

**Energy Community Secretariat**

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Vienna, 27 May 2021
ECS-5/17O27-05-2021

RE: Case ECS-5/17; Reasoned Request

Honorable Presidency of the Energy Community,
Honorable Vice-Presidencies of the Energy Community,

Please find attached the Reasoned Request in relation to Case ECS-5/17.
Please accept, Excellencies, the assurances of my highest consideration.

Yours sincerely,

Janez Kopač
Director

**H.E. MRS. ZORANA MIHAJLOVIĆ
MINISTER OF MINING AND ENERGY
REPUBLIC OF SERBIA**

**H.E. MR. YURII VITRENKO
FIRST DEPUTY MINISTER OF ENERGY
UKRAINE**

**H.E. MRS. KADRI SIMSON
COMMISSIONER FOR ENERGY
EUROPEAN COMMISSION**

**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-5/17

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (“the Treaty”) and Articles 15 and 29 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty,¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

BOSNIA AND HERZEGOVINA

seeking a Decision from the Ministerial Council that Bosnia and Herzegovina,

due to the failure to legally and functionally separate the distribution activities from generation and supply in both the Federation of Bosnia and Herzegovina and in Republika Srpska, Bosnia and Herzegovina fails to comply with the obligation to implement Article 26(1), (2) and (3) of Directive 2009/72/EC,

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

I. Relevant Facts

- (1) The organisation of the power sector of Bosnia and Herzegovina is determined by the constitutional structure of the country. While electricity transmission system operation, wholesale and cross-border trade are governed on the state level for the whole territory of Bosnia and Herzegovina, the two entities, Republika Srpska and Federation of Bosnia and Herzegovina, are competent for generation, distribution and supply of electricity to end-consumers in their respective jurisdictions.

¹ Procedural Act No 2015/04/MC-EnC of 16.10.2015.

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1. Federation of Bosnia and Herzegovina

- (2) The electricity sector in the Federation of Bosnia and Herzegovina is governed by the Law on Electricity of 2013.²
- (3) Article 46 of the Law on Electricity requires legal and functional unbundling of electricity distribution system operators, applicable by its entry into force on 5 September 2013.³ The Law on Electricity neither includes an obligation for adoption of a compliance program and/or appointment of compliance officer as stipulated by Article 26(2)(d) of Directive 2009/72/EC nor does it require the establishment of a separate branding and communication identity of the distribution system operator, as provided by Article 26(3) of Directive 2009/72/EC.
- (4) Article 114 of the Law on Electricity requires the development of a Program for restructuring the electricity sector in the Federation of Bosnia and Herzegovina which the Government adopted on 6 March 2014. The Program foresees step-wise functional and ultimately legal unbundling of the distribution system operators.⁴ However, the Program has never been adopted by the Parliament of the Federation of Bosnia and Herzegovina. This was confirmed in the Reply to the Opening Letter.⁵
- (5) On 16 December 2019, the Ministry of Energy, Mining and Industry of the Federation of Bosnia and Herzegovina submitted to the Secretariat and the Parliament of the Federation of Bosnia and Herzegovina a new draft Program for restructuring the electricity sector in the Federation of Bosnia and Herzegovina, which envisaged a step-wise functional and ultimately legal unbundling of the vertically integrated electricity companies *Elektroprivreda BiH d.d. Sarajevo*⁶ and *Elektroprivreda HZHB d.d Mostar*.
- (6) In December 2019, the Government of the Federation of Bosnia and Herzegovina, sent the Program for approval to the Parliament of the Federation of Bosnia and Herzegovina. In January 2020, the House of Representatives – the lower house of the Parliament of the Federation of Bosnia and Herzegovina gave consent to the program conditioned upon the Government of the Federation of Bosnia and Herzegovina making changes to the deadlines for its implementation. However, the Program has not been approved by the House of Peoples – the upper house of the Parliament of the Federation of Bosnia and Herzegovina. In November 2020, the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina asked the House of Peoples about its intention to approve the Program but has not received a reply.
- (7) Even if adopted, the Program would merely represent a plan for restructuring the energy sector, including a timeline for unbundling of the distribution system operators of the Federation in Bosnia and Herzegovina to be completed 36 months after adoption of the Program.

² Supra note 9.

³ Law on Electricity, Official Journal of the Federation of BiH No.66/13, 94/15 and 54/19.

⁴ Official Journal No. 20/14.

⁵ ANNEX 2. Reply to the Opening Letter, dated 22 February 2018. According to the information provided in the Reply, deadlines of the Government's proposal are already outdated due to the long-lasting lack of approval by the Parliament.

⁶ *Javno Preduzeće Elektroprivreda Bosne i Hercegovine d.d. Sarajevo*; www.epbih.ba

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- (8) As will be demonstrated in the following, the two distribution system operators active in the Federation of Bosnia and Herzegovina, *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar*,⁷ are still legally and functionally bundled with supply and generation activities. Compliance programs and/or officers are not in place.

Elektroprivreda BiH d.d. Sarajevo

- (9) *Elektroprivreda BiH d.d. Sarajevo* is a public enterprise registered as joint stock company. 90.37% of capital is owned by the Federation of Bosnia and Herzegovina, 9.63% by minority shareholders.⁸ The company's governance structure includes a general assembly composed of shareholder representatives, a supervisory board, the management⁹ and an audit committee. The supervisory board consists of seven members who are appointed and dismissed by the general assembly.¹⁰
- (10) *Elektroprivreda BiH d.d. Sarajevo* is the parent company within the *EPBIH* concern, which includes several companies active in the sectors of mining and manufacturing of equipment.¹¹ However, there are no separate companies for distribution operation, generation and supply of electricity. Instead, the activities of generation,¹² distribution¹³ and supply¹⁴ based on licenses issued to *Elektroprivreda BiH d.d. Sarajevo* are performed by this company and organised in units (called 'Directorates') under a common management.
- Electricity distribution and supply is organized in five regional sub-divisions – namely: Elektrodistribucija Sarajevo, Elektrodistribucija Tuzla, Elektrodistribucija Zenica, Elektrodistribucija Bihać and Elektrodistribucija Mostar – all part of *Elektroprivreda BiH d.d. Sarajevo*, without separate legal identities.

⁷ *Javno Preduzeće Elektroprivreda Hrvatske Zajednice Herceg Bosne d.d. Mostar*; www.ephzhb.ba.

⁸ Cf. www.epbih.ba – about company - general information.

⁹ The management is composed of Mr. *Admir Anđelića* (General Director), Mr. *Samir Selimović* (Executive Director for Production), Mr. *Elvir Lojić* (Executive Director for Distribution), Mr. *Zlatan Planinčić* (Executive Director for Supply and Trade), Mr. *Muhamed Kozadra* (Acting Executive Director for Economic Operations), Mrs. *Ružica Burić* (Executive Director for Legal Affairs and Human resources) and Mr. *Senad Salkić* (Executive Director for Capital Investment); cf. www.epbih.ba – about company - general information – organisation.

¹⁰ The members of the Supervisory Board are: Mr. *Izet Žigić* (President of the Supervisory Board), Mr. *Milenko Obad*, Mr. *Selvedin Subašić*, Mr. *Muhidin Zametica*, Mr. *Safet Isić*, Mr. *Vanja Bajrami*, and Mr. *Hasen Mašović*. The member of the Audit Committee are: Mr. *Almira Zulić-Burek*, Mrs. *Fikreta Bešović* and Mr. *Haris Jahić*. The members of the Audit Committee have been appointed at the 62th meeting of the General Assembly on 28.05.2020 for a period of four years from a date of appointment; cf. www.epbih.ba – about company - general information – organisation.

¹¹ The EPBIH Concern, as a form of co-operation of companies, was established in November 2009, by signature of an agreement on conduct of business between *Elektroprivreda BiH d.d. - Sarajevo* and its subsidiaries - seven coal mines, along with the former non-electric utility companies of *JP Elektroprivreda BiH d.d. - Sarajevo*; cf. www.epbih.ba/eng/page/epbih-concern.

¹² Generation license 06-03-734/32/12 issued by the Regulatory Commission for Energy in the Federation of Bosnia and Herzegovina (FERK) for the validity period of 01.01.2013-31.12.2022.

¹³ Distribution license No. 06-03-735/34/12 issued by FERK for the validity period of 01.01.2013-31.12.2027.

¹⁴ Supply license No. 06-03-755/143/16 issued by FERK for the validity period of 01.01.2017-31.12.2021.

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- Generation is performed by two thermal power plants, TPP Kakanj and TPP Tuzla, as well as three larger hydro power plants (HPP Jablanica, HPP Grabovica and HPP Salakovac), and a few smaller hydro power plants.¹⁵

(11) The company structure can be displayed as follows:¹⁶

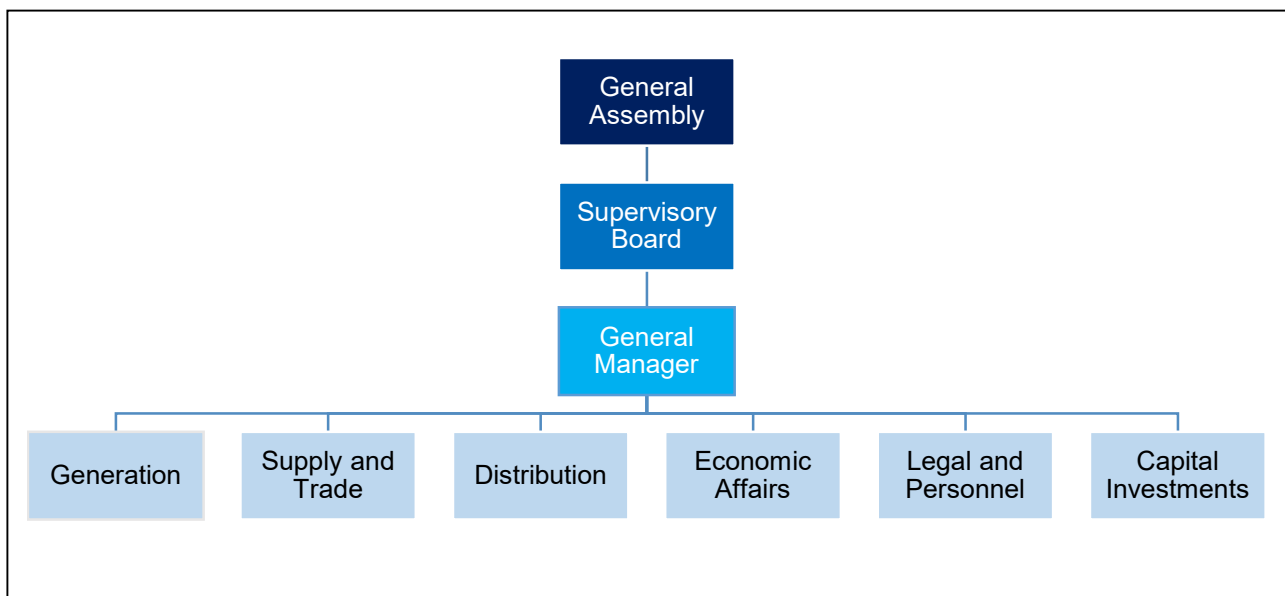


Figure 1: Company structure of *Elektroprivreda BiH d.d. Sarajevo*

Elektroprivreda HZHB d.d Mostar

(12) *Elektroprivreda HZHB d.d Mostar* is registered as a joint stock company.¹⁷ 90% of its capital is owned by the Federation of Bosnia and Herzegovina, 10% are owned by investment funds, banks and other legal and natural persons.¹⁸ The company’s governance structure includes a general assembly composed of shareholder representatives, a supervisory board, the management¹⁹ and an audit committee. The supervisory board consists of six members and a president who are appointed and dismissed by the general assembly.²⁰

¹⁵ www.epbih.ba/eng/page/subsidiaries#distribution.

