

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

DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

D/2011/02/MC-EnC: Decision 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

The Ministerial Council of the Energy Community,

Having regard to the Treaty establishing the Energy Community ('the Treaty'), and in particular Articles 24, 25, 79 and 100(i) and (ii) thereof,

Having regard to the proposal from the European Commission,

Whereas:

1. Article 11 of the Treaty defines the '*acquis communautaire* on energy' as meaning: (i) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, (ii) Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and (iii) Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.
2. By Decision No 2007/06/MC-EnC of 18 December 2007, the Ministerial Council decided that the Contracting Parties were to implement Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks.
3. The above-mentioned pieces of European Union law have been amended and recast into four new acts and have been repealed with effect from 3 March 2011 and replaced by two new directives and two new regulations. It is appropriate to amend Article 11 of the Treaty accordingly.
4. The Energy Community should adapt its *acquis* on energy to the recent changes in the European Union law, taking into account its own institutional framework and the specific situation of each of its Contracting Parties.
5. By Recommendation No 2010/02/MC-EnC of 24 September 2010 on the implementation of amendments to the '*acquis communautaire* on energy', the Ministerial Council recommended that Contracting Parties should implement the *acquis* on energy defined in Article 11 of the Treaty, as amended and replaced by the above-mentioned pieces of European Union law.
6. With effect from 30 June 2011, the European Regulators Group for Electricity and Gas has ceased its activities, which have been taken over by the Agency for the Cooperation of Energy Regulators.
7. At its meetings on 29/06/2011 and 05/10/2011, the Permanent High Level Group finalised and endorsed this Decision,

HAS ADOPTED THIS DECISION:

Article 1

Amendments to Article 11 of the Energy Community Treaty ('The *acquis* on energy')

1. Article 11 of the Treaty establishing the Energy Community shall be replaced by the following text:

'The "acquis communautaire on energy", for the purpose of this Treaty, shall mean the acts listed in Annex I of this Treaty'.

2. Annex I shall be replaced by the following text:

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

(1) 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.

(2) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(3) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(4) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, as amended by Commission Decision 2010/685/EU of 10 November 2010, as adopted by Decision No 2011/02/MC-EnC of the Ministerial Council of 06/10/2011.

(5) Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, as adopted by Decision No 2007/06/MC-EnC of the Ministerial Council of 18/12/2007.

(6) Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, as adopted by Decision No 2007/06/MC-EnC of the Ministerial Council of 18/12/2007.'

Article 2

Amendments to the rules of the Energy Community Treaty relating to the Regulatory Board

The second sentence of Article 59 of the Treaty establishing the Energy Community shall be replaced by the following text:

'The European Union shall be represented by the European Commission, assisted by one regulator of each Participant, and one representative of the Agency for the Cooperation of Energy Regulators.'

Article 3

Implementation of the energy *acquis*

1. Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC, Directive 2009/73/EC, Regulation

(EC) No 714/2009 and Regulation (EC) No 715/2009, as adapted by this Decision, by 1 January 2015. They shall forthwith inform the Energy Community Secretariat thereof.

The Contracting Parties shall apply the measures referred to in the previous paragraph with effect from 1 January 2015 with the following exceptions:

- Article 11 of Directive 2009/72/EC, which they shall apply from 1 January 2017;
- Article 11 of Directive 2009/73/EC, which they shall apply from 1 January 2017.

2. The Contracting Parties shall communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by this Decision.

Article 4

General adaptations under Article 24 of the Energy Community Treaty

1. Save where otherwise stated in this Decision, the text of the acts referred to in Article 1 shall be adapted to the Energy Community as follows:

- (a) the term 'Member States' shall be replaced by 'Contracting Parties';¹
- (b) the term 'Community' shall be replaced by 'Energy Community';
- (c) references to EU law shall be replaced by references to the equivalent provisions under the Energy Community Treaty, if any, or shall not be applicable, as appropriate;
- (d) the term 'European Commission' shall be replaced by 'Energy Community Secretariat';
- (e) references to the Official Journal of the European Union shall be replaced by the expression 'a dedicated section of the website of the Energy Community';
- (f) references to the Agency for the Cooperation of Energy Regulators shall not be applicable;
- (g) references to the European Network for Transmission System Operators and to the establishment of network codes shall not be applicable;
- (h) references to the executive powers and reporting obligations of the European Commission under EU law shall not be applicable;
- (i) references to the Community-wide network development plan shall not be applicable;
- (j) the date '3 September 2009' shall read '6 October 2011'.

2. The adaptations referred to in Articles 5 to 24 of this Decision shall apply in addition to the adaptations referred to in paragraph 1 of this Article.

3. Points (f) and (g) of Article 4(1) are without prejudice to potential participation by the Energy Community Contracting Parties in the work of these organisations, in accordance with Article 31 of Regulation (EC) N° 713/2009 and with the statutes and rules of procedure of ENTSO-E and ENTSO-G.

¹ Republic of Serbia issued a reserve on this provision (in Annex).

Article 5

Ad hoc adaptations concerning definitions

1. In Article 2(26) and (27) of Directive 2009/72/EC, the year '1996' shall read '2006'.
2. In Article 2(g) of Regulation (EC) No 714/2009 and in Article 2(33) of Directive 2009/73/EC, the date '4 August 2003' shall read '1 July 2007'.

Article 6

Ad hoc adaptations concerning measures on consumer protection

1. Article 3(16) of Directive 2009/72/EC and Article 3(12) of Directive 2009/73/EC shall not be applicable. Article 26 of this Decision shall apply.
2. In the second paragraph of point 2 of Annex I to Directive 2009/72/EC and of Annex I to Directive 2009/73/EC, the date '3 September 2012' shall read '1 January 2014'.

Article 7

Ad hoc adaptations concerning regional cooperation

1. In Article 6(1) of Directive 2009/72/EC, the third and fourth sentences shall be replaced by the following: 'Such regional cooperation shall concern cooperation in the geographical area defined under Title III of the Treaty establishing the Energy Community. It may cover other geographical areas.'
2. In Article 7(1) of Directive 2009/73/EC, the third and fourth sentences shall not be applicable.
3. Article 12 of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009 shall not be applicable. Article 25 of this Decision shall apply.

Article 8

Ad hoc adaptations concerning transmission system operators

1. The dates referred to in Directive 2009/72/EC and in Directive 2009/73/EC shall be adapted as follows:
 - in Article 9(1), '3 March 2012' shall read '1 June 2016';
 - in Article 9(4), '3 March 2013' shall read '1 June 2017'.
2. In point 1.5 of Annex I to Regulation (EC) No 715/2009, the date '1 July 2006' shall read '1 January 2010'.

Article 9

Ad hoc adaptations concerning the certification of transmission system operators

1. In Article 3(1) of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009:
 - the period mentioned in the first subparagraph ('two months') shall read 'four months';
 - the second subparagraph shall read as follows: 'When preparing the opinion referred to in the first subparagraph, the Secretariat shall request the Energy Community Regulatory Board to provide its opinion on the national regulatory authority's decision.';
 - the last sentence of the second subparagraph shall not apply.
2. In Article 3(6) of Regulation (EC) No 714/2009 and of Regulation (EC) No 715/2009:

– the expression ‘the Commission shall take a decision’ shall read ‘the Secretariat shall issue an opinion’;

– the last sentence shall be replaced by the following three sentences: ‘The regulatory authority shall take the utmost account of that opinion. Where the final decision diverges from the Secretariat’s opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying its decision. Diverging decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion’.

Article 10

Ad hoc adaptations concerning certification in relation to third countries

1. When assessing whether granting certification will not put at risk the security of energy supply of the Energy Community (Article 11(3) of Directive 2009/72/EC and of Directive 2009/73/EC), the regulatory authority or other competent authority designated shall also take into account the rights and obligations resulting from association or trade agreements between the Contracting Party and the European Union.

2. When preparing its opinion under Article 11(6) of Directive 2009/72/EC and of Directive 2009/73/EC, the Secretariat shall request the views of the Energy Community Regulatory Board. When assessing the risk under Article 11(7) of the same Directives, the Secretariat shall also take account of the rights and obligations referred to in paragraph 1.

Article 11

Ad hoc adaptations concerning the independent system operator

In Article 13(1) of Directive 2009/72/EC and in Article 14(1) of Directive 2009/73/EC, the expression ‘approval by the Commission’ shall read ‘the opinion of the Energy Community Secretariat’.

Article 12

Ad hoc adaptations concerning the inter-transmission system operator compensation mechanism

1. The following provisions in Article 13 of Regulation (EC) No 714/2009 shall not be applicable:

– The second subparagraph of Article 13(3);

– Paragraph 4.

2. The Energy Community shall endeavour to adopt as soon as possible Commission Regulation (EU) No 774/2010 of 2 September 2010 on laying down guidelines relating to inter-transmission system operator compensation and a common regulatory approach to transmission charging.

Article 13

Ad hoc adaptations concerning the tasks of distribution system operators

In Article 25(5) of Directive 2009/72/EC, the date ‘1 January 2002’ shall read ‘1 January 2006’.

Article 14

Ad hoc adaptations concerning the unbundling of accounts

In Article 31(3) of Directive 2009/72/EC and of Directive 2009/73/EC, the date '1 July 2007' shall read '1 January 2015'.

Article 15

Ad hoc adaptations concerning access to storage facilities

In Article 33(3) of Directive 2009/73/EC, the date '1 January 2005' shall read '1 January 2007'.

Article 16

Ad hoc adaptations concerning new interconnectors and infrastructure

1. In Article 17 of Regulation (EC) No 714/2009:

- the term 'Agency' shall read 'Energy Community Regulatory Board' throughout the Article;
- the first part of Article 17(1)(e) shall read 'since 1 July 2007,'.

2. In Article 36 of Directive 2009/73/EC, the word 'Agency' shall read 'Energy Community Regulatory Board' throughout the Article.

3. In Article 36(9) of Directive 2009/73/EC and in Article 17(8) of Regulation (EC) No 714/2009:

- in the first subparagraph, the expressions 'the Commission may take a decision requiring' and 'the Commission may take a decision requesting' shall read 'the Secretariat may issue an opinion inviting';
- the third subparagraph shall read 'The notifying bodies shall take the utmost account of a Secretariat opinion that recommends to amend or withdraw the exemption decision. Where the final decision diverges from the Secretariat's opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying its decision. Diverging decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion';
- in the fifth subparagraph: (a) the expression 'Commission's approval of' shall read 'Secretariat's opinion on'; and (b) the expression 'Commission decides' shall read 'Secretariat considers'.

Article 17

Ad hoc adaptations concerning market opening and reciprocity

1. In Article 33(1) of Directive 2009/72/EC and in Article 37 of Directive 2009/73/EC:

- subparagraph (a) shall not be applicable;
- the date '1 July 2004' shall read '1 January 2008';
- the date '1 July 2007' shall read '1 January 2015'.

2. Paragraph 1 of this Article shall apply without prejudice to special deadlines agreed in the Protocols of Accession to the Energy Community.

Article 18

Ad hoc adaptations concerning the regulatory authorities

1. In Articles 36 and 37 of Directive 2009/72/EC, 40 and 41 of Directive 2009/73/EC, 19 of Regulation (EC) No 714/2009 and 24 of Regulation (EC) No 715/2009, the term 'Agency' shall read 'Energy Community Regulatory Board'.

2. In Article 37(1)(d) and the third subparagraph of Article 37(2) of Directive 2009/72/EC and in Article 41(1)(d) and the third subparagraph of Article 41(2) of Directive 2009/73/EC, the reference to 'the Commission' is not applicable.

Article 19

Ad hoc adaptations concerning penalties

1. Article 22(1) of Regulation (EC) No 714/2009 and Article 27 of Regulation (EC) No 715/2009 shall read as follows: 'Contracting Parties shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that those provisions are implemented. The penalties provided for must be effective, proportionate and dissuasive. Contracting Parties shall notify these provisions to the Secretariat by 1 January 2015 and shall notify the Secretariat without delay of any subsequent amendment affecting them.'

2. Article 22(2) of Regulation (EC) No 714/2009 shall not be applicable.

Article 20

Ad hoc adaptations concerning the regulatory regime for cross-border issues

In Article 38(1) of Directive 2009/72/EC and in Article 42(1) of Directive 2009/73/EC, the expression 'Agency' shall read 'Energy Community Regulatory Board'.

Article 21

Ad hoc adaptations concerning compliance with the Guidelines

Article 39 of Directive 2009/72/EC and Article 43 of Directive 2009/73/EC shall not be applicable.

Article 22

Ad hoc adaptations concerning safeguard measures

The second and third paragraphs of Article 42 of Directive 2009/72/EC and paragraphs 2 and 3 of Article 46 of Directive 2009/73/EC shall not be applicable. Articles 36 to 39 of the Energy Community Treaty shall apply.

Article 23

Ad hoc adaptations concerning measures to ensure a level playing field

In Article 43(2) of Directive 2009/72/EC and in Article 47(2) of Directive 2009/73/EC, the expression 'following the notification to and approval by the Commission' shall read 'following notification to the Secretariat, which shall issue an opinion'.

Article 24

Ad hoc adaptations concerning derogations

1. In Article 44 of Directive 2009/72/EC, paragraph 1 and the first sentence of paragraph 2 shall not be applicable.

2. In Article 48(2) of Directive 2009/73/EC:

– the expression ‘the Commission may request that’ shall read ‘the Secretariat shall issue an opinion, inviting, as the case may be,’;

– the second subparagraph shall not be applicable.

3. In Article 48(3) of Directive 2009/73/EC, the date ‘4 August 2003’ shall read ‘1 July 2006’.

4. Article 49 of Directive 2009/73/EC (‘Emergent and isolated markets’) and subparagraph (a) of the first paragraph and the second subparagraph of Article 30 of Regulation (EC) No 715/2009 shall not be applicable.

Article 25

Regional cooperation of transmission system operators

Transmission system operators shall promote operational arrangements in order to ensure the optimum management of the Energy Community network and shall promote the development of energy exchanges, the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions, paying due attention to the specific merits of implicit auctions for short-term allocations, and the integration of balancing and reserve power mechanisms.

Article 26

Energy consumer checklists

1. Contracting Parties shall ensure that electricity and gas suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklists established by the European Commission under the acts referred to in Article 1.

2. The checklists shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty.

Article 27

Guidelines

1. The Energy Community shall endeavour to apply the Guidelines adopted by the European Commission under Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009.

2. These Guidelines, which may need to be adapted to the institutional framework of the Energy Community, shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty.

3. The Permanent High Level Group shall adopt a Procedural Act on application of this article.

Article 28

Network codes

1. The Energy Community shall endeavour to apply the network codes developed at European Union level under the acts referred to in Article 1.

2. The relevant network codes shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty. Before taking a decision, the Permanent High Level Group shall seek the opinion of the Energy Community Regulatory Board.

3. The Permanent High Level Group shall adopt a procedural act on application of this Article.

Article 29

Decisions of the Energy Community Regulatory Board

1. Opinions and decisions of the Energy Community Regulatory Board in application of the acts referred to in Article 1, as adapted by this Decision, shall be adopted by a majority of its members, which must include a vote in favour by the European Union.

2. The annual report of the Energy Community Regulatory Board shall contain a summary of the opinions and decisions referred to in paragraph 1.

