

BILATERAL RELATIONS
BETWEEN KOSOVO AND SERBIA
REGARDING
THE ENERGY SECTOR

October 2019

Supported by:



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**BACKGROUND NOTE/STUDY ON:
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Abbreviations

| | |
|----------------|--|
| CERG | Continental Europe Regional Group |
| CGES | Transmission System Operator, Montenegro |
| EC | European Commission |
| EIC | Energy Identification Code |
| EMS | Elektromreza Srbije (Serbian Transmission System Operator) |
| EnC | Energy Community |
| EnCAC | Energy Community Advisory Council |
| EnCS | Energy Community Secretariat |
| EnCT | Energy Community Treaty |
| ENTSO-E | European Network of Transmission Operators |
| EPS | Elektroprivreda Serbia (Electric Power Utility of Serbia) |
| ERO | Energy Regulatory Office, Kosovo |
| EU | European Union |
| ITC | Inter Transmission System Operation Compensation |
| KEDS | Kosovo Electricity Distribution and Supply |
| KEK | Kosovo Energy Corporation |
| KOSTT | Kosovo Transmission System and Market Operator |
| MC-EnC | Ministerial Council of Energy Community |
| MEPSO | Electricity Transmission and Power System Management, Montenegro |
| OST | Transmission System Operator, Albania |
| SAA | Stabilisation & Association Agreement |

| | |
|--------------|---|
| TSO | Transmission System Operator |
| UN | United Nations |
| UNMIK | United Nations Mission in Kosovo |
| UTCE | Union for the Coordination of Transmission of Electricity |

Introduction

1. In this background note/study, the aim is to critically analyse the bilateral relations between the Republic of Kosovo (henceforth Kosovo) and Serbia regarding energy within both the Energy Community Treaty and the Brussels Dialogue, and based on that to draw policy recommendations.

2. The objectives of this background note/study include:
 - i) Critically review the historic facts about the bilateral relations between Kosovo and Serbia regarding energy;
 - ii) Critically review the implementation, or lack thereof of agreements achieved between Kosovo and Serbia regarding energy within the Energy Community Treaty ;
 - iii) Critically review the implementation, or lack thereof of agreements achieved between Kosovo and Serbia regarding energy within the Brussels Dialogue;
 - iv) Estimate the monetary losses and the lost revenues of Kosovo resulting from Serbia's violation of the different agreements relating to energy reached with Kosovo; and
 - v) Propose relevant policy recommendations.

The structure of this background note/study is based on the structure of the objectives specified above.

The Energy Community Treaty and the Dispute Regarding Energy between KOSTT and EMS

1. Bilateral energy relations, including electricity in transit, between KOSTT and EMS were established in 2000 and were governed by the 2000 Temporary Energy Exchange Agreement¹ and the 2001 Temporary Technical Arrangement.² These two agreements were signed between the Public Utilities Department of UNMIK on behalf of KOSTT (back then, before the unbundling process, Power Company of Kosovo) and the Ministry of Energy and Mining of Serbia on behalf of EMS (back then, before the unbundling process, Electric Power Industry of Serbia). As per the 2011 Reasoned Opinion of the EnCS, although not respected, the two agreements are legally binding on both KOSTT and EMS, given that (i) they were signed by their respective Contracting Parties and (ii) they have never been terminated. As per Item 1.4.2 of the 2000 Temporary Energy Exchange Agreement "*the party for whom the electricity transit is performed shall reimburse the transit costs of the other party, in kind or on a financial basis*".³⁴
2. In 2004, as per Article 3 of Regulation 1228/2003, several multilateral ITC agreements were signed aiming at establishing a mechanism for managing the compensation for electricity transit costs.⁵ Following the entry into force of these ITC Agreements, in 2004 EMS - a signatory to these agreements - stopped compensating KOSTT for the costs incurred (*relating to losses or infrastructure*) resulting from electricity in transit through the Kosovo grid originating in and

¹UNMIK (2000), 'Temporary Energy Exchange Agreement. In the Reasoned Request of the Energy Community Ministerial Council.' Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

² UNMIK (2001), Temporary Technical Arrangement. In the Reasoned Request of the Energy Community Ministerial Council'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

³ Compensation in kind is to be computed and paid in accordance with EKC by-laws.

⁴ Energy Community Secretariat (2011), 'Reasoned Opinion on Case ECS 03/08, dated 7 October 2011'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

⁵European Parliament (2009), 'EP Regulation No 1288/2003'. Available at: <https://www.ceer.eu/documents/104400/-/-/70c72407-a9ce-4b4e-1eec-164225c8dd06> [Accessed on: September 6, 2019].

ending on the EMS network. Accordingly, EMS ceased to transfer to KOSTT the revenues received from allocating transmission capacity on the three interconnectors of Contracting Parties adjacent to the network operated by KOSTT, namely Albania, North Macedonia and Montenegro. In March 2011, another ITC agreement was signed between ENTSO-E and 39 TSOs, including EMS but, excluding KOSTT. As per this ITC Agreement, “EMS is listed as both ITC party and Country/Control Block for Serbia”, without any special reference to the territory of Kosovo”.⁶ Further, as per Regulation (EU) No 838/2010, TSOs operating on the territories of the Energy Community Law are entitled to participate in the ITC mechanism. Accordingly, KOSTT, which operates as a TSO on the territory of Kosovo, is entitled to participate in the ITC mechanism and to be compensated for electricity transit.⁷

3. According to the Kosovo government, Serbia’s violation of the agreements has caused a financial damage of ca. 15 million Euros annually to the Kosovan TSO.⁸ This gives a total financial damage - total financial debt that the Serbian TSO owes to the Kosovan TSO - of ca. 225 million Euros for the period 2004-2019.
4. In 2006, UNMIK on behalf of Kosovo signed the Energy Community Treaty (henceforth EnCT).⁹ Accordingly, Kosovo is a member of EnCT since 2006.

⁶ Energy Community Secretariat (2011), ‘Reasoned Opinion on Case ECS 03/08, dated 7 October 2011’ Points 17 and 18. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

⁷European Commission (2010), ‘Regulation (EU) No 838/2010’. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:250:0005:0011:EN:PDF> [Accessed on: September 6, 2019].

⁸ Ministry of Energy and Mining (2009), ‘Kosovo Energy Strategy 2009-2018’. Available at: http://www.mei-ks.net/repository/docs/ANNEX_12_-_Kosovo_Energy_Strategy_2009-2018.pdf [Accessed on: September 6, 2019].

⁹Starting in 2019, Kosovo will have a reporting obligation pursuant to Annex VIII.B of the Large Combustion Plan Directive 2001/80/EC as amended by Decision 2013/05/MC-EnC.

