



Republic of Serbia
**COMMISSION FOR
PROTECTION OF COMPETITION**

25 Savska St., 4th Floor, Belgrade

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MINISTRY OF MINING AND ENERGY

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Belgrade

The Ministry of Mining and Energy forwarded to the Commission for Protection of Competition by email on November 18, 2020, with a request for its opinion, the Draft Amendments to the Treaty Establishing Energy Community, Draft Protocol on Denomination of Parties and other updates of the Treaty, as well as the Draft Procedural Acts.

Pursuant to Article 22 of the Law on Protection of Competition (Official Gazette of the RS 51/09 and 95/13) and Article 19, paragraph 1, item 1) of the Statute of the Commission for Protection of Competition (Official Gazette of the RS 49/2010), at the 30th Session held on November 23, 2020, following an assessment of the materials provided, the Council of the Commission for Protection of Competition delivers the following

OPINION

The Draft Amendments to the Treaty Establishing Energy Community (hereinafter, **the Treaty**), as well as the Draft Protocol on Denomination of Parties and other updates of the Treaty, are not acceptable from the competency-based perspective of the Commission for Protection of Competition, since from the content of the documents concerned follows that the proposals and suggestions provided by the Commission to the Ministry of Mining and Energy (hereinafter, **the Ministry**) in the previous period, last sent by email on November 16, 2020, are not taken into account.

In regards to the Draft Procedural Acts, the Commission for Protection of Competition maintains its view that it cannot take any position until the text of the initial Treaty is agreed on, and in particular, the provisions of the Treaty that represent a legal basis for the adoption of Procedural Acts, for reasons of the hierarchy of legal acts and different procedures for their adoption as prescribed under the Treaty.

In reasoning the above position, and in connection with the Draft Amendments to the Treaty provided, the Commission indicates that said document does not include the amendment to Article 18, paragraph 2 of the Treaty that the Commission for Protection of Competition and the Commission for State Aid Control have forwarded to the Ministry as a joint position of the two institutions from September 2019. The proposal stipulated that the wording in the provision of Article 18, paragraph 2 be amended so that after the words: "Any practices contrary to this Article shall be assessed..." the following wording be

inserted: "**by the competent authority of the Contracting Party**". The purpose of this amendment was to specify the competence of relevant bodies of the Contracting Parties for the assessment of practices referred to in Article 18, paragraph 1 of the Treaty¹, and in such a way to avoid the legal uncertainty. It should be noted that at the time of signing the Treaty Establishing Energy Community², the Commission for Protection of Competition was not yet established as an autonomous and independent institution. Meanwhile, the Commission was established in 2006 pursuant to the Law on Protection of Competition from 2005³. This act and the 2009 Law on Protection of Competition have essentially transposed the provisions from Articles 101 and 102 of the Treaty on the Functioning of the European Union, which was also confirmed during the bilateral screening process with EC representatives, as well as in the annual EC Progress Reports on Serbia. Furthermore, the implementation of antitrust rules by the Commission in all industry sectors (not only in the energy and other sectors covered by the Treaty) is continuously monitored by the European Commission by means of a reporting mechanism on the implementation of the Stabilization and Association Agreement, which also entered into force in the period following the signing of the Treaty Establishing Energy Community. In the light of the above, the Commission reiterates its suggestion for the amendment of Article 18, paragraph 2 so as to include the proposed change, that is, to read:

*"Any practices contrary to this Article shall be assessed **by the competent authority of the Contracting Party** on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community (attached in Annex III)."*

Such an amendment to Article 18, paragraph 2 of the Treaty is also important in the context of the proposed amendment to Article 81, Article 91, item 1(a), Article 91, item 2, paragraph 2, Article 92, item 2, as well as Article 92'', item 2 of the Treaty. To that end, the Commission reiterates that even though it has no objections to strengthening the voting system and the needed voting majority principle within the Energy Community system, it has forwarded to the Ministry a request for clarification of the 'positive vote of the European Community' proposal in the context of decisions adopted under Articles 18 and 19 of the Treaty, as well as the level on which the European Community's vote would be cast or weighted when taking a decision.

