

TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

REASONED REQUEST

in Case ECS-2/15

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community and Article 28 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty, the

SECRETARIAT OF THE ENERGY COMMUNITY

against

FORMER YUGOSLAV REPUBLIC OF MACEDONIA

seeking a Decision from the Ministerial Council that the former Yugoslav Republic of Macedonia, by failing to ensure that the customers eligible for the purchase of electricity from the supplier of their choice comprise all non-household and household customers, fails to comply with its obligations under Article 33(1) of Directive 2009/72/EC, as adapted by Ministerial Council Decision 2011/02/MC-EnC.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

a. Introduction

- (1) As a Contracting Party to the Treaty establishing the Energy Community ("the Treaty"), the former Yugoslav Republic of Macedonia is under an obligation to implement the *acquis communautaire* on energy as listed in Article 11 of the Treaty,¹ including Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

¹ Article 11 of the Treaty has been amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty ("Decision 2011/02/MC-EnC"), ANNEX 1

- (2) Pursuant to Article 33(1) Directive 2009/72/EC, the Contracting Parties had to open the electricity markets and to ensure eligibility of all customers (both non-household and household) as from 1 January 2015.
- (3) Market opening within the meaning of Article 33 of Directive 2009/72/EC requires the Contracting Parties to grant to electricity customers the right to freely choose their electricity suppliers from domestic or non-domestic sources, and thus become eligible customers within the meaning of Article 2(12) of Directive 2009/72/EC.
- (4) Based on its assessment and the results of the preliminary procedure undertaken in the present case, the Secretariat of the Energy Community (“the Secretariat”) has come to the conclusion that the amendments to the Energy Law from 2014 postponing market opening beyond 2015 constitute a violation of Article 33(1) of Directive 2009/72/EC

b. The electricity sector

- (5) The electricity sector in the former Yugoslav Republic of Macedonia operates under the provisions of the Energy Law of 2011, as amended several times.² The Energy Law at the time of its adoption, and the secondary legislation based on it, envisaged gradual opening of the electricity market. According to the Energy Law of 2011, all customers including households should have been granted eligibility status as from 1 January 2015.
- (6) The national energy regulatory authority of the former Yugoslav Republic of Macedonia, the Energy Regulatory Commission (*ERC*) has adopted a set of regulatory rules under the Energy Law, including the Market Rules from February 2014.³ Amended twice since then, these Market Rules oblige all customers except small enterprises and households to purchase electricity on the competitive market, i.e. not subject to prices regulated by *ERC*.
- (7) The key players in the electricity market are the state-owned incumbent utility *Elektrani na Makedonija AD (ELEM)* and *EVN Makedonija AD*. *ELEM* owns the majority of generation plants, namely two TPPs and eight HPPs, with a total installed capacity of 1380 MW. *ELEM* also operates a small distribution network through which it supplies 73 industrial customers with some 80 GWh per year. The Austrian utility *EVN* holds 90% of shares in *EVN Makedonija* which is the owner of most of the distribution assets and supplier of 98% of all sales to the so-called “tariff customers”. All household customers in the country and more than 99,9% of all non-household customers are connected to the distribution system of *EVN Makedonija*. The supply licenses for incumbent suppliers *EVN Makedonija* and *ELEM Energetika* cover the public service obligation to supply tariff customers with electricity by the end of 2014, and starting from July 2016⁴ as the suppliers of last resort.
- (8) The transmission network is operated by *Makedonski Elektroprenosen Sistem Operator (MEPSO)*, a state owned company responsible for electricity transmission, electric power system control and balancing. *MEPSO* also performs the functions of a market operator.

² Energy Law, Official Journal of R. Macedonia, No.16/11, 136/11, 79/13, 164/13, 41/14 and 151/14. After the amendments to the Energy Law of October 2014, that gave rise to this case, the Energy Law has been also amended in OJ No.33/15 (energy efficiency), 192/15 (energy auditors), 215/15 (public private partnership regarding distribution of natural gas) and 06/16 (concerning regulation of water services)

³ Energy Regulatory Commission, Market Rules, No.01-481/1, 17.02.2014

⁴ Even though the function of supplier of last resort has been assigned by primary law to the suppliers of tariff customers, and was supposed to start from 1 January 2015, this function could only become effective with the adoption of the Rules for supply of electricity as last resort and according to their latest amendments of November 2014, this function became effective from 1 July 2016

c. Eligibility under the Energy Law before the amendments in 2014

- (9) The Energy Law from 2011 defines eligible customers as customers that purchase energy from generators, suppliers or traders of their own choice.⁵
- (10) Although Article 82 of the Energy Law of 2011 stipulates that all electricity customers shall be deemed eligible, all customers (except the customers connected to the high voltage grids that were already eligible according to the previous Energy Law) have in practice obtained the eligibility status only when certain secondary legislation entered into force.⁶
- (11) Under the Law, customers that have obtained the status of eligible customers are expected to sign an electricity supply contract.⁷ Eligible customers are not allowed to switch back to regulated supply, i.e. the Energy Law also links eligibility (the right to choose the supplier) with compulsory termination of regulated supply.⁸

aa. Household customers

- (12) According to the Energy Law as it stood before the amendments giving rise to the present case were adopted, household customers were to be captive until 31 December 2014.⁹ Captive customers are defined in Article 197(7) of the Law as “customers who purchase electricity under stipulated terms and conditions and prices, and cannot select the electricity supplier at their own preference.”
- (13) Under Article 197(5) of the Energy Law, the electricity supply for captive customers is deemed a regulated energy activity, and it was to be terminated as from 1 January 2015.

bb. Small customers

- (14) Small electricity customers are defined as “enterprises with less than 50 employees and total annual income or total assets less than 10 million EUR in MKD counter value, excluding the energy generators and transmission and distribution system operators.”¹⁰
- (15) Once the secondary legislation listed in Article 197(1) of the Energy Law was adopted by ERC, small electricity customers were given an option until the end of 2014 to either stay with the incumbent supplier or to switch. All small customers chose the first option.

cc. Secondary legislation

- (16) Article 57 of the Market Rules gives small customers and households the right to opt for being supplied under a “regulated contract”¹¹ or for purchasing from a supplier of their choice. Customers that purchase electricity under a regulated contract are those customers that have

⁵ Article 3(44) Energy Law of 2011

⁶ The secondary legislation referred to in Article 197(1) Energy Law 2011 covers: Electricity Supply Rules, Rules on Electricity Supply of Last Resort, Electricity Price-Setting Regulation for Supplier of Last Resort, Electricity Market Code and Tariff Systems for electricity transmission/distribution and services provided by the electricity market operator

⁷ Article 197(2) Energy Law of 2011

⁸ Article 82(4), 197(4) and (5) Energy law of 2011

⁹ Article 197(1) Energy Law of 2011

¹⁰ Article 3 Energy Law of 2011

¹¹ Regulated contract is the contract that is subject to approval by the Energy Regulatory Commission, Article 3(87) Energy Law of 2011.

decided to be supplied by the supplier of last resort under the prices regulated by the *ERC*.¹² Article 131(2) of the Market Rules stipulated that the households remain captive until 31 December 2014 and that they have to buy electricity from one of the supplier of tariff customers, *ELEM Energetika* and *EVN Makedonija*, at regulated conditions. The list of eligible customers which do not fall in the category of small customers is published by *MEPSO* by 30 April each year and communicated to distribution network operators. These eligible customers are obliged to negotiate a market-based supply contract within 60 days.