UNMIK as a Contracting Party to the EnCT designated KOSTT as the only TSO on the territory of KOSOVO in accordance with Article 8 of Directive 2003/54/EC.¹⁰¹¹

5. As per Item 1.3 of the 2001 Temporary Technical Arrangement, KOSTT assumed the obligation “*to remunerate EMS for the provision of its services, including procurement of secondary regulation by KOSTT from the Serbian utility Elektroprivreda Serbia (EPS)*”.¹² In April 2007, KOSTT ceased to remunerate EPS for such services.

6. On 6 August 2008 – failing to resolve the energy dispute through bilateral negotiations and negotiations with the support of ETSO and the European Commission - KOSTT filed a complaint with the Energy Community Secretariat (henceforth the EnCS) against Serbia. Consequently, the EnCS opened **Case ECS-3/08**. The subject matter of the complaint was “that Serbia through actions taken by the public company EMS, fails to comply with Article 9 of the Treaty read in conjunction with Articles 3 and 6 of Regulation 1228/2003 on ***conditions for access to the network for cross-border exchanges in electricity*** (“Regulation 1228/2003”), by ***barring KOSTT from participating in the Inter-TSO compensation agreement*** (“the ITC agreement”), and ***from allocating transmission capacity on the interconnectors with the Contracting Parties adjacent to Kosovo****, namely Albania, the former Yugoslav Republic of Macedonia and Montenegro”.¹³

7. In its Opening Letter, dated 17 September 2010, EnCS provided arguments to its preliminary conclusion that: i) the failure of EMS to compensate KOSTT for the costs

¹⁰European Parliament (2008), ‘Directive No 2003/54/EC’. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0054:20080123:EN:PDF> [Accessed on: September 6, 2019].

¹¹ It has to be noted that Kosovo laws applicable to KOSTT “transpose the EnC *acquis communautaire* on TSOs, which contains Directive 2003/54/EC and Regulation (EC) 1228/2003.

¹² UNMIK (2001), Temporary Technical Arrangement. In the Reasoned Request of the Energy Community Ministerial Council’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

¹³ Energy Community Secretariat (2016), ‘Reasoned Request of the Energy Community Secretariat, dated 20 July 2016’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

incurred resulting from electricity in transit through the network operated by KOSTT originating in and ending on the EMS network is a violation of Article 3 of Regulation 1228/2003, and ii) EMS's usage of revenues resulting from the transmission capacity allocation on the interconnectors with Contracting Parties adjacent to Kosovo, namely Albania, Montenegro and North Macedonia presents a violation of Article 6(6) of Regulation 1228/2003.¹⁴

8. Upon Serbia's reply on Case ECS-3/08, the EnCS partially withdrew from the Reasoned Request, dated 31 May 2016¹⁵, and submitted to the MC-EnC a revised version on 20 July 2016.¹⁶ Accordingly, the subject matter concerning Case ECS-3/08 was reformulated as follows "*... the use of revenues made from the allocation by EMS of transmission capacity on the interconnectors...*" with the three concerned Contracting Parties adjacent to Kosovo.¹⁷ So, subject matter contained only the issue of EMS' usage of revenues made from allocation of transmission capacity on the three concerned interconnectors adjacent to KOSTT. The issue of allocation of transmission capacity was excluded and treated by EnCS in another legal case.

9. Being a member of the EnCT, KOSTT as the only designated and licenced TSO on the territory of Kosovo have the obligation to fully comply with the EnC *acquis communautaire*, as envisaged in Article 10 of EnCT, "*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.*"¹⁸ In doing so, according to

¹⁴ Energy Community Secretariat (2011), 'Reasoned Opinion on Case ECS 03/08, dated 7 October 2011' Points 17 and 18. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

¹⁵ Energy Community Secretariat (2016), Reasoned Request of the Energy Community Secretariat, dated 31 May 2016'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

¹⁶ Energy Community Secretariat (2016), 'Reasoned Request of the Energy Community Secretariat, dated 20 July 2016'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

¹⁷ Ibid.

¹⁸Energy Community (2006), 'Energy Community Treaty'. Available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2005/EN/1-2005-435-EN-F1-1.Pdf> [Accessed on: September 6, 2019].

Regulation 1288/2003¹⁹, Article 6, Paragraphs 1-5, KOSTT as a TSO is, inter alia, under a legal obligation to manage congestion problems in a non-discriminatory manner on its network, allocate capacity of interconnection for market participants, inform market participants of capacity allocation plans, ensure the use to maximum capacity of interconnection lines. Further, as stipulated in Regulation 1288/2003, Article 3, KOSTT should, inter alia, be compensated for costs incurred for capacity allocation on its network by TSOs in whose network electricity flows originate and TSOs in whose networks electricity flows end.

10. In Point 79 of its Reasoned Request, dated 20 July 2016, the EnCS, however, explains that owing to KOSTT not being formally recognised as a control area (pending the entry into force of the Connection Agreement with ENTSO-E), EMS performs congestion management and capacity allocation on the three interconnectors between Kosovo and adjacent Contracting, Albania, North Macedonia and Montenegro.²⁰ Consequently, these three Contracting Parties have contracts with EMS and not KOSTT. Given this situation, EnCS does not consider that Serbia fails to comply with EnC law regarding congestion management and capacity allocation, but usage of congestion revenues (as elaborated below).

11. Yet, it has to be restated that as clarified in Point 26 of the Reasoned Request, EMS was not mandated to perform congestion management and capacity allocation on these three interconnectors by any of the previous agreements (Temporary Energy Exchange Agreement, Temporary Technical Arrangement and SMM control block Agreement) between Kosovo and Serbia (and/or KOSTT and EMS) governing their energy relations.²¹

¹⁹ Regulation (EC) No 1288/2003 has been replaced by Regulation No 714/2009. Regulation No 714/2009 was later incorporated into the EnC *acquis communautaire* by Decision 2011/02/MC-EnC of the MC-EnC, dated 6 October 2011 (Energy Community Secretariat, 2011).

²⁰ Energy Community Secretariat (2016), 'Reasoned Request of the Energy Community Secretariat, dated 20 July 2016'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

²¹ *Ibid.*

12.As per Article 6(6) of Regulation 1228/2003, “Any revenues resulting from the allocation of interconnection shall be used for one or more of the following purposes: (a) guaranteeing the actual availability of the allocated capacity; (b) network investments maintaining or increasing interconnection capacities; (c) 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 modified”. The usage of revenues resulting from capacity allocation of interconnection as regulated in Article 6(6) of Regulation 1228/2003, has been specified in more detail in Article 16(6) of Regulation 714/2009.²²

13.To date, EMS is de facto performing congestion management and capacity allocation on the three interconnectors with Contracting Parties adjacent to Kosovo and has signed contracts with these three Parties. Consequently, EMS, and not KOSTT, collects all congestion revenues, including revenues obtained from performing congestion management and capacity allocation on the three interconnectors adjacent to the network operated by KOSTT.²³ The collection of such revenues by EMS is confirmed by reports published by EMS, the three TSOs, the regulatory authority of Serbia, as well as reports published by the Serbia Ministry. Further evidence is provided in the reply of the Serbian Ministry to the EnCS Opening Letter, whereby the Ministry claims that it complies with Article 6(6) of Regulation 1288/2003.²⁴

²²European Parliament (2009), ‘EP Regulation No 714/2009’. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0015:0035:EN:PDF> [Accessed on: September 6, 2019].