In regards to the proposal of a new Article 25, item 5, point 1, the Commission's proposal to amend said provision by deleting the wording "**and any other evidence**" in the first sentence thereof is also not taken into account. The Commission reiterates that its proposal to delete a part of the provision concerned was given since the wording provided therein is too wide and may cause legal uncertainty. Furthermore, the Commission also underlines that the last sentence in the provision referred to above or the wording "**that may affect trade between a Contracting Party and a Member State of the European Union**" does not suit the context of the preceding provisions. Thus, the Commission suggests to amend the proposed Article 25, item 5, point 1 so as to read:

"5. For the decision under paragraphs 3 and 4, the European Union may take into account decisions of the Ministerial Council under Title VII of this Treaty that points to a lack of compliance with
(a) Treaty rules concerning the internal energy market and environment as set out in Title II, Chapters II and III of this Treaty, or

¹ Under the provision of Article 18, paragraph 1 of the Treaty, they include restrictive agreements, abuse of dominance and public aid as practices that are incompatible with the proper functioning of the Treaty, insofar as they may affect trade of Network Energy between the Contracting Parties.

² Law on Ratification of the Treaty Establishing Energy Community between the European Community and the Republic of Albania, Republic of Bulgaria, Bosnia and Herzegovina, Republic of Croatia, Former Yugoslav Republic of Macedonia, Republic of Montenegro, Romania, Republic of Serbia and United Nations Interim Administration Mission in Kosovo in compliance with the Resolution 1244 of the UN Security Council, published in the Official Gazette of the RS No. 62 of July 19, 2006.

³ Law on Protection of Competition, Official Gazette of the Republic of Serbia 79/2005.

(b) European Union rules on competition as set out in Title II, Chapter IV of this Treaty, in so far as they may be relevant for the provisions referred to in paragraph 1."

In regards to the proposal of **a new Article 92' of the Treaty** that would introduce, inter alia, financial penalties for non-compliance with decisions of the Ministerial Council that establish a failure to act on commitments by the Contracting Parties, including commitments from the provisions on competition referred to in Article 18 of the Treaty, the Commission reiterates that such a solution is not acceptable for reasons that are also stated on several earlier occasions. Specifically, in the field of protection of competition exists an independent national authority that is, inter alia, authorized to sanction behaviors of undertakings in breach of the law. The sanctioning includes imposing administrative measures that comprise of monetary fines as measures for protection of competition. The possibility for a foreign authority to impose fines through the Treaty Establishing Energy Community as envisaged therein would represent a transfer of competencies to another authority other than the Commission for Protection of Competition, and which would be in violation of the positive legal regulations of the Republic of Serbia.

Concerning the Draft Protocol on Denomination of Parties and other updates of the Treaty, the Commission hereby reiterates that it has informed the Ministry by email on October 26, 2020 on the fact that the Draft Protocol is not at issue in the part concerning the renumbering of existing articles of the Treaty for the purpose of harmonization with the numeration of corresponding parts of the European Union acquis. However, given that a new wording was added to Article 2.(1) of the Draft Protocol that reads: *"where the Ministerial Council has, in accordance with the Energy Community Treaty, incorporated these pieces of the European Union acquis **into the legal order of the Energy Community**"*, the Commission requested a clarification as to the party responsible for proposing such an amendment, what it implies, in addition to an explanation of the legal basis for such an amendment. Given that no reply was provided to the Commission's inquiry, as well as the fact that the Treaty Establishing Energy Community does not contain a definition of the legal order of the Energy Community (but it incorporates the legal order of the European Union), **the Commission finds it unacceptable to introduce the wording as quoted above into the text of this Protocol.**

As to the Draft Procedural Acts, the Commission maintains its view that it cannot take any position until the text of the initial Treaty is agreed on, and in particular, the provisions of the Treaty that represent a legal basis for the adoption of Procedural Acts, for reasons of the hierarchy of legal acts and different procedures for their adoption as prescribed under the Treaty. The Commission also underlines that pursuant to Article 100 of the Treaty, to amend the Treaty (the provisions of Title I to VII that include, inter alia, provisions on concentration and state aid), the unanimity of the Ministerial Council's Members is needed, thus of all the Contracting Parties. In contrast, Article 87 of the Treaty, referred to in Article 83 of the Treaty, lays down that a two-third majority of the votes cast by the Ministerial Council's Members or the Contracting Parties, including a positive vote of the European Community, is needed to adopt a Procedural Act. Also, Article 86 of the Treaty stipulates that a Procedural Act shall regulate organizational, budgetary and transparency issues of the Energy Community. **For the reasons stated above, the Commission underlines that it is necessary to harmonize the text of the Treaty before entering into negotiations on new Procedural Acts.**

PRESIDENT OF THE COMMISSION

Nebojša Perić