¹⁶ Cf. <https://www.epbih.ba/eng/page/organization-of-the-company#company-management>.

¹⁷ Registration number 1-3177.

¹⁸ www.ephzhhb.ba – about us – company profile – basic data.

¹⁹ The management is composed of Mr. Marinko Gilja (General Manager), Mr Robert Lesko (Director for Legal Affairs), Mr. Ante Tutiš (Director for Economic Affairs), Mr. Zoran Tabak (Director for Production), Mr. Ilija Bakalar (Director for Distribution), Mr. Ivica Prskalo (Director for Supply) and Mr. Drago Bago (Director for Development); cf. www.ephzhhb.ba – organisation – management.

²⁰ The current members of the Supervisory Board are Mr. Božo Perić (President); Mr. Zoran Buntić; Mr. Ivo Vincetić; Mrs. Karmela Miletić; Mr. Ivica Krivić; Mr. Alija Fitozović; cf. www.ephzhhb.ba – organisation – supervisory board.

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(13) Based on licenses issued to *Elektroprivreda HZHB d.d Mostar*, the company performs the activities of electricity supply,²¹ distribution²² and generation²³ organised in units (also called ‘Directorates’) under a common management.²⁴

(14) The company is structured as follows:

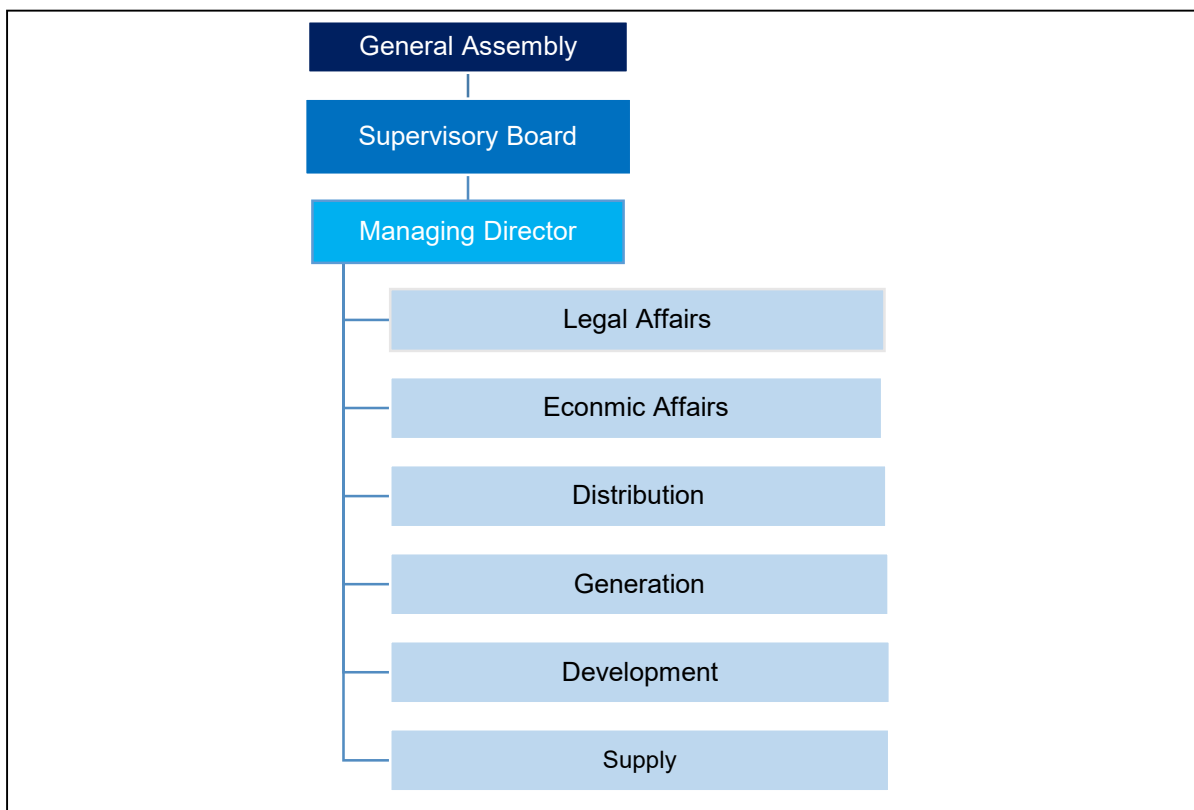


Figure 2: Company structure of *Elektroprivreda HZHB d.d Mostar*

2. Republika Srpska

(15) The electricity sector in Republika Srpska is governed by the Law on Energy of 2009²⁵ and the Electricity Law of July 2020.²⁶ Article 14(1) of the Law on Energy stipulates unbundling of energy

²¹ Supply license No. 06-03-739-10/140 issued by FERK for the validity period of 01.01.2017-31.12.2021.

²² Distribution license No. 06-03-737/34/12 issued by FERK for the validity period of 1.1.2013-31.12.2027. Transmission activities have been separated in 2006.

²³ Generation license No. 06-03-730/31/12 issued by FERK for the validity period of 01.01.2013-31.12.2022.

²⁴ On the performed activities see: www.ephzhd.ba – organisation – distribution / production / supply.

²⁵ Adopted on 14 May 2009, Official Journal 49/2009.

²⁶ Official Gazette of RS, No.68/20 of 13.07.2020.

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activities, including electricity, but does not prescribe details of the unbundling requirements. Article 14(2) of the Energy Law reads that unbundling "*can be related to legal, functional and accounting unbundling*", while Article 14(1) leaves the final decision on the concrete unbundling concept to the Electricity Law. Article 50(2) of the Electricity Law of July 2020 transposes the general requirement of Article 26(1) of Directive 2009/72/EC for unbundling in legal, organisational and decision-making terms.

- (16) Article 50(4) items (1)-(5) of the 2020 Electricity Law transposes the specific requirements for functional unbundling from Article 26(2)(a) and (b) and the first two sentences of litera (c), as well as Article 26(3) of Directive 2009/72/EC by requiring separation and independent decision-making of the distribution system operator's management, availability of sufficient human, technical, physical and financial resources for the performance of distribution system activities as well as a separate branding and communication identity.
- (17) Article 51 of the 2020 Electricity Law transposes the possibility stipulated in Article 26(2)(c) sentences three to five of Directive 2009/72/EC for the parent company to approve the financial plan of the distribution company, without interfering into the day to day business or individual decisions related to the construction or upgrading of the distribution network.
- (18) The obligation stemming from Article 26(d) of Directive 2009/72/EC to establish a compliance program and appoint a compliance officer is transposed in Article 48 of the 2020 Electricity Law.
- (19) According to its Article 147(1), the 2020 Electricity Law entered into force on 1 January 2021. Pursuant to Article 140 of this Law, legal and functional unbundling are to be implemented within one year from the entry into force of the new Electricity Law, i.e. by 1 January 2022. In case of non-compliance within this deadline, Article 147(3) of the 2020 Electricity Law foresees a withdrawal of the licenses.

Elektroprivreda Republike Srpske

- (20) In Republika Srpska electricity distribution, generation and supply are performed by *Elektroprivreda Republike Srpske* (ERS). The holding company ERS is registered as joint stock company which is 100% owned by the Government of Republika Srpska and consists of incorporated subsidiaries described below.²⁷ ERS's governance structure includes a general assembly representing the shareholder, a supervisory board,²⁸ the management²⁹ and an audit committee.³⁰ The supervisory board consists of five members who are appointed and dismissed

²⁷ www.ers.ba – profile – history.

²⁸ The Supervisory Board is composed of Mrs *Slavica Injac* (President), Mr. *Nebojsa Rikalo* (Deputy President), Mr. *Milenko Đukić* and Mr. *Siniša Mandić*; cf. www.ers.ba.

²⁹ The management of ERS is composed of Mr. *Luka Petrović* (Acting Director General), Mr. *Goran Vukoje* (Director for Technical Affairs) and Mr. *Borislav Grubač* (Director for Organisational and Legal Affairs), Mr. *Darko Milunović* (Executive Director for Economic and Financial Affairs) and Mr. *Jovica Vlatković* (Executive Director for Development and Investment).

³⁰ The Audit Committee is composed of Mr. *Zoran Božić* (Chairman), Mr *Radomir Tabaković*, Mr. *Mile Balotic*, Mrs. *Jela Rikalo* and Mrs. *Dragana Pejić*.

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by the general assembly. The activities of *ERS* are legally separated into five subsidiaries engaged in electricity generation, and five subsidiaries engaged in electricity distribution.

(21) The electricity-related activities of *ERS* are organised in:

- Five daughter companies engaged in electricity generation – *ZP Hidroelektrane na Trebišnjici ad Trebinje*, *ZP Hydroelectric Power Plants on Drina ad Visegrad*, *ZP Hidroelektrane na Vrbasu ad Mrkonjić Grad*, *ZP Rudnik and Thermal Power Plant Gacko a.d. Gacko*, *ZP Rudnik* and *Termoelektrana Ugljevik a.d. Ugljevik*.³¹
- Five subsidiaries engaged in electricity distribution – *ZP Elektrokrajina a.d. Banja Luka*,³² *ZP Elektro Doboj a.d. Doboj*,³³ *ZP Elektro Bijeljina a.d. Bijeljina*,³⁴ *ZP Elektrodistribucija Pale a.d. Pale*³⁵ and *ZP Elektrohercegovina a.d. Trebinje*.³⁶
- Electricity supply activities, including supply under regulated conditions (public supply) are performed by the holding company *ERS* within a department (directorate) for supply.³⁷
- Two of the distribution companies, *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale*, also hold licenses for generation of electricity.³⁸ They operate the following hydropower plants: *Bijeljina* operates HPP Tišća and HPP Vlasenica, whereas *Elektrodistribucija Pale* operates HPP Mesići and HPP Bogatići.

³¹ All daughter companies hold valid electricity generation licenses issued by the regulatory authority of Republika Srpska, REERS; cf. www.reers.ba – register of licenses – electricity – generation.

³² Registration No. 1074440; Unique Identification No. 4400855640000; www.elektrokrajina.com; distribution license issued by decision of REERS No. 01-467-10/12 effective as of 28.12.2012; supply license issued by decision of REERS No. 01-420-12/14/R-99-345 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

³³ Registration No. 01074628; Unique Identification No. 4400014500009; www.elektrodoboj.net; distribution license issued by decision of REERS No. 01-430-11/14/R-99-353 effective as of 28.12.2014; supply license issued by decision of REERS No. 01-431-5/14/R-99-349 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

³⁴ www.elektrobijeljina.com; distribution license issued by decision of REERS No. 01-425-14/14/R-99-352 effective as of 28.12.2014; supply license issued by decision of REERS No. 01-426-6/14/R-99-347 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

³⁵ Registration No. 1814788; Unique Identification No. 4400570050004; www.edbpale.com; distribution license issued by decision of REERS No. 01-453-11/12 effective as of 28.12.2012; supply license issued by decision of REERS No. 01-487-8/14/R-99-348 effective as of 28.12.2014.

³⁶ Registration No. 1814788; Unique Identification No. 4400570050004; www.elektrohercegovina.com; distribution license issued by decision of REERS No. 01-450-12/12 effective as of 28.12.2012; supply license issued by decision of REERS No. 01-423-10/14/R-99-346 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

³⁷ Based on that decision, the regulator adopted a decision amending the license for supply of electricity, Decision number 04 / 1-012-2-233 / 21 dated 04.02.2021, [Spoj: P-30-465-97/11 \(reers.ba\)](http://Spoj: P-30-465-97/11 (reers.ba)).