Article 30

General coordination by the Commission

1. The Secretariat shall provide the European Commission with all information necessary for it to perform its role of coordinator under Article 4 of the Energy Community Treaty.

2. In particular, the Secretariat shall provide the Commission with a draft of the opinions to be issued in application of the acts referred to in Article 1, as adapted by this Decision.

3. In order to avoid delays, working arrangements on implementation of this Article shall be agreed between the Secretariat and the European Commission at operational level.

Article 31

Reporting

1. The Secretariat shall monitor and review application of this Decision in the Contracting Parties.

2. The Secretariat shall submit an overall progress report to the Ministerial Council for the first time by 30 June 2012, and thereafter on an annual basis. The progress report shall reflect the progress made on creating a complete and fully operational internal market in electricity and gas and the obstacles that remain in this respect, including aspects of market dominance, market concentration, predatory or anti-competitive behaviour and the effect thereof in terms of market distortion. It shall in particular consider:

– the implementation by each Contracting Party of the provisions on unbundling, certification and on independence of the national regulatory authorities and application of these provisions in practice,

– the existence of non-discriminatory network access,

– effective regulation,

– the development of interconnection infrastructure and the security of supply situation in the Energy Community,

– the extent to which the full benefits of the opening of markets are accruing to small enterprises and household customers, notably with respect to public service and universal service standards,

– the extent to which markets are in practice open to effective competition, including aspects of market dominance, market concentration and predatory or anti-competitive behaviour,

– the extent to which customers are actually switching suppliers and renegotiating tariffs,

– price developments, including supply prices, in relation to the degree of opening of the markets, and

– the experience gained from application of this Decision as far as effective independence of system operators in vertically integrated undertakings is concerned and whether other measures in addition to functional independence and separation of accounts have been developed which have effects equivalent to legal unbundling.

3. The Secretariat shall present a report to the Ministerial Council for the first time by 30 June 2012, and thereafter on an annual basis, summarising the opinions issued by the Secretariat in application of the acts referred to in Article 1, as adapted by this Decision.

Article 32

This Decision enters into force upon its adoption and is addressed to the Contracting Parties.

Done in Chisinau on 06th October 2011

For the Ministerial Council

.....

Presidency

ANNEX

"On all issues pertaining to the definition of "interconnectors and cross border exchanges of energy" the term "Member States" shall be construed as "Adhering Parties".

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

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Vienna, 10 October 2014

FYR of Macedonia-MIN/O/jko/05/10-10-2014

Excellency,

I am writing to you to express my concerns regarding the draft Energy Law submitted to Parliament on 7 October. Postponing full market liberalisation of the power market until 2020 is a very clear breach of your country's obligations under the Energy Community Treaty, which stipulates that the market should be open as of 1 January 2015. The draft Law would deprive consumers the possibility to choose their electricity supplier, which is their fundamental right.

Protecting consumers from dramatic price increases is a legitimate aim of any Government. However, this aim can be achieved through measures which are far less distorting to the market and compliant with the Energy Community acquis. The regulatory authority can, for as long as it is necessary, continue to set prices without depriving the customers of their right to switch away from the incumbent utility EVN. Customer protection is best achieved by targeting support to socially vulnerable customers and not by subsidizing every single household, including the rich via cross subsidies from overburdened business entities. The decision is even less understandable taking into account the fact that the electricity market in Macedonia for bigger consumers is already liberalised, competition exists and the results are very encouraging for everybody except a monopolistic electricity provider.

I would like to strongly urge you to withdraw the draft Law and submit to the Parliament legislation which is compliant with the Third Energy Package. The Secretariat is currently reviewing such laws and will submit them to the relevant authorities in the course of next week. If this draft Law is adopted, the Energy Community Secretariat will be obliged to start an infringement procedure immediately after the deadline for complete market liberalisation passes on 1 January 2015.

I and the Energy Community Secretariat remain at your disposal for any further clarifications and assistance.

Please accept, Excellency, the assurances of my highest consideration.

Best regards,

Janez Kopač
Director



H.E. MR. BEKIM NEZIRI
MINISTER OF ECONOMY
FORMER YUGOSLAV REPUBLIC OF MACEDONIA

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Mrs. Nora Aliti, Deputy Chairperson of the Committee for European Integration, Assembly of Republic of Macedonia

Mr. Fabrizio Barbaso, Deputy Director General, DG Energy, European Commission

Delegation of the European Union to the former Yugoslav Republic of Macedonia

ЗАКОН ЗА ИЗМЕНУВАЊЕ И ДОПОЛНУВАЊЕ НА ЗАКОНОТ ЗА ЕНЕРГЕТИКА

Сл. Весник на Р. Македонија, бр.151 од 15.10.2014 година

Член 1

Во Законот за енергетика („Службен весник на Република Македонија“ број 16/11, 136/11, 79/13, 164/13 и 41/14) во членот 7 став (3) точка 2) зборот „петгодишниот“ се заменува со зборот „едногодишниот“.

Член 2

Во членот 8 во ставот (5) зборовите: „пред влегување во сила на овој закон“ се бришат.

Член 3

Во членот 12 ставот (1) се менува и гласи:

„Владата на Република Македонија со енергетскиот биланс за период од една година, како индикативен плански документ, ги определува вкупните потреби од енергија и потребите од одделните видови на енергија, како и можностите за нивното задоволување од домашно производство и од увоз.“

Ставовите (3), (4) и (5) се бришат.

Ставот (6) кој станува став (3) се менува и гласи:

„Министерството ја следи реализацијата на енергетскиот биланс за тековната година и доколку е потребно предлага соодветни мерки на Владата на Република Македонија.“

Ставовите (7) и (8) стануваат ставови (4) и (5).

Член 4

Во членот 19-а по ставот (1) се додаваат два нови става (2) и (3) кои гласаат:

„(2) Вработените во Регулаторната комисија за енергетика кои вршат помошно-технички работи имаат статус на помошно-технички персонал.“

(3) На помошно-техничкиот персонал во Регулаторна комисија за енергетика, ќе се применуваат општите прописи за работни односи.“

Член 5

Во членот 136 ставот (3) се менува и гласи:

„Инвеститорот е должен кон барањето за издавање на одобрение за градење на нови згради или значителна реконструкција на постојни згради, како составен дел на основниот проект да приложи потврда од трговец поединец или правно лице кое поседува лиценца за вршење на енергетска контрола со која потврдува дека минималните барања за енергетска ефикасност кои се содржани во основниот проект се во согласност со минималните барања за енергетска ефикасност утврдени во правилникот од ставот (8) на овој член. Трговец поединец или правно лице кое поседува лиценца за вршење на енергетска контрола наплаќа надомест за издадената потврда.“

Ставот (4) се менува и гласи:

„По завршување на изградбата на згради или по значителна реконструкција на постојните згради, инвеститорот е должен да обезбеди сертификат за енергетски карактеристики на зградата и истиот да го поднесе во постапката за ставање во употреба согласно Законот за градење. Сертификат за енергетски карактеристики на зградата се обезбедува пред издавање на одобрението за употреба, односно пред изготвувањето на извештајот за извршен технички преглед од надзорен инженер, односно пред давањето на изјава заверена кај нотар под полна материјална и кривична одговорност од изведувачот со која тој потврдува дека

зградата, односно градежната единица е изградена во согласност со одобрението за градење и основниот проект или проектот на изведена состојба, во зависност од категоријата на зградата.“

Во ставот (6) зборовите: „копијата од изјавата до ставот (3)“ се заменува со зборовите: „потврдата од ставот (3)“.

Во ставот (8) точка 9) се менува и гласи:

“формата и содржината на потврдата со која се потврдува дека минималните барања за енергетска ефикасност кои се содржани во основниот проект се во согласност со минималните барања за енергетска ефикасност“.

По ставот (8) се додава нов став (9) кој гласи:

„(9) Министерот ја пропишува максималната висина на надоместокот за издавање на потврдата од ставот (3) на овој член, врз основа на плоштината на корисната подна површина на зградите и категориите на зградите определени со правилникот од ставот (8) од овој член.“

Член 6

Членот 137 се менува и гласи:

„(1) Со овластување за енергетски контролор може да се стекне секое физичко лице ако ги исполнува следните услови:

1) да има најмалку високо образование во областа на градежништвото, архитектурата, машинството или електроенергетика (диплома за завршено високо образование VII/1 или диплома согласно со Болоњската декларација најмалку со 180 кредити според европскиот кредит трансфер систем (ЕКТС));

2) да има најмалку пет години работно искуство во струката на работи на проектирање, надзор и одржување на градежни објекти, испитување на енергетски или процесни постројки, вршење на енергетски контроли или други енергетски услуги или работа на стручни или научни дејности од областа на енергетиката;

3) да има завршено обука за енергетски контролор кај правните лица за спроведување на обуки за енергетски контролори и

4) положен стручен испит за енергетски контролор.

(2) Физичкото лице кое се стекнало со овластување за енергетски контролор може да врши енергетска контрола само ако е вработено кај трговец поединец или правно лице кои се стекнале со лиценца за вршење на енергетска контрола.

(3) Овластувањето за енергетски контролор од ставот (1) на овој член важи за период од три години, со можност за продолжување од по три години. Овластувањето може да се продолжи само ако енергетскиот контролор успешно заврши обука за усовршување на енергетските контролори, согласно со правилникот од член 135 од овој закон. Енергетскиот контролор поднесува барање за продолжување на овластувањето 30 дена пред истекот на рокот на важност на добиеното овластување.

(4) Агенцијата за енергетика најмалку еднаш на три години објавува повик за избор на правни лица за спроведување на обуки за енергетски контролори, како и обуки за усовршување на енергетските контролори, врз основа на програмата за обука и програмата за усовршување на енергетските контролори, изготвени на начин пропишан со правилникот од членот 135 од овој закон.

(5) Агенцијата за енергетика ги изготвува и донесува програмата за обука и програмата за усовршување на енергетските контролори најдоцна до 31 октомври во тековната година за наредниот период од најмногу три години. Програмите се објавуваат во “Службен весник на Република Македонија” и на веб страницата на Агенцијата за енергетика.

(6) Агенцијата за енергетика донесува решение за избор на правните лица од ставот (4) на овој член, кое е со важност од три години.

(7) Агенцијата за енергетика води евиденција на избраните правни лица од ставот (4) на овој член и истата ја објавува на својата веб страница.

(8) Правните лица од ставот (4) на овој член ја спроведуваат обуката за енергетски контролори согласно правилникот од член 135 од овој закон. За завршената обука правните лица од ставот (4) издаваат уверение за успешно завршена обука за енергетски контролор.

(9) Правните лица од ставот (4) на овој член ја спроведуваат обуката за усовршување на енергетски контролори согласно правилникот од член 135 од овој закон. За завршената обука за усовршување правните лица од ставот (4) издаваат уверение за успешно завршена обука за усовршување на енергетски контролор.

(10) Формата, содржината и начинот на издавање на уверението од ставите (8) и (9) ги пропишува министерот.

(11) Максималната висина на надоместокот за учество на обука и максималната висина на надоместокот за учество на обука за усовршување на енергетските контролори се определува во зависност од просторните и материјалните услови како и за ангажирање на стручни лица за спроведување на обуки и се определуваат со тарифникот што го донесува Агенцијата за енергетика, а го одобрува Владата на Република Македонија."

Член 7

Во членот 137-а став (18) алинејата 5 се менува и гласи:

„да има најмалку пет години работно искуство по дипломирањето, на работи на проектирање, надзор и одржување на градежни објекти, испитување на енергетски или процесни постројки, вршење на енергетски контроли или други енергетски услуги или работа на стручни или научни дејности од областа на енергетиката.“

По алинејата 5 се додава нова алинеја 6 која гласи:

„- да поседува уверение за успешно завршена обука за енергетски контролор.“

Член 8

Во членот 137-б став (1) во алинејата 2 зборовите: "практичен пример" се заменуваат со зборовите: "практичен дел".

Ставот (3) се менува и гласи:

„Вториот дел од испитот се состои од:

- практичен пример и прашања кои треба кандидатот да ги одговори врз основа на анализа и решавање на практичниот пример и
- спроведување на една енергетска контрола, со примена на софтверска алатка која е во согласност со методологијата за пресметка на енергетски карактеристики на зградите од правилникот од член 136 став (8) од овој закон, изработка на извештај за спроведената енергетска контрола и одговор на прашања.“

Член 9

Во членот 137-в во ставот (3) зборовите: "врши и" се заменуваат со зборовите: „определува место за вршење на енергетска контрола и го врши оценувањето на кандидатот во врска со вториот дел од испитот од член 137-б став (3) алинеја 2 од овој закон и врши.“

Во ставот (7) зборовите: „бројот на изготвени прашања и практични примери, како и сложеноста на материјата“ се заменуваат со зборовите: „бројот на кандидати кои го полагаат испитот од член 137-б став (3) алинеја 2 од овој закон и бројот на верифицирани, ревидирани и изготвени прашања и практични примери.“

По ставот (8) се додава нов став (9) кој гласи:

„(9) Исплатата на надоместокот на членовите на Комисијата од став (2) на овој член се врши од сметката на сопствени приходи на Министерството за економија, од уплатените средства од кандидатите кои полагаат испит.“

Член 10

Во член 137-г по ставот (1) се додава нов став (2) кој гласи:

„(2) По исклучок од став (1) на овој член, за потребите од спроведување на енергетската контрола и изработка на извештајот за спроведената енергетска контрола, кандидатите може да ја користат софтверска алатка за енергетска контрола што ја поседуваат правните лица за спроведување на обуки за енергетски контролори од член 137 став (4) на овој закон“.

Ставот (2) кој станува став (3) се менува и гласи:

„Стручниот испит за енергетски контролор се спроведува во февруарска, јунска и октомвриска испитна сесија.“

Член 11

Во членот 137-и во ставот (1) зборовите: „практичен пример“ се заменуваат со зборовите: „практичен дел“.

Ставот (2) се менува и гласи:

„Вториот дел од испитот од член 137-б став (3) алинеја 1 од овој закон се полага истиот ден по успешно полагање на првиот дел.“

Во ставот (4) зборовите: “две се слични” се заменуваат со зборовите: „две се слични со точниот одговор“.

Ставот (7) се менува и гласи:

„Вториот дел од испитот се состои од:

1) решавање на практичен пример и одговарање на пет прашања кои произлегуваат од практичниот пример и решението на практичниот пример, при што секое прашање од практичниот пример има пет можни опции на одговор, од кои една е точна, две се слични со точниот одговор, додека две се неточни и целосно спротивни на точниот одговор и

2) спроведување на една енергетска контрола, со примена на софтверска алатка која е во согласност со методологијата за пресметка на енергетски карактеристики на зградите од правилникот од член 136 став (8) од овој закон, изработка на извештај за спроведената енергетска контрола и одговор на прашања.“

Ставот (8) се менува и гласи:

„Вториот дел од испитот од член 137-б став (3) алинеја 2 од овој закон се состои од посета на зграда или градежна единица и прибирање на податоци за добиената зграда или градежна единица, внесување и обработка на податоци во соодветна софтверска алатка, подготовка на извештај за спроведена енергетска контрола и презентирање на истиот извештај.“

Ставот (9) се менува и гласи:

„Услов за полагање на вториот дел од испитот од член 137-б став (3) алинеја 2 од овој закон е кандидатот да го положи вториот дел од испитот од член 137-б став (3) алинеја 1 од овој закон.“

По ставот (9) се додаваат пет нови става (10), (11), (12), (13) и (14) кои гласат:

„(10) Кандидатот кој го положил вториот дел од испитот од член 137-б став (3) алинеја 1 од овој закон има обврска во рок од 15 работни дена:

- да спроведе една енергетска контрола на зграда или градежна единица. Локацијата на зградата или градежната единица кандидатот ја добива од Комисијата за верификација, најдоцна два работни дена од денот на успешно полагање на вториот дел од испитот од член 137-б став (3) алинеја 1 од овој закон. Претставник од Комисијата ги придружува кандидатите при посетата на локацијата на зградата или градежната единица;

- да изготви извештај за спроведената енергетска контрола, при што ќе користи соодветна софтверска алатка и

- да го достави извештајот за спроведената енергетска контрола до Комисијата за верификација, во хартиена форма.