- (17) When *ERC* adopted the Market Rules in 2012, an obligation to purchase electricity on the competitive market was imposed on all customers starting from 1 January 2013, except small enterprises and households. With the amendment of the Market Rules in June 2013, this deadline was postponed to 1 October 2013.¹³ An Action Plan for the Liberalization of the Electricity Market adopted by *ERC* on 30 September 2013¹⁴ postponed that date further to 1 April 2014. On that date, all electricity customers except households were supposed to become eligible, whereas on 1 January 2015, all electricity customers, including households, were supposed to become eligible. The Action Plan further imposed certain obligations on key market players in order to ensure a smooth opening of retail market for customers connected to the distribution network.
- (18) New Market Rules were adopted in February 2014.¹⁵ According to Article 56 of the Market Rules of 2014, all non-household customers with more than 50 employees and total annual income or total assets less than 10 million EUR in MKD counter value could participate on the market, after signing a contract with a supplier of trader of their choice. The small non-household customers and the households were given a choice to be supplied either on the market from a supplier of their choice, or from the supplier of last resort at regulated conditions.¹⁶ However, Article 131(1) of the Market Rules still considered the households captive customers, thus allowing the choice of supplier only to the small non-household customers.
- (19) In accordance with the Energy Law in force at that time, the suppliers of tariff customers should have been operational until 31 December 2014.¹⁷

dd. Supplier of last resort

- (20) For the eligible customers, suppliers of last resorts were nominated through the Law itself.¹⁸ That function was to be performed by “*the suppliers for captive consumers ... that have been issued licenses on electricity supply to captive consumers prior to the day when the present law enters into effect.*”¹⁹ The commencement of the activities of the suppliers of last resort was linked with the date for market opening for small customers, and was as determined by the Law²⁰ as well as by the Rules for Supply with Electricity as a Last Resort.²¹ This in practice meant that once the

¹² Article 8(1) Energy Law of 2011

¹³ Energy Regulatory Commission, Amendments to the Market Rules, No. 01-1166/1, 27.06.2013

¹⁴ Energy Regulatory Commission, Action Plan for the liberalisation of the electricity market in the Republic of Macedonia, No. 01- 1645/2, 30.09.2013

¹⁵ Energy Regulatory Commission, Market Rules, 2014 *supra*

¹⁶ Article 57(1) Market Rules of 2014

¹⁷ Article 58(1)(4) Market Rules of 2014

¹⁸ Article 8(5) Energy law of 2011

¹⁹ Article 8(5) Energy law of 2011

²⁰ Article 202 Energy Law of 2011

²¹ Energy Regulatory Commission, Rules for supply of electricity as a last resort, Official Journal No. 144, 15.11.2012 as amended last time on 27.11.2014. These Rules, according to the last amendments shall be applied as from 1 July 2016

non-household customers gained the eligibility right, they could choose whether to be supplied at unregulated conditions by a supplier of their choice, or to be supplied by the supplier of last resort under regulated conditions without time limitations. This choice was supposed to be allowed also to the households after 1 January 2015.

- (21) The supplier of last resort provides a public service of electricity supply to households or small customers in cases stipulated by the Energy Law.²² According to the Energy Law, the manner and procedure under which households or small customers can obtain the right to be supplied by the electricity supplier of last resort is to be determined by the *ERC*.²³
- (22) The supplier of last resort is under an obligation to purchase electricity in order to satisfy the demands of households and small customers that would decide to be supplied by it, once they will obtain the right to choose their electricity supplier.²⁴ The supplier of last resort must have a regulated contract with the generator under public service obligation²⁵ (*ELEM Energetika*) for the purchase of the electricity necessary to satisfy the demand of households and small customers.²⁶

d. The evolution of the electricity market in the former Yugoslav Republic of Macedonia

- (23) The opening of the electricity market in the former Yugoslav Republic of Macedonia started in May 2007 when all electricity customers connected to the transmission network (except the public enterprise *Macedonian Railways*) started to buy electricity at the open electricity market at unregulated conditions.²⁷
- (24) As from 1 January 2008, all customers connected to the transmission system gained eligibility status and started to fully cover their electricity demand on the open electricity market. As from 1 January 2012, network operators began purchasing electricity for covering losses on the open electricity market. On 30 September 2013, the *ERC* adopted the Action Plan to liberalize the electricity market and starting from 1 April 2014, all “large” customers with more than 50 employees and over 10 million total annual revenue or total assets became eligible. There were 222 customers of this kind. They chose their own supplier and signed agreements for the supply of electricity.²⁸
- (25) According to the Energy Law of 2011, all customers including households would have been granted eligibility status as from 1 January 2015. Eventually, this has not happened due to the 2014 amendments to the Energy Law.

e. The legislative changes giving rise to the present case

- (26) The former Yugoslav Republic of Macedonia has not adopted energy legislation transposing Directive 2009/72/EC of the so-called Third Energy Package.
- (27) Instead, while drafts of a Third Energy Package-compliant Energy Law were developed with EU assistance, the Government proposed and the Parliament adopted amendments to the existing Energy Law on 13 October 2014.²⁹

²² Article 3 Energy Law of 2011

²³ Article 28 Energy Law of 2011

²⁴ Article 80(1) Energy Law of 2011

²⁵ Articles 3(89) and 22 Energy Law of 2011

²⁶ Article 66 Energy law of 2011

²⁷ Page 1 of the Reply to the Opening Letter

²⁸ Rationale and explanation accompanying the Proposal for amendments to the Energy Law, submitted by the Government to the Macedonian Parliament, and confirmed by the Reply to the Opening Letter

²⁹ Official Journal No.151, 15.10.2014

(28) As an exception to Article 82(1) of the Energy Law according to which all customers shall be deemed eligible, Article 18³⁰ of the amendments stipulates the categories of customers that shall remain captive, i.e. without the right to choose their supplier. Article 18 of the amendments reads:³¹

“Article 18

Article 197(1) is amended and reads:

As an exception to Article 82(1) of this Law, tariff customers are:

- (1) small customers of electricity, with electricity consumption over 1000 MWh in 2015, until June 30, 2016;*
- (2) small customers of electricity, with electricity consumption, more than 500 MWh in 2016, until June 30, 2017;*
- (3) small customers of electricity, with electricity consumption over 100 MWh in 2017, until June 30, 2018;*
- (4) small customers of electricity, with electricity consumption over 25 MWh in 2018, until June 30, 2019 and*
- (5) all households and other small customers of electricity, until June 30, 2020.”*

(29) In short, the amendments to the Energy Law deny eligibility to small non-household customers (defined as having below 50 employees and 10 million total annual revenue or total assets) and all household customers at the time of submission of this Reasoned Request, and envisage granting of that right only in accordance with the schedule described above, which for small non-household customers depends on the criterion of annual electricity consumption. All customers which are not being granted eligibility under this schedule, i.e non-household customers with a too low annual consumption and all households are considered captive and obliged to buy electricity from the incumbent tariff supplier.

