



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 December 12, 2022 the Ministry of Mining and Energy submitted to the Commission for the Protection of Competition, Proposal of a platform for the participation of the delegation of the Republic of Serbia at the 20th meeting of the Ministerial Council of the Energy Community, which will be held on December 15, 2022 in Vienna, Republic of Austria, with related attachments, for the purpose of giving opinions.

The Council of the Commission for Protection of Competition, pursuant to Article 22 of the of the Law on the Protection of Competition ("Official Gazette of the RS", no. 51/09 and 95/13) at the 107th session of December 14, 2022, upon consideration of the submitted Platform Proposal with the associated attachments, provides the following

OPINION

In connection with the submitted Proposal of the Platform for the participation of the delegation of the Republic of Serbia at the 20th meeting of the Ministerial Council of the Energy Community (hereinafter: Platform Proposal), the Commission for the Protection of Competition (hereinafter: The Commission), within its jurisdiction, proposes correcting and specifying the statements from the Platform Proposal, namely in the part entitled "*Adoption of the Decision on Incorporation of Regulation (EU) 2019/942, Regulation (EU) 2019/943, Regulation (EU) 2015 /1222, Regulation (EU) 2016/1719, Regulation (EU) 2017/2195, Regulation (EU) 2017/2196, Regulation (EU) 2017/1485 into the legal acquis of the Energy Community, amending Annex I of the Treaty on the Energy Community and on amendments and supplements to the Decision of the Ministerial Council no. 2021/13/MS-EnC and no. 2011/02/MS-EnC and Adoption of the Procedural Act on the Integration of the Regional Energy Market*", according to the following:

- 1) On page 7, in the third paragraph of the relevant part of the Platform Proposal, a sentence reads:

*„Assuming that the integration of regional energy markets requires the creation of equal conditions for interested parties from the Contracting Parties and EU member states, **the inclusion of a regulatory body that is independent from the interested parties and cross-border cooperation between executive authorities to ensure that the Contracting Parties apply European competition rules and state aid in the same way as the institutions of the European Union and its member states,***

the provisions of the proposed procedural act define interested parties, establish reciprocity between interested parties, determine the competence of the European Union Agency for the Cooperation of Regulators in the Energy Sector (ACER) and the European Association for Cooperation of the operator of transmission systems for electricity (ENTSO-E), defines the way of cooperation of interested parties with ENTSO-E and the cooperation of authorities responsible for competition and control of state aid."

In the light of the multilateral nature of the Treaty on the Establishment of the Energy Community¹, the Commission acknowledges the fact that there is a possibility that all relevant bodies of the Contracting Parties, i.e. bodies for the protection of competition and control of state aid of the Contracting Parties, do not apply the rules of competition and state aid of the European Union in the same way as the institutions of the European Union and its member states. However, when it comes to the Republic of Serbia, the Commission for the Protection of Competition is already doing so, considering the obligations assumed on the basis of the Stabilization and Association Agreement², as well as the process of fulfilling those obligations that the European Commission monitors through the work of relevant committees and subcommittees, *inter alia*, through the work of the Subcommittee for the Internal Market and Competition, in whose work the Commission also participates. Given the assessment of the European Commission within that process, which is contained in the annual Reports of the European Commission on the progress of the Republic of Serbia in the relevant segment of Negotiating Chapter 8 (Competition Policy) - violations of competition and concentration ("Antitrust and mergers"), **the Commission believes that there is no need for the bolded part of the above-mentioned paragraph to remain in the national document such as the Platform Proposal, i.e., proposes to delete the underlined part of the paragraph on page number 7. Otherwise, the cited statement could be considered applicable to the Republic of Serbia, when it comes to the actions of national bodies for the protection of competition and the control of state aid.**

- 2) On page 10, in the fifth paragraph of the relevant part of the Platform Proposal, the following wording is stated:

*, Article 4. The procedural act gives the Advisory Board the authority to issue binding opinions. **Given that the prohibitions imposed by the Ministerial Council are not provided with an appropriate legal mechanism for their execution in accordance with the provisions of the existing Agreement, which is the reason for numerous previous proposals for the adoption of procedural acts, in order to create the possibility of immediate application and execution of the aforementioned decisions and prohibitions.** The opinions of the Joint Committee (applying the European *acquis* that has not been subject to harmonization) will be adopted by a simple majority of votes and the Advisory Committee will have to take them into account when adopting the opinion in accordance with Article 32 of the Procedural act no. 2008/01/MC-EnC, with amendments, on the rules of procedure for resolving disputes under the Treaty". The text of the provision proposed in this way introduces arbitrariness without a clearly defined procedure, jurisdiction and way of functioning of an advisory body, which is not clear and exhaustive. The consequence of the provision is that a simple majority of votes in the Joint Committee takes a position that binds the Advisory Committee (**which takes the form of a decision**), while it should be taken into account that item 4 of Article 4 stipulates that "the Joint Committee is co-chaired by the European Commission and the Secretariat" so in that sense, the Republic of Serbia, as a contracting party, could find itself in an unequal position. Given the already*

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.

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).

stated problematic nature of the formation of such a body (Joint Committee), we also point out the lack of detailed rules on the procedure for passing opinions, voting, jurisdiction, etc. Such a prescribed norm allows the co-chairs to determine the agenda, and the Republic of Serbia, even in a situation where it exercises its right and proposes an agenda topic that it considers important, may find itself in a situation where the topic is never on the agenda.