(11) Кандидатот има обврска најдоцна во рок од три дена по доставувањето да го презентира извештајот за спроведената енергетска контрола пред Комисијата за верификација и да одговара на прашањата кои ќе му ги постави Комисијата за верификација. Комисијата за верификација му поставува на кандидатот пет прашања кои се во врска со извештајот за спроведената енергетска контрола како и спроведувањето на енергетската контрола.

(12) Комисијата за верификација го оценува презентираниот извештај за спроведената енергетска контрола и одговорите на прашањата, согласно правилникот од ставот (3) од овој член. Секое прашање има три опции на одговор, од кои една е точна, една е помалку точна и една е неточна.

(13) Се смета дека кандидатот го положил вториот дел од испитот од член 137-б став (3) алинеја 2 од овој закон ако постигнал најмалку 70% од вкупниот број предвидени поени со одговарање на прашањата од став (12) од овој член.

(14) Резултатите од полагањето на вториот дел од испитот од член 137-б став (3) алинеја 2 од овој закон се објавуваат на интернет страницата на Министерството за економија во рок од три работни дена од денот на презентирање на извештајот за спроведената енергетска контрола и одговарањето на прашањата кои се во врска со истиот извештај."

Член 12

Во членот 137-ј ставот (3) се менува и гласи:

„Полагањето на вториот дел од стручниот испит од член 137-б став (3) алинеја 1 од овој закон се врши со решавање на практичниот пример и одговарање на пет прашања кои произлегуваат од практичниот пример, во вид на електронско решение (во натамошниот текст: електронски практичен пример).“

Во ставот (8) зборовите: „2015 година“ се заменуваат со зборовите: „2016 година“.

Во ставот (9) по зборовите: „вториот дел од испитот“ се додаваат зборовите: „кој се однесува на практичниот пример и прашањата кои произлегуваат од практичниот пример“.

Член 13

Во членот 137-л во ставот (5) по зборот „дека“ се додаваат зборовите: „првиот дел од“.

Ставот (6) се менува и гласи:

„Вкупното траење на времето определено за решавање на практичниот пример и одговор на прашањата од вториот дел од испитот од член 137-б став (3) алинеја 1 од овој закон изнесува 120 минути.“

Во ставот (7) зборот „испитот“ се заменува со зборовите: „вториот дел од испитот од член 137-б став (3) алинеја 1 од овој закон.“

По ставот (7) се додава нов став (8) кој гласи:

„(8) Кандидатот кој не го положил вториот дел од испитот се смета дека не го положил испитот.“

Член 14

Во членот 138 по ставот (8) се додаваат два нови става (9) и (10) кои гласат:

„(9) За нови згради и градежни единици како и за згради и градежни единици кои биле предмет на значителна реконструкција, определени со правилникот од член 136 став (8) од овој закон, трговец поединец или правно лице кое поседува лиценца за вршење на енергетска контрола издава сертификат за енергетските

карактеристики на зградата врз основа на податоци од основниот проект, проектот на изведена состојба и одобрението за градење, како и визуелна контрола на зградата. Трговец поединец или правно лице кое поседува лиценца за вршење на енергетска контрола наплаќа надомест за издадениот сертификат за енергетски карактеристики на зграда за нови згради и градежни единици како и за згради и градежни единици кои биле предмет на значителна реконструкција. (10) Министерот ја пропишува максималната висина на надоместокот за издавање на сертификат за енергетските карактеристики на зграда, врз основа на плоштината на корисната подна површина на зградите и категориите на зградите определени со правилникот од член 136 став (8) од овој закон.”

Ставот (9) кој станува став (11) се менува и гласи:

„Трговец поединец или правно лице кое поседува лиценца за вршење на енергетска контрола за извршената енергетска контрола согласно член 134 став (2) и член 136 став (5) од овој закон и став (8) од овој член наплаќа надомест.“

По ставот (11) се додава нов став (12) кој гласи:

„(12) Владата на Република Македонија, на предлог на Министерот ја пропишува максимална висина на надоместокот за извршената енергетска контрола, врз основа на плоштината на корисната подна површина на зградите и категориите на зградите определени со правилникот од член 136 став (8) од овој закон.“

Член 15

Во членот 150 во ставот (2) по зборовите: „Владата на Република Македонија“ се додаваат зборовите: „на предлог на министерот“.

Во ставот (3) по зборовите: „Владата на Република Македонија“ се додаваат зборовите: „на предлог на министерот.“

Член 16

Во членот 157-г став (8) зборовите: „бројот на изготвени прашања како и сложеноста на материјата“ се заменуваат со зборовите: „бројот на кандидати и бројот на верифицирани, ревидирани и изготвени прашања“.

По ставот (9) се додава нов став (10) кој гласи:

„(10) Исплатата на надоместокот на членовите на Комисијата од став (2) од овој член и член 157-љ став (3) од овој закон се врши од сметката на сопствени приходи на Министерството за економија, од уплатените средства од кандидатите кои полагаат испит.“

Член 17

Во членот 157-л во ставот (1) зборовите: “две се слични” се заменуваат со зборовите: “две се слични со точниот одговор”.

Член 18

Во член 197 ставот (1) се менува и гласи:

„По исклучок од членот 82 став (1) на овој закон тарифни потрошувачи се:

- 1) мали потрошувачи на електрична енергија, со потрошувачка на електрична енергија во 2015 година над 1000 MWh, до 30 јуни 2016 година;
- 2) мали потрошувачи на електрична енергија, со потрошувачка на електрична енергија во 2016 година над 500 MWh, до 30 јуни 2017 година;
- 3) мали потрошувачи на електрична енергија, со потрошувачка на електрична енергија во 2017 година над 100 MWh, до 30 јуни 2018 година;
- 4) мали потрошувачи на електрична енергија, со потрошувачка на електрична енергија во 2018 година над 25 MWh, до 30 јуни 2019 година и
- 5) домаќинствата и сите останати мали потрошувачи на електрична енергија, до 30 јуни 2020 година.“

Во ставот (4) зборовите: "31 декември 2014" се заменуваат со зборовите: "30 јуни 2020".

Во ставот (5) зборовите: "1 јануари 2015" се заменуваат со зборовите: "1 јули 2020".

Член 19

Во членот 198 во ставот (2) зборовите: "31 декември 2014" се заменуваат со зборовите: "30 јуни 2020".

Член 20

Одредбите од членовите 1 и 3 од овој закон ќе отпочнат да се применуваат од 1 јануари 2015 година.

Одредбите од член 136 ставови (3) и (4) утврдени во член 5 од овој закон ќе отпочнат да се применуваат од 1 јануари 2015 година.

На започнатите постапки за добивање на одобрение за градење или значителна реконструкција на згради или градежни единици до 1 јануари 2015 година ќе се применуваат одредбите од Законот за енергетика („Службен весник на Република Македонија“ број 16/11, 136/11, 79/13, 164/13 и 41/14).

Одредбите од членовите 6, 7, 8, 9, 10, 11, 12, 13, 16 и 17 од овој закон ќе отпочнат да се применуваат од 5 декември 2014 година.

Одредбата од член 138 став (9) утврдена во член 14 од овој закон ќе отпочне да се применува од 1 јануари 2015 година.

Член 21

Прописите утврдени во овој закон ќе се донесат во рок не подолг од три месеци од денот на влегување во сила на овој закон.

Член 22

Регулираните договори за купопродажба на електрична енергија за потребите на тарифните потрошувачи, склучени до денот на влегувањето во сила на овој закон, ќе се применуваат до 30 јуни 2020 година.

Член 23

Регулаторната комисија за енергетика ќе ги усогласи прописите со одредбата од член 197 утврдена во член 18 од овој закон и со одредбата од член 198 утврдена во член 19 од овој закон, во рок од 30 дена од денот на влегување во сила на овој закон.

Член 24

Се овластува Законодавно-правната комисија на Собранието на Република Македонија да утврди пречистен текст на Законот за енергетика.

Член 25

Овој закон влегува во сила осмиот ден од денот на објавувањето во „Службен весник на Република Македонија“.

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Opening Letter in Case ECS-2/15

By the present Opening Letter, the Energy Community Secretariat ("the Secretariat") initiates dispute settlement proceedings against former Yugoslav Republic of Macedonia for non-compliance with Article 33 Directive 20 09/72/EC¹ read in conjunction with Annex I of the Treaty.

Under the Dispute Settlement Procedures, the Secretariat may initiate a preliminary procedure against a Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Article 12 of these Rules, such a procedure is initiated by way of an Opening Letter.

According to Article 10(2) of the Dispute Settlement Procedures, the purpose of the procedure hereby initiated is to establish the factual and legal background of the case, and to give the Party concerned ample opportunity to be heard. In this respect, the preliminary procedure shall enable former Yugoslav Republic of Macedonia either to comply of its own accord with the requirements of the Treaty or, if appropriate, justify its position. In the latter case, former Yugoslav Republic of Macedonia is invited to provide the Secretariat with all factual and legal information relevant to the case at hand within the deadline set at the end of this letter.

I. Background and Facts

a. The electricity sector

The electricity sector in former Yugoslav Republic of Macedonia operates under the provisions of the Energy Law of 2011, as amended several times and most recently in October 2014.² The Energy Law at the time of its adoption envisaged gradual opening of the electricity market, taking into account then existing market conditions and the specific roles and inherited features of key market participants. The Law defines a set of secondary legislation to be developed within specified timeframes.

The Energy Regulatory Commission (*ERC*) has been active since 2003. A set of regulatory rules has been adopted under the Energy Law, including the Market Rules from February 2014,³ amended twice since then, obliging all customers except small enterprises and households, to purchase electricity on the competitive market.

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

¹ 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.

² Energy Law, Official Journal of R. Macedonia, No.16/11, 136/11, 79/13, 164/13, 41/14 and 151/14.

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

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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*, the owner of most of the distribution assets and supplier of 98% of all sales to 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*.

In addition there are independent power producers: the oil-fired TPP *Negotino* with 210 MW installed capacity, and two gas-fired CHPs with total 260 MW of installed capacity.

The transmission network is operated by AD 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.

Currently, there are 51 registered traders with valid licenses issued by ERC and 7 licenses for supply of electricity to end customers. The supply licenses for incumbent suppliers (*EVN Makedonija* and *ELEM Energetika*) extend to public service obligation to supply tariff customers by the end of 2014, and subsequently afterwards to supply of last resort.

b. Eligibility and market opening

The Energy Law from 2011 defines eligible customers as customers that purchase energy from generators, suppliers or trades at their own preference, and small electricity customers 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.”⁴

Article 82 of the Energy Law of 2011 stipulates that all electricity customers shall be deemed eligible, but all of them (except the customers connected to the high voltage grids that were already eligible according to the previous Energy Law) will in practice obtain the eligibility status when certain secondary legislation enters into force.⁵ Households were to be captive until 31 December 2014.⁶ 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.” The eligible customers shall sign an electricity supply contract. Article 82(5) authorizes the relevant system operator to discontinue delivery of electricity to customers without electricity supply contracts signed, except to households and small customers that shall be supplied by the electricity supplier of last resort.

⁴ Article 3 Energy Law 2011

⁵ 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

⁶ Article 197(1) Energy Law of 2011

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The supplier of last resort is defined as an electricity supplier that provides a public service of electricity supply to households or small customers in cases stipulated in the Energy Law,⁷ and a procedure under which households or small customers can obtain the right to be supplied by the electricity supplier of last resort.⁸ The supplier of last resort is under an obligation to purchase electricity to address the demand of households and small customers that have decided to be supplied by it.⁹ It shall have a contract with the generator that is in charge with a public service obligation to provide electricity to address the demand of households and small customers. The contract shall be approved by the ERC¹⁰ and generation for these purposes is considered a regulated activity.¹¹ Moreover, the price at which the supplier of last resort sells electricity to the captive customers is also regulated.¹²

The opening of the electricity market was initiated in May 2007 when all electricity customers connected to the transmission network started to buy electricity for satisfying 55% of their needs at the open electricity market at unregulated conditions. As from 1 January 2008, these customers started to cover fully their electricity needs at the open electricity market. When in 2012, the TSO and the DSO started to buy electricity for covering their losses on the market, approximately 40% of the market was liberalised.¹³

While according to Article 57 of the Market Rules the small customers and the households were entitled to opt for being supplied as tariff customers or to purchase from a supplier of their choice, Article 131(2) of the Market Rules stipulated that the households remain captive until 31 December 2014 and they buy electricity from the supplier of tariff customers 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 the supply contract within 60 days in the market.

When ERC adopted Market Rules in 2012, an obligation to purchase electricity on the competitive market - starting from 1 January 2013 - was imposed on all customers, except small enterprises and households. With the amendment of the Market Rules this deadline was postponed until 1 October 2013 and this was repeated with the adoption of Action plan for liberalization of the electricity market adopted on 30 September 2013. The Action plan established 1 April 2014 as a date for liberalization of the electricity market for all electricity customers except households, and 1 January 2015 as a date for liberalization of the electricity market for all electricity customers, including households. It further imposed strict obligations of key market players in order to ensure smooth opening of retail market for customers connected to the distribution network.

⁷ Article 3 Energy Law of 2011

⁸ According to Article 28 of the Energy Law of 2011 ERC is in charge of adopting the Rules on Electricity Supply of Last Resort for Households and Small Consumers

⁹ Article 80(1) Energy Law of 2011

¹⁰ Article 66 Energy law of 2011

¹¹ Article 4(4) Energy Law of 2011

¹² Article 22 Energy Law of 2011

¹³ ERC, Action Plan for liberalisation of the electricity market, 30.09.2013

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In former Yugoslav Republic of Macedonia eligible customers are not allowed to switch back to regulated supply. Small customers became also eligible - after the secondary legislation listed in Article 197(1) of the Energy Law was adopted by ERC - but they were given an option until the end of 2014 to stay with the incumbent supplier or to switch, and all of them chose the first option. For those who decided to switch, a supplier of last resort was nominated.

c. Legislative changes

While all the above mentioned changes regarding the eligibility and market opening were done through secondary legislation, i.e. amendments to the Market Rules and acts of the ERC, the Ministry of Economy, supported with the EU funded assistance team, has been working on aligning the Energy Law with the Third Energy Legislative Package. The work involving all stakeholders from the country with the support of EU funded technical assistance and the Energy Community Secretariat had its aim to draft first version of legislative documents for public consultations by mid 2014. The Consultants prepared a gap analysis and a draft Energy Law, a version of which was sent to the Secretariat for a review in September 2014.