(30) In December 2014, the Market Rules were also amended in order to reflect the changes in the primary legislation.³² Article 11 of the amendments to the Market Rules defines the timeline for granting eligibility to the small non-household customers and the households that corresponds to the timeline from Article 18 of the amendments to the Energy Law.

(31) The Government’s official reasoning behind these amendments was the protection of customers from price increases. According to the estimation of the Government accompanying the amendments, prices would have to increase for approximately 20,67% if all small customers could freely choose their supplier of electricity.

II. Relevant Energy Community Law

(32) Energy Community Law is defined in Article 1 of the Rules of Procedure for Dispute Settlement under the Treaty (“Dispute Settlement Procedures”)³³ as “a Treaty obligation or [...] a Decision addressed to [a Party]”. A violation of Energy Community Law occurs if “[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law” (Article 2(1) Dispute Settlement Procedures).

³⁰ amends Article 197(1) of the existing Energy Law of 2011

³¹ Translation of Article 18 of the amendments to the Energy Law of October 2014 provided by the Secretariat

³² Energy Regulatory Commission, Amendments to the Market Rules, 01- 2818/1, 23.12.2014

³³ Procedural Act No 2008/01/MC-EnC of 27 June 2008

(33) Article 6 of the Treaty reads:

The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

(34) Article 10 of the Treaty reads:

*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.*

(35) Article 11 of the Treaty reads:³⁴

The "acquis communautaire on energy", for the purpose of this Treaty, shall mean (i) the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity [...]

(36) Article 24 of the Treaty reads:

*For the implementation of [...] Title [II], the Energy Community shall adopt Measures adapting the *acquis communautaire* described in this Title, taking into account both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties.*

(37) Article 94 of the Treaty reads:

*The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.*

(38) Annex I to the Energy Community Treaty reads:³⁵

2. Each Contracting Party must ensure that the eligible customers within the meaning of the European Community Directives 2003/54/EC and 2003/55/EC are: from 1 January 2008, all non-household customers;

from 1 January 2015, all customers.

(39) Annex I to the Energy Community Treaty reads:³⁶

List of acts included in the "acquis communautaire on energy:"

³⁴ Article 11 EnCT has been amended by Decision of the Ministerial Council of the Energy Community D/2011/02/MC-EnC and it introduces an obligation for the Contracting Parties to adopt Directive 2009/72/EC and Regulation (EC) No714/2009 by 1 January 2015. By then, the Contracting Parties have to comply with Directive 2003/54/EC and Regulation (EC) No 1228/2003

³⁵ Annex I of the Treaty before the amendments of the Treaty with Ministerial Council Decision D/2011/02/MC-EnC. This text is relevant as a specific reference to the obligations undertaken by former Yugoslav Republic of Macedonia regarding market opening with signing the Energy Community Treaty

³⁶ Amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

- (40) Article 2 of Directive 2009/72/EC as adapted by Ministerial Council Decision 2011/02/MC-EnC (“Definitions”) reads:

For the purposes of this Directive, the following definitions apply:

‘household customer’ means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities;

‘non-household customer’ means a natural or legal persons purchasing electricity which is not for their own household use and includes producers and wholesale customers;

‘eligible customer’ means a customer who is free to purchase electricity from the supplier of his choice within the meaning of Article 33.

- (41) Article 3(3) of Directive 2009/72/EC as adapted by Ministerial Council Decision 2011/02/MC-EnC (“Public service obligations and customer protection”) reads:

3. Contracting Parties shall ensure that all household customers, and, where Contracting Parties deem it appropriate, small enterprises, (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices To ensure the provision of universal service, Contracting Parties States may appoint a supplier of last resort. Contracting Parties shall impose on distribution companies an obligation to connect customers to their grid under terms, conditions and tariffs set in accordance with the procedure laid down in Article 23(2). Nothing in this Directive shall prevent Contracting Parties from strengthening the market position of the domestic, small and medium-sized customers by promoting the possibilities of voluntary aggregation of representation for this class of customers.

The first subparagraph shall be implemented in a transparent and non-discriminatory way and shall not impede the opening of the market provided for in Article 33.

- (42) Article 33(1) of Directive 2009/72/EC as adapted by Ministerial Council Decision 2011/02/MC-EnC (“Market opening and reciprocity”) reads:

1. Contracting Parties shall ensure that the eligible customers comprise:

...

(b) from 1 July 2008, at the latest, all non-household customers;

(c) from 1 July 2015, all customers.

- (43) Article 2(2) of the Dispute Settlement Procedures reads:

Failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party (central, regional or local as well as legislative, administrative or judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable.

III. Preliminary Procedure

- (44) According to Article 90 of the Treaty, the Secretariat may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. Pursuant to Article 10 of the Dispute Settlement Procedures, the Secretariat shall carry out a preliminary procedure before submitting a reasoned request to the Ministerial Council.
- (45) In October 2014, the Secretariat has been informed about the draft amendments to the Macedonian Energy Law. In a letter sent to the Minister of Economy dated 10 October 2014,³⁷ the Secretariat pointed out that the amendments would effectively postpone the electricity market opening to 2020 and that, in the event the amendments be adopted, the former Yugoslav Republic of Macedonia would be in breach of Energy Community law, in particular the eligibility rules and the rules on the opening of the electricity markets as provided for by Directive 2009/72/EC.
- (46) The Macedonian authorities did not respond to the Secretariat's concerns. Following a fast track parliamentary procedure, the amendments to the Energy Law were adopted by Parliament on 13 October 2014 as described above.³⁸
- (47) Subsequently, the Secretariat initiated proceedings under Article 90 of the Treaty by way of an Opening Letter under Article 12 of the Dispute Settlement Procedures sent on 30 January 2015.³⁹ In the Opening Letter, the Secretariat preliminarily concluded that the former Yugoslav Republic of Macedonia failed to comply with Article 33 of the Directive 2009/72/EC read in conjunction with Annex I of the Treaty by depriving small customers and household customers of their right to purchase electricity directly from the supplier of their choice and by making eligibility dependent on electricity consumption.
- (48) By a letter dated 3 April 2015, the Ministry of Economy, on behalf of the Government of the former Yugoslav Republic of Macedonia, replied to the Opening Letter, contesting the Secretariat's position that the amendments to the Law on Energy was in breach of Energy Community law and offering "justifications."⁴⁰ In the view of the Secretariat, none of them justified the breach of Article 33 of Directive 2009/72/EC.
- (49) Therefore, the Secretariat submitted a Reasoned Opinion to the former Yugoslav Republic of Macedonia under Article 13 of the Dispute Settlement Procedures on 27 April 2015.⁴¹
- (50) In the Reply to the Reasoned Opinion sent by the former Yugoslav Republic of Macedonia by a letter of 8 July 2015,⁴² the Ministry of Economy again did not dispute the facts established by the Secretariat nor contest the conclusions related to the amendments' non-compliance with Energy Community law. The Government reiterated only some of the arguments already made in the Reply to the Opening Letter.
- (51) As no further legislative developments of relevance occurred, the amendments to the Energy Law from October 2014 remained and are still in force. Therefore, the Secretariat considers the legal assessment and the conclusions of the Reasoned Opinion still valid. For this reason, the Secretariat decided to refer this case to the Ministerial Council for its Decision.