²³Energy Community Secretariat (2016), ‘Reasoned Request of the Energy Community Secretariat, dated 20 July 2016’ Points 82 and 83. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

²⁴Energy Community Secretariat (2016), ‘Response by the Republic of Serbia on Case ECS 03/08’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

14. Yet, EnCS objects to the Ministry's conclusion about compliance with Article 6(6) of Regulation 1288/2003. "The usages offered by the Ministry do not fully correspond to the ones listed in Article 6(6) of Regulation 1228/2003".²⁵

- a. The usage is not in compliance with Article 6(6)(a) in that EMS does neither *" earmark the revenues from capacity allocation on the interconnectors in question, nor does it use them in a specific manner to specifically guarantee the availability of the allocated capacity on these interconnectors..."*.
- b. The usage is not in compliance with Article 6(6)(b) in that, based on evidence at hand, EMS has not invested in maintaining or constructing new infrastructure within the KOSTT operated network. KOSTT solely financed all investments in infrastructure, including maintaining interconnectors with Contracting Parties adjacent to the Kosovo network and constructing of new interconnectors. For this purpose KOSTT was financially supported by donors, *"but not from the revenues obtained by capacity allocation."* Further, the construction of the new interconnector connecting Serbia with North Macedonia does not increase the interconnection capacity on the network operated by KOSTT, and *"is not specifically aimed to relieve eventual bottlenecks on the congested interconnectors in question"*.
- c. The usage is not in compliance with Article 6(6)(c) in that congestion revenues have not been considered by the respective regulatory authority of the territory interconnected with adjacent transmission systems, in this case the Kosovo ERO, for purposes of approving methodologies for the calculation of tariffs and of assessing the need to modify/lower tariffs applied by the TSO operating the network, in this case the KOSTT. De facto, it is the Serbian regulatory authority that has accounted for such revenues for modifying

²⁵ Energy Community Secretariat (2016), 'Reasoned Request of the Energy Community Secretariat, dated 20 July 2016'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

tariffs applied by EMS for customers connected to the Serbian transmission network. This is reconfirmed in the ECBR EWG Benchmarking Report on Compliance with Regulation No 1288/2003 and the Congestion Management Guidelines where the Serbian regulatory body declared that “*Congestion management income is 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 modified*”.

- d. Article 6(6)(c) of Regulation 1228/2003 is based on the rationale that congestion revenues generated by operating the transmission system should be used to reduce the tariffs set based on the costs resulting from operating the same transmission network, including costs arising from congestion management and capacity allocation on interconnectors. According to the EnCS, Article 6(6)(c) of Regulation 1228/2003 “*presupposes that either (1) the operator of the transmission system is the same entity as the entity allocating interconnection capacity, or (2) where this is not the case – e.g. when interconnection capacity is allocated by a coordinated auction office – that the entity allocating interconnection capacity clears and transfers the revenue to the operator of the network*”.²⁶ Given this and the fact that EMS (does not comply with EnC law and thus) unlawfully allocates capacity on the three interconnectors adjacent to the network operated by KOSTT, to be in compliance with the concerned Article 6(6)(c) EMS should pass on the revenue obtained through capacity allocation on the three aforementioned interconnectors to KOSTT, as one of the options foreseen by Article 6(6) of Regulation 1288/2003.

15. Given the above, in its Reasoned Opinion, dated 7 October 2011, the EnCS concluded that:

²⁶ Energy Community Secretariat (2016), ‘Reasoned Request of the Energy Community Secretariat, dated 20 July 2016’ Point 95. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

- a. *“By not paying compensation to KOSTT for costs incurred as a result of hosting cross-border flows of electricity on the network operated by KOSTT in cases where the electricity flow originates or ends on EMS' system, the Republic of Serbia, to which actions and non-actions of its state-owned transmission system operator are imputable, fails to comply with Article 3 of Regulation 1228/2003.”*
- b. *“By not using the revenues resulting from the allocation of interconnection 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, fails to comply with Article 6 of Regulation 1228/2003.”*
- c. *“In accordance with Article 13(2) of the Rules of Procedure for Dispute Settlement, the Republic of Serbia is requested to rectify the breaches identified in the present Reasoned Opinion, or at least make clear and unequivocal commitments in that respect, within a time-limit of two months, i.e. by 7 December 2011 and notify the Secretariat of all steps undertaken in that respect”.²⁷*

16. In the Conclusions of its Reasoned Opinion, dated 7 October 2011, the EnCS expressed its willingness *“to discuss swift and practicable solutions with all parties involved. Any initiative by the Ministry aimed at settling the present dispute in line with the Energy Community acquis, including further negotiations, will be actively supported by the Secretariat”*.²⁸

²⁷ Energy Community Secretariat (2011), ‘Reasoned Opinion on Case ECS 03/08, dated 7 October 2011’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

²⁸ Ibid.

17. Following Serbia's response to the Reasoned Opinion on **Case ECS-3/08**, dated 7 October 2011, the EnCS in the Conclusions to its Reasoned Request on **Case ECS-3/08**, dated 20 July 2016 requested from the EnC Ministerial Council "*to declare in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community that:*

- a. *By not using the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, the former Yugoslav Republic of Macedonia (now North 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, fails to comply with Article 6 of Regulation 1228/2003".²⁹*

18. In its Opinion, dated 10 October 2016, the Advisory Committee on **Case ECS-3/08** upheld the EnCS's Conclusions in the Reasoned Request on **Case ECS-3/08**, dated 20 July 2016.³⁰ In its Opinion, the Advisory Committee concluded that "*Serbia failed to comply with Article 12 of the Treaty in conjunction with Article 6 (6) of Regulation 1228/2003*".