³⁸ See the license registry at REERS: [Električna energija | PEPC \(reers.ba\)](http://Električna energija | PEPC (reers.ba))

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(22) The company structure can be displayed as follows:

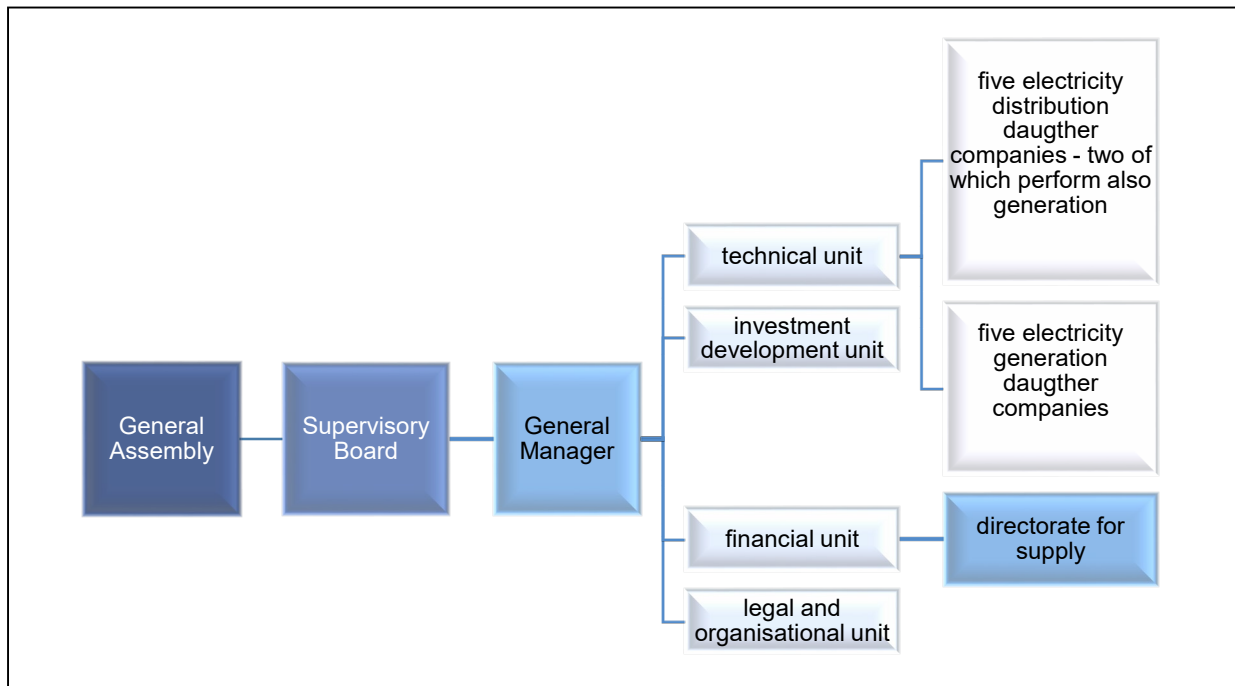


Figure 3: ERS structure

(23) By virtue of the number of connected customers, the exemption of Article 26(4) of Directive 2009/72/EC for integrated electricity undertakings serving less than 100000 connected customers does not apply to any of the utilities in either entity (.³⁹ Compliance by the latter thus, is out of the scope of the present case.

II. Relevant Energy Community Law

(24) Energy Community law is defined in Article 1 of the Dispute Settlement Procedures as “a *Treaty obligation* or [...] a *Decision addressed to [a Party]*”.

(25) Article 3 of the Dispute Settlement Procedures reads:

“(1) A Party fails to comply with its obligations under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law.

(2) 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

³⁹ It applies to the electricity distribution operator of Brčko District, *Komunalno Brčko* www.komunalno.ba, which is not subject to the present Reasoned Request.

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judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable.”

(26) 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.”

(27) Article 89 of the Treaty reads:

“The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.”

(28) Article 3 of Decision 2011/02/MC-EnC defines 1 January 2015 as deadline for transposition and implementation of the Third Energy Package, including Directive 2009/72/EC.

(29) Article 2(21) of Directive 2009/72/EC reads:

‘vertically integrated undertaking’ means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity.

(30) Article 2(35) of Directive 2009/72/EC reads:

‘electricity undertaking’ means any natural or legal person carrying out at least one of the following functions: generation, transmission, distribution, supply, or purchase of electricity, which is responsible for the commercial, technical or maintenance tasks related to those functions, but does not include final customers.

(31) Article 26 of Directive 2009/72/EC reads:

1. Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking.

2. In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:

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(a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;

(b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

(c) the distribution system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks

(d) the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 35(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.

3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4. Contracting Parties may decide not to apply paragraphs 1, 2 and 3 to integrated electricity undertakings serving less than 100000 connected customers, or serving small isolated systems.

III. Preliminary Procedure

(32) 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 11 of the Dispute Settlement Procedures, the Secretariat shall carry out a preliminary procedure before submitting a Reasoned Request to the Ministerial Council.

(33) In its Annual Implementation Reports, the Secretariat has consistently noted the lack of compliance with the legal and functional unbundling requirements under the Energy Community

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Treaty by Bosnia and Herzegovina, and made a reference to the present case that is open since 2018.⁴⁰

- (34) The Secretariat also established a dedicated platform, the so-called *Energy Community Distribution System Operators in Electricity* (ECDSO-E) aiming to support activities of Contracting Parties' electricity distribution system operators' efforts to implement the Energy Community *acquis communautaire* ('acquis'), among which the unbundling requirements stemming from Directive 2009/72/EC.⁴¹ Distribution system companies operating in Bosnia and Herzegovina have been involved in ECDSO-E activities. In this context, the Secretariat also provided detailed guidance on how to accomplish unbundling of distribution system operators and a Policy Guideline on unbundling of distribution system operators (DSOs).
- (35) In absence of any progress with electricity distribution system unbundling in Bosnia and Herzegovina since the entry into force of the Energy Community Treaty in 2006, on 3 October 2017 the Secretariat informed the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina (hereinafter: 'Ministry') about the preliminary finding of non-compliance with Article 26 of Directive 2009/72/EC for functional and legal unbundling of electricity distribution system operators in both entities.⁴²
- (36) The Ministry replied to the Secretariat by letter of 13 November 2017.⁴³ In its letter the Ministry did not challenge the facts and legal assessment in the Secretariat's letter of 3 October 2017 but
- confirmed that in the Federation of Bosnia and Herzegovina the Law on Electricity fails to transpose the obligation for a compliance programme and officer, as required by Article 26(2)(d) of Directive 2009/72/EC, and that unbundling of the two distribution system operators has not been implemented in praxis;
 - confirmed that in Republika Srpska legal and functional unbundling of the electricity distribution system operator has not been implemented.
- (37) On 16 January 2018, the Secretariat, by way of an Opening Letter,⁴⁴ initiated dispute settlement proceedings against Bosnia and Herzegovina for non-compliance with the Treaty and, in particular, with the obligations stemming from Article 26 of Directive 2009/72/EC for legal and functional unbundling of electricity distribution system operators, including the establishment of a compliance program and compliance officer.⁴⁵

⁴⁰ ECS, Annual Implementation Report of 2019, p. 36, and of 2020, p.44.

⁴¹ Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC as adopted and adapted by Decision of the Energy Community Ministerial Council 2011/02/MC-EnC.

⁴² Ref. ECS-6/17/O/03-10-2017.

⁴³ Ref. no. 07-1-28-3639-5/17; received by the Secretariat on 20.11.2017.

⁴⁴ ANNEX 1 (Opening Letter).

⁴⁵ Ref. ECS-5/17/O/16-01-2018.

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(38) On 19 March 2018, the Ministry of Foreign Trade and Economic Relations forwarded to the Secretariat a letter of the Ministry of Energy, Mining and Industry of the Federation of Bosnia and Herzegovina dated 22 February 2018 (hereinafter: the 'Reply to the Opening Letter') informing about the status of legal unbundling of distribution system operators in the Federation of Bosnia and Herzegovina.⁴⁶ With regard to that entity, the Reply confirmed the information already provided by the Ministry of Foreign Trade and Economic Relations in its letter of 13 November 2017, namely that legal and functional unbundling of electricity distribution system operators is legally required by the Law on Electricity but has not been implemented in practice, and that the Law on Electricity fails to transpose the obligation for a compliance programme and officer as stipulated by Article 26(2)(d) of Directive 2009/72/EC. The Reply did not contain any information about Republika Srpska.

(39) The Secretariat considered that the explanation provided by the authorities of Bosnia and Herzegovina did not affect the preliminary legal assessment of the Secretariat carried out in the Opening Letter, nor did it indicate that the breaches of Bosnia and Herzegovina's obligations under the Treaty had been rectified. While taking into account that the Electricity Law adopted by Republika Srpska in July 2020 transposes the requirements for legal, organisational and decision-making unbundling, the Secretariat took the view that Bosnia and Herzegovina still failed to implement Article 26 of Directive 2009/72/EC by actual unbundling, on 11 November 2020 submitted a Reasoned Opinion.⁴⁷

(40) On 8 December 2020, Bosnia and Herzegovina provided a Reply to the Reasoned Opinion.⁴⁸ In its Reply, Bosnia and Herzegovina informed about the status of implementation of the unbundling of the distribution system operators in Bosnia and Herzegovina:

- In relation to the Federation of Bosnia and Herzegovina, the Reply informed that implementation of the activities on legal unbundling of distribution activities is planned to be completed within 36 months from the date of approval by both houses of the Parliament of the Federation of Bosnia and Herzegovina to the Program on restructuring the energy sector in the Federation of Bosnia and Herzegovina. As explained above, the Program has not been adopted and implementation of unbundling of distribution activities has not been initiated, let alone completed.
- In relation to Republika Srpska, the Reply contained the unspecified assertion that activities on unbundling of the distribution system operators are taking place and a detailed design of functional unbundling is being prepared. Legal unbundling of the two distribution companies, *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale*, from generation, according to the Reply, was to be completed by 1 March 2021, and work on preparing the compliance program is ongoing. However, no decision was taken on how the

⁴⁶ ANNEX 2 (Reply to the Opening Letter).

⁴⁷ ANNEX 3 (Reasoned Opinion).

⁴⁸ ANNEX 4 (Reply to the Reasoned Opinion).

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unbundling should take place and whether the distribution system operators will still own the generation undertakings after unbundling.

- (41) The Reply to the Reasoned Opinion did not challenge the findings of the Secretariat related to failure to complete the unbundling process. It rather confirmed that the Program for restructuring the electricity sector in the Federation of Bosnia and Herzegovina has not been adopted, and that unbundling of the distribution system operators branches of *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar* has not started. The Reply to the Reasoned Opinion also confirmed that the activities for unbundling of the distribution system operators in Republika Srpska has still not been finalised. Instead, the Reply emphasised that measures are being taken which allegedly “*represent a clear commitment of Bosnia and Herzegovina to rectify the infringement.*”
- (42) As Bosnia and Herzegovina did not actually rectify the breaches in question, and with the option to withdraw if unbundling was actually achieved in both entities, the Secretariat decided to refer this case to the Ministerial Council for its decision.

IV. Legal Assessment

- (43) Transposition and implementation of functional and legal unbundling of electricity distribution system operators was already an obligation for Bosnia and Herzegovina under the Second Internal Energy Market Package⁴⁹ (with the exception of the requirement to introduce a compliance officer).⁵⁰
- (44) Article 26 of Directive 2009/72/EC in conjunction with Ministerial Council Decision 2011/02/MC-EnC obliges Bosnia and Herzegovina to transpose into national legislation, as well as to implement, the requirement of functional and legal unbundling of electricity distribution system operators, including the establishment of a compliance programme and compliance officer, no later than 1 January 2015.
- (45) In the absence of State legislation governing the activities of electricity distribution, supply and generation, the legal framework in the competent entities need to be compliant with Energy Community law, both on the levels of legislation and its application in practice. Consequently, the following assessment analyses compliance of the entities’ legislation with the requirements of Directive 2009/72/EC.
- (46) In its analysis, the Secretariat is aware of and respects the constitutional structure of Bosnia and Herzegovina and the division into two entities. At the same time, the State of Bosnia and Herzegovina as a Contracting Party to the Treaty, not its entities, assumes responsibility for compliance with the acquis. Under Article 3(2) of the Dispute Settlement Procedures, this includes „*any measure by the public authorities of the Party (central, regional or local [...]) [...]*“.