³⁷ ANNEX 2

³⁸ ANNEX 3. Official Gazette No 151/14

³⁹ ANNEX 4

⁴⁰ ANNEX 5

⁴¹ ANNEX 6

⁴² ANNEX 7

V. Legal Assessment

- (52) As a point of departure, the Secretariat notes that the Dispute Settlement Procedures adopted by the Ministerial Council in 2008 have been amended in October 2015.⁴³ Pursuant to Article 46(2) of the Procedural Act of 2015 amending the Dispute Settlement Procedures, however, „[c]ases initiated already before 16 October 2015 shall be dealt with in accordance with the Procedural Act applicable before the amendments adopted on that date.“
- (53) The Secretariat thus submits that the present Reasoned Request is being decided by the Ministerial Council under the Dispute Settlement Procedures of 2008.
- (54) The present Reasoned Request addresses the failure of the former Yugoslav Republic of Macedonia to comply with its obligations related to the opening of the electricity market stemming from Article 33 Directive 2009/72/EC as adapted by Ministerial Council Decision 2011/02/MC-EnC. Following the amendments adopted in 2014, the Energy Law currently in place falls short of ensuring eligibility of all customers as required by Energy Community law.

a. Violation of Article 33(1) of Directive 2009/72/EC

- (55) Open electricity markets are of principal importance for the achievement of the objectives of the internal energy market and the Treaty establishing the Energy Community. The obligation to open the electricity markets, as stipulated by Article 33 Directive 2009/72/EC and adapted by Ministerial Council Decision 2011/02/MC-EnC means that the Contracting Parties must grant electricity customers eligibility within certain time periods. Eligibility, as defined by Article 2(12) of Directive 2009/72/EC, is the right to freely choose electricity supplier from domestic or non-domestic sources.
- (56) The obligation for market opening is not a new requirement introduced only with the Third Energy Package. In fact, the date for complete market opening was set already back in 2006 in the Energy Community Treaty itself. Annex I to the Treaty, before being amended in 2011⁴⁴ adapted the deadlines stipulated in Article 21(1)b) and c) of Directive EC/2003/54,⁴⁵ and required the Contracting Parties to ensure eligibility from 1 July 2008 for all non-household customers and from 1 July 2015 for all customers.
- (57) After the adoption of the Third Energy Package, the obligation for opening the electricity markets is stipulated in Article 33(1) of Directive EC/2009/72. Article 17 of Decision 2011/02/MC-EnC adapted the market opening deadlines of Directive EC/2009/72 in line with the *status quo ante*, i.e. 1 July 2008 for all non-household customers and 1 July 2015 for all customers.
- (58) As its predecessor which was binding on the former Yugoslav Republic of Macedonia already since the entry into force of the Treaty, Article 33 of Directive 2009/72/EC also requires the Contracting Parties to open their markets gradually. Article 33(1) of Directive 2009/72/EC stipulates that all non-household customers had to be given the status of eligible customers in the first phase, by 1 January 2008. In the second phase, as from 1 January 2015, all customers including households had to become eligible customers.
- (59) The Court of Justice of the European Union has affirmed that time limits prescribed within a Directive for implementing certain provisions of that Directive are of special importance “*since the*

⁴³ PA/2015/04/MC-EnC of 16 October 2015 amended Procedural Act No 2008/01/MC-EnC of 27 June 2008

⁴⁴ Article 1(2) Ministerial Council Decision D/2011/02/MC-EnC.

⁴⁵ Article 21(1)b) and c) of Directive EC/2003/54 required Member States to ensure eligibility as from 1 July 2004 for all non-household customers and from 1 July 2007 for all customers

*implementing measures are left to the discretion of the Member States and would be ineffective if the desired aims are not achieved with the prescribed time-limits”.*⁴⁶

- (60) As they postpone the full opening of the electricity market in the former Yugoslav Republic of Macedonia until July 2020, the amendments to the Energy Law of October 2014 do precisely lead to such a result for the eligibility to be granted to both non-household and household customers.

aa. Non-household customers

- (61) Article 33(1) of Directive 2009/72/EC required the opening of the market to all non-household customers by 1 January 2008. According to Article 2(11) of Directive 2009/72/EC, the notion of non-household customers encompasses all “*natural or legal persons purchasing electricity which is not for their own household use and shall include producers and wholesale customers*”.
- (62) According to Article 18 of the amendments to the Energy Law, small non-household customers with electricity consumption over 1000 MWh in 2015 will become eligible after 30 June 2016, while the ones with lower consumption (of over 500 MWh, 100 MWh and 25 MWh) would become eligible after 30 June 2017, 2018 and 2019 respectively. All other small non-household customers with consumption below 25 MWh will become eligible only in July 2020. Until then, they are considered captive and obliged to buy electricity from their incumbent suppliers, one of the two suppliers for tariff customers.
- (63) The Secretariat respectfully submits that the provisions of Article 18 of the amendments are not in line with the Directive 2009/72/EC. According to the amendments, only those non-household customers that are not considered *small* (enterprises with more than 50 occupied persons and an annual income or assets exceeding EUR 10 million) retain their eligibility status gained with the adoption of the secondary legislation under the Energy Law from 2011, and spelt out by the several amendments to the Market Rules as described above. For the rest of the non-household customers, eligibility is denied and postponed to sometime during a period between July 2016 and 2020, depending on their consumption level. Article 33 of the Directive, by contrast, obliges Contracting Parties to ensure that all non-household customers become eligible as from 1 January 2008 without giving the possibility to Contracting Parties to postpone granting of eligibility for any category of non-household customers beyond this date. That means that both “large” and small non-household customers had to be granted eligibility as of 2008.
- (64) Hence, after the amendments to the Law all (small) non-household customers in the former Yugoslav Republic of Macedonia are explicitly not eligible within the meaning of Article 2(12) of Directive 2009/72/EC any longer, even though they were initially granted that right as from 1 July 2008. To further postpone the date(s) for granting the categories of non-household customers concerned eligibility in 2014 for not less than (up to) six years constitutes a clear breach of Article 33(1)(b) of Directive 2009/72/EC.

bb. Household customers

- (65) Article 33(1)(c) of Directive 2009/72/EC required the opening of the market to all customers (including households) by 1 January 2015. A household customer is defined by Article 2(10) of the Directive 2009/72/EC as “*customer purchasing electricity for his own household consumption, excluding commercial or professional activities.*”

⁴⁶ Case C-52/75 *Commission v Italy*, [1976] ECR 277, paragraph 10

- (66) Article 18 of the amendments stipulates that all household customers must continue to be supplied as “tariff customers” (i.e. without the right to choose their supplier) until July 2020.
- (67) Therefore, the amendments to the Energy Law of 2014 postpone eligibility to household customers beyond the deadline of 1 January 2015 by another 6 years. This constitutes a violation of Article 33(1)(c) of Directive 2009/72/EC.