19. On 14 October 2016, following the Conclusions of the EnCS Reasoned Request and the Conclusions of the Advisory Committee Opinion, having regard to Serbia's response, based on the EnCT the MC-EnC adopted the following decision:

- a. *"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*

²⁹ Energy Community Secretariat (2016), 'Reasoned Request of the Energy Community Secretariat, dated 20 July 2016'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

³⁰ Energy Community Advisory Committee (2016), 'Opinion on Case ECS 03/08 against Serbia'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

*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”.*³¹

20. In Article 2 of Decision 2016/02/MC-EnC, the MC-EnC envisaged follow-up actions. Accordingly, *“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”*. Further, as per the Decision, the MC-EnC invited the EnCS to “initiate a procedure under Article 92 of the Treaty” in case Serbia fails to rectify the breach. This Decision entered into force upon its adoption and was addressed to EnCT institutions and to the Parties.³²

21. Following Serbia’s failure to respect the MC-EnC Decision 2016/02/MC-EnC and rectify the breach, the EnCS based on Article 92 of the EnCT initiated a Request for Sanctions on **Case ECS-3/08**, dated 12 October 2017. Through this Request, the EnCS sought from the MC-EnC a Decision 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”. Further, it requested from the EnC-MC to urge Serbia to *“take all appropriate measures to rectify the breach identified in Ministerial Council Decision 2016/02/MC-EnC in cooperation with the Secretariat”* and provide the EnCMC with implementation reports about measures taken, by 2018. According to this Request, the EnCMC will invite the EnCS to monitor Serbia’s compliance with EnC *acquis communautaire*, and initiate a

³¹ Energy Community Ministerial Council (2016), ‘Decision 2016/02/MC-EnC, dated 14 October 2016’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

³² Energy Community Ministerial Council (2016), ‘Decision 2016/02/MC-EnC, dated 14 October 2016’ Article 3. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

procedure for imposing measures under Article 92 of the Treaty, if Serbia does not rectify the breaches by 1 July 2018.³³

22. On 29 November 2018, having regard to (i) the EnCT, (ii) MC-En Decision 2016/02/MC-EnC on **Case ECS-3/08**, (iii) Serbia's failure to rectify the identified breaches and thus to comply with EnCT by 7 December 2016, (iv) MC-EnC's invitation to the EnCS to initiate a procedure under Article 92 of the EnCT in case the breaches identified in MC-En Decision 2016/02/MC-EnC are not rectified by December 2016, and (iv) the fact that no tangible measures have been taken by Serbia in implementing MC-EnC Decision 2016/02/MC-EnC, considering the request by the EnCS, the MC-EnC adopted MC-EnC Decision 2018/12/MC-EnC.³⁴

23. As per MC-EnC Decision 2018/12/MC-EnC, "*Unless the Republic of Serbia rectifies the breaches identified in MC-EnC Decision 2016/02/MC-EnC within six months of the present Decision, the failure by Serbia to implement MC-EnC Decision 2016/02/MC-EnC will be considered a serious and persistent breach within the meaning of Article 92(1) of the Treaty*". The rest of content of this Decision is similar to the MC-EnC Decision 2016/02/MC-EnC. According to the Decision, the MC-EnC, again, urged Serbia to "*take all appropriate measures to rectify the breach identified in Ministerial Council Decision 2016/02/MC-EnC in cooperation with the Secretariat*" and provide the MC-EnC with implementation reports about measures taken in 2019. Further, the EnCS was invited to monitor Serbia's compliance with EnC acquis communautaire, and to request measures under Article 92 of the Treaty in 2019, in case Serbia does not implement the MC-EnC Decision 2016/02/MC-EnC by 1 July 2019. This Decision entered into force upon its adoption and was addressed to EnCT institutions and the Parties (Article 3, MC-EnC Decision 2018/12/MC-EnC).

³³ Energy Community Secretariat (2017), 'Reasoned Request on Case ECS 03/08, dated 12 October 2017'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308SRS.html> [Accessed on: September 6, 2019].

³⁴ Energy Community Ministerial Council (2018), 'Decision 2018/12/MC-EnC'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308SRS.html> [Accessed on: September 6, 2019].

24. It has to be noted that, as stated by the EnCS in Point 88 of the Reasoned Opinion, dated 7 October 2011, Regulation 1228/2003 can, unfortunately, not serve as a legal basis for the compensation of KOSTT's costs incurred in the period before the EnCT entered into force.³⁵ A similar stance is envisaged in Article 3.1 of the Framework Agreement.³⁶³⁷ Yet, before entry into force of the EnCT, relations between KOSTT and EMS regarding electricity transit were governed by the 2000 Temporary Energy Exchange Agreement. As per Item 1.4.2 of the 2000 Temporary Energy Exchange Agreement "*the party for whom the electricity transit is performed shall reimburse the transit costs of the other party, in kind or on a financial basis*". Consequently, for compensation of KOSTT's costs as elaborated on Case ECS-3/08 for the period before entry into force of the EnCT, EMS has to respect the 2000 Temporary Energy Exchange Agreement.

The Brussels Dialogue and the Dispute Regarding Energy between KOSTT and EMS

25. Following "The First Agreement of Principles Governing the Normalization of Relations" between Kosovo and Serbia, on 8 September 2013, the countries concluded the "Arrangements regarding energy" whereby they "confirmed their commitment to meeting all their obligations under the Energy Community Treaty, and to apply the EU energy acquis." According to this document, Kosovo and Serbia agreed on (i) the establishment of new trade company, (ii) the establishment of new supply and distribution services company and (iii) issuing of a supply license by the Energy Regulatory Office of Kosovo. Both parties agreed that "KOSTT will be

³⁵ Energy Community Secretariat (2011), 'Reasoned Opinion on Case ECS 03/08, dated 7 October 2011'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

³⁶ Article 3.1 stipulates that the Framework Agreement "*shall not have any effect on potential claims resulting from the relations between the Parties predating the entry into of this Agreement*" (Energy Community Secretariat, 2016)

³⁷ Energy Community Secretariat (2016), 'Reasoned Request of the Energy Community Secretariat, dated 20 July 2016'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

recognized as the Transmission System Operator for the territory of Kosovo for the purpose of participation in all relevant mechanisms (ITC, Congestion Management etc.)”. Further, the agreement stipulated that EMS will support KOSTT’s membership in ENTSO-E. The agreement envisaged that a bilateral operational agreement between KOSTT and EMS be signed, within three months from the signing of the Energy Agreement, repealing the 2000 Temporary Energy Exchange Agreement³⁸ and the 2001 Temporary Technical Arrangement.³⁹ According to the agreement, KOSTT will reconnect the 110 kV lines to Valac and take full control over the Valac substation on the border between Serbia and Kosovo. So, KOSTT as the only TSO will gain full control over the Kosovo grid.

26. After one year of negotiations facilitated by both the EC and the Energy Community Secretariat, on 12 February 2014 KOSTT and EMS signed a legally binding “Framework Agreement relating to the cooperation and coordination on the interconnected Transmission Systems of EMS and KOSTT”.⁴⁰ This agreement was the first step in fulfilling the obligations under the “2013 Arrangements regarding energy”. Through the Framework Agreement, KOSTT and EMS aimed at regulating issues related to congestion management, pan-European Inter-TSO Compensation and the application of EU standards for the operation of the transmission grid.