⁴⁹ Cf. Article 26 of Directive 2003/54/EC.

⁵⁰ A compliance program was, however, already required under the Second Internal Energy Market Package.

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Any failure of Republika Srpska and/or the Federation of Bosnia and Herzegovina to comply with the *acquis* is thus attributable to the State of Bosnia and Herzegovina as a Party to the Treaty.⁵¹

4.1 Incorrect transposition of the requirements for unbundling of electricity distribution system operators

- (47) With the adoption of the Electricity Law of July 2020, Republika Srpska transposed the requirements for legal and functional unbundling. Therefore, the Secretariat, already in the Reasoned Opinion, decided to discontinue the case to the extent that it related to the lack of transposition of Article 26 of the Directive 2009/72/EC in that entity.
- (48) In the Federation of Bosnia and Herzegovina, Article 46 of the Law on Electricity requires legal and functional unbundling of electricity distribution system operators in line with Article 26(2)(a), (b) and (c) of Directive 2009/72/EC. However, the legislation of Federation of Bosnia and Herzegovina fails to correctly transpose the requirements of Article 26(2)(d) and Article 26(3) of Directive 2009/72/EC in the absence, respectively, of an obligation to adopt a compliance program and a compliance officer, and of an obligation to separate the corporate identity of the distribution system operator from the supply activities of the vertically integrated undertaking.
- (49) The requirement of Article 114 of the Law on Electricity to adopt a Program for restructuring the electricity sector in the Federation of Bosnia and Herzegovina, has not been met. Namely, the draft program of December 2019 has not been formally adopted by the Parliament of the Federation of Bosnia and Herzegovina, and the deadlines indicated in the draft have not started running. In any event, in the absence of producing legal effect, such a Program could not replace measures transposing the requirements of Article 26(2)(d) and Article 26(3) of Directive 2009/72/EC.⁵²
- (50) The failure to correctly transpose the requirements of the *acquis* is attributable to Bosnia and Herzegovina under Article 3(2) of the Dispute Settlement Procedures.
- (51) Since the requirements for functional unbundling of distribution system operators are not transposed in the legislation covering the whole territory of Bosnia and Herzegovina, the

⁵¹ See also: Opinion of the Advisory Committee on case ECS-1/14, chapter 4; Secretariat, Opinion of the Advisory Committee in case ECS-8/11 where the Advisory Committee held: “[T]he Advisory Committee shares the Secretariat’s view that any failure of the authorities of Republika Srpska and/or the Federation of Bosnia and Herzegovina to comply with the Energy Community law has to be attributed to the State of Bosnia and Herzegovina as party of the Treaty [Point 48 of the Reasoned Request]”; cases 227-230/85 *Commission v Belgium* [1988] ECR I-1, paragraphs 9 and 10. The Court of Justice held that ‘the State is free to delegate powers to its domestic authorities as it considers fit and to implement directives by means of measures adopted by regional or local authorities,’ but that ‘division of powers does not however release it from the obligation to ensure that the provisions of the directive are properly implemented in national law.’ According to established case law, a State ‘may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law’.

⁵² See, to that effect, Case C-430/98 *Commission v Luxembourg*, paragraphs 8-13, Case C-648/13 *Commission v Poland*, paragraphs 129-132.

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Secretariat concludes that Bosnia and Herzegovina fails to comply with the obligation to transpose Article 26(2)(d) and Article 26(3) of Directive 2009/72/EC.

4.2 Failure to implement the requirements for unbundling of electricity distribution system operators

4.2.1 Lack of legal unbundling

(52) Directive 2009/72/EC requires that distribution is performed by a separate 'network' company. According to Article 26(1) of the Directive, distribution companies must be established as legally separate companies, which may however be subsidiaries of a vertically integrated electricity company. The precise legal form of the subsidiarity depends on national law.

Federation of Bosnia and Herzegovina

(53) In the Federation of Bosnia and Herzegovina the two distribution system operators, *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar* both operated under a fully integrated structure, and perform the activities of distribution, supply and generation under a common management. Consequently, legal separation of electricity distribution activities from electricity supply and generation is not in place. According to the Reply to the Reasoned Opinion, legal unbundling is planned to be completed within 36 months from the adoption of the Program on restructuring the energy sector in the Federation of Bosnia and Herzegovina, which has not even been adopted by the time of submitting this Reasoned Request.

(54) The lack of legal unbundling of *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar* amounts to a breach of Article 26(1) of Directive 2009/72/EC.

Republika Srpska

(55) In Republika Srpska electricity activities of the mother company *ERS* are legally separated into five subsidiaries engaged in electricity generation, and five subsidiaries engaged in electricity distribution, whereas supply activities are performed by the mother company. As of 1 April 2021, the supply activities have been separated from distribution and are performed by the mother company. However, two of the distribution companies *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale*, perform also generation activities and hold licenses for both distribution and generation.

(56) In other words, the legal unbundling requirement with respect to the separation of distribution from generation activities is not yet implemented in Republika Srpska. This amounts to a breach of Article 26(1) of Directive 2009/72/EC.

Conclusion

(57) Since the failure to correctly implement Article 26(1) of Directive 2009/72/EC in the Federation of Bosnia and Herzegovina and in Republika Srpska is attributable to Bosnia and Herzegovina

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under Article 3(2) of the Dispute Settlement Procedures, the Secretariat concludes that Bosnia and Herzegovina fails to comply with the obligation to implement Article 26(1) of the Directive 2009/72/EC.

4.2.2 Lack of functional unbundling

(58) In addition to the requirement of legal unbundling, the formally independent distribution companies must also be separate in term of their organisation and decision making. Management separation is the key requirement to ensure that distribution system operators act independently of supply and generation activities within the same vertically integrated undertaking or concern, and to avoid actual or potential conflicts of interest. Article 26(2) and (3) of Directive 2009/72/EC requires a number of elements of functional unbundling related to the independence of management, effective decision-making rights of the entity in charge of the distribution activities, the establishment of a compliance officer and compliance programme, the availability of necessary resources (including human, technical, physical and financial), and a clear separation of branding and communication of the distribution activities from those of supply.⁵³

(59) The obligation of management separation prescribed in Article 26(2)(a) of Directive 2009/72/EC requires that the persons responsible for the management of distribution activities do not participate in company structures of the vertically integrated undertaking and are not responsible, directly or indirectly, for the day-to-day operation of production, transmission or supply activities. Article 26(2)(b) of Directive 2009/72/EC further requires that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently.

The independence requirement goes beyond the top management of the distribution system operator and must also include the operational (middle) management of the distribution system operator.⁵⁴

(60) To guarantee independence of the distribution system operator and its management, Article 26(2)(c) of Directive 2009/72/EC further requires that the distribution system operator must have effective decision-making rights, independent from other parts of the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the network. To fulfil this requirement, the distribution system operator must have at its disposal the necessary resources, including human, technical, physical and financial resources, in order to fulfil its tasks of operating, maintaining and developing the network. This means that the distribution system operator may not unduly rely on the services of other parts of the vertically integrated undertaking. Where such services are provided, they must be provided at market conditions and

⁵³ Commission Staff Working Paper, chapter 3.3.

⁵⁴ Commission Staff Working Paper, chapter 3.3.1. See as well: *Ch. Jones* and *E. Cabau* in: *EU Energy Law, Volume 1: The Internal Energy Market* (fourth edition), paragraphs 5.41 and 5.42.

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laid down in a contractual arrangement to exclude cross-subsidies between the distribution system operator to other parts of the vertically integrated undertaking.⁵⁵

(61) Pursuant to Article 26(2)(d) of Directive 2009/72/EC, functional unbundling also requires the establishment of a compliance program and appointment of a compliance officer.

(62) The main purpose of a compliance programme is to provide a formal framework that guarantees that the network activities, individual employees and the management of the distribution system operator behave truly independent. Safeguard elements of the compliance program should therefore contain rules of conduct that preserve the confidentiality of commercially sensitive and commercially advantageous information required by Article 27 of Directive 2009/72/EC by clearly defining the information that is considered confidential and how such information must be treated.⁵⁶ To enforce the rules of conduct, sanctions should apply in case of an infringement of the established rules.⁵⁷

(63) Article 26(2)(d) of Directive 2009/72/EC also requires the appointment of a compliance officer who has to be fully independent and must have access to all the necessary information of the distribution system operator to comply with its obligation to develop and an annual report, setting out the measures taken to implement the requirements of Article 26(2)(a), (b) and (c) as well as (3) of Directive 2009/72/EC.⁵⁸ This report has to be sent to the national regulatory authority and must be published.

(64) According to Article 26(3) of Directive 2009/72/EC, a clear separation of the distribution system operator's identity must be ensured in communication and branding as well as premises, services and infrastructure. This requirement aims at excluding confusion between the system operation activities and those of supply and generation. To prevent such confusion, the compliance program required by Article 26(2)(d) of Directive 2009/72/EC should include rules for the behaviour of employees of a distribution system operator vis-à-vis network customers, to ensure they refrain from any reference to the related supply or generation business in their contacts with customers. Moreover, the distributions system operator must be situated in a separate office from the other parts of the vertically integrated company and have a different logo and corporate identity.⁵⁹

⁵⁵ Commission Staff Working Paper, chapter 3.3.1. See as well: *Ch. Jones* and *E. Cabau* in: EU Energy Law, Volume 1: The Internal Energy Market (fourth edition), paragraph 5.32.

⁵⁶ Article 27 of Directive 2009/72/EC requires distribution operators to “*preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.*”

⁵⁷ Commission Staff Working Paper, chapter 3.3.3. See as well: *Ch. Jones* and *E. Cabau* in: EU Energy Law, Volume 1: The Internal Energy Market (fourth edition), paragraph 5.65.

⁵⁸ When defining the specific rules and guarantees for the independence of the compliance officer of the distribution operator, the rules applicable to the compliance officers of Independent Transmission System Operators as laid down in Article 21(2) of Directive 2009/72/EC may serve as a point of reference. Cf. Commission Staff Working Paper, chapter 3.3.3.

⁵⁹ *Ch. Jones* and *E. Cabau* in: EU Energy Law, Volume 1: The Internal Energy Market (fourth edition), paragraphs 5.34, 5.70 and 5.71 and Commission Staff Working Paper, chapter 3.3.3.

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Application to the case at hand: Federation of Bosnia and Herzegovina

- (65) Separation of management for distribution services from supply and generation activities and independent decision-making for distribution activities are neither in place in *Elektroprivreda BiH d.d. Sarajevo* nor in *Elektroprivreda HZHB d.d Mostar*. In both companies, the Directorate for Distribution is part of an integrated company structure accountable to the common management, namely a General Manager, in the same manner as the Directorate for Supply and Supply and Trade and the Directorate for Generation.
- (66) This set up does not meet the management separation requirement of Article 26(2)(a)-(c) of Directive 2009/72/EC. Performance of distribution, supply and generation under a single management does not satisfy the requirement for separation and independence of the distribution system management and its decision making from the management of the supply and generation activities of the integrated company. In both companies, there is only one management of the several units / directorates. There is no separate and effective decision making related to distribution and independent from the other parts of the vertically integrated undertaking, as only the General Manager takes all decisions. Not only does this set-up not prevent the general management to give instructions regarding the day-to-day business of the distribution activities, but actually envisages this as the default mode.
- (67) The Reply to the Reasoned Opinion did not provide any information on any company internal measures for either *Elektroprivreda BiH d.d. Sarajevo* or *Elektroprivreda HZHB d.d Mostar* capable to ensure effective separation of decision making of the companies' distribution activities from supply or generation. A compliance program and compliance officer are neither required by the legislation in force in the Federation of Bosnia and Herzegovina, nor established in practice in either company. This is a breach of Article 26(2)(d) of Directive 2009/72/EC.
- (68) Finally, separate branding and communication identities or premises do not exist. The distribution services are not marketed under separate logos, postal addresses or advertisements. Instead, both *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar* use the same logo, postal addresses and advertisement regardless of whether distribution services or electricity as a commodity is marketed. Moreover, the websites of both companies inform that they perform generation, distribution and supply activities and that they are holders of licenses for all of those activities. This does not meet the requirement of Article 26(3) of Directive 2009/72/EC to prevent the distribution system operator to take advantage of its vertical integration and distort competition by creating confusion in respect of the identity of the supply branch.

