a decision establishing failure to comply”) reads:

*“(1) Where the Ministerial Council establishes the existence of a breach of a Party’s obligation pursuant to Article 91 of the Treaty the Party concerned shall take all appropriate measures to rectify the breach and ensure compliance with Energy Community law.*

*(2) The Secretariat, in accordance with Article 67(b) of the Treaty, shall review the proper implementation by the Party concerned of the decision, and may bring the matter directly before the Ministerial Council on the grounds of a failure to take the necessary measures to comply with the decision.”*

- (16) Article 39 of the Dispute Settlement Procedures (“Serious and persistent breach”) reads:

*“The Ministerial Council shall establish the existence of a serious and persistent breach by a Party of its obligations under the Treaty taking into account the particularities of each individual case.”*

- (17) Article 40 of the Dispute Settlement Procedures (“Request”) reads:

*“(1) A Party, the Secretariat or the Regulatory Board may request the Ministerial Council to determine the existence of a serious and persistent breach without a preliminary procedure.*

*(2) The request may follow up on a prior decision taken by the Ministerial Council under Article 91 of the Treaty or raise a new issue.*

*(3) The request shall set out the allegations against the Party concerned in factual and legal terms. It shall also contain a proposal as to concrete sanctions to be taken in accordance with Article 92(1) of the Treaty.*

*(4) The request shall be submitted to the Presidency and the Vice-Presidency at least 60 days before the respective meeting. A copy shall be submitted to the Secretariat for registration. The request shall not be made public.”*

- (18) Article 41 of the Dispute Settlement Procedures (“Decision-making procedure”) reads:

*“(1) The Presidency shall, within seven days after receiving it, forward the request to the Party concerned and ask it for a reply to the allegations made in the request.*

*(2) The Presidency and the Vice-Presidency may ask the Advisory Committee for its written opinion.*

*(3) The decision by the Ministerial Council on the existence of a serious and persistent breach shall be taken in accordance with Articles 92(1) and 93 of the Treaty.*

*(4) The decision taken by the Ministerial Council shall be made publicly available on the Secretariat’s website.”*

- (19) Article 42 of the Dispute Settlement Procedures (“Measures under Article 92”) reads:

*“(1) In the decision establishing the existence of a serious and persistent breach, the Ministerial Council shall determine sanctions in accordance with Article 92(1) of the Treaty and specify a time-limit.*

*(2) The obligations of the Party concerned under the Treaty shall in any case continue to be binding on that Party.*

*(3) The Ministerial Council shall at each subsequent meeting verify that the grounds continue to apply on which the decision establishing the existence of a serious and persistent breach was made and sanctions were imposed.”*

### **III. Legal Assessment**

#### *1. Introduction*

##### *aa. The binding nature of a Ministerial Council Decision*

- (20) A Decision taken by the Ministerial Council has binding effect *vis-à-vis* the Party concerned. This follows from Article 76 of the Treaty and Article 37 of the Dispute Settlement Procedures. As a consequence, the Party concerned is under an obligation to implement Decisions in its domestic legal system (Articles 6 and 89 of the Treaty).
- (21) In the case of a Decision taken under Articles 91 of the Treaty, such as Decision 2016/02/MC-EnC, the obligation to implement amounts to an obligation to fully rectify the breach identified and to ensure compliance with Energy Community law. This is expressly stipulated in Article 38(1) of the Dispute Settlement Procedures. In Article 2(1) of Decision 2016/02/MC-EnC, the Ministerial Council set a deadline until December 2016 for the Republic of Serbia to take all appropriate measures to that effect.
- (22) The non-implementation of a Ministerial Council Decision under Article 91 or 92 of the Treaty by the Party concerned in itself constitutes a breach of Energy Community law. Once a Decision establishing a breach has been adopted, it is not possible any longer for the Party concerned to contest the validity or the lawfulness of that Decision. The Treaty does not foresee an appeal against Decisions of the Ministerial Council, the supreme decision-maker under the Treaty. If a Party wants to challenge the position taken by the Secretariat in the course of a dispute settlement procedure, it needs to do so during the procedure leading up to the Decision by the Ministerial Council under Article 91 of the Treaty. Once that Decision is taken, the Party concerned is precluded from raising any arguments challenging the findings contained in the Decision. Otherwise legal certainty and the binding effect of Decisions would be frustrated. The only pathway the Treaty envisages for setting aside a Decision by the Ministerial Council under Article 91 or 92 of the Treaty is a request for revocation under Article 91(2) or Article 92(2) of the Treaty respectively.
- (23) It follows from the binding effect of Decisions under Energy Community law that the Republic of Serbia is obliged to implement Decision 2016/02/MC-EnC. Subsequent changes to domestic legislation or regulatory practice, as well as any legal and corporate reforms would thus affect the present Request only to the extent they result in effective rectification of the breach identified by the Ministerial Council, *i.e.* ensure that revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, the former Yugoslav Republic of Macedonia and Montenegro are used for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003. At the date of this Request, this is not the case.