cc. Conclusion

- (68) In conclusion, the Secretariat submits that the former Yugoslav Republic of Macedonia violates Article 33(1) of Directive 2009/72/EC as adapted by Ministerial Council Decision 2011/02/MC-EnC by withdrawing the eligibility right and making it unlawful for certain categories of non-household customers and all household customers to choose their electricity supplier by the dates set by this provision.
- (69) During the preliminary procedure, the Government asserted that the “*right of every consumer of electricity to choose the supplier ... remains guaranteed for the consumers with the amendments to the Energy Law*” and that the Government “did not give up on the market opening”⁴⁷ without sustaining this claim further except with a vague reference to “*the Constitution and law*”.⁴⁸
- (70) At the same time, the Government also acknowledges that the right of eligibility was effectively postponed by the amendments of 2014 (“*This right during the next period will realize the consumers under a dynamics established by the amendments to the Energy Law*”)⁴⁹ (“*In no part of the Law on Amending the Energy Law is mentioned that the electricity market will not be liberalized, but it is done by certain time dynamics...*”).⁵⁰
- (71) The Secretariat concludes that the conditions on which the eligibility status is being made dependent by Article 18 of the amendments to the Energy Law, namely extended deadlines and the level of electricity consumption, are not in compliance with the concept of market opening under Article 33(1) of Directive 2009/72/EC. According to that provision, the only legitimate condition to be fulfilled by an eligible customer is the expiry of the deadline set in Article 33(1)(b) and (c) of Directive 2009/72/EC.

b. Justifications submitted by the Government for postponing electricity market opening

- (72) In the Reply to the Opening Letter, the Government submitted several reasons for postponing of the electricity market opening. In the Reply to the Reasoned Opinion, the Government only challenged the Secretariat’s assessment of its “justifications” brought up earlier.
- (73) Before addressing these “justifications”, the Secretariat underlines that Article 33 of Directive 2009/72/EC contains a clear and unconditional obligation which does not allow for either exemptions or postponements. The following discussion of the arguments brought forward by the Government during the preliminary procedure are thus of relevance only in case and to the extent the Ministerial Council would disagree with the non-conditionality of Article 33 of Directive 2009/72/ EC.

aa. Public service obligations and universal service

⁴⁷ Point 11 of the Reply to the Reasoned Opinion

⁴⁸ Page 5 of the Reply to the Opening Letter

⁴⁹ Page 5 of the Reply to the Opening Letter

⁵⁰ Point 8 of the Reply to the Reasoned Opinion

- (74) With regard to the possibility of justifying breaches of Article 33 of Directive 2009/72/EC by recurrence to public service obligations, the Secretariat notes that Article 3 of Directive 2009/72/EC, the provision allowing for the imposition of public service obligations and requiring the maintenance of a universal service, explicitly prohibits implementation in a way which would impede the opening of the market provided for in Article 33.⁵¹ Since the former Yugoslav Republic of Macedonia formally denied eligibility to a large part of non-household customers and all household customers contrary to the obligation of Article 33 of the Directive, it cannot rely on Article 3(3) of Directive 2009/72/EC. Moreover, justification under Article 3 of Directive 2009/72/EC is explicitly excluded by Article 3(14) of that Directive which does not refer to Article 33 when allowing for non-application of certain provisions of the Directive.
- (75) That said, the Secretariat has pointed during the preliminary procedure that designing a public service obligation in line with the Energy Community *acquis* could be used as an alternative to, rather than a justification for, denying customers the right to choose their supplier. The Secretariat urged the former Yugoslav Republic of Macedonia to re-establish compliance by amending the Energy Law while designing an appropriate public service obligation, in line with Article 3 of Directive 2009/72/EC and the Treaty,⁵² which would address the social and macro-economic concerns expressed by the Government in its Reply such as protecting customers from price increases.

bb. Protection of household customers from price increases

- (76) During the preliminary procedure, the Government justified the postponement of the opening of the market for over 12 years beyond the deadlines set in the *acquis* by a risk of “possible drastic increase of the prices of electricity for the households”,⁵³ “[t]he only motive for amending the Energy Law is to protect the households of the Republic of Macedonia from the substantial increase in prices of electricity at full opening of the electricity market.”⁵⁴
- (77) In the Government’s view, denying small and medium non-household customers as well as household customers the right to choose and switch their supplier over a significant period of time exceeding the deadlines granted by the Energy Community Treaty is thus to be considered acceptable because it would allow for a prolongation of the current regime of cross-subsidisation between two categories of regulated prices, the very low prices for households and the (relatively) higher prices for non-households: “Consumers in Republic of Macedonia that fall into the category of households buy electricity at prices previously approved by the Energy Regulatory Commission that are relatively lower than prices in Europe and the region indicating the existence of cross-subsidization which by simultaneous and full opening of the market would cause shocks impact to the households.”⁵⁵ The Government is evidently afraid that this system may collapse if a large number of commercial (non-household) customers were to change the incumbent supplier and be supplied on the open market: “[I]t appears that a significant number of large customers (primarily the industrial and commercial sector) would have made a selection of supplier with electricity.”⁵⁶
- (78) In the Secretariat’s view, denial of eligibility within the meaning of Article 33(1)(b) and (c) of Directive 2009/72/EC as a means to protect a scheme which is based, on the one hand, on statutory sales and purchase obligations in the chain between the incumbent generation

⁵¹ See last subparagraph of Article 3(3) Directive 2009/72/EC

⁵² Article 3(1) Directive 2009/72. See Annex I and Annex III (Section III.a.b in Opening Letter)

⁵³ Page 2 of the Reply to the Opening Letter

⁵⁴ Point 1 of the Reply to the Reasoned Opinion

⁵⁵ Page 5 of the Reply to the Opening Letter

⁵⁶ Point 1 of the Reply to the Reasoned Opinion

company, *ELEM*, the dominant supplier of tariff customers and supplier of last resort, *EVN Makedonija*, and the majority of customers and, on the other hand, on the permanent and comprehensive regulation of energy prices (including the (wholesale) price of generation and the (retail) supply price) requiring cross-subsidization instead of being cost-reflective, is neither legitimate, suitable nor proportionate to the objective pursued.