In the meantime, while work on drafting a Third Energy Package compliant Energy Law was ongoing, the Government proposed and the Parliament adopted amendments to the existing Energy Law on 13 October 2014¹⁴ postponing full market liberalisation of the electricity market until 2020. Protecting customers from dramatic price increases was submitted as a rationale behind this action. According to the explanation of the Government, accompanying the proposed amendments, if all small customers would choose their supplier of electricity, the price would have to increase for approx. 20,67%. According to the documents accompanying the amendments, if the liberalisation would not be postponed, the [incumbent] supplier, EVN would not be able to meet its obligations towards AD ELEM and MEPSO which may cause disruption of security of supply of electricity.

The phases at which the liberalisation, i.e. the mandatory opening of the electricity market in former Yugoslav Republic of Macedonia is to proceed are to be found in Article 18¹⁵ of the amendments. This article stipulates that as an exception to Article 82(1) of the Energy Law – according to which all customers shall be deemed eligible - the following categories of customers remain captive, i.e. without a right to choose their supplier:

- 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;

¹⁴ Official Journal No.151, 15.10.2014

¹⁵ amends Article 197(1) of the existing Energy Law of 2011

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- 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

On 10 October 2014, after the Secretariat has been informed about the draft amendments submitted by the Government to the Parliament, a letter was sent to the Minister of economy expressing concerns about the incompliance of the proposed amendments and urging their withdrawal from the Parliament. In absence of any response from the Macedonian authorities, and the fast adoption of the amendments by the Macedonian legislator, given the importance of the delayed market opening the Secretariat decided to initiate the present proceedings under Article 90 of the Treaty.

II. Relevant Energy Community Law

Energy Community Law is defined in Article 1 of the Rules of Procedure for Dispute Settlement under the Treaty ("Dispute Settlement Procedures")¹⁶ 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).

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.

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.*

Article 11 of the Treaty reads:¹⁷

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 [...]

¹⁶ Procedural Act No 2008/01/MC-EnC of 27.06.2008

¹⁷ 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.

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Annex I to the Energy Community Treaty reads in paragraph 2:

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:

- (i) from 1 January 2008, all non-household customers;*
- (ii) from 1 January 2015, all customers.*

Article 3(3) of Directive 2009/72/EC (“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 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.

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

III. Preliminary Legal Assessment

The subject-matter of the proceedings initiated by the present Opening Letter relates to the amendments to the existing Energy Law of former Yugoslav Republic of Macedonia adopted in October 2014 which are infringing provisions from the Energy Community Treaty and Directive 2009/72/EC.

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1. Eligibility and market opening

a. An open market is of key importance to the achievement of the objectives of both the internal energy market and the Energy Community Treaty. Market opening within the meaning of Annex I of the Treaty and 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.

The Directive and the Energy Community Treaty (Annex I) require the Contracting Parties to open up their markets progressively. In a first step, all non-household customers were to be given the status of eligible customers. In a second step, all customers including households had to become eligible customers. Article 33(1) of Directive 2009/72/EC read in conjunction with Annex I to the Treaty 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*”. As from 1 January 2015, all customers including households should have been granted eligibility status.

According to the existing Energy Law, before the latest amendments and the secondary legislation in force all customers including households should have been granted eligibility status as from 1 January 2015. On 30.09.2013 ERC adopted an Action Plan to liberalize the electricity market, and from 01.04.2014 all customers with more than 50 employees and over 10 million total annual revenue or total assets became eligible. These were 242 customers. They chose their own supplier and signed agreements for the supply of electricity.¹⁸

The latest amendments of the Energy Law from October 2014 postponed the market opening and introduced another eligibility criterion instead of customers' categories of households and non-households as defined by the Treaty. Article 18 of the amendments, introduced a phased market opening according to electricity consumption per customer in the year preceding the year in which customers could gain eligibility status and a right to choose their supplier. The latest amendments to the Energy Law make automatically eligible only the customers with a consumption over 1000 MWh before 2015 but not all non-household and household customers as required by Article 33 Directive 2009/72/EC and the Annex I of the Energy Community Treaty. All other customers that have a lower consumption, i.e. all small commercial customers and households, are denied eligibility and are considered captive and obliged to buy electricity from the incumbent supplier that is designated as a supplier of last resort. For this reason, the small non-household customers (up to 50 employees and 10 million total annual revenue or total assets) and all households are still not considered automatically eligible within the meaning of Article 2(12) of Directive 2009/72/EC. This constitutes a violation of Article 33(1) of Directive 2009/72/EC.

¹⁸ Rationale and explanation accompanying the Proposal for amendments to the Energy Law, submitted by the Government to the Macedonian Parliament

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Furthermore, according to the definition of eligibility in former Yugoslav Republic of Macedonia this status depends on undertakings' own consumption and does not include resale of electricity. This is as well in breach of the eligibility rules from the Energy Community Treaty in particular Annex I read together with Article 33 of Directive 2009/72/EC, which requires that as from 1 January 2008 all non-household customers are eligible, including those customers who would afterwards resell the electricity bought from a supplier of their choice.

The Secretariat thus preliminary concludes that former Yugoslav Republic of Macedonia, by failing to open the market for non-household and household customers in accordance with its obligations under Article 33(1) of Directive 2009/72/EC read together with Annex I of the Treaty, fails to comply with the Energy Community rules on eligibility.

b. The rationale for postponing the market opening for the small customers and households, as explained in the documents accompanying the proposal for amending the Energy Law submitted by the Government to the Parliament, was to allow for phased price increase for households and avoiding disruption of the liquidity of the supplier of last resort.

Protecting customers from dramatic price increases is a legitimate aim of any Government. However, this may not be pursued by denying eligibility to customers. This aim can be achieved through measures which are much less distorting the market and compliant with the Energy Community *acquis*. A well defined universal service obligation could provide a tool for such protection which could amount also to price regulation without depriving the customers of their right to switch away from the incumbent utility *EVN Macedonia*.

However, even if Directive's provision on universal services is relied upon by former Yugoslav Republic of Macedonia with regard to protection of small customers and households, such protection must comply with the last sentence of Article 3(3) of Directive 2009/72/EC, i.e. it must be "*implemented in a transparent and non-discriminatory way and shall not impede the opening of the market provided for in Article 33*". It follows from what has been said above that by 1 January 2008, the market should have been open for all non-household customers, and from 1 January 2015 for all customers including households. All customers should therefore have the right to choose their supplier. This means that all domestic and foreign suppliers of electricity should have been given the right to directly sell to all customers in former Yugoslav Republic of Macedonia.

The approach pursued by the amendments to the Energy Law, i.e. depriving a number of non-household and all household customers from of their right to purchase electricity directly from the supplier of their choice and obliging them to continue purchasing electricity from the incumbent supplier as a supplier of last resort, impedes the proper opening of the market. Therefore, at this point in time, the Secretariat concludes that former Yugoslav Republic of Macedonia fails to comply with Article 33 Directive 2009/72/EC read in conjunction with Annex I of the Treaty.

Having said this, the Secretariat notes that eligibility has to be distinguished from price regulation. While the first one is a right pursuant to the Directive to every customer to choose its supplier, the

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second one is a possibility given to the State while ensuring universal service, i.e. supply of electricity [...] at *easily and clearly comparable, transparent and reasonable prices*. Implementing universal service however, does not constitute a requirement for price regulation. Nevertheless, if prices with such characteristics could not be achieved by the market itself, price regulation could be an option under Article 3(3) of the Directive 2009/72/EC. It could cover only the categories of customers defined in this provision, households and small enterprises, which are exactly those to whom eligibility has been denied in former Yugoslav Republic of Macedonia, provided that the proportionality requirement is satisfied as well.

IV. Conclusion

At this point in time, the Secretariat concludes that former Yugoslav Republic of Macedonia fails to comply with Article 33 Directive 2009/72/EC read in conjunction with Annex I of the Treaty.

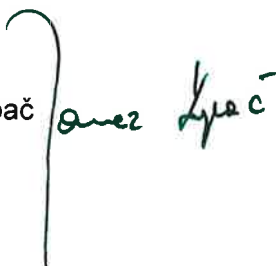
In accordance with Article 12 of the Dispute Settlement Procedures, the Government of former Yugoslav Republic of Macedonia is requested to submit its observations on the points of fact and of law raised in this letter within two months, i.e. by

31 March 2015.

Should former Yugoslav Republic of Macedonia wish to comply with the Treaty, the Secretariat, acting under Article 67 of the Treaty, is prepared to help in rectifying the identified cases of non-compliance and providing concrete assistance.

Vienna, 30 January 2015

Janez Kopač
Director



Dirk Buschle
Legal Counsel/Deputy Director



Република Македонија
Министерство за економија

Energy Community							
RECEIVED							
Date:		09 April 2015					
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Министерство за економија

Бр. 12-1739/7

Скопје _____ година

03-04-2015

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CERTIFICATE

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До: СЕКРЕТАРИЈАТ НА ЕНЕРГЕТСКА ЗАЕДНИЦА

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За г-дин Јанез Копач, директор

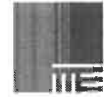
Предмет: Одговор на Отворено писмо во спор ECS-2/2015

Почитувани,

Во врска со Отвореното писмо во спорот ECS-2/2015 примено во Министерството за економија на 10.02.2015 година, а со кое Секретаријатот на Енергетската заедница отпочнува постапка за решавање на спор против Република Македонија за неусогласеност со член 33 од Директивата 2009/72/ЕС за заедничките правила на внатрешен пазар за електрична енергија, во врска со Анекс 1 од Договорот за основање на енергетската заедница, во име на Владата на Република Македонија, Министерството за економија во име на Владата на Република Македонија го доставува следниот одговор:

Првите почетоци на либерализацијата на пазарот на електрична енергија настануваат кога во Република Македонија започнува да се увезува електрична енергија од страна на тогашното вертикално интегрирано претпријатие АД ЕСМ - Скопје, за потребите на македонските потрошувачи. Реалната либерализација на пазарот на електрична енергија во Република Македонија започна од мај 2007 година, кога сите потрошувачи приклучени на преносната мрежа, освен јавното претпријатие Македонски железници, 55% од своите потреби на електрична енергија ги обезбедуваа на отворениот пазар на електрична енергија, додека преостанатите 45% ги обезбедуваа од АД МЕПСО - Скопје, како вршител на енергетската дејност снабдување со електрична енергија на тарифни потрошувачи на големо по регулирани цени.

Од 1 јануари 2008 година сите потрошувачи приклучени на преносниот систем се стекнаа со статус на квалификувани потрошувачи кои што



во целост своите потреби од електрична енергија ги обезбедуваа на отворениот пазар, со што помеѓу 20 и 25 проценти од пазарот на електрична енергија во Република Македонија се либерализираше. Република Македонија беше првата земја во регионот во која што количините на електрична енергија потребна за покривање на загубите на електрична енергија од 2012 година се набавуваат на слободниот пазар на електрична енергија.

Либерализацијата на пазарот на електрична енергија продолжи од 01.01.2014 година кога 222 претријатија своите потреби ги задоволуваат на пазарот на електрична енергија. Процентот на реална либерализација изнесува приближно 45%, имајќи во предвид дека мрежните оператори, загубите на електрична енергија од 01.01.2012 година ги набавуваат на отворениот пазар на електрична енергија. Во овој момент на слободниот пазар на електрична енергија во Република Македонија се тргуваат приближно 3.500 GWh електрична енергија, вклучувајќи ги и загубите на електрична енергија во преносната мрежа кои приближно изнесуваат 1.300 GWh. Доколку од вкупната потрошувачка на електрична енергија се издвои потрошувачката на домаќинствата, произлегува дека околу 70% од останатата вкупна потрошувачка на електрична енергија се обезбедува на отворен пазар. Од наведеното може да се заклучи дека во Република Македонија во пракса се имплементираа законските обврски и активности за отварање на пазарот на електрична енергија што овозможи Република Македонија да е пред другите земји потписнички на Договорот за основање на Енергетската заедница во однос на исполнување на оваа обврска.

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Исто така, од 01.07.2014 година, дополнително 31 претријатие своите потреби од електрична енергија ги обезбедуваат на слободниот пазар. Од 01.07.2015 се очекува уште триесетина претпријатија своите потреби да ги задоволуваат на пазарот на електрична енергија, доколку го исполнуваат критериумот за самостојно учество на пазарот. Со други зборови либерализацијата на пазарот на електрична енергија не е прекината за оние претријатија кои што исполнуваат критериумот за самостојно учество на пазарот (над 50 вработени и над 10 милиони евра годишен приход).

Имајќи го ова во предвид, како и информациите од Извештајот за имплементација на законодавството на Европската унија кое е опфатено со Договорот за основање на енергетската заедница за 2013 година изработен од Секретаријатот на енергетската заедница, може да се види дека процентуално од вкупната потрошувачка на





електрична енергија за 2013 година Република Македонија најголем дел ги обезбедува на отворениот пазар на електрична енергија во споредба со останатите договорни страни.

Во изминатиот период Регулаторната комисија за енергетика на Република Македонија, во улога на координатор, во соработка со операторот на електропреносниот систем, операторот на пазарот на електрична енергија, операторите на електродистрибутивните системи, трговците и снабдувачите работеше на финализирање на подзаконските акти и подготовка на инволвираните страни за спроведување на отварањето на пазарот на електрична енергија.

Во целиот процес на отварањето на пазарот на електрична енергија во изминатиот период Владата на Република Македонија обезбедуваше поддршка на примателите на социјална заштита, односно спроведуваше годишни програми за заштита од енергетска сиромаштија.

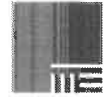
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Владата на Република Македонија во рамки на својата енергетска политика, во изминатиот период, внимателно го следеше отварањето на пазарот на електрична енергија, при што ги анализираше резултатите и обврските за идниот период. Беа констатирани придобивките кои ги остварија индустриските потрошувачи, кои беа очекувани при имплементацијата на оваа реформа, меѓутоа истовремено беа воочени определени ризици од продолжување на процесот со предвидената динамика, и тоа особено во однос на можно драстично зголемување на цените на електрична енергија за домаќинствата.

Република Македонија се соочува со повеќе предизвици во енергетскиот сектор, а како еден од нив се издвојува и обезбедување на алтернативно гориво на потрошувачите освен електричната енергија. Во оваа насока се работи на интензивен развој на преносната и дистрибутивната мрежа за природен гас со цел да се обезбеди дополнителен вид и избор на енергија за потрошувачите од различни категории.