*bb. Measures under Article 92 of the Treaty*

- (24) Besides triggering a self-standing obligation of the Party concerned to rectify any breaches identified in a previous Decision under Article 91(1) or Article 92(1) of the Treaty, Article 92(1) of the Treaty opens the possibility for further follow-up measures to be taken against the Party violating Energy Community law, namely (1) the determination of a serious and persistent breach of the Party's obligations under the Treaty, and (2) the suspension of certain rights deriving from the application of the Treaty to the Party.
- (25) Article 42(1) of the Dispute Settlement Procedures links these two measures in the sense that a Decision establishing the existence of a serious and persistent breach mandatorily "shall" determine sanctions in accordance with Article 92(1) of the Treaty, leaving discretion only for choosing the nature of the sanctions to be imposed. Contrary to this, in its case law in Cases ECS-8/11 and ECS-9/13, the Ministerial Council has followed an approach of separating these two measures. It has first established a serious and persistent breach,<sup>7</sup> and only in cases where the serious and persistent breach has not been rectified, it has imposed measures related to the suspension of certain rights deriving from the application of the Treaty.<sup>8</sup> Therefore, in the present Request, the Secretariat requests a Decision by the Ministerial Council on establishing a serious and persistent breach only. The Secretariat reserves the right to request measures related to the suspension of certain rights deriving from the application of the Treaty subject to another request under Article 92(1) of the Treaty.
- (26) Decisions under Article 92 of the Treaty do not require a preliminary procedure of the type applicable to Decisions pursuant to Article 91 of the Treaty. The fact that the present Request is a follow-up to the Ministerial Council's Decision concluding Case ECS-3/08 means that a comprehensive preliminary procedure has already been carried out during which the Republic of Serbia was given ample opportunity to be heard. This procedure also introduced the Ministerial Council to the subject-matter of the present Request.
- (27) Moreover, unlike Article 91 of the Treaty, Article 92 of the Treaty does not require a reasoning of the Request made to the Ministerial Council. Nevertheless, the Secretariat in accordance with Article 40(3) of the Dispute Settlement Procedures will set out the factual background and the main legal reasons for submitting the present Request.
- (28) Article 92(1) of the Treaty resembles Article 7 of the EU Treaty (TEU). This provision was introduced into the TEU by the Treaty of Amsterdam as an instrument for ensuring that EU Member States respect certain common values. In essence, it is a diplomatic or political rather than a legal procedure. Whether or not this procedure is suitable for the enforcement of the Treaty is not for the Secretariat to decide. It notes, however, that the European Commission considers that "*the procedure laid down by Article 7 of the Union Treaty ... is not designed to remedy individual breaches*".<sup>9</sup> Similarly, the report by the Ministerial Council's High Level Reflection Group comes to the conclusion that "*the current political approach of 'suspending certain rights' in reaction to a serious and persistent*

<sup>7</sup> See Ministerial Council Decision 2014/04/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina in Case ECS-8/11, dated 23 September 2014; Ministerial Council Decision 2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty in Case ECS-9/13, dated 14 October 2016.

<sup>8</sup> Ministerial Council Decision 2015/10MC-EnC on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty in Case ECS-8/11, dated 16 October 2015.

<sup>9</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, p. 7, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>.

*breach does not satisfy the standards of an Energy Community based on the rule of law*".<sup>10</sup> The Secretariat proposes the introduction of financial penalties by way of Treaty amendments instead.

- (29) As a decision under Article 7 TEU has so far not been triggered in the EU<sup>11</sup>, no precedence of relevance under Article 94 of the Treaty exists. In this situation, the Secretariat will base itself on the *travaux préparatoires* and the aforementioned interpretation issued by the European Commission when applying Article 92(1) of the Treaty to the present case.
- (30) In the following, the Secretariat will submit that the Republic of Serbia, at the date of this Request, continues to seriously and persistently breach Energy Community law.