27. The 2013 Arrangements regarding energy, stipulated that the signatories agreed “to find a common settlement solution as regards KOSTT claims and EMS claims. KOSTT considers that these claims are for unpaid transit and unpaid interconnection allocation revenues, whereas EMS considers that these claims are for secondary regulation. EMS considers that these claims are for secondary and tertiary

³⁸ UNMIK (2000), ‘Temporary Energy Exchange Agreement. In the Reasoned Request of the Energy Community Ministerial Council.’ Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

³⁹ UNMIK (2001), Temporary Technical Arrangement. In the Reasoned Request of the Energy Community Ministerial Council’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

⁴⁰ Energy Community Secretariat (2016), ‘Reasoned Request of the Energy Community Secretariat, dated 20 July 2016’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

regulation services.” The agreement also envisaged that if the parties fail to jointly resolve this issue (KOSTT claims and EMS claims) within six months, “both parties agree to submit these claims to the international arbitration”.⁴¹

28.As per Article 1.3 of the Framework Agreement, “KOSTT assumes the responsibility for the its area within the Synchronous Area Continental Europe, and as part of the Control Block comprising the transmission systems of the Parties and the neighbouring CGES and MEPSO, subject to agreement of the TSOs of the other areas of the Control Block.” As per Point 2.2 of the Framework Agreement, KOSTT and EMS would “continuously improve their cooperation in all areas of system operation with the aim to establish a Control Area operated by KOSTT in accordance with ENTSO-E’s Operation Handbook...” and EMS will support KOSTT to become a member of ENTSO-E.”

29.On 15 September 2014, upon another round of negotiations facilitated by the Energy Community Secretariat, KOSTT and EMS developed and signed a legally binding “Inter-TSO Agreement on Network and System Operation Management between EMS and KOSTT”. This Agreement aimed “*to stipulate the rules and routines applying to the cooperation between the EMS and KOSTT in order to ensure the secure operation of the interconnected transmission network. The earliest as of 1 January 2015, KOSTT and EMS will operate transmission systems under their responsibilities as two separate Control Areas, subject to KOSTT’s commitment to comply with the applicable standards of ENTSO-E’s Operation Handbook and any other requirements ENTSO-E may set.*”

30.The Parties agreed that the Framework Agreement and the Inter-TSO Agreement enter into force on 12 February 2014 and 15 September 2014, respectively. Further, they agreed that upon entry into force of the Inter-TSO Agreement, it would

⁴¹ Ibid.

supersede the 2000 Temporary Technical Agreement and the 2001 Temporary Energy Exchange Agreement.

31. To date, neither the Framework Agreement nor the Inter-TSO Agreement has been implemented.⁴²

32. On 9 July 2015, following years of discussions and negotiations between EMS and KOSTT, under both the auspices of the European Commission and the Secretariat, based on the decision of the RG CE Plenary, the Connection Agreement between ENTOS-E and KOSTT was approved whereby KOSTT would become an independent transmission system of a part of the Continental Europe Synchronous Area.

33. Upon the approval of the Connection Agreement, irrespective of the agreements reached regarding its commitments to support KOSTT's membership in ENTSO-E within the EU-facilitated dialogue, as well as under the auspices of the EnCS and within the EnCT, on 22 July 2015, Serbia submitted a revision request regarding the Connection Agreement for KOSTT on the grounds "*that this decision is seriously prejudicial to its interes*". The decision on the Connection Agreement was suspended as per Article 6.1 of the RG CE ToRs.⁴³ Given this, the Convenor of the RG CE Plenary, Mr. Baumann requested from EMS to submit a revision request by 14 August 2015.⁴⁴ On 1 September 2015, owing to an approved request for postponing the deadline, EMS submitted a full formulation of the revision request.

34. On 25 August 2015, prior to submitting its revision request, Serbia continued negotiations with Kosovo within the EU-facilitated Dialogue. The Parties agreed on an action plan on the implementation of obligations under the Arrangements

⁴² Energy Community (2019), 'WB6 Electricity Monitoring Report. Energy Community Secretariat'. Available at: https://www.energy-community.org/regionalinitiatives/WB6/Monitoring_EL.html [Accessed on: September 9, 2019].

⁴³ Article 6.1 of the RG CE envisages the suspension of decisions, which are subject to a revision request, until a final decision is taken by the Plenary.

⁴⁴ Note to the Regional Group Continental Europe, 16 September 2015.

regarding energy. The document consists of 17 articles and a disclaimer, and is provided in the “Conclusions report of the EU facilitator on the implementation of the 2013 Energy Agreement dated 25 August 2015.”⁴⁵ This action is only additional evidence in the pool of proofs of Serbia’s hypocrisy throughout the process of normalisation of relations with Kosovo.

35.The EU facilitator’s Conclusions report dated 25 August 2015 (hence forth Conclusions report) specifies that to fulfil their obligations under the 2013 Arrangements regarding energy, Kosovo and Serbia agreed on the following: (i) the establishment of new trade company, (ii) the establishment of new supply and distribution service company, (iii) supply license to be issued by Energy Regulatory Office of Kosovo, (iv) distribution services to be provided by the new supply and distribution company, (v) support to be provided by Serbia and EMS to KOSTT in the latter’s application to sign an interconnection agreement with ENTSO-E, including in the appeal process, and (vi) implementation of all points specified in the Conclusions independent of progress in point 15 (in this background note/study labelled “(iv) distribution services to be provided by the new supply and distribution company”).

36.Serbia succeeded in its revision request in that, as per Article 16 of the Connection Agreement, entry into force of the Connection Agreement for Kosovo was conditioned by two criteria, namely that: *“a. All the Parties have signed the present Agreement; and b. The supply license of the Serbian supplier in Kosovo* (“ElektroSever”) has been issued and become operational”*.⁴⁶

⁴⁵ European Union (2015), ‘Conclusions report of the EU facilitator on the implementation of the 2013 Energy Agreement’. Available at: http://eeas.europa.eu/archives/docs/statements-eeas/docs/facilitated-dialogue/150825_02_conclusions-on-the-implementation-of-energy-agreement_en.pdf [Accessed on: September 6, 2019].

⁴⁶ Energy Community Secretariat (2016), ‘Reasoned Request of the Energy Community Secretariat, dated 20 July 2016’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

- 37.** Yet, as explained by the EnCS according to the 2013 Arrangements regarding energy, Serbia's support for KOSTT's ENTSO-E membership was not conditioned by the issuance of a supply license of the Serbian company.⁴⁷
- 38.** The company ElektroSever, a subsidiary of the Electric Power Utility of Serbia, was registered as the power supply company with the Kosovo Business Registration Agency in November 2018. The delay in licencing was due to Serbia violating the 2015 Conclusions report by not respecting the legal and regulatory framework of Kosovo. Licensing of this company is a precondition for the entry into force of the Connection Agreement, and vice versa.
- 39.** On 2 July 2019, at the time of writing this Background note/study, the RG CE Plenary decided on a new Connection Agreement between ENTSO –E and KOSTT. The Agreement envisages that not later than April 2020, KOSTT will become an independent Regulatory Area/Block within Continental Europe, which is a precondition for KOSTT to be able to perform congestion management and capacity allocation on the three interconnectors of the adjacent Contracting Parties.
- 40.** It has to be noted that Kosovo and Serbia agreed to disagree on the issue of ownership of property on the territory of Kosovo, in this case with respect to the energy sector property. As per the Disclaimer of the Conclusions report, Kosovo and Serbia have radically different opinions about ownership of the property on the territory of Kosovo. The representatives of Kosovo declared that *"in accordance with Kosovo Constitution and Laws, and international law, namely UNSCR 1244 and respective UNMIK Regulations, the property within the territory of Kosovo is ownership of Republic of Kosovo"*. The Serbian representatives, however, claimed that *"in accordance with domestic and international law, namely UNSCR 1244, property within the territory of Kosovo is ownership of Serbia, under specific provincial regulation and in full accordance with the Constitution of Serbia"*. This

⁴⁷ Note to the Regional Group Continental Europe, 16 September 2015.

fundamental difference in opinion regarding ownership, in this case, of the energy-related property/assets on the territory of Kosovo represents a serious obstacle to the implementation of the 2013 Arrangements regarding energy.

