



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

25/IV Savska Street, Belgrade

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MINISTRY OF MINING AND ENERGY

Nemanjina 22-26
Belgrade

On July 18, 2022, the Ministry of Mining and Energy submitted to the Commission for the Protection of Competition (hereinafter: the Commission), by e-mail, the proposal of the Procedural Act on encouraging the integration of the regional energy market in the Energy Community, as well as the proposals of the acts marked as Annexes 1, 1b, 1c, 1d, 1e, 1f and 1g, which amend and supplement the EU regulations in the field of energy, listed below in the text, in order to give an opinion.

The Council of the Commission for Protection of Competition, pursuant to Article 22 of the Law on Protection of Competition ("Official Gazette of the RS", no. 51/09 and 95/13) and Article 19, paragraph 1, item 1) of the Statute of the Commission for the Protection of Competition ("Official Gazette of the RS", no. 49/2010) on 91st session as of July 22, 2022, upon consideration of the submitted material, gives the following

OPINION

The proposal of the Procedural Act on encouraging the integration of the regional energy market in the Energy Community was submitted to the Commission electronically for the first time, for the purpose of giving an opinion, on May 13, 2022. In relation to this proposal, the Commission supplied its view in the opinion number 7/0-01-49/2022-2 as of May 18, 2022.

Given the fact that the new proposal of the Procedural Act on encouraging the integration of the regional energy market in the Energy Community, submitted on July 18, 2022 (hereinafter referred to as: the proposal) does not significantly deviate from the previous one, that is, that the objections of the Commission from the above-mentioned opinion were not taken into account, remaining with the already stated positions, the Commission states the following:

The procedural acts of the Energy Community cannot regulate a matter that falls within the scope of regulation of the Treaty on the Establishment of the Energy Community¹, nor can such acts amend the Treaty, which clearly prescribes the manner and conditions of its amendment. The Commission

¹ Law on the Ratification of the Treaty on the Establishment of the Energy Community between the European Community and the Republic of Albania, the Republic of Bulgaria, Bosnia and Herzegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, the Republic of Montenegro, Romania, the Republic of Serbia and the United Nations Interim Mission in Kosovo in accordance with Resolution 1244 of the United Nations Security Council, was published in the "Official Gazette of RS" No. 62 as of July 19, 2006.

believes that, in this case, the conditions prescribed by Article 86 of the Treaty, have not been met, which stipulates that: *"The Procedural Act regulates the organizational, budgetary and transparency issues of the Energy Community, including the delegation of authority by the Ministerial Council to the Permanent High Level Group, the Regulatory Board or the Secretariat and has a binding character for the institutions of the Energy Community, as well as for the Parties, if this is foreseen by the Procedural Act itself."*

However, if the previously stated position of the Commission is not abided by, we also wish to point out the following:

- Provision of Article 2, paragraph 1, item b) of the Proposal, which determines the powers of the Agency for the Cooperation of Energy Regulators, the adoption of individual decisions by that Agency has been foreseen. The provisions of the proposed article are not clear enough and on the basis thereof it cannot be concluded whether individual decisions of the aforementioned Agency could also concern issues of competition protection, which, in terms of acts or actions that affect or could affect competition on the market of the Republic of Serbia, are under the competence solely of the Commission in accordance with the Law on the Protection of Competition ("Official Gazette of the RS", no. 51/09 and 95/13, hereinafter: Law), and in that sense it is necessary to precisely define the specified provision.
- Provision of Article 4 of the proposal stipulates the duty of cooperation of the "national executive authorities of the Contracting Parties" with the "national executive authorities of the member states", the European Commission and the Secretariat of the Energy Community, although it is not precisely defined which authorities does it refer to.

Also, the Commission is of the opinion that the provisions of this article are insufficiently precise with regard to the wording "enforcement of prohibitions in the field of competition and state aid, as contained in Articles 18 and 19 of the Treaty". In this context, the Commission points out that the Law entrusts it with the exercise of public powers and that it is exclusively competent to decide on the rights and obligations of market participants and to determine administrative measures in accordance with the Law, both in the procedures for examining and determining the restrictive agreements and abuse of a dominant position, as well as in concentration control procedures. Therefore, according to the opinion of the Commission, the provision of Article 4 of the proposal in this part can be interpreted only in that sense (for example, an administrative measure containing a prohibition of certain behavior can only be adopted by the Commission in accordance with the Law).

When it comes to cooperation with other bodies for the protection of competition and the European Commission, the Commission points out that such cooperation already exists and takes place within the framework of valid regulations, primarily the Law and the Stabilization and Association Agreement² (hereinafter: SSA). The Commission concluded several bilateral agreements on cooperation with competition protection bodies³, while based on the SAA, the Commission cooperates with the European Commission in the field of competition protection, for which it is competent.