## 2. Continued existence of a breach

- (31) The Secretariat submits that the Republic of Serbia continues to breach Article 1 of Decision 2016/02/MC-EnC and Article 6 of Regulation 1228/2003<sup>12</sup> to which this Article of the Decision refers.
- (32) As described above, the Secretariat assumed a proactive role in all discussions and negotiations aiming at settling amicably the dispute between the two transmissions system operators involved, as outlined in detail in the Reasoned Request submitted to the Ministerial Council on 13 May 2016 in Case ECS-3/08. Nevertheless, all efforts made over the last nine years did ultimately not result in the Republic of Serbia complying with Article 6 of Regulation 1228/2003.
- (33) It is still undisputed that the transmission system operator for electricity in the Republic of Serbia, the fully state owned company *Elektromreža Srbije* ("EMS"), performs congestion management and allocates 50% of the available transfer capacities on the three interconnectors of the system operated by the transmission system operator of Kosovo *Operator Sistemi, Transmisioni dhe Tregu të Kosovës Sh.a*, ("KOSTT") with Albania, former Yugoslav Republic of Macedonia and Montenegro in the absence of a formal recognition of KOSTT as control area.
- (34) At the date of this Request, the Republic of Serbia still fails to ensure that its state-owned transmission system operator uses revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, former Yugoslav Republic of Macedonia and Montenegro for one or more of the purposes specified in Article 6(6) of Regulation 1228/2003, in compliance with Energy Community law. In particular:

Firstly, the Republic of Serbia does not ensure that these revenues are used for guaranteeing the actual availability of the allocated capacity: Neither does EMS allocate revenues from capacity allocation on the interconnectors in question, nor does it use them

<sup>10</sup> Report of the High Level Reflection Group, p. 20, available at [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/3178024/0633975AD9F97B9CE053C92FA8C06338.PDF](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3178024/0633975AD9F97B9CE053C92FA8C06338.PDF).

<sup>11</sup> The European Commission has recently issued a recommendation to Poland stating that in case the Polish authorities take any measures that will aggravate the systemic threat to the rule of law, the Commission is ready to immediately activate Article 7 TEU (Commission Recommendation of 26.7.2017 regarding the rule of law in Poland C(2017) 5320 final). Furthermore, in the case of Hungary, the European Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 TEU (European Parliament resolution of 17 May 2017 on the situation in Hungary 2017/2656(RSP)).

<sup>12</sup> This provision corresponds to Article 16(6) of Regulation 714/2009 of the Third Energy Package. In determining how congestion revenue may be used, the latter provision applies stricter standards for the third option, namely the reduction of the general level of network tariffs. However, the arguments put forward in the present assessment remain the same.



in a specific manner to specifically guarantee the availability of the allocated capacity on these interconnectors.<sup>13</sup>

Secondly, the Republic of Serbia does not ensure that these revenues are used for network investments maintaining and increasing interconnection activities: The revenue obtained from capacity allocation on the three interconnectors subject to the present dispute becomes part of the overall revenues of EMS and are used to finance all of its activities. Although some of these revenues may in fact be used to upgrade certain interconnection capacities, this does not ensure that any and all revenues resulting from interconnection capacity allocation on the three interconnectors in question are used for this purpose. Particularly, as it is laid down in detail in the Reasoned Request, EMS has not invested in or maintained transmission infrastructure on the territory of Kosovo\* since the entry into force of the Treaty.

Thirdly, the Republic of Serbia does not ensure that these revenues are used as an income to be taken into account by regulatory authorities when approving the methodology for calculating network tariffs and/or in assessing whether tariffs should be amended: EMS does not transfer any revenue gained by allocating capacity on the three interconnectors concerned to KOSTT. Since revenues obtained by EMS are not passed on to KOSTT, they may not be reflected in the tariff decisions by ERO, the regulatory authority in Kosovo\*, and cannot be used for any reduction of the overall level of transmission tariffs on the network operated by KOSTT.

- (35) Furthermore, at the date of this Request, EMS and KOSTT have also failed in making any progress in finalizing bilateral agreements on compensation of past congestion management. To the Secretariat's best knowledge, after adoption of Decision 2016/02/MC-EnC, no further action capable of affecting the above assessment was taken.
- (36) In conclusion, the Secretariat submits that the Republic of Serbia, in the aftermath of Decision 2016/02/MC-EnC, failed to rectify the breach of its obligations under the Treaty as listed in Article 1 of that Decision.