Во Република Македонија и во останатите земји од регионот во изминатите триесетина години домаќинствата имаат најниска цена за разлика од сите останати потрошувачи приклучени на електродистрибутивниот систем и покрај тоа што причинуваат најголеми трошоци на целиот овој систем со оглед на нерамномерниот дневен дијаграм на потрошувачка. Процесот на добивање на реална цена за домаќинствата е долготраен процес. Во изминаитиве неколку години беа донесени потребните тарифни системи, вклучувајќи го и





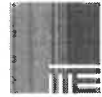
најбитниот тарифниот систем за дистрибуција на електрична енергија согласно кој секој потрошувач плаќа според напонското ниво на кој е приклучен. Во одлуките за 2014 година за првпат трошоците за користење на дистрибутивниот систем за домаќинствата беа пресметани согласно Тарифниот систем за дистрибуција на електрична енергија. Во овој момент процентот на наплата за домаќинствата приближно изнесува 88%, додека на индустриските потрошувачи, околку 93%. Во 2006 година, процентот на наплата за домаќинствата изнесуваше под 80%. Од овие причини, Регулаторната комисија за енергетика на Република Македонија во своите методологии за цени за регулираното снабдување вовеле нови елементи, како што се маржа за снабдување и ненаплатливи побарувања, со цел да ја подобри ликвидноста на регулираниот снабдувач, како и да го поттикне да го зголеми процентот на наплата. Очигледно е дека овие мерки даваат соодветен резултат, но за тоа е потребно време. Со нагло зголемување на цената на електричната енергија за домаќинствата, ќе се намали и процентот на наплата, а со тоа ќе се намалат и приходите на регулираниот снабдувач, поради што нема да биде во можност да ги покрие трошоците за набавка на електрична енергија со што ќе се доведе во опасност и сигурноста во снабдувањето со електрична енергија. Искуствата од земјите членки на Енергетската заедница покажуваат дека домаќинствата своите потреби од електрична енергија ги обезбедуваат на регулираниот пазар на електрична енергија.

Со Законот за изменување и дополнување на Законот за енергетика донесен од Собранието на Република Македонија на 13 октомври 2014 година кој е објавен во „Службен весник на Република Македонија“ бр.151/14) следниот чекор на либерализација беше одложен за 01 јули 2016 година. Владата на Република Македонија и понатаму ја исполнува определбата за усогласување на националното законодавство во делот на енергетиката со законодавството опфатено со Договорот за основање на енергетската заедница, и истото го прави во фази имајќи ги во предвид структурата на потрошувачката и спецификите на националниот систем.

Според прелиминарната правна оценка на законодавството врзано со Договорот за основање на енергетската заедница, во отвореното писмо се укажува дека Република Македонија не успеала да се усогласи со членот 33 од Директивата 2009/72/ЕС за заедничките правила на внатрешен пазар за електрична енергија, во врска со Анекс 1 од Договорот за основање на енергетската заедница.

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Согласно член 33 од Директивата 2009/72/ЕС за заедничките правила на внатрешен пазар за електрична енергија врзано со Анекс 1 од Договорот за основање на енергетска заедница квалификувани потрошувачи се сите потрошувачи освен домаќинствата почнувајќи од 01 јануари 2008 година, додека домаќинствата ќе бидат квалификувани потрошувачи почнувајќи од 01 јануари 2015 година.

Согласно член 10 од Договорот, секоја договорна страна го применува *acquis communautaire* за енергија во согласност со временските рокови за имплементација дадени во Анекс 1.

Согласно член 24 од поглавје VII Адаптација и развој на законодавството на Европската унија на Договорот, Енергетската заедница ќе усвои мерки за прилагодување на *acquis communautaire* опишано во ова поглавје и ќе ги земе предвид институционалната рамка на Договорот и специфичната ситуација на секоја од договорните страни.

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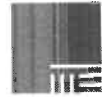
Според оценката на Секретаријатот, обврската за обезбедување на јавна услуга за малите потрошувачи и домаќинствата мора да биде имплементирана на транспарентен и недискриминаторен начин и не треба да го отежнува отварањето на пазарот утврдено со член 33 од Директивата, односно од 01.01. 2008 година во Република Македонија пазарот на електрична енергија треба да биде отворен за квалификуваните потрошувачи, а започнувајќи од 01.01.2015 година за сите потрошувачи вклучувајќи ги и домаќинствата. Притоа сите потрошувачи треба да имаат право да го изберат својот снабдувач, односно според Секретаријатот тоа значи дека сите домашни и странски снабдувачи би имале право да продаваат на сите потрошувачи во Република Македонија.

Според оценката на Секретаријатот квалификуваноста треба да се издвои од регулацијата на цените. Имено, Секретаријатот наведува дека квалификуваноста е право во согласност со Директивата секој потрошувач да го избере својот снабдувач, додека ценовната регулација е можност на државата при обезбедувањето на јавна услуга за снабдување со електрична енергија да обезбеди лесни и јасно споредливи транспарентни и оправдани цени.

Врз основа на напреднаведеното се укажува на следното:

Во Република Македонија постои правна рамка утврдена со Законот за енергетика („Службен весник на Република Македонија број 16/2011, 136/2011, 79/2013, 164/2013, 41/2014 и 151/2014) која е во согласност со член 3 став 3 од Директивата 2003/54/ЕС за заеднички правила за





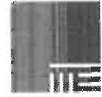
внатрешен пазар на електрична енергија, односно член 3 став 3 од Директивата 2009/72/ЕС за заедничките правила на внатрешен пазар за електрична енергија и согласно која е наметната обврска за обезбедување на јавна услуга по однапред утврдени правила. Уредувањето и наметнувањето на обврската за извршување на јавна услуга во правна регулатива уште повеќе ја зајакнува транспарентноста и обезбедува објективност и недискриминација. Правата на граѓаните и правата на потрошувачите во Република Македонија се гарантираат со Уставот и со закон. Во конкретниот случај станува збор за право на „квалификуваност“ односно право секој потрошувач на електрична енергија да го избере својот снабдувач. Ова право и понатаму останува гарантирано на потрошувачите со измените на Законот за енергетика. Ова право во наредниот период ќе го остваруваат потрошувачите според временска динамика утврдена со измените на Законот за енергетика, притоа имајќи ги предвид спецификите на нашата земја, како што впрочем упатува и член 24 од Договорот за основање на Енергетската заедница. Во таа насока укажуваме дека Секретаријатот на енергетската заедница, како надлежен согласно Договорот за основање на енергетската заедница за следење на состојбите во енергетскиот сектор кај земјите потписнички на Договорот, цениме дека требаше да ја има предвид ситуацијата во Република Македонија а посебно во делот на намалените можности за диверзификација на енергетските ресурси, да ги предочи состојбите и евентуално да иницира постапка за измена на Анекс 1 од Договорот за Република Македонија.

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Ова од следните причини:

- Со Анексот 1 од Договорот е преземена обврската за целосно отварање на пазарот на електрична енергија во Република Македонија од 01.01. 2015 година.
- Институционалните прашања и правните акти поврзани со целосната либерализација на пазарот на електрична енергија во Република Македонија беа завршени и донесени.
- Од првиот нацрт текст на Законот за енергетика можеше да се види дека оваа година во рамки на ИПА проектот ќе се изработува Програма за заштита на ранливите потрошувачи во која детално ќе биде дефиниран концептот на ранливите потрошувачи, категоријата на ранливи потрошувачи, механизмите за обезбедување на поддршка и друго, и која ќе треба да се спроведува паралелно со следниот чекор на отварање на пазарот на електрична енергија.





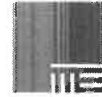
- Потрошувачите во Република Македонија кои спаѓаат во категорија на домаќинства купуваат електрична енергија по цени претходно одобрени од Регулаторната комисија за енергетика кои се реалитивно пониски во споредба со цените во Европа и регионот што укажува на постоење на вкрстено субвенционирање кое по едновремено и целосното отварање на пазарот би предизвикало шоковен удар на домаќинствата.
- Просечната нето исплатена плата во Република Македонија од објавените статистички податоци е во граници на 350 евра, додека стапката на невработеност согласно статистичките податоци од декември е 27,9% од активното население.
- Во Извештајот на Групата за рефлексивност на високи претставници (High Level Reflection Group), врз основа на која Секретаријатот во многу анализи и предлози се повика, е наведено дека законодавството кое е опфатено во Дел II од Договорот за основање на енергетската заедница треба подобро и посуштински да се адаптира на социјално-економската состојба на земјите потписнички на Договорот. За да се исполни истото потребно е зајакнување и подобро користење на член 24 од Договорот. Истото понатаму е преточено во акции кои бараат флексибилност во опфатот и временската рамка при адаптирањето на законодавството на Европската Унија.

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Од страна на потрошувачите во Република Македонија по донесувањето на измените на Законот за енергетика во октомври 2014 година немаше официјални реакции од засегнатите страни за одложувањето на процесот на либерализација.

Наводите во Отвореното писмо дека дефиницијата за квалификуваност зависи од сопствената потрошувачка на претпијатијата и не вклучува препродажба на енергија не се точни. Во дефиницијата 44 од членот 3 од Законот за енергетика, квалификуван **купувач** е купувач кој купува електрична енергија од производители, снабдувачи или трговци по сопствен избор. Во дефиницијата 73 од истиот член **потрошувач** на енергија или енергент е купувач кој што набавената енергија или енергент ја користи за сопствена потрошувачка, вклучувајќи ги и операторите на системите за пренос и за дистрибуција кога купуваат енергија или енергент заради покривање на загубите во соодветните системи и производителите на енергија за сопствена потрошувачка. Во членот 82 сите **купувачи** на електрична енергија се квалификувани купувачи на електрична енергија. **Потрошувачите** на електрична енергија купуваат електрична





енергија од снабдувачите на електрична енергија, според овој закон и условите и начелата дефинирани во Правилата за снабдување. Од дефиницијата 101 за снабдување со електрична енергија од членот 3 во врска со став (1) од членот 79 од Законот за енергетика, и дефиницијата 117 за трговија со електрична енергија од членот 3 во врска со став (1) од членот 81 од Законот за енергетика, прозлегува дека снабдувачите и трговците се квалификувани купувачи на електрична енергија кои можат електричната енергија и да ја препродаваат.

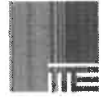
Не се точни констатациите дека Владата на Република Македонија со предлогот за изменување и дополнување на Законот за енергетика, покрај тоа што обезбедила фазно зголемување на цената за домаќинствата, овозможила и да не се наруши ликвидноста на снабдувачот во краен случај. Имено, согласно образложението на Предлог Законот за изменување и дополнување на Законот за енергетика станува збор за ликвидноста на најголемиот дел од електроенергетскиот сектор имајќи ги во предвид меѓусебните законски реалации и обврски на чинителите на регулираниот дел на пазарот на електрична енергија. Дополнително на ова, треба да се има во предвид дека законските одредби уредуваат дека потрошувачите кои се во категорија на домаќинства и мали потрошувачи се тарифни потрошувачи и се снабдуваат преку снабдувачот за тарифни потрошувачи а не преку снабдувачот во краен случај со електрична енергија. Истото важи и за останатите констатации во делот б поврзани со снабдувачот за краен случај со електрична енергија, односно треба да се направи разлика помеѓу обврските на снабдувачот во краен случај на електрична енергија и снабдувачот за тарифни потрошувачи како што е уредено во Законот за енергетика.

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Република Македонија има право да се повика на правото на „*proportionality and subsidiarity*“ од „Договорот за Европската унија“. Ова право и дозволува на Република Македонија во усогласувањето на својата легислатива со Европската легислатива, да изврши примена согласно можностите за имплементација во Република Македонија, при што акцентот е ставен на заштитата на социјалната категорија од преголемо зголемување на цените.

Поточно, Принципот на пропорционалност е утврден во член 5 од Договорот за Европската унија. Критериумите за пријавување се утврдени во Протоколот (бр. 2) за примена на принципите на „*proportionality and subsidiarity*“ во прилог на договорите. Принципот на „*proportionality and subsidiarity*“ е исклучително важен, бидејќи го подвлекува сето она што Европската Унија го прави во области каде





што немаат право на исклучива надлежност. Што значи дека во пракса Европската комисија мора да ја оправда релевантноста на сите предлози во однос на принципите, и всушност, кога предлозите одат на разгледување во Комисиите на Европскиот парламент истите се еден од првите тестови што тие ги разгледуваат.

Односно, ако се смета дека предлогот е само уште еден пример над прописите, тоа значи дека е сосема несразмерен, тогаш може да има силни причини за спротивставување на истото врз основа на пропорционалност.

Потребно е да се потенцира дека дури и во ЕУ, зададените рокови врзани за имплементацијата на одредени правила за пазарите со електрична енергија, не се запазени. Пред се тука станува збор за „Internal electricity market roles for EU“ кое донесување се бара уште од првите директиви за внатрешниот пазар со електрична енергија во ЕУ, односно „ENTSO-E Network codes“ се уште не ја поминале процедурата на „Comitology“. Поставениот рок за завршување на оваа процедура во ЕУ беше до крајот на 2013. Ова е секако голем проблем со кој се соочува ЕУ, а истиот е наметнат на Република Македонија. При тоа ако се додаде и дека одредени членки на ЕУ, како Бугарија, Грција не се во потполност сообразни и хармонизирани со мерките кои се наметнуваат на Република Македонија, а во одредени земји тоа функционира само декларативно на хартија, додека реално пазарот дури и нема никаква либерализација, само ја потврдува оправданоста на одлуката на Влада на Република Македонија.

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Неопходно е да се наведе и дека во регионот на ЈИЕ нема регионален пазар за електрична енергија и нема транспарентна индикација за цените што би можело да се обезбеди за крајните купувачи да имаат информации кои се релевантни за одлучување. Ако кон тоа се додаде и многу мала или речиси комплетен недостаток на ликвидноста на пазарите во окружувањето на Република Македонија, зголемени ризици од сите аспекти кои снабдувачите ги вградуваат во понудените цени при ситуација на сериозно голем процент на увозна зависност на Република Македонија, се укажува на оправданоста за носење една ваква одлука. Впрочем сите горе наведени проблеми беа една од главните причини за „BLACK OUT“ во Калифорнија.

Врз основа на сето наведено може да се заклучи дека со Законот за изменување и дополнување на Законот за енергетика не се напушта заложбата за создавање на целосно либерализан пазар на електрична енергија, туку врз основа на околностите во кои се наоѓа Република Македонија, се пристапува кон утврдување на реални рокови.





Владата на Република Македонија и понатаму останува на патот на спроведување на реформите во енергетскиот сектор и исполнување на обврските кои произлегуваат од Договорот за основање на енергетската заедница.

Со почит,

МИНИСТЕР,

Bekim No



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Reasoned Opinion

in Case ECS-2/15

I. Introduction

- (1) According to Article 90 of the Treaty establishing the Energy Community (hereinafter: "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 Procedural Act No 2008/01/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 (hereinafter: "Dispute Settlement Procedures"), the Secretariat carries out a preliminary procedure before submitting a reasoned request to the Ministerial Council.
- (2) In October 2014, the Secretariat has been informed about draft amendments to the Energy Law, aiming to reschedule and effectively postpone the electricity market opening in the former Yugoslav Republic of Macedonia until 2020. Therefore, in a letter sent to the Minister of Economy dated 10 October 2014, the Secretariat pointed out that should the amendments be adopted, 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 (as adapted).¹
- (3) 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 2014.² 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. 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. The Government was requested to submit its observations on the points of fact and of law raised in the Letter within two months, i.e. by 31 March 2015.

¹ 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 and repealing Directive 2003/54/EC (2009), **OJ L** 211/55, as adapted by 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.

² Official Gazette No 151/14.

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- (4) 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 (hereinafter “the Reply”), contesting the Secretariat’s position that the amendments to the Law on Energy was in breach of Energy Community law and offering “justifications” to which the Secretariat will come back in the legal assessment.
- (5) Having assessed the information and arguments put forward in the Reply, the Secretariat considers that the argumentation provided in the Reply does not challenge the assessment made by the Secretariat or justify the breaches of the Energy Community law identified in the Opening Letter. The Reply also gives no evidence of legislative developments that could have rectified the situation. The Energy Law, as amended in 2014, is still in force. Therefore, the Secretariat considers the preliminary legal assessment and the conclusions of the Opening Letter still valid.
- (6) Under these circumstances, the Secretariat decided to submit the present Reasoned Opinion.