Regarding the Ministry's request for an opinion on the proposals of acts marked as Annexes 1, 1b, 1c, 1d, 1e, 1f and 1g, which amend and supplement the EU regulations in the field of energy, namely:

² Law on Confirmation of the Stabilization and Association Agreement between the European Communities and their member states, on the one hand, and the Republic of Serbia, on the other hand, ("Official Gazette of the RS - International Agreements", No. 83/2008).

³ The commission concluded bilateral cooperation agreements with, *inter alia*, the competition protection bodies of Hungary, Austria, Romania, Slovenia, Croatia, Montenegro, Bosnia and Herzegovina and North Macedonia.

1. Regulation (EU) 2019/942 of the European Parliament and of the Council of June 5, 2019 on establishing of the European Union Agency for the Cooperation of Energy Regulators (Annex 1)
2. Regulation (EU) 2019/943 of the European Parliament and the Council of June 5, 2019 on the internal market of electricity (Annex 1b)
3. Commission Regulation (EU) 2015/1222 of July 24, 2015 establishing a guideline on capacity allocation and congestion management (Annex 1c),
4. Commission Regulation (EU) 2016/1719 of September 26, 2016 establishing a guideline on forward capacity allocation (Annex 1d),
5. Commission Regulation (EU) 2017/1485 establishing a guideline on electricity transmission system operation (Annex 1e),
6. Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (Annex 1f) and
7. Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration (Annex 1g)

The Commission points to the following:

No accompanying explanation was submitted with the proposed amendments to the aforementioned acts, but based on the introductory remarks of the proposed acts and their content, it can be concluded that they are proposed for the adaptation and incorporation of the aforementioned regulations into the Treaty on the Establishment of the Energy Community. Precisely in this regard, the previous issue arises, that is not within the competence of the Commission. It refers to fulfilling the requirements from Title II, Chapter VII of the Treaty on the Establishment of the Energy Community, that is, Articles 24 and 25 of the Treaty, which prescribe the possibility of adaptation of the *acquis communautaire* of the EU through this Treaty, in accordance with the evolution of the *acquis* of the EU. Furthermore, bearing in mind that these regulations pertain to the field of energy, the fulfillment of the relevant conditions would need to be assessed in connection with the provisions of Article 10 and 11 of the Treaty, which prescribe the method of implementation and the set of legal *acquis* of the EU in the field of energy that falls under the said Treaty.

Assuming that the stated conditions for proposing the relevant acts from the Agreement are met, the Commission indicates the following:

- In the text of the proposal of the act marked as Annex 1b (Annex 1b), which amends and supplements the Regulation EU 2019/943 of the European Parliament and the Council of June 5, 2019 on the internal energy market, immediately below the name of the regulation, it is stated that it will be incorporated (in the Treaty on the establishment of the Energy Community) and adapted by the decision of the Ministerial Council of the Energy Community, but also to amend Article 11 of the Treaty. Provision of Article 100 of the Treaty on the Establishment of the Energy Community prescribes a procedure for its amendments and supplements, according to which the unanimity of the members of the Ministerial Council is necessary, while for the decisions of the Ministerial Council by which a certain act is adapted and incorporated into the Treaty, according to Article 81, the vote of the majority of the members of the Ministerial Council is sufficient. Therefore, if there is an intention to change a certain article of the Treaty on the establishment of the Energy

Community, in addition to the intention to incorporate the corresponding EU regulation into this Treaty, the procedure from Article 100 prescribed thereby, would have to be abided by.

Also, in the text of the proposal for amendments to EU Regulation 2019/943 of the European Parliament and the Council of June 5, 2019 on the internal energy market, the term "Energy Community competition law" is mentioned in several places). In connection with the above, the Commission points out that the Treaty on the establishment of the Energy Community takes over the competition rules of the European Union, which are listed in Annex III of the Treaty. In view of the above, it would be meaningful to specify that it related to the EU competition rules that are accordingly incorporated in the Treaty on the establishment of the Energy Community and to refer to Annex III of the Treaty. In addition, it would be necessary to add "and the national law on the protection of competition", that is, "in accordance with the national law on the protection of competition".

- The commission further points out that in all the proposals of the acts (for example, in Annex 1e, in Article 45, paragraphs 1 and 2, in Annex 1b in Article 50, etc.), there are provisions that provide for the delivery, that is, the exchange of certain data and information between independent market participants (manufacturers, transmission and/or distribution system operators, etc.). It relates to the data and information that are commercially "sensitive" (for example, about price, costs, capacities, etc.) and the exchange of which can be problematic in terms of competition protection. The Commission is aware that the delivery and exchange of this data is foreseen and necessary in order to ensure the smooth and continuous functioning of the energy system, so it expects that the prescription of the obligation to exchange information will be limited only to the necessary information and data, which will be used exclusively for the purpose, in a way and to an extent that is necessary to achieve the desired.

Regarding the remaining part of the material, the Commission, from the aspect of its jurisdiction, has no objections.

PRESIDENT OF THE COMMISSION

Nebojša Perić, m.p.