- (79) Firstly, the compliance with Energy Community law of the scheme the Government wants to protect is, in itself, highly doubtful under the case law of the Court of Justice.⁵⁷ According to the Court, former Yugoslav Republic of Macedonia was allowed to assess whether “*it is necessary to impose on undertakings operating in the [electricity] sector public service obligations in order, in particular, to ensure that the price of the supply of [electricity] to final consumers is maintained at a reasonable level.*”⁵⁸ The assessment should also verify that the intervention would be imposed in general interest, that it complies with the principle of proportionality as well as that the criteria from Article 3(2) Directive 2003/54/EC are fulfilled (the obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity companies to national consumers, as required by Article 3(2) Directive 2003/54/EC.)⁵⁹
- (80) Secondly, the Secretariat recalls that the Government has provided no evidence⁶⁰ for its presumption that granting the right to choose the supplier would lead to an immediate switching of a large number of non-household customers to alternative suppliers, and that such switching would have the suspected effect of a “price shock” on household customers. The Government has made only a vague reference to an analysis that shows such result, but despite the fact that it is incumbent on the Party that brings such an argument to substantiate it, the Government has failed to do so.
- (81) Thirdly, the experience in all other Contracting Parties which have introduced full eligibility within the meaning of Article 33 of Directive 2009/72/EC shows that they have not experienced “price shocks” on the household customers. In fact, full opening of the market and granting eligibility of all customers including households in other Contracting Parties,⁶¹ has been coupled with a plan for reaching cost-reflectivity of regulated prices and a timeline for their eventual deregulation.
- (82) Fourthly, the Government seems to ignore that Contracting Parties can avail themselves of the possibility to impose public service obligations – including regulation of retail prices for non-household and household customers as part of universal service – on suppliers within the margin set by Article 3(2) and (3) as well as the case law of the Court of Justice cited above. These options can be used to cushion any abrupt price increases in a manner compliant with the Treaty rather than depriving Macedonian customers from the rights granted to them under the Treaty.
- (83) Fifthly, the Secretariat recalls that Directive 2009/72/EC addresses the social problems of the kind expected by the Government through targeted support to be granted to vulnerable customers to be defined in accordance with Article 3 of Directive 2009/72/EC. Energy Community

⁵⁷ Case C-265/08, *Federutility and others v Autorità per l'energia elettrica e il gas* [2010] ECR I-000 paragraphs 25- 47.

⁵⁸ Case C-265/08, *Federutility*, paragraph 32

⁵⁹ Article 3(2) Directive 2003/54/EC

⁶⁰ See also point 66 in the Reasoned Opinion

⁶¹ See for example Article 397 Serbian Energy Law, “Official Gazette of the RS”, No. 145/2014 that reads: „An energy entity that on the date of coming into force of this Law holds the license for performing the activity of public electricity supply shall continue to supply households and small customers at regulated prices, [...], with rights and obligations of a guaranteed supplier, until the appointment of the guaranteed supplier under Article 190 hereof.

Until 1 May 2017, the Agency shall publish the first report on the need for further regulation of prices [...].”

law thus explicitly allows for a “*protection of the social category from excessive price increases*”.⁶² By depriving customers of their right to eligibility, however, the former Yugoslav Republic of Macedonia has chosen measures which are also not proportionate to achieve the goal of social protection, as they apply in an undifferentiated manner to those who are socially vulnerable and those who are not.

- (84) Finally, the Secretariat would like to point out that it was the Government and the *ERC* which created the purported problem of an abrupt price increase for small non-household and household customers in case of compliance with the Treaty’s deadlines by years of inertia in terms of deregulation of prices before and after the Treaty entered into force. In the Reply, the Government concedes that the (regulated) prices at which households buy electricity are “*relatively lower than prices in Europe and the region.*” The price level in the former Yugoslav Republic of Macedonia is artificially low⁶³ precisely because of the reason that the institutions in charge kept on delaying any serious price reform.

cc. Ensuring security of supply

- (85) During the preliminary procedure, the Government also seemed to allege that compliance with Article 33 of Directive 2009/72/EC could jeopardize the security of energy supply in the former Yugoslav Republic of Macedonia. This concern is essentially based on the fear that financial losses incurred by the incumbent supplier of tariff customers⁶⁴ (in the future: the supplier of last resort, in both cases the company *EVM*) would also affect the liquidity of other key market participants, namely the state-owned companies *ELEM* and *MEPSO*: “*Therefore, in the chain of supply of electricity is not only the liquidity of one provider, that is, supplier for tariff consumers, but also for the other participants.*”⁶⁵ The Government thus assumes that postponement of market opening was necessary in order to avoid the disruption of the liquidity of “*most of the electricity energy sector*” which ultimately would jeopardize security of supply, including the security of investments.
- (86) The Secretariat notes that this line of argumentation is also reflected in the Explanatory Notes to the draft Energy Law. They read on page 3 of Part I:

⁶² Page 7 of the Reply to the Opening Letter

⁶³ Ministry of Economy of the Republic of Macedonia, Strategy for energy development in the Republic of Macedonia until 2030 (2010), p. 13

Eurostat, Statistics explained (2015), ec.europa.eu/eurostat/statistics-explained/index.php/Energy_price_statistics;

International Monetary Fund, *Former Yugoslav Republic of Macedonia: Selected Issues* (2009), IMF Country Report No 09/61, p. 31

⁶⁴ According to Article 197(5) Energy Law, the electricity supply for captive customers should have been terminated as from 1 January 2015. Afterwards, suppliers of last resort should provide a public service of electricity supply to households or small customers in cases stipulated in the Energy Law, Article 3 Energy Law of 2011, and a procedure under which households or small customers can obtain the right to be supplied by the electricity supplier of last resort (according to Article 28 of the Energy Law of 2011 the Energy Regulatory Commission is in charge of adopting the Rules on Electricity Supply of Last Resort for Households and Small Consumers). In essence however, the suppliers of last resort are to be the suppliers that have been issued licenses on electricity supply to captive consumers prior to the day when the present law enters into effect. Only the commencement of operation as suppliers of last resort was linked with date for market opening for small customers, and was defined by Article 202 Energy Law 2011, as well as with the ERC Rules for Supply with Electricity as a Last Resort, Official Journal No. 144, 15.11.2012 as amended last time on 27.11.2014. These Rules, according to the last amendments shall be applied as from 1 July 2016

⁶⁵ Point 3 of the Reply to the Reasoned Opinion

“The chosen model in the draft Law allows phased increase of the prices for the households as well as avoiding disruption of the liquidity of the supplier of last resort. In case the supplier has no liquidity, it would not be able to comply with the payment obligations towards AD ELEM and AD MEPSO, which would lead to disruption of security of supply.”

- (87) The Secretariat acknowledges that security of supply may constitute a legitimate reason of public interest which in principle can justify derogations from certain rules and principles of Energy Community law, to the extent they allow for such derogation.⁶⁶ Due to its clear and unconditional character, however, Article 33 of Directive 2009/72/EC does not fall within that category of norms. In order to address possible security of supply concerns, the competent authorities in the former Yugoslav Republic of Macedonia should have imposed public service obligations on undertakings operating in the electricity sector under Article 3(2) of the Directive which explicitly refers to security of supply.
- (88) The Secretariat submits that in any event, the measure actually taken by the legislature of the former Yugoslav Republic of Macedonia, namely the refusal by law to grant its customers the right to choose their supplier, cannot be justified by reference to security of energy supply. Both the Explanatory Notes as well as the Government’s explanations confirm that the objective of the amendments to the Energy Law was to protect the liquidity of a system (and its protagonists) which is based on a design not in line with the market model pursued by the Energy Community Treaty. The latter requires full deregulation of prices at wholesale level and retail price regulation only within the scope of a public service obligation compliant with Article 3 of Directive 2009/72/EC. This measure is essentially protectionist in nature as it has the effect of shielding the incumbent companies from any actual or potential competition by prolonging their legal or factual monopolies for a significant period of time. In the Secretariat’s view, it is rather the continued foreclosure of the market in the former Yugoslav Republic of Macedonia, in combination with prices regulated below market prices, which jeopardizes security of supply. This system makes the entire electricity system of the country dependent on the liquidity of three companies, while constantly decreasing their liquidity.
- (89) The Secretariat thus submits that even in case the liquidity of the incumbent companies was indeed at risk by granting eligibility to all customers, this problem should be addressed by deregulating prices or reviewing the level of regulated prices. In addition, *ERC* has the competence and the means necessary to continuously monitor the development of the market as well as security of the supply, and take measures against any malfunctioning or abuse if needed.
- (90) To the extent the Government suggests that the collection rates will be further decreased as a consequence of rising electricity prices,⁶⁷ which again would lead to reducing the liquidity of the incumbents and would represent a risk for security of supply, the Secretariat points out that postponing market opening does not constitute an adequate measure to keep collection rates stable. On the contrary, granting customers the right to choose a supplier based on competition, coupled with measures aimed to improve payment discipline would be more appropriate to achieve this aim.