Application to the case at hand: Republika Srpska

- (69) Besides the lack of legal unbundling of two distribution companies from generation activities, there is no separate and effective decision making related to distribution and independent from

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generation because common management takes all decisions for both activities in *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale*. The functional unbundling requirements for separation of management for electricity distribution services are not met. Article 50 in conjunction with Article 140 and 147(1) of the 2020 Electricity Law of Republika Srpska require functional unbundling of ERS only by 1 January 2022. The holding ERS's has a governance structure that includes a general assembly representing the shareholder, a supervisory board, the management and an audit committee. Its distribution activities are separate legal entities organised as joint stock companies with their own management.

- (70) There is no separation of decision making within the joint stock distribution companies from generation. The same management is responsible for both generation and distribution activities, and there is only a separate sector dealing with generation within the organisational scheme of the company.⁶⁰ Separate and independent decision making for distribution system activities from generation is therefore not ensured in line with Article 26(2)(a)-(c) of Directive 2009/72/EC.
- (71) Moreover, a compliance program and compliance officer have not been established in any of the five distribution daughter companies of ERS. Compliance programmes and compliance officers do not exist in *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale*, where distribution is legally bundled with generation. This amounts to a breach of Article 26(2)(d) of Directive 2009/72/EC.
- (72) Finally, separate branding and communication identities or premises are not implemented in Republika Srpska either. While all five distribution subsidiaries have separate website, logo and postal address, there is no separation in terms of communication between the distribution and generation of the two companies *ZP Elektro Bijeljina a.d. Bijeljina* and *ZP Elektrodistribucija Pale a.d. Pale*.
- (73) By consequence, Bosnia and Herzegovina fails to implement the requirements of the *acquis* for functional unbundling of its electricity distribution system operators as required by Article 26 paragraph (2) *litera* (a), (b), (c) and (d) and Article 26(3) of Directive 2009/72/EC.

Conclusion

- (74) Since the failure to correctly implement the requirements for functional unbundling in the Federation of Bosnia and Herzegovina and in Republika Srpska is attributable to Bosnia and Herzegovina under Article 3(2) of the Dispute Settlement Procedures, the Secretariat concludes that Bosnia and Herzegovina fails to comply with the obligations for timely implementation of Article 26 (2)(a), (b), (c) and (d) and (3) of Directive 2009/72/EC.

ON THESE GROUNDS

⁶⁰ See: [shtampa \(elektrobijeljina.com\)](http://shtampa(elektrobijeljina.com)) and [Организациона шема – ZP „Elektrodistribucija“ a.d Pale \(edbpale.com\)](http://Организациона шема – ZP „Elektrodistribucija“ a.d Pale (edbpale.com)).

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

due to the failure to legally and functionally separate the distribution activities from generation and supply in both the Federation of Bosnia and Herzegovina and Republika Srpska, Bosnia and Herzegovina fails to comply with the obligation to implement Article 26(1), (2) and (3) of Directive 2009/72/EC.

On behalf of the Secretariat of the Energy Community

Vienna, 27 May 2021



Janez Kopač

Director



Dirk Buschle

Deputy Director/ Legal Counsel

List of Annexes

- ANNEX 1 Opening Letter of 16 January 2018
- ANNEX 2 Reply to the Opening Letter of 22 February 2018
- ANNEX 3 Reasoned Opinion of 11 November 2020
- ANNEX 4 Reply to the Reasoned Opinion of 8 December 2020
- ANNEX 5 Program for restructuring of the electricity sector of the Federation of Bosnia and Herzegovina

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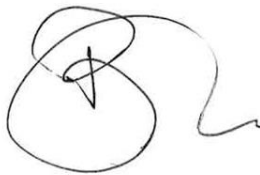
Vienna, 16 January 2018
ECS-5/17/O/16-01-2018

REF. Bosnia and Herzegovina - Opening Letter Case ECS-5/17

EXCELLENCY,

In attachment kindly find an Opening Letter in relation to the Case ECS-5/17.

Yours sincerely,



Dirk Buschle
Deputy Director and Legal Counsel

H.E. MR. MIRKO ŠAROVIĆ
MINISTER OF FOREIGN TRADE AND ECONOMIC RELATIONS
BOSNIA AND HERZEGOVINA

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Opening Letter in Case ECS-5/17

By the present Opening Letter, the Energy Community Secretariat ('the Secretariat') initiates dispute settlement proceedings against Bosnia and Herzegovina for non-compliance with the Treaty establishing the Energy Community ('the Treaty'), and in particular with the obligations stemming from Article 26 of Directive 2009/72/EC¹ for functional and legal unbundling of electricity distribution system operators, including the establishment of a compliance program and compliance officer.

Under the Dispute Settlement Procedures², 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 11(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 Bosnia and Herzegovina to comply of its own accord with the requirements of the Treaty or, if appropriate, justify its position. In the latter case, Bosnia and Herzegovina is invited to provide the Secretariat with all factual and legal information relevant to the case at hand.

1. Background and facts

The organisation of the power sector of Bosnia and Herzegovina is determined by the constitutional structure of the country. While electricity transmission system operation, wholesale and cross-border trade are governed on state level for the whole territory of Bosnia and Herzegovina, the administrative bodies of the two entities, Republika Srpska and Federation of Bosnia and Herzegovina, as well as Brčko District of Bosnia and Herzegovina, are responsible for generation, distribution and supply of electricity to end-customers in their respective jurisdictions.

- *Federation of Bosnia and Herzegovina*

In the Federation of Bosnia and Herzegovina Article 46(1) of the Law on Electricity³ requires legal and functional unbundling of electricity distribution system operators in line with Article 26 paragraph 2 litera (a), (b) and (c) of Directive 2009/72/EC but falls short of transposing the obligation for a compliance programme and officer as stipulated by litera (d) of Directive 2009/72/EC. *In praxi*, the

¹Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC as adopted and adapted by Decision of the Energy Community Ministerial Council 2011/02/MC-EnC.

²Procedural Act 2015/04/MC-EnC of the Ministerial Council.

³Official Journal no. 66 of 28.08.2013, p 316 *et seq.*

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two distribution system operators, *Elektroprivreda BiH d.d. Sarajevo*⁴ and *Elektroprivreda HZHB d.d. Mostar*⁵ are still legally and functionally bundled with supply and generation. Compliance programs and/or officers are not in place. A program on restructuring of the electricity sector as foreseen by Article 114 of the Law on Electricity to be adopted by the Federal Ministry of Energy and Mining and the Government of the Federation of Bosnia and Herzegovina has not been adopted yet.

Elektroprivreda BiH d.d. Sarajevo is a public enterprise registered as joint stock company. 90% of capital is owned by the Federation of Bosnia and Herzegovina, 10% by minority shareholders. The company's governance structure includes a Company Assembly, the Supervisory Board, the management and the Audit Committee. The Supervisory Board consists of seven members who are appointed and dismissed by the Company Assembly, the later being composed of shareholder representatives. *Elektroprivreda BiH d.d. Sarajevo* has the status of the parent company in the EPBIH concern,⁶ which is connected with several companies in the field of mining and manufacturing of equipment. In the power sector the company performs the activities of generation,⁷ distribution⁸ and supply.⁹ Electricity distribution is organized in five regional units – namely: *Elektrodistribucija Sarajevo*, *Elektrodistribucija Tuzla*, *Elektrodistribucija Zenica*, *Elektrodistribucija Bihać* and *Elektrodistribucija Mostar* – all part of *Elektroprivreda BiH d.d. Sarajevo* without separate legal identity. The exemption of Article 26(4) of Directive 2009/72/EC for integrated electricity undertakings serving less than 100.000 connected customers does not apply to *Elektroprivreda BiH d.d. Sarajevo* which has more than 740.000 customers.¹⁰

Elektroprivreda HZHB d.d. Mostar is registered as a joint stock company.¹¹ 90% of capital is owned by the Federation of Bosnia and Herzegovina. The company performs the activities of electricity supply,¹² distribution¹³ and generation.¹⁴ The company's governance structure includes a Supervisory Board of six members that are appointed and dismissed by the Assembly of the company. The exemption of Article 26(4) of Directive 2009/72/EC for integrated electricity undertakings serving less than 100.000 connected customers does not apply to *Elektroprivreda HZHB d.d. Mostar* which has more than 200.000 customers.¹⁵

⁴ *Javno Preduzeće Elektroprivreda Bosne i Hercegovine d.d. Sarajevo* is the parent company for utilities performing generation, distribution, supply, trading, export and import of electricity; www.elektroprivreda.ba.

⁵ *Javno Preduzeće Elektroprivreda Hrvatske Zajednice Herceg Bosne d.d. Mostar*; www.ephzhh.ba.

⁶ The EPBIH Concern, as a form of co-operation of companies, was established in November 2009, by signature of an agreement on conduct of business between *Elektroprivreda BiH d.d. - Sarajevo* and its subsidiaries - 7 coal mines, along with the former non-electric utility companies of *Elektroprivreda BiH d.d. - Sarajevo*.

⁷ Generation license 06-03-734/32/12 issued by FERK for the validity period of 1.1.2013-31.12.2022.

⁸ Distribution license no 06-03-735/33/12 issued by the Regulatory Commission for Energy in the Federation of Bosnia and Herzegovina (FERK) for the validity period of 1.1.2013-31.12.2027.

⁹ Supply license no 06-03-755/143/16 issued by FERK for the validity period of 1.1.2017-31.12.2021.

¹⁰ Cf. <http://www.elektroprivreda.ba/eng/page/general-information>.

¹¹ Registration number 1-3177.

¹² Supply license no 06-03-739-10/140 issued by FERK for the validity period of 1.1.2017-31.12.2021.

¹³ Distribution license no 06-03-737/34/12 issued by FERK for the validity period of 1.1.2013-31.12.2027. Transmission activities have been separated in 2006.

¹⁴ Generation license 06-03-730/31/12 issued by FERK for the validity period of 1.1.2013-31.12.2022.

¹⁵ <http://www.ephzhh.ba/o-nama/profil-drustva/?lang=en>.

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- Republika Srpska

In Republika Srpska Article 14 of the Law on Energy addresses the unbundling requirements for vertically integrated energy undertakings.¹⁶ However, the law does not stipulate a final unbundling model: while Article 14(2) concedes that unbundling *can* involve legal, functional and accounting unbundling, Article 14(1) leaves the final decision on the concretely to be implemented unbundling concept to the sector law, in this case the Electricity Law.¹⁷ The latter, however, does not stipulate any requirement for legal or functional unbundling. On the contrary, Article 39 entitles and requires electricity distribution system operators to supply customers, if entitled to do so in their license. In praxis, the five distribution system operators¹⁸ – all subsidiaries of the joint stock company *Elektroprivreda Republike Srpske*¹⁹ that is 100% owned by the Government of Republika Srpska – are still legally and functionally bundled with supply and each of them holds both distribution and supply licenses.²⁰ The Law on Energy does not contain any requirement for adopting compliance programmes and/or appointing compliance officers, and those are not in place in any of the distribution and supply companies.

- Brčko District

The horizontally and vertically integrated power utility *Komunalno Brčko* performs electricity distribution and supply in Brčko District. The management of the company consists of the Steering Committee, as the main managing body, and the director of the company, as an executive management body. With roughly 35000 customers²¹ *Komunalno Brčko* is not subject to the unbundling requirements of Article 26 of Directive 2009/72/EC.