41. The ownership issue was addressed by EnCS too. Addressing Serbia's response, the EnCS in its Reasoned Opinion (Point 53), dated 7 October 2011, and its Reasoned Request on Case ECS-3/08 (Point 73), dated 20 July 2016, emphasises that its legal assessment "*has no bearing and is not dependent on the question of ownership of the transmission network. Energy Community law is neutral towards the question of ownership, which remains to be determined in accordance with general property law*"⁴⁸. Yet, in Point 70 of its Reasoned Opinion, EnCS refers to Point 61 and argues that "*KOSTT owns the transmission assets in Kosovo*".⁴⁹

KOSTT's Financial Losses Resulting from the Non-Payment of Electricity Bills in the North of Kosovo

42. Since 1999, KEK, which as per the legal framework of Kosovo was responsible, inter alia, to operate the electricity network on the territory of Kosovo, has been prevented from operating the electricity grid in the north of Kosovo – upon the unbundling process this task was later conferred to KOSTT by licence issued by ERO.⁵⁰ The power network in this part of Kosovo territory was unlawfully operated by a Serbian power company, established by EPS, with whom customers connected to the network in that part of Kosovo territory had contracts. Hence, customers living in Leposaviq, North Mitrovica and Zubin Potok received electricity bills from

⁴⁸ Energy Community Secretariat (2016), 'Reasoned Request of the Energy Community Secretariat, dated 20 July 2016'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

⁴⁹ Energy Community Secretariat (2011), 'Reasoned Opinion on Case ECS 03/08, dated 7 October 2011'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

⁵⁰ Ministry on Energy and Mining (2009), 'Kosovo Energy Strategy 2009-2018'. Available at: http://www.mei-ks.net/repository/docs/ANNEX_12_-_Kosovo_Energy_Strategy_2009-2018.pdf [Accessed on: September 6, 2019].

the Serbian power company.⁵¹⁵² According to these authors, the EPS claimed that it was not involved in the operation of the network in the north of Kosovo. Yet, in its Revision Request, dated 22 July 2015, addressing the EnCS, EMS in Point 3 of its proposal admits that it supplies electricity in the north of Kosovo “... *to allow the current supplier EPS to continue with the supply of the customers on the north...*”. Given the situation, ever since 1999 customers in the north of Kosovo territory did not pay their electricity bills to KEK. According to the Ministry of Energy and Mining, in 2008 the total amount of unpaid bills had reached **145 million Euros**. In 2009, a number of customers connected to the network in the north of RSK signed contracts with KEK.

43. According to the Press Release of the Council for the Kosovan Defence of Human Rights and Freedoms (henceforth CDHRF), dated 10 July 2019, for 17 years, regular customers of the Kosovo Electricity Distribution and Supply (henceforth KEDS) through their electricity tariffs have unlawfully paid for KEDS’s losses resulting from non-payment of electricity bills by customers connected to the electricity network in the north of Kosovo.⁵³ As explained by CDHRF, the financial loss - resulting from non-payment by the customers connected to the electricity network in the north of Kosovo – was forwarded as a financial burden to regular customers through higher electricity tariffs and is estimated to be ca. **12 million Euros annually**. For a period of 17 years, this gives a total of **204 million Euros**.

44. In the meantime, Government of Kosovo promised that it would compensate the regular customers for the financial burden which was unlawfully levied on them by

⁵¹ Customers living in the Zvečan municipality received bills from Trepča.

⁵² Sovrlic, S. and Dapic, S. (N/A), ‘Silence and Darkness after the Brussels Agreement’. Available at: <http://crnobelisvet.com/wp-content/uploads/2018/02/DARKNESS-AND-SILENCE-AFTER-THE-BRUXELLES-AGREEMENT.pdf> [Accessed on: September 6, 2019].

⁵³ CDHRF (2019), ‘Serbs in the north still not paying electricity bills’. Available at: <https://gazetainfokus.com/kmdlj-serbet-ne-veri-ende-nuk-po-paguajne-faturat-e-rrymes/> [Accessed on: September 6, 2019].

KOSTT through higher electricity bills.⁵⁴ To date, the regular customers of KOSTT have not been compensated for the monetary damage.

45. To date, the issue of and the total financial loss resulting from non-payment of electricity bills by customers connected to the electricity network in the north of Kosovo, even if discussed, has, unfortunately, not been evidenced in any of the documents resulting from the arrangements and agreements on energy reached between Kosovo and Serbia (and/ or between KOSTT and EMS). In February 2015, the Serbian company operating in the north of Kosovo started a campaign whereby it issued to customers in the north of Kosovo electricity bills containing the debt for the period 1 December 2012 - 31 December 2014, including a warning of disconnection in case of non-payment until 4 March 2015.⁵⁵ This campaign was put to an end without explanation. On 31 October 2015, Serbia through a government decision established a Working Group responsible for establishing a collection system for electricity payments/debts.

46. In sum, although it is not clear whether customers in the north of Kosovo have paid their electricity bills to the Serbian company, it is clear that KEDS' financial debt from non-payment of electricity bills by customers in the north of Kosovo has reached ca. **204 million Euros**.⁵⁶

Collateral damage resulting from Serbia's Breach of the EnCT

47. In June 2016, the newly built 400kV transmission line between Kosovo and Albania was inaugurated. The two countries failed to make progress in operationalising the

⁵⁴ Ibid.

⁵⁵ Sovrlic, S. and Dapic, S. (N/A), 'Silence and Darkness after the Brussels Agreement'. Available at: <http://crnobelisvet.com/wp-content/uploads/2018/02/DARKNESS-AND-SILENCE-AFTER-THE-BRUXELLES-AGREEMENT.pdf> [Accessed on: September 6, 2019].