⁶⁶ Case 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] ECR 2727, paragraphs 34- 35 and 44- 51; Case 503/99 *Commission v Belgium* [2002] ECR I-4809, paragraphs 43 -55; EFTA Court, Case E-2/06 [2007], paragraph 79

⁶⁷ Page 2 of the Reply to the Opening Letter

- (91) Finally, the Government argues that postponing market opening is necessary due to the fact that “*there is no regional electricity market and transparent price indication.*”⁶⁸
- (92) In this respect, the Secretariat submits that national barriers for participating in an emerging market need to be removed for regional and national markets to become sufficiently liquid. Denying customers the right to choose their supplier contradicts that objective. The amendments to the Energy Law, on the one hand, prevent the Macedonian customers from being supplied by suppliers established in other Parties to the Treaty. On the other hand, they deprive foreign suppliers the access to the Macedonian customers which in turn prevents the regional integration of the electricity markets.
- (93) With regard to the argument that the region lacks a transparent price indication, the Secretariat submits that although there is not one regional power exchange, several organized markets are functioning in the neighboring Community Contracting Parties and EU Member States. The Greek organized market, Hungarian HUPLEX, Romanian OPCOM as well as the recently launched Bulgarian IBEX and Serbian SEEPLEX are delivering such price signals, and those are also used by the suppliers and traders on the Macedonian market for wholesale supply and supply of electricity to the eligible customers. Since a large number of Macedonian customers are already eligible, the Secretariat cannot accept the argument that postponing market opening for the remaining small non-household household customers is necessary due to the lack of transparent price formation or a reference price.

dd. Article 24 of the Treaty

- (94) During the preliminary procedure, the Government also invoked Article 24 of the Treaty as a justification for the postponement of market opening under Article 33 of Directive 2009/72/EC.
- (95) Accordingly, any compliance assessment should take into account the country’s specific situation.⁶⁹ According to the Government, this alleged “specific situation” results mainly from the kind of purported problems described at point a. above. In other words, the Government seems to believe that market opening in the former Yugoslav Republic of Macedonia is unacceptable for socio-economic reasons and that a “*special situation*” in this respect may give rise to a derogation from the obligations stemming from Article 33 of Directive 2009/72/EC.
- (96) In the Secretariat’s view, the Government is wrong on both accounts.
- (97) Firstly, the Secretariat disputes that the Macedonian situation described by the Government is indeed a special one when comparing to the Contracting Parties in general and countries in South East Europe in particular. The Contracting Parties from South East Europe share a number of similarities, including low employment rates and similar average salaries.⁷⁰ As a recent IMF Report underlines, “*it is the incomplete reform process [in the Western Balkans] that is holding back convergence to income levels of richer European Union economies.*”⁷¹
- (98) Secondly, the Secretariat already argued above that the delay of granting the eligibility right under Article 33 of Directive 2009/72/EC by reference to alleged social problems cannot be justified within the general framework established by that Directive. This assessment is not

⁶⁸ Page 6 of the Reply to the Opening Letter

⁶⁹ Page 3 of the Reply to the Opening Letter

⁷⁰ The average ratio of employed persons to the working-age population in these countries was 46% in 2012, compared with 64% in the euro area and 63% among the new EU Member States. See IMF Working Paper, *Boosting Job Growth in the Western Balkans*, 14/16, January 2014, pages 4 and 15

⁷¹ IMF Report, *The Western Balkans: 15 Years of Economic Transition*, March 2015

called into question by Article 24 of the Treaty. That provision cannot justify the failure of a Contracting Party to grant eligibility to all its electricity customers.

- (99) Article 24 of the Treaty indeed envisages the possibility of adopting “*measures adapting the acquis communautaire [...] taking into account [...] the specific situation of each of the Contracting Parties*” when incorporating the EU *acquis* to be made binding upon Contracting Parties under Title II of the Treaty. However, this provision is not directly applicable, as it depends on two initiatives, namely (i) a proposal to that effect by the European Commission which holds an exclusive right of initiative in that respect (Article 79 of the Treaty) and (ii) a decision taken by the Ministerial Council. In other words, Article 24 of the Treaty provides a legal basis, not a self-executive legal norm.
- (100) The appropriate point in time to adapt Directive 2009/72/EC in a way which would accommodate the Government’s expectations would have been the incorporation of that Directive by the Ministerial Council’s Decision 2011/02/MC-EnC of 6 October 2011. However, neither did the European Commission propose nor did the Ministerial Council adopt any adaptations to Article 33 of Directive 2009/72/EC other than amending the dates “1 July 2004” to read “1 January 2008” and “1 July 2007” to read “1 January 2015,” and stipulating that those dates shall apply “*without prejudice to special deadlines agreed in the Protocols of Accession to the Energy Community*”.⁷² In particular, the Government of the former Yugoslav Republic of Macedonia did not avail itself of its right to suggest changes to the European Commission’s proposal and did not vote against Decision 2011/02/MC-EnC at the Ministerial Council’s meeting. As a result, the country is bound by Article 33 of Directive 2009/32/EC as any other Contracting Party. And even before the adoption of Directive 2009/72/EC, i.e. when the Treaty was negotiated, signed and ratified, the former Yugoslav Republic of Macedonia fully accepted the obligations stemming from the Energy Community *acquis*, including those stipulated in Annex I of the Treaty and in particular the explicit reference to market opening already contained in the original version of that Annex.
- (101) Finally, the Government also makes reference to the Report of the High Level Reflection Group of May 2014.⁷³ That Report indeed reads:
- “More flexibility should be allowed in the scope and time of the adaptation of the acquis taking into account that the situation of the Contracting Parties may differ in many aspects which are key for implementation (e.g. social conditions, existing or missing links to EU transmission grids, existing or missing gas pipelines, different country sizes, different technical standards etc.)”*⁷⁴
- (102) As long as none of the proposals made by this Report have been taken up and implemented by the competent institutions of the Energy Community, this appraisal cannot change the legal assessment of the case at hand.
- ee. The relevance of EU Member States and other Contracting Parties purported failure to comply*
- (103) The Government, during the preliminary procedure, also tried to justify its failure to implement Article 33 of Directive 2009/72/EC by claiming that the deadlines related to the implementation