The Secretariat established a dedicated platform, so-called *Energy Community Distribution System Operators in Electricity* (ECDSO-E), including an online forum aiming to coordinate and support activities of Energy Community Contracting Parties' electricity DSOs' efforts to implement the acquis, among which the unbundling requirements of Directive 2009/72/EC. The distribution system companies operating in Bosnia and Herzegovina have been involved in ECDSO-E activities. In the context of ECDSO-E, the Secretariat provided detailed guidance on how to accomplish DSO unbundling including a toolbox for functional unbundling that was made available to the ECDSO-E

¹⁶ Official Journal 49/2009.

¹⁷ Latest update Official Journal 01/2011.

¹⁸ Namely: *ZP Elektrokrajina a.d. Banja Luka*, *ZP Elektro Dobo* j a.d. Dobo j, *ZP Elektro Bijeljina a.d. Bijeljina*, *ZP Elektro distribucija Pale a.d. Pale* and *ZP Elektrohercegovina a.d. Trebinje*.

¹⁹ www.ers.ba – profile – subsidiary companies.

²⁰ *MH "ERS" ZP "Elektro Dobo* j" *AD Dobo* j: distribution license no 01-430-04/1/08-2/14, supply license no 01-431-04-1/13-3/14; *MH ERS ZEDP "Elektro-Bijeljina" a.d. Bijeljina*: distribution license no 01-425-04-1/11-2/14, supply license no 01-426-04-1/14-3/14; *MH ERS - Matično preduzeće A.D. Trebinje ZP "Elektrokrajina" A.D. Banjaluka*: distribution license no 01-467-04-1/10-2/12, supply license no 01-420-04-1/17-3/14; *MH ERS ZP "Elektro distribucija" a.d. Pale*: distribution license no 01-453-04-1/12-2/12, supply license no 01-487-04-1/15-3/14; *MH ERS Trebinje ZP "Elektro-Hercegovina" a.d. Trebinje*: distribution license no 01-450-04-1/09-2/12, supply license no 01-423-04-1/16-3/14. Licenses are issued by the Regulatory Commission for Energy of Republic of Srpska and available at: www.reers.ba – register of licenses. Distribution licenses are issued for a period of 7-10 years as of 2014; supply licenses have a validity of 18 months, thus have been renewed after first issuance.

²¹ http://www.komunalno.ba/index.php?option=com_content&view=article&id=74&Itemid=179&lang=bs. See as well: Secretariat, Annual Implementation Report 2017, chapter 4.1.b.

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online forum in November 2016. Further to this, the Secretariat organized specific meetings dedicated to DSO unbundling.

Under the so-called Berlin or Western Balkan 6 (WB6) process established in 2014,²² the WB6 countries, including Bosnia and Herzegovina, committed to complete legal and functional unbundling of distribution system operators and supply companies until March 2016.²³ The Secretariat is reporting regularly on the progress made by the WB6 Contracting Parties, continuously pinpointing to lack of progress made by the Bosnia and Herzegovina in complying with the aforementioned obligation.²⁴

Finally, in its Annual Implementation Reports the Secretariat drew attention to lack of compliance with the legal and functional DSO unbundling requirements by Bosnia and Herzegovina.²⁵

In absence of any progress with legal and functional DSO unbundling in Bosnia and Herzegovina, the Secretariat decided to initiate the present proceedings under Article 90 of the Treaty.

On 3 October 2017 the Secretariat informed the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina (hereinafter ‘the Ministry’) about the envisaged opening of dispute settlement procedures against Bosnia and Herzegovina for non-compliance with the obligations stemming from Article 26 of Directive 2009/72/EC should Bosnia and Herzegovina fail to notify the Secretariat by 16 October 2017 the latest the measures taken to transpose and implement Article 26 of Directive 2009/72/EC.²⁶ The Ministry replied to the Secretariat by letter of 13 November 2017.²⁷ In its letter the Ministry did not provide arguments capable of challenging the facts and legal assessment brought forward in the present Opening Letter.

2. Relevant Energy Community Law

Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “*a Treaty obligation or [...] a Decision addressed to [a Party]*”.

Decision 2011/02/MC-EnC incorporating Directive 2009/72/EC in the acquis is addressed to the Republic of Albania. Consequently, Article 26 of Directive 2009/72/EC is to be considered subject to Article 1 of the Dispute Settlement Procedures.

Article 3 of the Dispute Settlement Procedures provides that:

(1) A Party fails to comply with its obligations under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law.

²² Cf. <https://www.energy-community.org/regionalinitiatives/WB6.html>. Also referred to as so-called “Berlin process” that kicked off with a conference of Western Balkan States in August 2014 followed by annual summits in Vienna (2015), Paris (2016) and Trieste (2017).

²³ 2015 Summit, Final Declaration by the Chair, item 22 and Addendum, Energy Soft Measures II.4, item 3.

²⁴ Cf. https://www.energy-community.org/regionalinitiatives/WB6/Monitoring_EL.html.

²⁵ Latest edition of 2017, chapter 4.1.b.

²⁶ Ref. ECS-5/17/O/03-10-2017.

²⁷ Ref no. 07-1-28-3639-5/17; received by the Secretariat on 20 November 2017.

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(2) 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.

Article 6 of the Treaty reads:

“The Parties shall take all appropriate measures, whether general or particular, to ensure fulfillment 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 89 of the Treaty reads:

“The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.”

Article 26 of Directive 2009/72/EC reads:

1. *Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking.*

2. *In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:*

(a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;

(b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

(c) the distribution system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks

(d) the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 35(1) and shall be published. The compliance

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officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.

3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4. Contracting Parties may decide not to apply paragraphs 1, 2 and 3 to integrated electricity undertakings serving less than 100000 connected customers, or serving small isolated systems.

3. Preliminary Legal Assessment

On 7 October 2011 the Ministerial Council of the Energy Community, acting upon Articles 24, 25, 79 and 100(i) and (ii) of the Treaty, adopted Decision 2011/02/MC-EnC. The objective of the Decision was to implement and adapt Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amend Articles 11 and 59 of the Treaty, thus incorporating the so-called Third Energy Package in the Energy Community. In Article 3(1) of Decision 2011/02/MC-EnC the deadline for complying with the adopted legal acts was set for 1 January 2015.

In its analysis, the Secretariat is aware of and respects the constitutional structure of Bosnia and Herzegovina and the division into two entities. At the same time the State of Bosnia and Herzegovina as a Contracting Party to the Treaty, not its entities, assumes full responsibility for compliance with the *acquis*. Under Article 2(2) of the Dispute Settlement Procedures, this includes „any measure by the public authorities of the Party (central, regional or local [...]) [...]“. Any failure of Republika Srpska and/or the Federation of Bosnia and Herzegovina to comply with the *acquis* is thus attributable to the State of Bosnia and Herzegovina as a Party to the Treaty.²⁸

In the absence of State legislation governing the activities of electricity distribution, supply and generation, the legal framework in the entities will have to make good for that lack by being fully compliant, harmonized and congruent, both on the levels of legislation and its application in practice. Consequently, the following assessment analyses compliance of the entities' legislation with the requirements of Directive 2009/72/EC.

²⁸ See also: Opinion of the Advisory Committee on case ECS-1/14, chapter 4; Secretariat, Reasoned Request on case ECS-8/11, para.s 48 and 49; cases 227-230/85 *Commission v Belgium* [1988] ECR I-1, paragraphs 9 and 10. The Court of Justice held that 'the State is free to delegate powers to its domestic authorities as it considers fit and to implement directives by means of measures adopted by regional or local authorities,' but that 'division of powers does not however release it from the obligation to ensure that the provisions of the directive are properly implemented in national law.' According to established case law, a State 'may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law.'

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Article 26 of Directive 2009/72/EC obliges the Contracting Parties to introduce functional and legal unbundling of electricity distribution system operators, including the establishment of a compliance program and a compliance officer, which shall be applied by the national electricity distribution system operators by not later than 1 January 2015. As its information presently stands, the Secretariat concludes that Bosnia and Herzegovina fails on both accounts.

It has to be stressed that transposition and implementation of functional and legal unbundling of electricity distribution system operators was already an obligation for Bosnia and Herzegovina under the Second Internal Energy Market Package²⁹, with the exception of the requirement to introduce a compliance officer.³⁰ To this extent, the requirements of Article 26 of Directive 2009/72/EC are only a continuation of pre-existing obligations and with which Bosnia and Herzegovina fails to comply.

a. Incorrect transposition of the requirements for unbundling of electricity distribution system operators

- In the Federation of Bosnia and Herzegovina Article 46(1) of the Law on Electricity requires legal and functional unbundling of electricity distribution system operators in line with Article 26 paragraph 2 litera (a), (b) and (c) of Directive 2009/72/EC and in line with the timeframe foreseen by the Energy Community acquis: namely, the Electricity Law entered into force on 5 September 2013³¹ without stipulating a transitional deadline for compliance with its Article 46. However, the law runs short in transposing the obligation for a compliance programme and officer as stipulated by Article 26 paragraph 2 litera (d) of Directive 2009/72/EC.
- In Republika Srpska Article 14 of the Law on Energy requires unbundling of vertically integrated energy undertaking but does not stipulate a final unbundling model: while Article 14(2) concedes that unbundling *can* involve legal, functional and accounting unbundling, Article 14(1) leaves the final decision on the concretely to be implemented unbundling concept to the sector law, in this case the Electricity Law³². The latter, however, does not stipulate any requirement for legal or functional unbundling. On the contrary, Article 39 entitles and requires electricity distribution system operators to supply customers.

The Secretariat concludes that the legislation of

- the Federation of Bosnia and Herzegovina fails to correctly transpose the requirements of Article 26 paragraph 2 litera (d) of Directive 2009/72/EC in line with the timeframe foreseen by the Energy Community acquis by failing to require the introduction of a compliance program and officer.

²⁹ Cf Article 26 of Directive 2003/54/EC.

³⁰ A compliance program was, however, already required under the Second Internal Energy Market Package.

³¹ Article 118 of the Law on Electricity rules entry into force eight days after its publication in the Official Journal of the Federation of Bosnia and Herzegovina. The law was published in the Official Journal on 28.08.2013 (Official Journal no. 66 of 28.08.2013, p 316 *et seq*).

³² Latest update Official Journal 01/2011.

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- the Republika Srpska fails to correctly transpose the requirements of Article 26 paragraph 2 litera (a), (b), (c) and (d) of Directive 2009/72/EC in line with the timeframe foreseen by the Energy Community acquis by failing to require legal and functional unbundling as well as introducing a compliance program and officer.

b. Failure to implement the requirements for unbundling of electricity distribution system operators

Lack of legal unbundling

Article 26 of Directive 2009/72/EC requires that distribution is performed by a separate ‘network’ company. The obligation to create a separate company only concerns network activities. Other activities such as supply and production can be carried on within a single company. The vertically integrated undertaking is in principle free to choose the legal form of the DSO, provided that this legal form ensures a sufficient level of independence of the management of the DSO from other parts of the vertically integrated undertaking in order to fulfill the requirements of functional unbundling.³³

- In the Federation of Bosnia and Herzegovina, *in praxi*, the two distribution system operators, *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar*, each have a fully integrated structure, performing activities of distribution, supply and generation, with no legal division of related activities. This is visible from the still integrated corporate governance structure.
- In Republika Srpska, *in praxi*, the five distribution system operators – all part of *Elektroprivreda BiH d.d. Sarajevo* without separate legal identity - are still legally bundled with supply and hold related licenses. This is visible from the still integrated corporate governance structure.

The failure to implement legal unbundling of *Elektroprivreda BiH d.d. Sarajevo*, *Elektroprivreda HZHB d.d Mostar* and *Elektroprivreda BiH d.d. Sarajevo* is attributable to Bosnia and Herzegovina under Article 3(2) of the Dispute Settlement Procedures.