II. Factual background

a. The electricity sector

- (7) The electricity sector in the former Yugoslav Republic of Macedonia operates under the provisions of the Energy Law of 2011, as amended several times and most recently in October 2014.³ The Energy Law at the time of its adoption envisaged gradual opening of the electricity market, taking into account the existing market conditions and the specific roles and features of the key market participants.
- (8) The Energy Regulatory Commission (*ERC*) has been active since 2003. A set of regulatory rules has been adopted under the Energy Law, including the Market Rules from February 2014,⁴ amended twice since then, obliging all customers except small enterprises and households to purchase electricity on the competitive market.
- (9) 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*.

³ Energy Law, Official Gazette No.16/11, 136/11, 79/13, 164/13, 41/14 and 151/14.

⁴ Energy Regulatory Commission, Market Rules, No.01-481/1, 17.02.2014.

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- (10) There are also several independent power producers: the oil-fired TPP *Negotino* with 210 MW installed capacity and two gas-fired CHPs with total 260 MW of installed capacity.
- (11) The transmission network is operated by AD *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.
- (12) Currently, there are 51 registered traders of electricity with valid licenses issued by ERC and 7 licenses for supply of electricity to end customers. The supply licenses for incumbent suppliers (*EVN Makedonija* and *ELEM Energetika*) cover public service obligation to supply tariff customers with electricity by the end of 2014, and starting from July 2016⁵ as the suppliers of last resort.

b. Eligibility under the Energy Law and market opening

- (13) The Energy Law from 2011 defines eligible customers as customers that purchase energy from generators, suppliers or trades of their own choice.⁶
- (14) 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.⁷
- (15) Under the Law, customers that have obtained the status of eligible customers are expected to sign an electricity supply contract.⁸ 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.⁹

aa. Household customers

- (16) 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 2014.¹⁰ 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.”

⁵ According to the latest amendments of the Rules for supply of electricity as last resort of November 2014. fr

⁶ Article 3(44) Energy Law of 2011.

⁷ 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.

⁸ Article 197(2) Energy Law of 2011.

⁹ Article 82(4), 197(4) and (5) Energy law of 2011.

¹⁰ Article 197(1) Energy Law of 2011.

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- (17) Under Article 197(5) of the Energy Law, the electricity supply for captive customers shall be deemed regulated energy activity, and its performance was to be terminated as from 1 January 2015.

bb. Small customers

- (18) 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.”¹¹
- (19) 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

- (20) Article 57 of the Market Rules gives small customers and households the right to opt for being supplied under a “regulated contract”¹² or for purchasing from a supplier of their choice. Customers that purchase electricity under a regulated contract are those customers that have decided to be supplied by the supplier of last resort under the prices regulated by the ERC.¹³ 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 the supplier of tariff customers 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.
- (21) 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 2013.¹⁴ An Action Plan for the Liberalization of the Electricity Market adopted by ERC on 30 September 2013¹⁵ 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.

¹¹ Article 3 Energy Law of 2011.

¹² Regulated contract is the contract that is subject to approval by the Energy Regulatory Commission, Article 3(87) Energy Law of 2011.

¹³ Article 8(1) Energy Law of 2011.

¹⁴ ERC, Amendments to the Market Rules, No. 01-1166/1, 27.06.2013

¹⁵ ERC, Action Plan for the liberalisation of the electricity market in the Republic of Macedonia, No. 01-1645/2, 30.09.2013

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(22) New Market Rules were adopted in February 2014.¹⁶ The electricity market consists of regulated and unregulated segment. 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,¹⁷ but Article 131(1) of the Market Rules still considered the households captive customers, thus giving the choice of supplier only to the small non-household customers. In accordance with the Energy Law in force at that time, the suppliers of tariff customers should operate until 31 December 2014.¹⁸

dd. Supplier of last resort

- (23) For the eligible customers, suppliers of last resorts were nominated through the Law itself.¹⁹ That function is 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.”*²⁰ 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 Law²¹ as well as by the Rules for Supply with Electricity as a Last Resort.²² This in practice meant that once the non-household customers gain 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. This choice was to be allowed to the households after 1 January 2015.
- (24) The supplier of last resort provides a public service of electricity supply to households or small customers in cases stipulated by the Energy Law.²³ 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 adopted by the ERC.²⁴ Moreover, Article 82(5) of the Law authorizes the relevant system operator to discontinue delivery of electricity to all customers without supply contracts, except for households and small customers which must be supplied by the electricity supplier of last resort.
- (25) The supplier of last resort is under an obligation to purchase electricity in order to address the demands of households and small customers that would decide to be supplied by it,

¹⁶ ERC, Market Rules, No.01-481/1, 17.02.2014

¹⁷ Article 57(1) Market Rules of 2014

¹⁸ Article 58(1)(4) Market Rules of 2014

¹⁹ Article 8(5) Energy law of 2011.

²⁰ Article 8(5) Energy law of 2011.

²¹ Article 202 Energy Law of 2011.

²² ERC, 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.

²³ Article 3 Energy Law of 2011.

²⁴ Article 28 of the Energy Law of 2011.

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once they obtain the right to choose their electricity supplier.²⁵ It shall have a contract with the generator charged with a public service obligation to provide electricity to address the demand of households and small customers. The contract must be approved by the ERC.²⁶ Generation for these purposes is considered a regulated activity defined by the Energy Law as the “*activity by means of which the public service is provided and performed under terms and conditions, manner, prices and tariffs stipulated, i.e., approved by the Energy Regulatory Commission*”.²⁷ Moreover, the price at which the supplier of last resort sells electricity to the captive customers is also regulated.²⁸

c. The evolution of market opening

- (26) As confirmed by the Reply, the opening of the electricity market in 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. At that time, customers connected to the transmission network satisfied 55% of their demand for electricity at an open electricity market.
- (27) 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.²⁹
- (28) According to the Energy Law, all customers including households would have been granted eligibility status as from 1 January 2015. This has never happened due to the 2014 amendments to the Energy Law.

d. The legislative changes giving rise to the present case

- (29) While the work on drafting a Third Energy Package compliant Energy Law had already started and was ongoing, the Government proposed and the Parliament adopted amendments to the existing Energy Law on 13 October 2014.³⁰

²⁵ Article 80(1) Energy Law of 2011.

²⁶ Article 66 Energy law of 2011.

²⁷ Article 3(89) Energy Law of 2011.

²⁸ Article 22 Energy Law of 2011

²⁹ 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.

³⁰ Official Journal No.151, 15.10.2014

- (30) As an exception to Article 82(1) of the Energy Law according to which all customers shall be deemed eligible, Article 18³¹ of the amendments stipulates that the following categories of customers remain captive, i.e. without the right to choose their supplier:
- 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.
- (31) 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.
- (32) The Government's rationale behind these amendments was the protection of customers from price increases. According to the explanation 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. In addition, according to the Reply, *"it is about the liquidity of most of the electricity energy sectors, taking to consideration mutual legal relations and obligations of the stakeholders in the regulated part of the electricity market."*³³ In particular, this concerns the liquidity of the by far largest incumbent supplier, EVN who would not be able to meet its obligations towards ELEM and MEPSO, which may cause disruption of security of supply of electricity.

III. Relevant Energy Community Law

- (33) Energy Community Law is defined in Article 1 of the Rules of Procedure for Dispute Settlement under the Treaty ("Dispute Settlement Procedures")³⁴ 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).

³¹ amends Article 197(1) of the existing Energy Law of 2011

³² ERC, Amendments to the Market Rules, 01- 2818/1, 23.12.2014

³³ Page 5 of the Reply.

³⁴ Procedural Act No 2008/01/MC-EnC of 27.06.2008.

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(34) 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.

(35) 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.*

(36) Article 11 of the Treaty reads:³⁵

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 [...]

(37) 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.*

(38) 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.*

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

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:

³⁵ 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.

³⁶ 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.

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from 1 January 2008, all non-household customers;

from 1 January 2015, all customers.

(40) Annex I to the Energy Community Treaty:³⁷

List of acts included in the “*acquis communautaire* on energy:”

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.

(41) 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:

10. ‘household customer’ means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities;
11. ‘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;
12. ‘eligible customer’ means a customer who is free to purchase electricity from the supplier of his choice within the meaning of Article 33.

(42) 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.

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

³⁷ Amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.

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.

IV. Legal Assessment

1. Violation of Article 33 of Directive 2009/72/EC

- (44) The subject-matter of the present proceedings consists of the failure of 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 and Annex I of the Treaty.
- (45) Open electricity markets are of the 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 of Directive 2009/72/EC and adapted by Ministerial Council Decision 2011/02/MC-EnC. The obligation to open the electricity markets 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. Article 33 of Directive 2009/72/EC.
- (46) Directive 2009/72/EC and Annex I of the Energy Community Treaty require 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.
- (47) 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 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”.³⁸
- (48) As they postpone the full opening of the electricity market in Macedonia until July 2020, the latest 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.
- (49) As to the Government’s argument in its Reply that Article 82 of the Energy Law treats all buyers of electricity as “eligible buyers”,³⁹ suffice it to recall that Article 18 of the

³⁸ Case C-52/75 *Commission v Italy*, [1976] ECR 277, paragraph 10.

³⁹ Page 4 of the Reply.

amendments introduce an exception to Article 82 of the Energy Law that denies certain categories of customers' eligibility until the dates mentioned in those amendments.

a. Non-household customers

- (50) Article 33(1) of Directive 2009/72/EC read in conjunction with Annex I to the Treaty required the opening of the market to all non-household costumers 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*”.
- (51) According to Article 18 of the amendments to the Macedonian Energy Law, small non-household customers with electricity consumption over 1000 MWh in 2015 would 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 and all households regardless of their consumption would become eligible only in July 2020. Until then, they are considered captive and obliged to buy electricity from their incumbent suppliers, the suppliers for tariff customers.
- (52) The Secretariat considers 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 as gained with the adoption of the secondary legislation as stipulated in the Energy Law from 2011, and detailed by the several amendments to the Market Rules as explained above. For the rest of non-household customers, i.e. for the small non-household customers only, the granting of eligibility is postponed to the period between July 2016 and 2020, depending on their consumption level. This is not in line with the Directive because the Directive obliges Contracting Parties to ensure that *all* non-household consumers become eligible as from 1 January 2008 without giving the possibility to Contracting Parties to postpone the 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.
- (53) Hence, after the amendments to the Law all (small) non-household customers are not eligible within the meaning of Article 2(12) of Directive 2009/72/EC, even though they should have been 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 and by not less than (up to) six years constitutes a clear breach of Article 33(1)(b) of Directive 2009/72/EC.

b. Household customers

- (54) Article 33(1) of Directive of Directive 2009/72/EC read in conjunction with Annex I to the Treaty 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 a “customer purchasing electricity for his own household consumption, excluding commercial or professional activities.”
- (55) Article 18 of the amendments stipulates that all household customers and small non-household customers with consumption below 25 MWh would continue to be supplied as “tariff customers” (i.e. remain not eligible customers) until July 2020.
- (56) Therefore, despite the fact that the deadline for ensuring their eligibility was 1 January 2015, the amendments to the Energy Law postpone granting eligibility to household customers by another 6 years This constitutes a violation of Article 33(1)(c) of Directive of Directive 2009/72/EC.

c. Conclusion

- (57) In conclusion, the Secretariat is of the opinion that former Yugoslav Republic of Macedonia failed to comply with its obligations under Article 33(1)(b) and (c) of Directive 2009/72/EC by making it unlawful for certain categories of non-household customers and all household customers to choose their electricity supplier by the dates set by Energy Community law.
- (58) In its Reply to the Opening Letter, the Government assert that the “right of every consumer of electricity to choose the supplier ... remains guaranteed for the consumers with the amendments to the Energy Law” without sustaining this claim further except with a vague reference to “the Constitution and law”.⁴⁰ In view of the clear and unambiguous wording of Article 18 of the amendments, such denial of a breach of Article 33 of Directive 2009/72/EC is not acceptable. By the sentence following this assertion, the Governments 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”).

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

- (59) In its Reply to the Opening Letter, the Government submitted several reasons for postponing of the electricity market opening. In the view of the Secretariat, none of them justifies the breach of Article 33 of Directive 2009/72/EC. For the sake of completeness and

⁴⁰ Page 5 of the Reply.

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clarification, however, the Secretariat will elaborate on the arguments put forward by the Government in its Reply in the following.

a. Public service obligations and universal service

- (60) With regard to the possibility of justifying breaches of Article 33 of Directive 2009/72/E by recurrence to public service obligations, the Secretariat notes that the provision contains a straight-forward and unequivocal obligation which does not allow for exemptions or postponements. This is confirmed by 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, which explicitly prohibits implementation in a way which would impede the opening of the market provided for in Article 33.⁴¹ Since 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.
- (61) That said, the Secretariat has pointed out in its Opening Letter 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 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,⁴² which would address the social and macro-economic concerns expressed by the Government in its Reply such as protecting customers from price increases.⁴³

b. Protection of household from price increase

- (62) The Government justifies 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.*”⁴⁴ In particular, “*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; the average net salary paid in*

⁴¹ See last subparagraph of Article 3(3) of Directive 2009/72/EC.

⁴² Article 3(1) Directive 2009/72.

⁴³ It also follows from case law that Contracting Parties are permitted under Directive 2009/72/EC 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*”, Case C-265/08, *Federutility and others v Autorità per l'energia elettrica e il gas* [2010] ECR- 2010 I-03377, paragraph 32.

⁴⁴ Page 2 of the Reply.

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*Republic of Macedonia from the published statistics is within the limits of 350 Euros, while the unemployment rate according to statistics from December is 27.9% of the active population.*⁴⁵

- (63) In the Government's view, the rationale of postponing the opening of the market for small non-household and all household customers was thus to allow for a gradual price increase rather than an abrupt liberalization which would subject customers to (presumably) higher market based prices immediately. According to a study cited by the Government, and relied upon in the Government's explanation accompanying the proposed amendments, if all small customers would choose their supplier of electricity, the electricity price of the households would increase by approximately 20,67%. Thus, the Government refers to the purpose of "protection of households from price increase."⁴⁶
- (64) In the Secretariat's view, the arguments made by the Government are not relevant for the case at hand.
- (65) Firstly, the present case concerns the concept of eligibility within the meaning of Article 33(1)(b) and (c) of Directive 2009/72/EC, i.e. the right given to customers to choose and switch their supplier. The Secretariat fails to see how giving customers the right to choose an alternative supplier may, in itself, lead to price increases at all, let alone "shocks". It is to be expected that customers will exercise this right only if the conditions offered by such an alternative supplier are more attractive than the existing supplier's in terms of quality and/or price. The right conferred on customers by Article 33 thus widens the options for customers, and should not force them to switch supplier. The amendments to the Energy Law are based on the presumption that all small non-household customers would immediately switch to a supplier different than the incumbent supplier EVN, which would leave the latter supplying electricity only to households, the regulated price for which is currently below market price.
- (66) In this respect, the Secretariat notes that the Government has provided no evidence for its presumption that granting the right to choose the supplier would lead to an immediate switching of all non-household customers to alternative suppliers, which given the market structure, past experience (see paragraph 19 of this Reasoned Opinion) and general switching patterns in countries in a comparable situation does not seem likely. One would also assume that an incumbent supplier would react to actual or potential competitive pressure in a more open market.
- (67) Furthermore, 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 – on suppliers within the margin set by Article 3(2) and (3) as well as the case law of the Court of Justice.⁴⁷ These options

⁴⁵ Page 5 of the Reply.

