



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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The Ministry of Mining and Energy forwarded to the Commission for Protection of Competition by e-mail, with a request for its opinion, the Draft Procedural Act on cooperation between competent authorities in the fields of compliance with Articles 18 and 19 of the Treaty Establishing Energy Community.

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 26th Session held on September 22, 2020, following an assessment of the Draft Procedural Act provided, the Council of the Commission for Protection of Competition delivers the following

OPINION

The proposal to regulate the issues of compliance with the provisions of the Treaty Establishing Energy Community that relate to competition and state aid (Articles 18 and 19 of the Treaty) by a Procedural Act, as an act of a lower rank than the Treaty, and whose adoption does not require the agreement of all Contracting Parties, is not acceptable.

Instead, it is necessary to continue the negotiations on the amendments to the Treaty Establishing Energy Community¹ (hereinafter, the Treaty) by the Ministry of Mining and Energy on behalf of the Republic of Serbia, and to which the Commission for Protection of Competition contributes from its competency-based perspective.

The Draft Procedural Act on cooperation between competent authorities in the fields of compliance with Articles 18 and 19 of the Treaty Establishing Energy Community, with accompanying explanation (hereinafter, the Draft), is prepared by the Energy Community Secretariat, an administrative body of this international organization, and **during negotiations dealing with the amending of the Treaty Establishing Energy Community**, a process in which the Commission for Protection of Competition (hereinafter, the Commission) takes an active role.

¹ 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.

On reviewing the text of the Draft provided, it can be established that the subject matter it intends to regulate goes beyond the framework of a procedural act. Namely, Article 86 of the Treaty Establishing Energy Community stipulates that a Procedural Act shall regulate organizational, budgetary and transparency issues of the Energy Community. On the other hand, it is apparent from the wording of the Draft that it pursues to regulate institutional and procedural issues or matters of procedures conducted by national authorities, which may have a considerable effect on the functioning of national institutions outside the Energy Community. Thus, the issues at hand belong to the **domain of amendments to the Treaty Establishing Energy Community, which as such is also established in the accompanying explanation of the Energy Community Secretariat.**

Article 86 of the Treaty also prescribes that Procedural Acts have binding force on the institutions of the Energy Community, and, if the Procedural Act so provides, on the Contracting Parties. Given that the Draft, for the most part, is addressed to national authorities and not the Contracting Parties, it does not meet the conditions set out in Article 86 of the Treaty for the adoption of a Procedural Act.

In this regard, and specifically due to the differing relevance of the subject matters they regulate, the Treaty Establishing Energy Community also stipulates a different procedure for the adoption of these two types of acts, as well as amendments thereof. Under Article 100 of the Treaty, to amend the Treaty (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 83 of the Treaty, referred to in Article 87 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, are needed to adopt a Procedural Act. Therefore, in case that the Republic of Serbia or its competent authorities do not agree with the Draft Procedural Act provided, it could still be adopted unlike the amendments to the Treaty Establishing Energy Community.

In the accompanying explanation of the Energy Community Secretariat attached to the Draft Procedural Act, a discretionary assessment of the Secretariat is given that reads: "*energy markets in the Contracting Parties are seriously distorted due to anti-competitive practices and extensive subsidization schemes*". Such an assessment, not substantiated or supported by facts in any way, may represent a position of the Secretariat but not the basis for the adoption of a new Procedural Act of the Energy Community.

Furthermore, the Energy Community Secretariat in its explanation states that "*The High-Level Reflection Group's Report, the Analytical Paper as well as all other assessments concur in the view that application of the acquis related to competition and state aid in the energy sectors is non-functional in the Energy Community*". Given that the Report and Analytical Paper referred to above date back to 2014 and 2015, respectively, they cannot serve as a basis for the assessment of the current situation in said areas nor of the progress reached after 2015.

Finally, for the reasons stated above and in particular due to the subject matter that it intends to regulate, the Draft is not acceptable, instead, it is necessary to continue negotiations on the amendments to the Treaty under the mandate and competencies of all relevant institutions of the Republic of Serbia. For this reason, the Commission will not provide commentaries, suggestions and proposals to individual provisions of the Draft, **instead, it underlines that the conferral of any executive enforcement and investigative powers in the field of protection of competition would be contrary to the Law on Protection of Competition and a commitment of national legislators that the Commission is an autonomous and independent organization competent for the application of antitrust regulations.**