The Secretariat concludes that by maintaining legally bundled activities of *Elektroprivreda BiH d.d. Sarajevo*, *Elektroprivreda HZHB d.d Mostar* and *Elektroprivreda BiH d.d. Sarajevo* Bosnia and Herzegovina failed to implement the requirements of the acquis for legal unbundling of its electricity distribution system operators.

Lack of functional unbundling

³³ Commission Staff Working Paper, interpretative note on Directive 2009/72/EC: the unbundling regime (22.1.2010), chapter 3.

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Article 26 of Directive 2009/72/EC requires a number of elements related to functional independence of management, effective decision-making rights of the entity in charge of the distribution activities, the establishment of a compliance officer and programme, the availability of necessary resources (including human, technical, physical and financial) to be at the DSO's disposal to fulfill its tasks; and a clear separation of branding and communication of the distribution activities from those of supply.

- In the Federation of Bosnia and Herzegovina functional unbundling of the distribution and supply activities of the two distribution system operators, *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar*, is not in place and compliance programs and compliance officers have not been established as required by Article 26(2) litera (d) of Directive 2009/72/EC.
- In Republika Srpska, *in praxis*, functional unbundling of the distribution and supply activities of *Elektroprivreda BiH d.d. Sarajevo* is not in place and compliance programs and compliance officers have not been established as required by Article 26(2) litera (d) of Directive 2009/72/EC.

No implementing measures have been developed, drafted and adopted which require functional unbundling of distribution and supply activities for any of the distribution system operators in Bosnia and Herzegovina.

The exemption of Article 26(4) of Directive 2009/72/EC for integrated electricity undertakings serving less than 100000 connected customers only applies to the electricity distribution operator of Brčko District, *Komunalno Brčko*.³⁴

The Secretariat concludes that Bosnia and Herzegovina failed to implement the requirements of the acquis for functional unbundling of its electricity distribution system operators as required by Article 26 of Directive 2009/72/EC. The failure to implement functional unbundling of *Elektroprivreda BiH d.d. Sarajevo*, *Elektroprivreda HZHB d.d Mostar* and *Elektroprivreda BiH d.d. Sarajevo* is attributable to Bosnia and Herzegovina under Article 3(2) of the Dispute Settlement Procedures.

4. Conclusion

Based on the assessment in the preceding paragraphs, the Secretariat must conclude that, by failing to transpose the requirements of Article 26 paragraph 2 litera (d) of Directive 2009/72/EC in the Federation of Bosnia and Herzegovina in line with the deadline foreseen by the acquis, by failing to transpose Article 26 of Directive 2009/72/EC in Republika Srpska in line with the deadline foreseen by the acquis and by failing to adopt, within the prescribed time limit, the national measures to ensure legal and functional unbundling of *Elektroprivreda BiH d.d. Sarajevo*, *Elektroprivreda HZHB d.d Mostar*

³⁴*Elektroprivreda BiH d.d. Sarajevo*: about 744000 customers (cf. www.elektroprivreda.ba/eng/page/general-information and: Secretariat, Annual Implementation Report 2017, chapter 4.1.b); *JP Elektroprivreda HZ HB d.d. Mostar*: around 200000 customers (cf <http://www.ephznb.ba/o-nama/profil-drustva/?lang=en#> and: Secretariat, Annual Implementation Report 2017, chapter 4.1.b).

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and *Elektroprivreda BiH d.d. Sarajevo* necessary to implement Article 26 of Directive 2009/72/EC, Bosnia and Herzegovina fails to fulfil its obligations under this Article.

In accordance with Article 13 of the Dispute Settlement Procedures, Bosnia and Herzegovina is requested to submit its observations on the points of fact and of law raised in this letter by

16 March 2018.



Janez Kopač
Director



Dirk Buschle
Deputy Director and Legal Counsel

131/18

Broj: 05-17-193/18
Mostar, 22.02.2018. godine

**Bosna i Hercegovina
MINISTARSTVO VANJSKE TRGOVINE I
EKONOMSKIH ODNOSA**

☒ Admir Softić, pomoćnik ministra

01
02
03



**BOSNA I HERCEGOVINA
MINISTARSTVO VANJSKE TRGOVINE
I EKONOMSKIH ODNOSA
SARAJEVO**

PRIMLJENO.			
Organizaciona jedinica	Klasifikaciona oznaka	Datumi broj	Broj priloga
09	28-	05-03-2018 152-2/18	

Predmet: Uvodno pismo u slučaju ECS-5/17
- Informacija dostavlja se

Poštovani,

Vašim dopisom, broj: 09-1-28-152-1/18 od 24.01.2018. godine, ovo Ministarstvo je poznato da je Sekretarijat Energetske zajednice, aktom, broj: ECS-5/17/O/16-01-2018 od 16. Januara 2018. godine, Ministarstvu vanjske trgovine i ekonomskih odnosa Bosne i Hercegovine, uputio predmetno pismo kojim se pokreće procedura rješavanja spora protiv Bosne i Hercegovine zbog neusklađivanja sa Ugovorom o uspostavljanju Energetske zajednice, a što se posebno odnosi na obaveze koje proizilaze iz primjene člana 26. Direktive 2009/72/EZ, koji se tiče funkcionisanja i pravnog razdvajanja operatora distributivnog sistema, uključujući uspostavljanje programa usklađivanja i određivanja službenika/lica za usklađivanje.

Takođe, u prethodnom periodu, Vašim dopisom, broj: 07-1-28-3639/17 od 06.10.2017. godine, obavjestili ste ovo Ministarstvo kako je Sekretarijat Energetske zajednice, aktom, broj: ECS-5/17/O/03-10-2017 od 03. Oktobra 2017. godine, od Ministarstva vanjske trgovine i ekonomskih odnosa Bosne i Hercegovine, zatražio informacije o svim mjerama poduzetim za transponovanje i primjenu člana 26. Direktive 2009/72/EZ, a o čemu ste o stanju u Federaciji BiH, bliže upoznati aktom ovog Ministarstva, broj:05-17-1877/17 od 24.10.2017.godine.

U skladu sa navedenim želimo Vas ponovo obavjestiti o slijedećem:

U Federaciji BiH 2013. godine donesen je Zakon o električnoj energiji u Federaciji Bosne i Hercegovine („Službene novine Federacije BiH“ broj 66/13 i 94/15) (koji je djelimično usklađen sa Trećim energetske paketom), a kojim se uređuje funkcionisanje elektroenergetskog sektora, elektroprivredne djelatnosti (uključujući razdvajanje djelatnosti i uspostavu operatora distribucije), razvoj tržišta električne energije, regulisanje tržišta, opći uslovi za isporuku električne energije, planiranje i razvoj, izgradnja, rekonstrukcija i održavanje elektroenergetskih objekata, nadzor nad provođenjem zakona i druga pitanja od značaja za obavljanje elektroprivredne djelatnosti u Federaciji Bosne i Hercegovine.

Navedeni Zakon o električnoj energiji u Federaciji Bosne i Hercegovine propisuje funkcionalno i pravno razdvajanje operatora distributivnog sistema. Operator distribucijskog sustava znači pravnu osobu, koja posjeduje dozvolu – licencu za djelatnost distribucije.

Parlament Federacije Bosne i Hercegovine je 31.07.2014. godine dao saglasnost na Privremene smjernice elektroenergetske politike Federacije Bosne i Hercegovine

(„Službene novine Federacije BiH“ broj 20/14) kojim je propisano da će elektroprivredna preduzeća u Federaciji BiH izvršiti funkcionalno, računovodstveno i upravljačko razdvajanje djelatnosti unutar kompanija do 30.09.2014. godine i izvršiti uspostavu Operatora distributivnog sistema (ODS), kao posebno pravno lice, do kraja 2014. godine. Pravno razdvajanje operatora distribucijskog sustava još uvijek nije izvršeno.

Također, Vlada Federacije Bosne i Hercegovine je 06.03.2014. godine donijela Program prestrukturiranja elektroenergetskog sektora u Federaciji BiH („Službene novine Federacije BiH“ broj 20/14) i čeka se davanje saglasnosti Parlamenta Federacije BiH na iste. Programom prestrukturiranja propisane su tri faze aktivnosti koje uključuju: računovodstveno i upravljačko razdvajanje, komercijalizaciju i dodatne analize tokom koje će operatori distributivnog sistema raditi kao zasebna preduzeća, operativno i upravljački neovisna od vladajućeg društva i korporatizaciju tokom koje se mogu formirati nova zavisna društva za sve ili pojedine djelatnosti, a na kraju ove faze sa radom otpočnu novouspostavljena zavisna društva. Obzirom da su Programom prestrukturiranja elektroenergetskog sektora u Federaciji BiH („Službene novine Federacije BiH“ broj 20/14), na koji još uvijek nije data saglasnost Doma naroda Parlamenta Federacije BiH, probijeni svi rokovi za njegovu implementaciju, te je iste potrebno ažurirati.

Federalno ministarstvo energije, rudarstva i industrije je takođe pripremlilo radni tekst izmjena i dopuna važećeg Zakona o električnoj energiji u Federaciji Bosne i Hercegovine („Službene novine Federacije BiH“ broj 66/13 i 94/15), čije odredbe su harmonizirane sa Direktivom 2009/72/EZ, a što se posebno odnosi na odredbe člana 26. stav 2. tačke (d) Direktive 2009/72/EZ, kojim se obavezuju ugovorne strane da prenesu u svoje zakonodavstvo i provode zahtijev funkcionalnog i pravnog, razdvajanja operatora distributivnog sistema električne energije, uključujući uspostavu programa usklađenosti i službenika odgovornih za usklađivanje.

Donošenje izmjena i dopuna važećeg Zakona o električnoj energiji u Federaciji Bosne i Hercegovine („Službene novine Federacije BiH“, broj 66/13 i 94/15), vezano je i za donošenje zakona na državnom nivou i činjenicu da je istim propisano da će se odredbe zakona koji regulišu djelatnosti u elektroenergetskom sektoru u entitetima i Distriktu uskladiti sa ovim zakonom u roku od šest mjeseci od stupanja na snagu ovog Zakona.

S poštovanjem,


MINISTAR
Nermin Džindić

Dostaviti:

- Naslovu,
- 05,
- a/a

Number: 05-17-193/18
Mostar, 22.2.2018

Bosnia and Herzegovina
MINISTRY OF FOREIGN TRADE AND ECONOMIC RELATIONS
Admir Softić, Assistant Minister

Subject: Opening letter in Case ECS-5/17
- Information for your attn.

Dear Sir,

This Ministry was informed by your letter No. 09-1-28-152-1/18 of 24.1.2018 that the Energy Community Secretariat, by its act No. ECS-5/17/0/16-01-2018 of 16.1.2018, sent to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina the subject letter, which initiated the dispute settlement procedure against Bosnia and Herzegovina due to non-compliance with the Treaty establishing the Energy Community, which in particular relates to the obligations arising from the application of Article 26 of Directive 2009/72/EC, concerning the functioning and legal unbundling of the distribution system operator, including the establishment of a harmonization program and the determination of persons in charge of harmonization.

Also, in the previous period, you informed the Ministry, with your letter No. 07-1-28-3639/17 of 6.10.2017, that the Energy Community Secretariat, by its Act No. ECS-5/17/0/03-10-2017 of 3.10.2017, requested from the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina information about all the measures taken to transpose and implement Article 26 of Directive 2009/72/EC. You were already briefly informed about the same matter in the Federation of Bosnia and Herzegovina by act No. 05-17-1877/17 of this Ministry, dated 24.10.2017.