⁴⁶ In its Reply, the Government refers to the purpose of "protection of households from price increase." Pages 2 and 4 of the Reply.

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

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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.

- (68) In reality, the argument related to potential “price shocks” seems to address rather the intended protection of the incumbent’s liquidity than the protection of household customers from “price shocks”. Protecting the incumbent’s liquidity as an argument will be addressed below.
- (69) Secondly, the Secretariat recalls that Directive 2009/72/EC addresses the social problems of the kind apparently 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 law thus explicitly allows for a “*protection of the social category from excessive price increases*”.⁴⁸ By depriving customers of their right to eligibility, however, the former Yugoslav Republic of Macedonia has thus 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.
- (70) Finally, the Secretariat would like to point out that it was the Government and *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 low⁴⁹ precisely because of the reason that the institutions in charge kept on delaying any serious price reform.
- (71) Furthermore, the Government also admits that there is currently cross-subsidization between the (higher) prices for small non-household customers (mostly commerce) and households, despite the fact under Directive 2009/72/EC, the *ERC* had a duty to ensure that there are no cross-subsidies.⁵⁰ In the Secretariat’s view, the Government cannot justify the delay in granting Macedonian customers eligibility by reference to problems which – to the extent they would indeed materialize – originate at least to some extent in the absence of reform measures taken in the past.

⁴⁸ Page 7 of the Reply.

⁴⁹ 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 (2014), 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.

⁵⁰ Article 37(1)(f) Directive 2009/72/EC.

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c. Ensuring security of supply

(72) The Government also seems to contend that compliance with Article 33 of Directive 2009/72/EC could jeopardize the security of energy supply in former Yugoslav Republic of Macedonia. In this respect, the Government deplores the lack of alternative sources of energy besides electricity. The Government also submits that should the liquidity of the incumbent supplier (supplier of tariff customers⁵¹ and afterwards supplier of last resort, currently the company *EVN*) be disrupted, it would not be in a position to covers its debts towards other key market participants (*AD ELEM* and *AD MEPSO*). The Government concludes that postponing of market opening was necessary in order to avoid the disruption of the liquidity of the “most of the electricity energy sector” which ultimately would jeopardize security of supply.

(73) 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:

“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.”

(74) 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.⁵² 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 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.

⁵¹ According to Article 197(5) of the 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 ERC 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.

⁵² 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.

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- (75) The Secretariat submits that in any event, the measure actually taken by the legislature of 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 Reply confirm that the objective of the amendments to the Energy Law was to protect the liquidity of the incumbent supplier. This measure is essentially protectionist in nature as it has the effect of shielding the incumbent supplier from any actual or potential competition by prolonging its legal supply monopoly for a significant period of time.
- (76) By contrast, the Government did not explain how granting all customers the right to choose their supplier, as required under Article 33 of Directive 2009/72/EC, would have put security of supply at risk by threatening the continuous physical flow of electricity from domestic or non-domestic sources (imports). In particular, it was not explained why the incumbent supplier should be the only supplier ensuring secure supply to end customers in case competition would challenge its monopolistic position, even if such challenge were indeed to reach an intensity which would eliminate the incumbent's ability to meet its financial obligations towards domestic or non-domestic generators and system operators (which was not sustained by any evidence in the Reply). In the Secretariat's view, it is rather the continued foreclosure of the market by keeping the incumbent supplier's exclusive position which jeopardizes security of supply, as it seems to make the entire electricity system of the country dependent on the liquidity of one single company.
- (77) The Secretariat submits that in case the liquidity of the incumbent who supplies electricity to final customers at prices regulated by *ERC* was indeed at risk, this problem should have been addressed by reviewing the level of regulated prices, to make sure they reflect the full costs of electricity, and allow for a reasonable profit margin. Furthermore, *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.
- (78) Moreover, the Reply suggests that the collection rates will be again decreased as a consequence of rising electricity prices, which again would lead to reducing the liquidity of the incumbent supplier and would represent a risk for security of supply. Again, the Secretariat points out that postponing market opening do 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. It was also noted above that the Reply did not sustain the claim that all (non-household) customers would exercise their eligibility at once should they be given the right to choose the supplier.
- (79) 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.*"
- (80) 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

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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 those suppliers the access to the Macedonian customers which in turn prevents the regional integration of the electricity markets.

- (81) With regard to the argument that the region lacks a transparent price indication, the Secretariat submits that although there is no regional power exchange on the territory of the Contracting Parties, several organized markets are functioning in the neighboring Parties to the Treaty. The Greek organized market, as well as Hungarian HUPEX, and Romanian OPCOM 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.

d. Flexibility and Article 24 of the Treaty

- (82) 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.
- (83) According to the Reply, any compliance assessment should take into account the country's specific situation. 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 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.
- (84) In the Secretariat's view, the Government is wrong on both accounts.
- (85) 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.⁵³ 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."⁵⁴
- (86) 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

⁵³ 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.

⁵⁴ IMF Report, *The Western Balkans: 15 Years of Economic Transition*, March 2015.

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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.

- (87) 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.
- (88) 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*”.⁵⁵ 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, To the contrary, 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. The former Yugoslav Republic of Macedonia thus repeatedly missed the opportunity to make use of the flexibility offered by Article 24 of the Treaty.
- (89) Finally, the Government also makes reference to the Report of the High Level Reflection Group of May 2014.⁵⁶ 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.)”*⁵⁷

⁵⁵ 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.

⁵⁶ Page 5 of the Reply.

⁵⁷ The High Level Reflection Group of the Energy Community, “*An Energy Community for the Future*” (2014), p. 13.

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- (90) 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. In any event, Macedonia remains at liberty to follow up on the Report and suggest turning flexibility from an intellectual concept to a legally binding feature of the Energy Community.

e. The relevance of EU Member States and other Contracting Parties purported failure to comply

- (91) The Government also tries to justify its failure to implement Article 33 of Directive 2009/72/EC by claiming that the deadlines related to the implementation of certain rules for liberalizing the electricity markets are not respected even by some EU Member States.⁵⁸
- (92) 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.
- (93) 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.⁵⁹
- (94) Therefore, unilaterally changing the time limits set out in Article 33 of the Directive 2009/72/EC by 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.

f. The principles of subsidiarity and proportionality

- (95) The Government also invokes the principles of subsidiarity and proportionality in order to justify its breach of Article 33 of Directive 2009/72/EC. 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".
- (96) The principle of subsidiarity is explicitly spelt out and defined in Article 5(3) of the EU Treaty.⁶⁰ The Secretariat will leave it open of whether the principle of subsidiarity can be

⁵⁸ Page 6 of the Reply.

⁵⁹ 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.

⁶⁰ 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."

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applied outside the confinements of EU law without any explicit specification in the Energy Community Treaty and limits itself to recalling that the Government has not set out how this principle would limit the Energy Community's legislature's – the Ministerial Council – competence to adopt Decisions taking binding effect on Contracting Parties, and in particular incorporating rules already adopted with the EU under Title II of the Treaty such as Article 33 of Directive 2009/72/EC.

- (97) As regards the principle of proportionality, the Secretariat indeed has already found that the principle of proportionality is one of the basic principles of Energy Community Law.⁶¹
- (98) The principle of proportionality is of utmost importance when reconciling to 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. It is to be recalled, however, that Directive 2009/73 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.
- (99) 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.
- (100) 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.

V. Conclusion

- (101) Former Yugoslav Republic of Macedonia was obliged under Article 33(1) of Directive 2009/72/EC read together with Annex I of the Treaty 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 former Yugoslav Republic of Macedonia.
- (102) In the light of the above assessment, the Secretariat concludes that, by depriving a 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 supplier as a supplier of last resort after 1

⁶¹ Case ECS-12/11 [2011], Opening Letter, p. 9.

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January 2015, former Yugoslav Republic of Macedonia fails to comply with Article 33 Directive 2009/72/EC read in conjunction with Annex I of the Treaty.

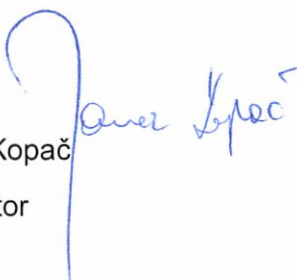
- (103) In accordance with Article 13(2) of the Dispute Settlement Procedures, former Yugoslav Republic of Macedonia is requested to rectify the breaches identified in the present Reasoned Opinion within a time-limit of two months, i.e. by

26 June 2015.

and notify the Secretariat of all steps undertaken in that respect.

Vienna, 27 April 2015

Janez Kopač
Director



Dirk Buschle
Legal Counsel/Deputy Director





Република Македонија
Министерство за економија

Energy Community
RECEIVED

Date: 09. Juli 2015

ECS-2/15/J09-07-2015

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До: СЕКРЕТАРИЈАТ НА ЕНЕРГЕТСКА ЗАЕДНИЦА

Am Hof 4, level 5

1010 Vienna, Austria

За г-дин Јанез Копач, директор

Министерство за економија

Бр. 12-4604/1

Скопје 08-07-2015 година

Јуриј Гагарин, 15

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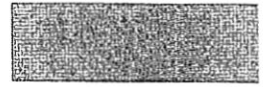
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Предмет: Одговор на Образложено мислење во спор ECS-2/15

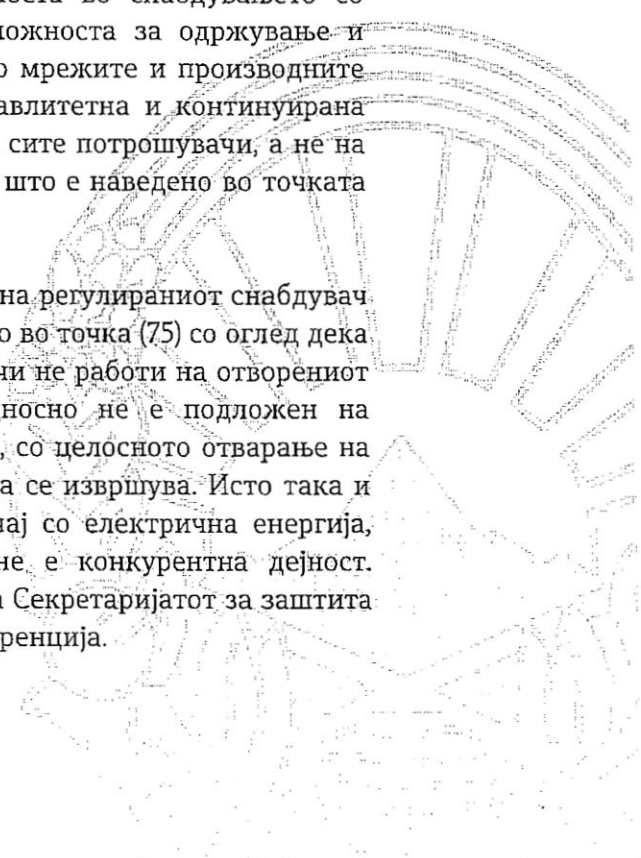
Почитувани,

Во врска со вашето Образложено мислење (Reasoned Opinion) по случајот ECS-2/15 од 27 април 2015 година со кој предлагате Република Македонија, најдоцна до 26 јуни 2015 година, да ги поправи прекршувањата на Договорот за основање на енергетската заедница кои се идентификувани во Основаното мислење, Министерството за економија во име на Владата на Република Македонија го доставува следниот одговор:

1. Единствен мотив за изменување на Законот за енергетика е заштита на домаќинствата на Република Македонија од значително зголемување на цените на електрична енергија по целосно отварање на пазарот на електрична енергија. Ова е од причина што анализите покажуваат дека со целосна примена на подзаконските акти крајната цена на домаќинствата ќе се зголеми и во овој момент. Имајќи го ова во предвид, произлегува дека значително голем број на потрошувачи (претежно од индустрискиот и комерцијалниот сектор) би направиле избор на станбундвач со електрична енергија. Исто така треба да се има во предвид дека цената на електричната енергија на производителот кој има обврска за обезбедување на јавна услуга е релативно ниска во однос на цената која ја нудат останатите снабдувачи и трговци. Цената на домаќинствата би се зголемила и по овој основ. Оттука произлегува дека образложението на Секретаријатот во точка (65) не е релевантно за околностите во електроенергетскиот сектор во Република Македонија.
2. Секретаријатот во своето образложение посебно во деловите (70) и (71) потврдува дека сепак постојат околности поради кои може да доведат до зголемување на цената на електричната енергија што беше и аргумент на Владата на Република Македонија во одговорот на Отвореното писмо.



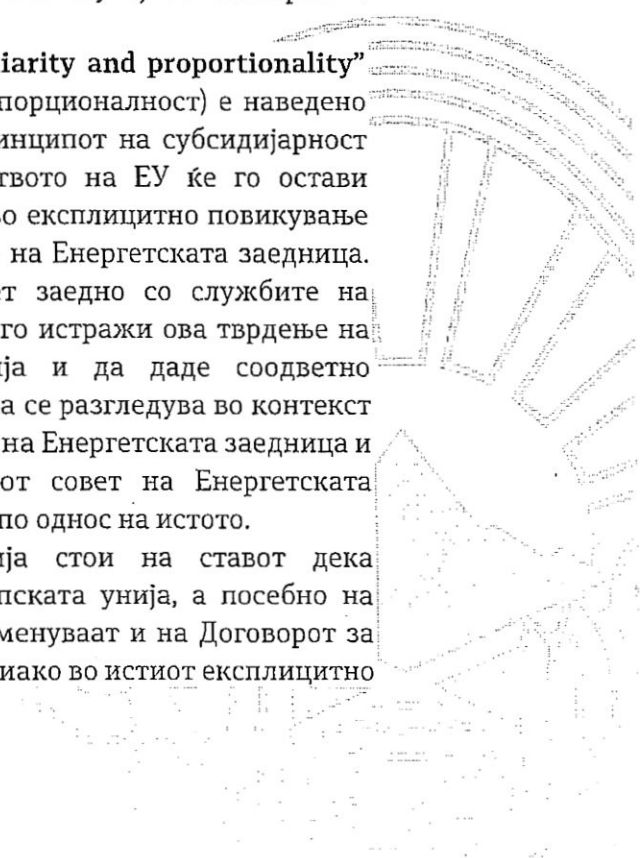
3. Секретаријатот неправилно го толкува фактот на заштита на потрошувачите со заштита на снабдувачот со електрична енергија на тарифни потрошувачи. Имено, целта на Владата е да нема ценовни шокови кај домаќинствата и при тоа објаснувајќи ја економската моќ на домаќинствата во Република Македонија со други зборови се наведува дека истите нема да бидат во можност да ги подмират своите сметки за потрошена електрична енергија. Од тука произлегува отвореното прашање за ликвидноста на снабдувачот во краен случај кој поради неможноста за наплата на своите побарувања, ќе влегува во долгови кон оние кои ја обезбедуваат енергијата, меѓу кои и производителот кој има обврска за обезбедување на јавна услуга, други производители, снабдувачи и трговци, како и давателите на мрежни услуги, а понатаму и на други економски оператори кои даваат различни услуги и стоки. Од тие причини во синџирот на снабдувањето со електрична енергија не станува збор само за ликвидноста на еден снабдувач, односно на снабдувачот за тарифни потрошувачи, туку и за останатите учесници. Имајќи го ова во предвид произлегува дека неможе да се создаде финансиски одржлив енергетски сектор кој ќе одговори на современите предизвици. Оттука, Владата на Република Македонија во одговорот на Отвореното писмо кога објаснува за загрозување на сигурноста во снабдувањето со електрична енергија мисли на неможноста за одржување и реализација на нови инвестиции во мрежите и производните капацитети што се предуслов за квалитетна и континуирана испорака на електрична енергија на сите потрошувачи, а не на физичките текови во мрежите како што е наведено во точката (79).
4. Неможе да стане збор за заштитата на регулираниот снабдувач од конкуренција како што е наведено во точка (75) со оглед дека снабдувачот за тарифни потрошувачи не работи на отворениот пазар на електрична енергија, односно не е подложен на конкуренција. Дополнително на ова, со целосното отварање на пазарот оваа дејност нема повеќе да се извршува. Исто така и дејноста снабдување во краен случај со електрична енергија, согласно Законот за енергетика не е конкурентна дејност. Оттука не се основани тврдењата на Секретаријатот за заштита на регулираниот снабдувач од конкуренција.