As the Commission previously stated, the procedural acts of the Energy Community cannot govern the issue that falls within the scope of regulation of the Treaty on the Establishment of the Energy Community, nor can such acts amend the Treaty, and therefore neither establish a new body, as provided for in Article 4. paragraph 1 of the Proposed procedural act on the integration of the regional energy market (marked as Annex 05a to the Platform Proposal). Also, in the case of the aforementioned act, the conditions prescribed by Article 86 of the Treaty have not been met.

Considering the above, the Commission proposes the wording of the text that would specify the second sentence, by replacing it with the text that is in bold in the following paragraph:

*, Article 4, paragraph 1 of the procedural act foresees the establishment of a Joint Committee consisting of representatives of the European Commission, the Secretariat, national authorities of the contracting parties responsible for competition and executive authorities responsible for the implementation of state aid, **which could only be the subject of possible amendments to the Treaty on the Establishment of the Energy Community.** The opinions of the Joint Committee (applying the European acquis that has not been subject to harmonization) will be adopted by a simple majority of votes and the Advisory Committee will have to take them into account when adopting the opinion in accordance with Article 32 of the Procedural act no. 2008/01/MC-EnC, with amendments, on the rules of procedure for resolving disputes under the Treaty". The text of the provision proposed in this way introduces arbitrariness without a clearly defined procedure, jurisdiction and way of functioning of an advisory body, which is not clear and exhaustive. The consequence of the provision is that a simple majority of votes in the Joint Committee takes a position that the Advisory Committee must take into consideration, while it should be taken into account that item 4 of Article 4 stipulates that "the Joint Committee is co-chaired by the European Commission and the Secretariat" so in that sense, the Republic of Serbia, as a contracting party, could find itself in an unequal position. Given the already stated problematic nature of the formation of such a body (Joint Committee), we also point out the lack of detailed rules on the procedure for passing opinions, voting, jurisdiction, etc. Such a prescribed norm allows the co-chairs to determine the agenda, and the Republic of Serbia, even in a situation where it exercises its right and proposes an agenda topic that it considers important, may find itself in a situation where the topic is never on the agenda.*

In the text, the **statement in brackets "(which takes the form of a decision)" has also been deleted**, because according to the Commission's understanding, it does not reflect the provision to which it refers.

- 3) It is necessary to harmonize the third paragraph on page 11 of the Platform Proposal with the fourth paragraph containing the proposal (in bold), so that it is unambiguous how the Republic of Serbia will vote.

When it comes to the related attachments, marked as Annex 05a and Annex 08, submitted to the Commission with the Platform Proposal, the Commission indicates the following:

- (1) Annex 05a, which is entitled Proposal for the adoption of the Procedural Act on the integration of the regional energy market, foresees in Article 4, paragraph 1, the establishment of a Joint Committee, which consists of representatives of the European

Commission, the Secretariat, the national authorities of the contracting parties responsible for competition and the executive authorities responsible for the implementation of state aid. Such a member's proposal does not meet the conditions prescribed by Article 86 of the Treaty on the establishment of the Energy Community, bearing in mind that the formation of a committee or other body of the Energy Community, even a consultative one, goes beyond the matter that can be regulated by a procedural act (organizational, budgetary and transparency issues of the Energy Community). Also, as the Commission previously stated, the Commission's cooperation with the European Commission already exists and takes place within the framework of valid regulations, primarily the Law on Protection of Competition and the Stabilization and Association Agreement. In addition, the Commission cooperates with other bodies for the protection of competition and has concluded several bilateral cooperation agreements. Finally, the Commission cooperates with the Secretariat of the Energy Community, in the context of fulfilling the obligations from the Treaty on the Establishment of the Energy Community.

Also, in connection with the part of Article 4, paragraph 1, which reads: "In order to ensure that the national executive bodies of the contracting parties **and the Ministerial Council implement the prohibitions contained in Articles 18 and 19 of the Treaty** effectively and in accordance with practice and case law, in connection with Articles 101, 102, 106 and 107 of the Treaty on the Functioning of the European Union...", we indicate that the Commission is the only national authority authorized to determine the violation of competition rules that affects or could affect competition in the territory of the Republic of Serbia. Any other possibility, at least when it comes to the Republic of Serbia, would be contrary to its positive legal regulations.

- 2) Annex 08 - summary of the Report of the Secretariat of the Energy Community on implementation for the Republic of Serbia, on page 12, contains an assessment of the Commission's actions on which the Commission has already expressed itself, and most recently in an email sent to the Ministry of Mining and Energy on December 7, 2022. As the Commission stated on that occasion, the Commission examines the concentration of market participants according to and when the conditions from the Law on Protection of Competition are met ("Official Gazette of RS", no. 51/09 and 95/13). Therefore, it cannot be said that the Commission "**limited** its action in the energy sector to the approval of one concentration", as stated in that Report, while in the description of the Commission's proceedings initiated in 2018 against the Niš City Heating Plant, it should be noted that it is the case of the procedure for determining the violation of competition, as the Commission previously specified.

Finally, the Commission is of the opinion that it is necessary to adhere in principle and consistently to the provisions of the Treaty on the Establishment of the Energy Community, which refer to its possible amendments and supplements.

Proposals for other attached acts, submitted with the Platform Proposal, regulate matters that do not fall under the jurisdiction of the Commission.

PRESIDENT OF THE COMMISSION

Nebojša Perić, m.p.