

# REPORT

## BY THE ENERGY COMMUNITY SECRETARIAT ON DISPUTE SETTLEMENT

### I. BACKGROUND

Title VII of the Treaty establishing the Energy Community envisages a so-called dispute settlement mechanism to enforce the obligations assumed by the Parties by signing the Treaty. Even though Articles 90 to 93 have been fully applicable from the entry into force of the Treaty, dispute settlement only started in practical terms once the Ministerial Council adopted the Rules of Procedure for Dispute Settlement under the Energy Community Treaty in June 2008 (*Procedural Act No 2008/01/MC-EnC of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty*). The main features under these Rules are a two-step preliminary procedure to be carried out by the Secretariat on its own initiative or upon complaint by a private body, and the creation of an Advisory Committee to support the Ministerial Council in taking a Decision under Article 91 of the Treaty.

### II. DISPUTE SETTLEMENT CASES UPON COMPLAINTS

Since the adoption of the Dispute Settlement Rules, the Secretariat has, as of 15 June 2010, received five complaints by private bodies. Upon receiving a complaint, the Secretariat assesses the merits of a case and decides whether to initiate a formal (preliminary) procedure. So far, the Secretariat has done that in one case (Case ECS-2/08). Before initiating a procedure, the Secretariat will sound out possible solutions to the case in an informal way.

In the first of the five cases, Case **ECS-1/08** against Bosnia and Herzegovina, the dispute could be closed already in this informal way. It concerned a customs register fee levied on electricity imports amounting to 1% of the import value. In the Secretariat's assessment, this practice constituted a violation of Article 41 EnC on the free movement of goods. In October 2008, the Secretariat had a meeting with all authorities concerned as well as the complainant in Sarajevo, where all legal and practical aspects were discussed. As a result, Bosnia and Herzegovina accepted to change its practice and exempt all imports from Parties to the Energy Community from customs register fee upon request of the importer. With the complainant being satisfied with the outcome, the Secretariat closed the case.

In Case **ECS-2/08** against the former Yugoslav Republic of Macedonia, the Secretariat initiated a formal procedure in September 2008 by way of an Opening Letter (Article 12 of the Rules of Procedure). The case concerns two aspects of the Law on Energy amended in 2008, namely the lack of opening of the wholesale market and the position

of the state-owned electricity company, as well as the lack of cost-reflectivity of distribution tariffs with respect to the costs for purchasing electricity necessary to cover non-technical losses. After attempts of the Secretariat to find an acceptable solution in bilateral discussions with the Government failed, and the Ministerial Council expressed its concerns with respect to the situation in the former Yugoslav Republic of Macedonia in June 2009, the Secretariat issued a Reasoned Opinion in July 2009 (Article 13 of the Rules of Procedure). In this document, the Secretariat made a detailed legal assessment of the two aspects forming the subject-matter of the case, and requested the Government to make clear and unequivocal commitments as to rectifying the specified instances of non-compliance. In its reply, the Government denies that the Law on Energy as well as the secondary legislation are in breach of Energy Community law. Upon analysis of the arguments put forward, the Secretariat came to the conclusion that its concerns expressed in the Reasoned Opinion have not been dispelled.

Taking note of the Action Plan adopted by the Government in reaction to the Reasoned Opinion, the Secretariat decided to wait until the adoption of a new Law on Energy and Rulebook supposed to rectify the identified instances of non-compliance before taking further procedural steps. The Action Plan sets a deadline until the end of June 2010 for the adoption of a new Law. The Secretariat was consulted during the drafting period and provided comments and assistance. So far, however, neither a new Law nor a Rulebook have been adopted. The former Yugoslav Republic of Macedonia thus failed to live up to expectations expressed by the Permanent High Level Group at its meeting on 17 March 2010, namely that *“a new Law on Energy as well as a new Rulebook on Tariffs closer in line with the electricity acquis will be adopted soon by the former Yugoslav Republic of Macedonia.”* Furthermore, it needs to be observed that the Energy Regulatory Commission remained inactive with regard to amending its Rulebook. The Secretariat is currently preparing a Reasoned Request to follow up on this protracted case of non-compliance.

As a “spin-off” of Case ECS-2/08, the Secretariat received two more complaints against the former Yugoslav Republic of Macedonia by the same company, filed as Cases **ECS-4/08** and **ECS-1/09** respectively. Both cases concern different aspects of denial of third party access, as well as an allegedly discrimination in price regulation by the regulatory authority. As these cases are closely linked to Case ECS-2/08 which is at an advanced procedural stage, the Secretariat will make further action dependent on the resolution of Case ECS-2/08.

Case **ECS-3/08** against the Republic of Serbia is still at the informal stage. The case concerns certain aspects of Directive 2003/54/EC and Regulation No 1228/2003 related to inter-TSO compensation and congestion management. Having heard both the complainant and the Republic of Serbia separately, the Secretariat organised a mediation meeting in Vienna in September 2009. At this meeting, the Secretariat shared with the participants its preliminary assessment of the case. All participants agreed that until the introduction of multilateral solutions to the problems raised, a fair and balanced agreement between EMS and KOSTT is necessary as a basis for the future bilateral relation. The subsequent bilateral meeting between both EMS and KOSTT in Skopje did not lead to such an agreement. Subsequently, the Secretariat made a final effort proposing a bilateral working basis between EMS and KOSTT in form of a Memorandum of Understanding. The Memorandum, among other things, proposed the establishment of an escrow account for any disputed payments. No agreement on the Memorandum

was achieved. The Secretariat is currently assessing the prospects for an Opening Letter.

### **III. DISPUTE SETTLEMENT CASES ON SECRETARIAT'S OWN MOTION**

As of today, the state of implementation of the *acquis* in the Contracting Parties can still not be described as satisfactory (see the Secretariat's Implementation Report for 2010), in particular with regard to implementation in practice (i.e. going beyond transposition) of key concepts of the *acquis*, such as market opening and public service obligations. Initiating dispute settlement procedures on its own motion might provide the Secretariat some leverage to push for more comprehensive and faster implementation beyond its traditional monitoring and assistance role. The Secretariat was explicitly invited to make use of this procedure by the donors. At the meeting of the Permanent High Level Group of 29 June 2010, the Secretariat "*recalled that the implementation of the existing acquis is still far from being completed and required significant further efforts. ... The Secretariat announced that it will make use of the dispute settlement mechanism to address cases of non compliance, in particular with respect to market opening, price regulation and barriers to trade.*" A number of cases in this respect are currently under assessment and may be expected to lead to Opening Letters within the following months.

### **IV. CONCLUSIONS**

The dispute settlement procedure constitutes an important feature of the Treaty establishing the Energy Community and is crucial for the enforcement of Energy Community law. From the Secretariat's perspective, engaging in dispute settlement proceedings constitutes the means to clear away key obstacles to full implementation of the *acquis* and to actively support the emerging of competitive markets based on the application of harmonized rules.

The experience so far shows that there is also a true need for dispute settlement from the business perspective. Not only does it provide some degree of protection against Treaty violations in individual cases; the existence of a workable dispute settlement procedure constitutes an important element in providing the legal certainty needed to attract investment to the Energy Community Contracting Parties. Where no consensus with the Party concerned can be achieved, the Secretariat will have to use all possibility envisaged by the Treaty in order to maintain the credibility of the Energy Community as an international organization based on the rule of law.