⁵⁶ CDHRF (2019), 'Serbs in the north still not paying electricity bills'. Available at: <https://gazetainfokus.com/kmdlj-serbet-ne-veri-ende-nuk-po-paguajne-faturat-e-rrymes/> [Accessed on: September 6, 2019].

new transmission line and load frequency control due to lack of progress in reaching a Connection Agreement between the European Network of Transmission System Operators for Electricity (ENTSO-E) and the Kosovo Transmissions System Operator (KOSTT). The Connection Agreement between the ENTSO-E and KOSTT could not enter into force due to the long-lasting political dispute between Kosovo and Serbia, particularly the lack of progress in fulfilling their obligations under the 2015 Energy Arrangements regarding the supply license to be issued to Elektrosever by the Energy Regulatory Office of Kosovo (for details read Point 37 in this document). In July 2019, the Connection Agreement was approved and the same will enter into force on 14 April 2020. As a result, on the same day (14 April 2020) the 400kV transmission to Albania will become operational.

48.In an interview, Mr. Zeqo⁵⁷, head of the Transmission System Operator (OST) of Albania, emphasised that the 400kV transmission link between Albania and Kosovo has undergone depreciation during the four years that it has not been used. He further explained that, due to not being able to use the new transmission line, Kosovo and Albania have suffered a **lost tariff income** amounting at 500 thousand to 1 million Euros annually. Taking the average of 750 thousand Euros as the annual lost tariff income and multiplying it by four years - the total period during which the transmission line could have been operationalised – gives a **total lost tariff income of 3 million Euros**. Accordingly, Kosovo and Albania have lost **ca. 3 million Euros** due to Serbia conditioning the operationalisation of the transmission line with licensing of Elektrosever.

⁵⁷ Radio Televizioni Shqiptar (2017), '400 kV line with Kosovo, Albania suggests arbitration'. Available at: <https://www.rtsh.al/lajme/linja-400-kv-me-kosoven-shqiperia-sugjeron-arbitrazhin/> [Accessed on: September 6, 2019].

Conclusions

- 49.** Energy relations, including electricity in transit, between Kosovo and Serbia were established in 2000 and the same were governed by the 2000 Temporary Energy Exchange Agreement⁵⁸ and the 2001 Temporary Technical Arrangement.⁵⁹ These two agreements are legally binding on both KOSTT and EMS, since they were signed by their respective Contracting Parties and have never been terminated. Yet, in 2004, owing to the entry into force of a series of ITC Agreements, to which EMS was a signatory, Serbia through EMS unilaterally started violating the two agreements with Kosovo. As a result, EMS ceased to transfer to KOSTT the revenues received from allocating transmission capacity on the three interconnectors of Contracting Parties adjacent to KOSTT's network, namely Albania, North Macedonia and Montenegro.
- 50.** In 2006, Kosovo became a member of the Energy Community whereby KOSTT was designated as the only TSO on the territory of Kosovo in accordance with Article 8 of Directive 2003/54/EC. Despite being a Contracting Party to the EnC Treaty, Serbia through EMS violated it by continuing to **not transfer** to KOSTT the revenues made from capacity allocation on the three interconnectors of the three concerned Contracting Parties adjacent to KOSTT's network.
- 51.** In this regard, it has to be noted that Serbia through EMS also prevented KOSTT from participating in the ITC mechanisms, although KOSTT was entitled to it. The 2011 ITC agreement between ENTSO-E and 39 TSOs, listed EMS as both ITC party and Country/Control Block for Serbia, but no special reference was made to the territory of Kosovo. According to Regulation (EU) No 838/2010, KOSTT as a TSO

⁵⁸ UNMIK (2000), 'Temporary Energy Exchange Agreement. In the Reasoned Request of the Energy Community Ministerial Council.' Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

⁵⁹ UNMIK (2001), Temporary Technical Arrangement. In the Reasoned Request of the Energy Community Ministerial Council'. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

operating on the territory of Kosovo, that is, a territory of the Energy Community Law, was entitled to participate in the ITC mechanism. Further, none of the initial agreements (Temporary Energy Exchange Agreement, Temporary Technical Arrangement and SMM control block Agreement) mandated EMS to perform congestion management and capacity allocation on three concerned interconnectors adjacent to KOSTT. Rather, as per these agreements, EMS was legally obligated to transfer to KOSTT the revenues made from allocation of transmission capacity on the three concerned interconnectors.

52. Kosovo continuously made efforts to resolve the energy dispute through bilateral negotiations and negotiations with the support of ETSO and the European Commission, but to no avail. Consequently, in 2008, KOSTT filed a complaint with the EnCS, which opened **Case ECS-3/08** against Serbia. In its response, Serbia attempted to legally justify the actions of EMS and claimed that the same were not in violation of the EnCT, to no avail. The EnCS refocused the subject matter of **Case ECS-3/08 against Serbia** to EMS's usage of revenues from allocation of transmission capacity on the three concerned interconnectors adjacent to KOSTT. The first part of the subject matter of this legal case was dealt with in another EnCS legal case against Serbia.

53. On **Case ECS-3/08 against Serbia**, the EnC Secretariat concluded and requested a decision from the EnC Ministerial Council. On 14 October 2016, having regard to the Conclusions of the EnCS Reasoned Request, dated 20 July 2016, and the Conclusions of the Advisory Committee Opinion, dated 10 October 2016, and Serbia's response, based on the Energy Community Treaty the MC-EnC adopted Decision 2016/02/MC-EnC, which postulates that *"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”.*⁶⁰

54. It has been more than a decade of legal battle regarding **Case ECS-3/08 against Serbia**, and Serbia still fails to respect the MC-EnC Decision 2016/02/MC-EnC and rectify the breach. Consequently, on 29 November 2018, having regard to the fact that no tangible measures have been taken by Serbia in implementing MC-EnC Decision 2016/02/MC-EnC, the MC-EnC adopted MC-EnC Decision 2018/12/MC-EnC (read Point 22 of this document for details). According to this Decision, *“Unless the Republic of Serbia rectifies the breaches identified in MC-EnC Decision 2016/02/MC-EnC within six months of the present Decision, the failure by Serbia to implement MC-EnC Decision 2016/02/MC-EnC will be considered a serious and persistent breach within the meaning of Article 92(1) of the Treaty”*. Again, Serbia has failed to respect this Decision.

55. Exposing its hypocrisy, Serbia, parallel **to failing to respect** the Decisions of the EnC Ministerial Council regarding **Case ECS-3/08**, engaged in negotiations, facilitated by the EU as well as the EnCS, regarding energy relations with Kosovo and committed itself to meeting all the obligations of the Energy Community Treaty. Within these negotiations, Kosovo and Serbia signed the following agreements: 2013 Brussels Agreement, 2013 Energy Agreement, 2013 Arrangements regarding Energy, 2015 Conclusions report, 2014 Framework Agreement, and 2014 Inter-TSO Agreement. To date, no tangible measures have been taken by Serbia in implementing them.