*aa. Seriousness of the breach*

- (37) In a Communication of 2005 concerning the EU pre-Lisbon infringement action procedure, the European Commission stated that "[a]n *infringement concerning non-compliance with a judgment is always serious*".<sup>14</sup> It can be argued that this statement is applied by analogy to the situation at hand. Given that Article 92 of the Treaty was modelled on Article 7 TEU, the Secretariat also considers relevant the Communication of 2003, which offers a view on what qualifies a breach as serious.<sup>15</sup> Within this procedure, the breach in question must go beyond specific situations and concern a more systematic problem. In order to determine the seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach.
- (38) As specified in Preamble 9 of Regulation 1228/2003, in an open, competitive market, transmission system operators should be compensated for costs incurred as a result of

<sup>13</sup> Namely by buying back capacity rather than cancelling capacity rights in the event of difficulties.

<sup>14</sup> Communication of the European Commission on the application of Article 228 of the EC Treaty, SEC(2005) 1658, section 16, available at <http://ec.europa.eu/transparency/regdoc/rep/2/2005/EN/SEC-2005-1658-1-EN-MAIN-PART-1.PDF>; see also ECJ C-169/13, *Commission v Italy*, ECLI:EU:C:2014:2407, para. 100; ECJ C-378/13, *Commission v Greece*, ECLI:EU:C:2014:2405, paras. 37, 72.

<sup>15</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, COM(2003) 606 final, 15.10.2003.

hosting cross-border flows of electricity on their networks by the operators of the transmission systems from which cross-border flows originate and the systems where those flows end. Ensuring that revenues resulting from capacity allocation in interconnectors with different countries are used for the purposes specified in Article 6(6) of Regulation 1228/2003 constitutes a particularly important element of the *acquis* as it serves the aim of upgrading congestion management and interconnection capacities among Contracting Parties. It is therefore of key importance for Contracting Parties to comply with requirements set out in Article 6(6) of Regulation 1228/2003 in order to increase the effective functioning of the Energy Community internal market and attain the objectives of Energy Community law.

- (39) Moreover, the failure by the Republic of Serbia to comply with Article 6(6) of Regulation 1228/2003 further exacerbates the seriousness of the breach since it substantially impacts its capability of complying with more stringent criteria of the subsequent Regulation under the Third Energy Package, namely Article 16(6) of Regulation 714/2009.
- (40) The Communication by the European Commission on Article 7 TEU of 2003 – upon which Article 92 of the Treaty was modelled – suggests that, as in the European Union, the Ministerial Council of the Energy Community disposes of a discretionary power to determine that there is a serious and persistent breach. In this respect, the Secretariat recalls that it was invited by the Ministerial Council in Decision 2016/02/MC-EnC to initiate a procedure under Article 92 of the Treaty if the breach has not been rectified by December 2016. This presupposes the existence of a serious (and persistent) breach.

*bb. Persistence of the breach*

- (41) According to the European Commission, for a breach to be persistent, it must last some time.<sup>16</sup> The Republic of Serbia's failure to comply with Article 6(6) of Regulation 1228/2003 persists since 2006, when the Treaty entered into force. In the Secretariat's view, this long lasting state of non-compliance and the particular seriousness of the breach render the breach persistent. In a case of measures under Article 92 of the Treaty against Bosnia and Herzegovina, the Ministerial Council in 2014 deemed eight years of serious breaches as being persistent within the meaning of Article 92 of the Treaty.
- (42) The Secretariat recalls that the Republic of Serbia has been constantly reminded of its breach in the Secretariat's Implementation Reports and its bilateral communication, as well as by numerous Ministerial Council and Permanent High Level Group meetings, without any result.

## **ON THESE GROUNDS**

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community in accordance with Article 92(1) of the Treaty to declare that:

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<sup>16</sup> Communication of the European Commission on the application of Article 228 of the EC Treaty, SEC(2005) 1658, p. 8.

1. The failure by the Republic of Serbia to implement Ministerial Council Decision 2016/02/MC-EnC and thus to rectify the breach identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. The Republic of Serbia shall take all appropriate measures to rectify the breach identified in Ministerial Council Decision 2016/02/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2018.
3. The Secretariat is invited to monitor compliance of the measures taken by the Republic of Serbia with the Energy Community *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty

On behalf of the Secretariat of the Energy Community

Vienna, 12 October 2017

A blue ink signature of Janez Kopač.

Janez Kopač  
Director

A black ink signature of Dirk Buschle.

Dirk Buschle  
Deputy Director / Legal Counsel

## List of Annexes

- Annex I      Ministerial Council Decision 2016/02/MC-EnC
- Annex II     Letter sent by the Energy Community Secretariat to the Minister of Mining and Energy of the Republic of Serbia, No. ECS-03/08/01-03-2017, 1 March 2017