⁷² Article 17 Ministerial Council’s Decision [2011/02/MC-EnC](#) of 6 October 2011. So far, there has not been any special deadline different than the 2008 and 2015 deadlines for market opening

⁷³ Page 5 of the Reply to the Opening Letter

⁷⁴ The High Level Reflection Group of the Energy Community, “*An Energy Community for the Future*,” 2014, p. 13

of certain rules for liberalizing the electricity markets are not respected even by some EU Member States.⁷⁵

- (104) Firstly, the Secretariat notes that the Government failed to identify any particular case of another Contracting Party or Member State to implement Article 33(1)(b) and (c) of Directive 2009/72/EC.
- (105) Secondly, settled case law suggests that any delays on the part of a Member State or Contracting Party in performing obligations stemming from a directive may not be invoked by another Member State or Contracting Party to justify its own, even temporary, failure to perform its obligations.⁷⁶
- (106) Therefore, unilaterally changing the time limits set out in Article 33 of the Directive 2009/72/EC by the former Yugoslav Republic of Macedonia cannot be justified on the basis of other Contracting Parties' or EU Member States' alleged failure to comply with the same provisions.

ff. The principles of subsidiarity and proportionality

- (107) The Government has also invoked the principles of subsidiarity and proportionality in order to justify its breach of Article 33 of Directive 2009/72/EC.⁷⁷ Without specifying how it interprets these principles any further, the Government seems to infer from them the right to apply the Energy Community *acquis* according to its own "possibilities". In the Reply to the Reasoned Opinion, the Government submits that "*the overall objective of the principle of subsidiarity and proportionality is to provide the right of Member States to take certain measures.*"⁷⁸
- (108) The principle of subsidiarity is explicitly spelt out and defined in Article 5(3) of the EU Treaty.⁷⁹ The Energy Community Treaty does not copy that provision. Evidently, it is the prerogative of the former Yugoslav Republic of Macedonia to propose its inclusion by way of proposing amendments to the Treaty under its Article 100.
- (109) But even if a subsidiarity principle implicitly existed under Energy Community law, this principle would not limit the Energy Community's legislature's – the Ministerial Council – competence to adopt Decisions taking binding effect on Contracting Parties where such competence is established by the Treaty, and in particular incorporating rules already adopted within the EU under Title II of the Treaty such as Article 33 of Directive 2009/72/EC.
- (110) Moreover, the Government claims that "*the protection of the consumers from price shocks is exclusive issue of the Member State as they may have unforeseeable social consequences for the living standards of the citizens.*"⁸⁰ In this respect, the Government confuses the principle of subsidiarity with the possibilities for imposing public service obligations and measures of customer protection offered to Contracting Parties under Article 3 of Directive 2009/72/EC. As has been explained above, the former Yugoslav Republic of Macedonia did not avail itself of

⁷⁵ Page 6 of the Reply to the Opening Letter

⁷⁶ Case C-52/75 *Commission v Italy*, [1976] ECR 277, paragraph 11; Case C-327/98 *Commission v French Republic* [1999], paragraph 14; Case C-38/89 *Ministère public v Guy Blanguernon* [1990], paragraph 7; Case C-146/89 *Commission v United Kingdom* [1991] ECR 3533, paragraph 47

⁷⁷ Page 5 of the Reply to the Opening Letter

⁷⁸ Point 8 of the Reply to the Reasoned Opinion

⁷⁹ According to that principle, "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"

⁸⁰ Point 8 of the Reply to the Reasoned Opinion

these possibilities but instead chose to eliminate customers' right to eligibility, an option clearly exceeding what is legitimate under Article 3 of Directive 2009/72/EC.

- (111) As regards the principle of proportionality, the Government suggests that the amendments made to the Energy Law in 2014 are to be considered proportionate as they did not abandon market opening, i.e. granting customers the right of eligibility, completely and forever, but only for a certain period of time.⁸¹
- (112) The Secretariat indeed has already considered that the principle of proportionality is one of the basic principles of Energy Community Law.⁸² The principle of proportionality is of utmost importance when reconciling two conflicting policy objectives or determining the scope of an exemption to a general principle in a given legal system, to the extent that the system envisages such exemptions.
- (113) The Government's argument, by contrast, has nothing to do with the principle of proportionality as a legal principle as it essentially claims that a violation of rules binding under the Energy Community Treaty should be tolerated as the violation could have been even worse.
- (114) It is to be recalled, in that respect, that Directive 2009/73/EC does not envisage exemptions or the possibility for deferring the right to eligibility beyond the dates given there. The Government can also not invoke the principle of proportionality to replace and bypass the lack of adaptations made under Article 24 of the Treaty in the course of the legislative process.
- (115) If the principle of proportionality is to be applied at all in the present case, it would have required the former Yugoslav Republic of Macedonia to address the alleged problems persisting in the Macedonian energy sector by adequate public service obligations as suggested above, and not an outright denial of customers' eligibility rights.
- (116) In reality, the Government invokes both the principles of subsidiarity and proportionality in an unspecified manner to challenge the legally binding character of a rule of Energy Community law, Article 33 of 2009/72/EC. This attempt must be rejected as it calls into question the foundations of the Energy Community Treaty establishing a community subject to the rule of law.
- (117) The Secretariat respectfully submits that the former Yugoslav Republic of Macedonia was obliged under Article 33(1) of Directive 2009/72/EC to open the electricity market for all customers including households as from 1 January 2015. All customers without exception should have been granted the right to choose their supplier and all domestic and foreign suppliers of electricity should have been given the right to directly sell to all customers in the former Yugoslav Republic of Macedonia.
- (118) By depriving a large number of non-household customers and all household customers from exercising their right to purchase electricity directly from the supplier of their choice and by obliging them to continue purchasing electricity from the incumbent tariff supplier or supplier of last resort after 1 January 2015, the former Yugoslav Republic of Macedonia fails to comply with Article 33 Directive 2009/72/EC.

⁸¹ Point 11 of the Reply to the Reasoned Opinion

⁸² Case ECS-12/11 [2011], Opening Letter, p. 9

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully proposes that the Ministerial Council of the Energy Community declare in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community that

by failing to ensure that the customers eligible for the purchase of electricity from the supplier of their choice comprise all non-household and household customers, fails to comply with its obligations under Article 33(1) of Directive 2009/72/EC.

On behalf of the Secretariat of the Energy Community

Vienna, 13 May 2016

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač

Director

A handwritten signature in black ink, appearing to read "Dirk Buschle".

Dirk Buschle

Deputy Director/ Legal Counsel

List of Annexes

- ANNEX 1 Ministerial Council Decision D/2011/02/MC-EnC
- ANNEX 2 Letter by the Secretariat to the Minister of Economy dated 10 October 2014
- ANNEX 3 Law amending the Energy Law, Official Gazette No 151/14
- ANNEX 4 Opening Letter in Case ECS-2/15
- ANNEX 5 Reply to the Opening Letter by former Yugoslav Republic of Macedonia
- ANNEX 6 Reasoned Opinion in Case ECS-2/15
- ANNEX 7 Reply to the Reasoned Opinion by former Yugoslav Republic of Macedonia