56. Despite these agreements, Serbia even blocked the entry into force of the 2015 Connection Agreement between ENTSO-E and KOSTT conditioning it by two criteria, namely that: *“a. All the Parties have signed the present Agreement; and b. The supply license of the Serbian supplier in Kosovo* (“ElektroSever”) has been issued and become*

⁶⁰ Energy Community Ministerial Council (2016), ‘Decision 2016/02/MC-EnC, dated 14 October 2016’. Available at: <https://www.energy-community.org/legal/cases/2008/case0308RS.html> [Accessed on: September 6, 2019].

operational". Simultaneously, Serbia engaged in delaying the registration and licencing of ElektroSever in Kosovo which was only registered in November 2018. On 2 July 2019, the RG CE Plenary decided on a new Connection Agreement between ENTSO-E and KOSTT according to which not later than April 2020 KOSTT will become an independent Regulatory Area/Block within Continental Europe.

57. The financial damage to Kosovo resulting from EMS's actions and non-actions which are imputable to Serbia, consists of three components: i) non-compensation for capacity allocation on the three concerned interconnectors which amount to **ca. 225 million Euros** for the period 2004-2019; ii) non-payment of electricity bill in the north of Kosovo which to date has reached **ca. 204 million Euros**; and iii) lost revenues resulting from not using the 400 kV transmission line with Albania which amounts to ca. 3 million Euros for the period 2016-2019.

58. To summarise, since 1999, Serbia has continuously taken destructive actions in many different aspects during the process of establishment as well as normalisation of its energy relation with Kosovo. Both within the EU-facilitated dialogue and under the auspices of the EnCS according to the EnCT, Serbia has signed several agreements on energy with Kosovo (2000 Temporary Energy Exchange Agreement, 2001 Temporary Technical Arrangement, 2013 Brussels Agreement, 2013 Energy Agreement, 2013 Arrangements regarding Energy, 2015 Conclusions report, 2014 Framework Agreement, and 2014 Inter-TSO Agreement). Yet, as elaborated above, evidence shows that Serbia has been consistent in violating or not implementing at all these agreements. Consequently, there is no tangible progress in their implementation, and the negotiations on energy between Kosovo and Serbia within the energy sector have turned into a Never-Ending Saga.

Recommendations

1. Several different agreements (2013 Brussels Agreement, 2013 Energy Agreement, 2013 Arrangements regarding Energy, 2015 Conclusions report) with the same aims and, to a large extent, same content had to be reached on energy alone, but there is still no tangible progress in their implementation. Given this, Kosovo should not allow the negotiations on Energy to be transformed into a Never-Ending Saga by Serbia. Therefore, Kosovo should not approve of any negotiations without a clearly specified deadline of completion and it should insist on having detailed Energy Arrangements with a clear and specific text. It cannot be emphasised strongly enough that Kosovo should under no circumstances accept any agreement text, which is characterised by any constructive ambiguities. Further, the agreement should be accompanied by a clearly specified action plan, with a clearly specified timeframe/deadlines on implementation.
2. The EnCS, the Brussels Dialogue Facilitator, i.e. the EU, as well as the international community should take all necessary measures to ensure that Serbia, no later than within six months from the resuming of the Brussels Dialogue, complies with the MC-EnC Decision 2016/02/MC-EnC (elaborated in detail above), namely that Serbia *“takes 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”* (Energy Community as per the.
3. KOSTT and EMS should start negotiations facilitated by EnCS on the Interim Agreements on ITC and Congestion Management, taking due account of the EMS-KOSTT Framework Agreement. KOSTT should submit to the EnCS and EMS its request for compensation from the revenues EMS received from allocating transmission capacity on the three interconnectors of Contracting Parties adjacent to the network operated by KOSTT for the period 2006-2019, during which Kosovo

was a Contracting Party to the EnCT. The total amount that EMS owes to KOSTT has to be re-estimated to cover the period under negotiation. Following this, an agreement on KOSTT's request should be reached within a **short period of time** from the submission of the request proposal by KOSTT. The agreement should contain an action plan regarding details of and a deadline for payment.

4. KOSTT and EMS should start negotiations facilitated by the EU on KOSTT's request for compensation from the revenues EMS received from allocating transmission capacity on the three interconnectors of Contracting Parties adjacent to the network operated by KOSTT for the period 2004-2006, as per 2000 Temporary Energy Exchange Agreement. The total amount that EMS owes to KOSTT has to be re-estimated to cover only that period under negotiation. Following this, an agreement on KOSTT's request should be reached within **short period of time** from the submission of the request proposal by KOSTT. The agreement should contain an action plan regarding details of and a deadline for payment.
5. In case Serbia fails to reach the agreements foreseen under Recommendations 3 and 4, and/or does not take measures to implement the agreements, when reached, the Government of Kosovo should submit these claims to international arbitration.
6. Prior to an agreement reached at international arbitration, Kosovo should suspend all activities envisaged in Point 15 on Distribution Services of Arrangements regarding energy. That is, Kosovo should condition the implementation of Point 15 of the Arrangements regarding energy with the solution of the disputes elaborated in Recommendations 3 and 4.
7. The EnCS, the Brussels Dialogue Facilitator, i.e. the EU, as well as the international community should take all necessary measures to ensure that Serbia, no later than within one month from the resuming of the Brussels Dialogue, starts the implementation of the Framework Agreement with Kosovo.

- 8.** The EnCS, the Brussels Dialogue Facilitator, i.e. the EU, as well as the international community should take all necessary measures to ensure that Serbia, no later than within one month from the resuming of the Brussels Dialogue, starts the implementation of the Inter-TSO Agreement with Kosovo.
- 9.** In case Serbia fails to fully comply with and fully implement the Framework Agreement and/or the Inter-TSO Agreement with Kosovo, Kosovo should file a complaint with the EnCS.
- 10.** Until a solution to the dispute is found regarding Recommendations 7 and 8, Kosovo should suspend all activities envisaged in Point 15 on Distribution Services of the Arrangements regarding energy. That is, Kosovo should condition the implementation of Point 15 of the Arrangements regarding energy with the solution of the disputes elaborated in Recommendations 7 and 8.
- 11.** Kosovo and Albania should take to international arbitration their claims regarding the lost income amounting to ca. 3 million Euros resulting from Serbia conditioning the operationalisation of the 400 kV interconnection line between Kosovo and Albania with licensing of ElektroSever.
- 12.** Until a solution to the dispute is found regarding Recommendation 11, Kosovo should suspend all activities envisaged in Point 15 on Distribution Services of the Arrangements regarding energy. That is, Kosovo should condition the implementation of Point 15 of the Arrangements regarding energy with the solution of the disputes elaborated in Recommendation 11.
- 13.** Owing to the continuous infringements by EMS, Kosovo/ KEDS should take to international arbitration KEDS' claims about the losses it has incurred from non-payment of electricity bills by customers in the north of Kosovo which to date amounts to ca. **204 million Euros.**

14. Until a solution to the dispute is found regarding Recommendation 13, Kosovo should suspend all activities envisaged in Point 15 on Distribution Services of the Arrangements regarding energy. That is, Kosovo should condition the implementation of Point 15 of the Arrangements regarding energy with the solution of the disputes elaborated in Recommendation 13.