5. Кога Секретаријатот наведува дека Владата штити монополски позиции треба да се има во предвид дека станува збор за учесници на регулираниот дел на пазарот на електрична енергија во Република Македонија кои работат согласно услови и тарифи одобрени односно утврдени од страна на Регулаторната комисија за енергетика на Република Македонија врз основа на претходно донесени методологии и правила.
6. Секретаријатот на енергетската заедница во точката (102) погрешно ја утврдува моменталната состојба. Во периодот почнувајќи од 01 јануари 2015 година во Република Македонија домаќинствата и потрошувачите кои не се домаќинства не се снабдуваат од снабдувач во краен случај со електрична енергија. Согласно Законот за енергетика (Службен весник на Република Македонија број 16/2011, 136/2011, 79/2013, 164/2013, 41/2014, 151/2014 и 33/2015) малите потрошувачи и домаќинствата во определени временски периоди утврдени во овој член ќе бидат тарифни потрошувачи, односно ќе се снабдуваат со електрична енергија преку снабдувачот за тарифни потрошувачи а не снабдувачот во краен случај на електрична енергија. Малите потрошувачи и домаќинствата доколку останат без свој снабдувач или доколку не изберат снабдувач ќе можат да се снабдуваат преку снабдувач во краен случај со електрична енергија.
7. Во делот “f. The principles of subsidiarity and proportionality” (Принципи на субсидијарност и пропорционалност) е наведено дека прашањето за примена на принципот на субсидијарност надвор од рамките на законодавството на ЕУ ќе го остави отворено, со оглед дека нема никакво експлицитно повикување на истото во Договорот за основање на Енергетската заедница. Секретаријатот со својот капацитет заедно со службите на Европската комисија би требало да го истражи ова тврдење на Владата на Република Македонија и да даде соодветно образложение. Ова прашање треба да се разгледува во контекст на член 94 од Договорот за основање на Енергетската заедница и доколку е потребно Министерскиот совет на Енергетската заедница би требало да даде насоки по однос на истото.
8. Владата на Република Македонија стои на ставот дека принципите од Договорот на Европската унија, а посебно на членот 5 од истиот треба да се применуваат и на Договорот за основање на Енергетската заедница иако во истиот експлицитно

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не е наведено. Општата цел на принципот на субсидијарност и пропорционалност е да обезбеди право на земјите членки да превземаат одредени мерки. Исто така, принципот на субсидијарност се применува во случаите кога не постои исклучива надлежност на повисоките тела за прашања кои се од значење за земјите членки. Заштитата на потрошувачите од ценовни шокови е исклучиво прашање на земјата членка затоа што истите можат да имаат несогледливи социјални последици по животниот стандард на граѓаните. Од тука и Законот за изменување и дополнување на Законот за енергетика е во насока на субсидијарно применување на одредбите од Договорот за основање на Енергетската заедница кои немаат за цел да ги дерогираат превземените обврски од договорот, туку истите да ги транспонира во националното законодавство со што ќе се овозможи полесно исполнување на обврските. Во ниеден дел од Законот за изменување и дополнување на Законот за енергетика не се спомнува дека пазарот за електрична енергија нема да се либерализира за домаќинствата и малите потрошувачи, туку истото се прави со одредена временска динамика која ќе ги амортизира ценовните удари за домаќинствата. Во овој контекст принципот на субсидијарност се подразбира, иако истиот можеби не е дел од некаков акт (case C-84/94, ECR I-5755 and C-233/94, ECR I-2405).

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9. Имено, треба да се има во предвид дека и со Договорот за основање на Енергетската заедница се формира заедница која функционира во делот на енергетиката и истата би требало да работи на принципите на Европската унија, односно да се имаат во предвид принципите на Европската унија при примена на Договорот за основање на Енергетската заедница. Неопходно е да се истакне дека една од страните на Договорот за основање на Енергетската заедница е и Европската заедница која има обврска да работи по принципите и вредностите на Договорот за основање на Европската унија. А самиот Договор за основање на Енергетска заедница укажува дека одредбите од Договорот и мерките (член 27, член 40 и други) се применуваат на териториите на кои се применува Договорот за формирање на Европската заедница.
10. Владата на Република Македонија повикувајќи се на принципот на субсидијарност и одговорот на Отвореното писмо, а имајќи ја во предвид и моменталната состојбата во државата укажува дека во овој момент целосното отворање на пазарот на





електрична енергија од 01.01.2015 година не е поволно за граѓаните на Република Македонија. Односно, како и секоја Влада се грижи за социјалната состојба на своите граѓани.

11. Законот за изменување и дополнување на Законот за енергетика е една од мерките која е пропорционална во однос на обврската за целосно отворање на пазарот имајќи во предвид дека Владата на Република Македонија не се откажала од отворањето на пазарот туку предложила временска динамика во спроведувањето на оваа обврска.

Едновременно уште еднаш потенцираме дека Владата на Република Македонија и понатаму останува на патот на спроведување на реформите во енергетскиот сектор и исполнување на обврските кои произлегуваат од Договорот за основање на енергетската заедница. Во контекст на ова во наредниот период ќе се изготват анализи за можноста за понатамошна либерализација на пазарот на електрична енергија и врз основа на направените анализи ќе се изготват соодветни предлози.

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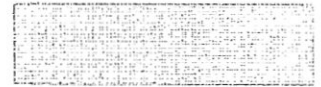
Со почит,

МИНИСТЕР,
Bekim Neziri



Изработиле: м-р Исмаил Лумв
м-р Валентина Старделова
Контролирал: м-р Размена Чекиќ Дуровиќ
Одобрил: м-р Виолета Кеќкарска
Согласен: Анета Димовска





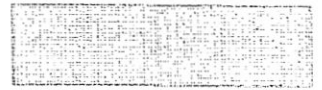
Courtesy Translation

Subject: Response to the Reasoned Opinion in the dispute ECS-2/15

Respected,

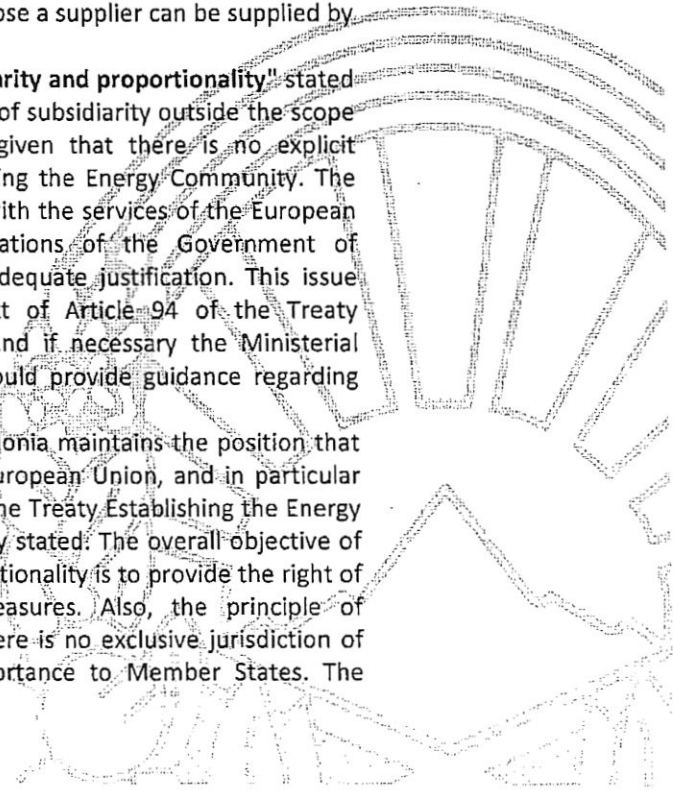
Regarding your Reasoned Opinion in case ECS-2/15 of April 27, 2015 in which you propose the Republic of Macedonia no later than June 26, 2015, to repair the breaches of the Treaty Establishing the Energy Community which are identified in the Reasonable Opinion, the Ministry of Economy on behalf of the Government of Republic of Macedonia submits the following response:

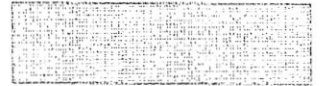
1. The only motive for amending the Energy Law is to protect the households of the Republic of Macedonia from the substantial increase in prices of electricity at full opening of the electricity market. This is because the analysis shows that the full application of the by-laws the final price of households will increase at this point. Taking this into account, it appears that a significant number of large customers (primarily the industrial and commercial sector) would have made a selection of supplier with electricity. It should also be borne in mind that the price of electricity to the producer who has the responsibility for providing a public service is relatively low compared to the price offered by other suppliers and traders. The price of household would increase in this respect. Hence the explanation of the Secretariat in point (65) is not relevant to the circumstances in the electricity sector in the Republic of Macedonia.
2. The Secretariat in its explanation especially in parts (70) and (71) confirms that there are circumstances which may lead to an increase in the price of electricity which was the argument of the Government of Republic of Macedonia in response to the Open letter.
3. The Secretariat incorrectly interprets the fact of consumer protection with the protection of electricity supplier for tariff consumers. Namely, the goal of the Government is no price shocks for households and thereby explaining the economic power of households in the Republic of Macedonia in other words stating that they will not be able to pay their bills for consumed electricity. From here stems the open question about the liquidity of the provider of last resort which due to the impossibility of recovering their claims, will enter into debt to those who provide energy, including producer which has the responsibility for providing a public service, other manufacturers and suppliers traders and providers of network services and further to other economic operators who provide various services and goods. 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. Taking this into account it appears that can not be created a financially sustainable energy sector that will respond to contemporary challenges. Hence, the Government of Republic of Macedonia in response to the Open Letter that explains the endangering the safety of supply of electricity refers to



the inability to maintain and implement new investments in networks and production capacities as a precondition for quality and continuous delivery of electricity to all consumers and not the physical flows in networks as specified in point (79).

4. It is not about the protection of regulated supplier from the competition as referred to in point (75) given that supplier for tariff customers is not working on the open electricity market, i.e. not subject to competition. In addition, with the full opening of the market this activity will no longer be running. Also the supply activity of last resort with electricity, pursuant the Law on Energy is not a competitive activity. Hence are not established the claims of the Secretariat for the protection of the regulated supplier of competition.
5. When the Secretariat states that the Government protects monopolistic positions should be borne in mind that it is the participants of the regulated electricity market in the Republic of Macedonia that work according to conditions and tariffs approved or set by the Energy Regulatory Commission of the Republic Macedonia on the basis of previously adopted methodologies and rules.
6. Energy Community Secretariat in paragraph (102) incorrectly determines the current status. In the period starting from January 1, 2015 in Republic of Macedonia the households and consumers who are not households are not supplied with electricity from a supplier of last resort . According to the Energy Law (Official Gazette number 16/2011, 136/2011, 79/2013, 164/2013, 41/2014, 151/2014 and 33/2015) small consumers and households in certain time periods specified in this Article are tariff consumers, that is, will be supplied with electricity through a supplier for tariff consumers and not the supplier of last resort for electricity. The small consumers and households if they stay without a supplier or if they do not choose a supplier can be supplied by a supplier of last resort with electricity.
7. In the part "**f. The principles of subsidiarity and proportionality**" stated that the issue of applying the principle of subsidiarity outside the scope of EU legislation will be left open, given that there is no explicit reference to it in the Treaty Establishing the Energy Community. The Secretariat with its capacity together with the services of the European Commission should investigate allegations of the Government of Republic of Macedonia and to give adequate justification. This issue should be considered in the context of Article 94 of the Treaty Establishing the Energy Community and if necessary the Ministerial Council of the Energy Community should provide guidance regarding the same.
8. The Government of Republic of Macedonia maintains the position that the principles of the Agreement on European Union, and in particular Article 5 of the same should apply to the Treaty Establishing the Energy Community, although it is not explicitly stated. The overall objective of the principle of subsidiarity and proportionality is to provide the right of Member States to take certain measures. Also, the principle of subsidiarity applies in cases where there is no exclusive jurisdiction of the higher bodies on issues of importance to Member States. 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. Thereof the Law Amending the Law on Energy is into direction of subsidiarily applying the provisions of the Treaty Establishing the Energy Community that are not intended to derogate undertaken obligations under the Agreement, but the same to transpose into national legislation, thus enable easier fulfillment of the obligations. In no part of the Law on Amending the Energy Law is mentioned that the electricity market will be liberalized for households and small consumers, but it is done by a certain time dynamics that will depreciate the price impact for households. In this context the principle of subsidiarity means, even though it may not be part of an act (case C-84/94, ECR I-5755 and C-233/94, ECR I-2405).

9. Namely, it should be borne in mind that with the Treaty Establishing the Energy Community is formed a community that operates in the sectors of energy and it should work on the principles of the European Union, that is, to consider the principles of the European Union when applying the Treaty Establishing the Energy Community. It is necessary to point out that one of the Parties to the Treaty Establishing the Energy Community is the European Community, which has an obligation to work on the principles and values of the Treaty Establishing the European Union. And the Treaty Establishing the Energy Community indicates that the provisions of the Treaty and measures (Articles 27, 40, etc.) are applied to the territories on which is applied the Agreement Establishing the European Community.
10. The Government of Republic of Macedonia invoking the principle of subsidiarity and the response to the Open Letter, and bearing in mind the current situation in the country indicates that at this point the full opening of the electricity market from 01.01.2015 year is not favorable for the citizens of the Republic of Macedonia. That is, as every Government cares for the social condition of its citizens.
11. The Law Amending the Law on Energy is one measure that is proportional in relation to the obligation of full market opening given that the Government of Republic of Macedonia did not give up on the market opening but proposed dynamics in the implementation of this obligation.

At the same time, once again we emphasize that the Government of Republic of Macedonia remains on the path of implementation of the reforms in the energy sector and fulfilling the obligations arising from the Treaty Establishing the Energy Community. In this context, the forthcoming period will be prepared analyzes for the possibility for further liberalization of the electricity market on the basis of the prepared analyzes will be prepared appropriate proposals.

Respectfully,

**MINISTER,
Bekim Neziri**