In line with the above, we would like to inform you again of the following:

In the Federation of BiH, the Law on Electricity of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH" No. 66/13 and 94/15) (which is partially harmonized with the Third Energy Package) was adopted in 2013, and it regulates the functioning of the electricity sector (including unbundling of activities and establishment of distribution operator), development of the electricity market, regulation of the market, general conditions for the delivery of electricity, planning and development, construction, reconstruction and maintenance of electricity facilities, supervision of law enforcement and other issues of importance for conducting activities in the field of electricity in the Federation of Bosnia and Herzegovina.

The aforementioned Law on Electricity in the Federation of Bosnia and Herzegovina prescribes the functional and legal unbundling of the distribution system operator. Distribution System Operator means a legal entity that holds a license for the distribution activity.

The Parliament of the Federation of Bosnia and Herzegovina gave its approval on Temporary guidelines for the electricity policy of the Federation of BiH on 31.7.2014 (Official Gazette of the Federation of Bosnia and Herzegovina No. 20/14) that stipulate that the electric power companies in the Federation of Bosnia and Herzegovina shall perform functional, accounting and managerial unbundling of activities within the companies by 30.9.2014 and establish a Distribution System Operator (ODS) as a separate legal entity by the end of 2014.

Legal unbundling of the distribution system operator has not yet been carried out.

Also, the Government of the Federation of Bosnia and Herzegovina on 6.3.2014 adopted the Program of Restructuring the Electricity Sector in the Federation of BiH ("Official Gazette of the Federation BiH" No. 20/14) which is awaiting the approval of the Parliament of the Federation of BiH. The Program prescribes three phases of the activities that include: accounting and managerial unbundling, commercialization and additional analysis during which the distribution system operators will operate as separate companies, operationally and managerially independent of the main company, as well as corporatization during which new dependent companies can be formed for all or individual activities, and at the end of this phase, newly established dependent companies are starting to work. Considering that the Program of Restructuring the Electricity Sector in the Federation of BiH ("Official Gazette of the Federation of BiH" No. 20/14), which is still not approved by the House of Peoples of the Parliament of the Federation of BiH, breaks all the deadlines for its implementation, it needs to be updated.

The Federal Ministry of Energy, Mining and Industry has also prepared a draft text of amendments to the current Law on Electricity in the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation BiH" No. 66/13 and 94/15), whose provisions are harmonized with Directive 2009/72/EC, which in particular refers to provisions in Article 26(2) (d) of Directive 2009/72/EC, which obliges the contracting parties to transpose into their legislation and enforce the requirement of functional and legal unbundling of the electricity distribution system operator, including the establishment of a harmonization program and the determination of persons in charge of harmonization.

Adoption of amendments to the current Law on Electricity in the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of Bosnia and Herzegovina", No. 66/13 and 94/15) is also related to the adoption of laws at the state level and the fact that the given Law stipulates that the provisions of the laws regulating activities in the electricity sector in the Entities and the District shall be aligned with this Law within six months from the entry into force of this Law.

Sincerely,

MINISTER

Nermin Džindić

Energy Community Secretariat

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Vienna, 11 November 2020
ECS-5/17O11-11-2020

Reference: Reasoned Opinion in Case ECS-5/17

EXCELLENCY,

Please find attached a Reasoned Opinion in relation to the Case ECS-5/17 addressed to your attention.

Kindly accept, Excellency, the expressions of my highest considerations.

Yours sincerely,



Janez Kopač
Director
Energy Community Secretariat

**H.E. MR. STAŠA KOŠARAC
MINISTER OF FOREIGN TRADE AND ECONOMIC RELATIONS
BOSNIA AND HERZEGOVINA**

Reasoned Opinion

in Case ECS-5/17

1. Introduction

- (1) According to Article 90 of the Treaty establishing the Energy Community (hereinafter: 'Treaty'), the Energy Community Secretariat (hereinafter: 'Secretariat') may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council of the Energy Community (hereinafter: 'Ministerial Council'). Pursuant to Article 11 of the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter: 'Dispute Settlement Procedures'),¹ the Secretariat carries out a preliminary procedure before submitting a Reasoned Request to the Ministerial Council.
- (2) In its Annual Implementation Reports, the Secretariat has consistently noted the lack of compliance with the legal and functional unbundling requirements under the Energy Community Treaty by Bosnia and Herzegovina.²
- (3) Besides the obligations arising from the Treaty, which are solely relevant for assessing compliance in the present case, under the so-called Berlin or Western Balkan 6 (WB6) process established in 2014,³ the WB6 countries, including Bosnia and Herzegovina, committed to complete legal and functional unbundling of distribution system operators and supply companies until March 2016.⁴ The Secretariat has been regularly reporting on the progress made by the WB6 Contracting Parties, and continuously points to the lack of progress by Bosnia and Herzegovina in advancing distribution system unbundling.⁵
- (4) The Secretariat also established a dedicated platform, the so-called *Energy Community Distribution System Operators in Electricity* (ECDSO-E) aiming to support activities of Contracting Parties' electricity distribution system operators' efforts to implement the Energy Community *acquis communautaire* ('acquis'), among which the unbundling requirements stemming from Directive 2009/72/EC.⁶ Distribution system companies operating in Bosnia and Herzegovina have been involved in ECDSO-E activities. In this context, the Secretariat also provided detailed guidance on how to accomplish unbundling of distribution system operators and a Policy Guideline on unbundling of distribution system operators (DSOs).

¹ Procedural Act No. 2015/04/MC-EnC of 16.10.2015.

² Latest edition of 2019, page 36.

³ Cf. <https://www.energy-community.org/regionalinitiatives/WB6.html>. Also referred to as so-called "Berlin process" that kicked off with a conference of Western Balkan States in August 2014 followed by annual summits in Vienna (2015), Paris (2016), Trieste (2017), London (2018), Poznań (2019) and Zagreb (2020).

⁴ 2015 Summit, Final Declaration by the Chair, item 22 and Addendum, Energy Soft Measures II.4, item 3.

⁵ Cf. https://www.energy-community.org/regionalinitiatives/WB6/Monitoring_EL.html.

⁶ Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC as adopted and adapted by Decision of the Energy Community Ministerial Council 2011/02/MC-EnC.

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- (5) In absence of any progress with electricity distribution system unbundling in Bosnia and Herzegovina since the entry into force of the Energy Community Treaty in 2006, the Secretariat decided to initiate the present proceedings under Article 90 of the Treaty.
- (6) On 3 October 2017 the Secretariat informed the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina (hereinafter: 'Ministry') about the preliminary finding of non-compliance with Article 26 of Directive 2009/72/EC for functional and legal unbundling of electricity distribution system operators.⁷
- (7) The Ministry replied to the Secretariat by letter of 13 November 2017.⁸ In its letter the Ministry did not challenge the facts and legal assessment in the Secretariat's letter of 3 October 2017 but
- confirmed that in the Federation of Bosnia and Herzegovina
 - i. the Law on Electricity⁹ requires legal and functional unbundling of electricity distribution system operators. The Ministry did not contest that unbundling has not been implemented in praxis;
 - ii. the Law on Electricity fails to transpose the obligation for a compliance programme and officer as stipulated by Article 26(2)(d) of Directive 2009/72/EC;
 - confirmed that in the Republika Srpska
 - i. legal unbundling of electricity distribution from supply has not been implemented;
 - ii. the licensing conditions issued by the Regulatory Commission of Republika Srpska¹⁰ oblige the distribution system operators to functionally unbundle. The Ministry did not contest that functional unbundling has not been implemented in praxis.
- (8) On 16 January 2018, the Secretariat, by way of an Opening Letter, initiated dispute settlement proceedings against Bosnia and Herzegovina for non-compliance with the Treaty and, in particular, with the obligations stemming from Article 26 of Directive 2009/72/EC for legal and functional unbundling of electricity distribution system operators, including the establishment of a compliance program and compliance officer.¹¹
- (9) By email of 19 March 2018 the Ministry of Foreign Trade and Economic Relations forwarded to the Secretariat a letter of the Ministry of Energy, Mining and Industry of the Federation of Bosnia and Herzegovina dated 22 February 2018 (hereinafter: the 'Reply') informing about the status of legal unbundling of distribution system operators in the Federation of Bosnia and Herzegovina.¹² For the Federation of Bosnia and Herzegovina, the Reply confirmed the

⁷ Ref. ECS-6/17/O/03-10-2017.

⁸ Ref. no. 07-1-28-3639-5/17; received by the Secretariat on 20.11.2017.

⁹ Adopted on 12 August 2013, Official Journal No. 66 of 28.08.2013, amendment 94/15.

¹⁰ <http://www.reers.ba/en>.

¹¹ Ref. ECS-5/17/O/16-01-2018.

¹² Reference number 05-17-193/18. The deadline for reply to the Opening Letter expired on 16.03.2018.

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information already provided by the Ministry of Foreign Trade and Economic Relations in its letter of 13 November 2017, namely that legal and functional unbundling of electricity distribution system operators is legally required by the Law on Electricity but has not been implemented in practice, and that the Law on Electricity fails to transpose the obligation for a compliance programme and officer as stipulated by Article 26(2)(d) of Directive 2009/72/EC. The Reply did not contain any information for Republika Srpska.

- (10) Having assessed the information put forward in the Reply, the Secretariat considers that the explanation provided by the authorities of Bosnia and Herzegovina does not affect the preliminary legal assessment of the Secretariat carried out in the Opening Letter. The Reply does also not give evidence of activities or developments in the meantime that could have rectified the breaches of Bosnia and Herzegovina's obligations under the Treaty. While taking into account changes in the legislative framework of Republika Srpska in its assessment, the Secretariat still considers that Bosnia and Herzegovina fails to comply with Article 26 of Directive 2009/72/EC.
- (11) Under these circumstances, the Secretariat decided to submit the present Reasoned Opinion.

2. Factual Background

- (12) The organisation of the power sector of Bosnia and Herzegovina is determined by the constitutional structure of the country. While electricity transmission system operation, wholesale and cross-border trade are governed on state level for the whole territory of Bosnia and Herzegovina, the legislative framework and the administrative bodies (including national regulatory authorities) of the two entities, Republika Srpska and Federation of Bosnia and Herzegovina, are responsible for generation, distribution and supply of electricity to end-customers in their respective jurisdictions.

2.1 Federation of Bosnia and Herzegovina

- (13) The electricity sector in the Federation of Bosnia and Herzegovina is governed by the Law on Electricity of 2013.¹³
- (14) Article 46 of the Law on Electricity requires legal and functional unbundling of electricity distribution system operators as of the date of its entry into force on 5 September 2013.¹⁴ The Law on Electricity neither includes an obligation for adoption of a compliance program and/or appointment of compliance officer as stipulated by Article 26 (2)(d) of Directive 2009/72/EC nor requires the establishment of a separate branding and communication identity of the distribution system operator.

¹³ Supra note 9.

¹⁴ Article 118 of the Law on Electricity rules entry into force eight days after its publication in the Official Journal of the Federation of Bosnia and Herzegovina. The law was published in the Official Journal on 28.08.2013.

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- (15) Article 114 of the Law on Electricity requires the development of a program for restructuring the electricity sector in the Federation of Bosnia and Herzegovina within three months following the entry into force of the Law on Electricity, i.e. by 5 December 2013. The Government adopted a program on 6 March 2014 which foresees step-wise functional and ultimately legal unbundling.¹⁵ However, the program has not been approved by the Parliament of the Federation of Bosnia and Herzegovina and therefore was never formally adopted. This was confirmed in the Reply.¹⁶
- (16) By email of 16 December 2019, the Ministry of Energy, Mining and Industry of the Federation of Bosnia and Herzegovina submitted to the Secretariat and the Parliament of the Federation of Bosnia and Herzegovina a new program for restructuring the electricity sector in the Federation of Bosnia and Herzegovina, step-wise functional and ultimately legal unbundling of the vertically integrated electricity companies *Elektroprivreda BiH d.d. Sarajevo*¹⁷ and *Elektroprivreda HZHB d.d. Mostar*. However, this program has also not been adopted.
- (17) As will be demonstrated in the following, the two distribution system operators active in the Federation of Bosnia and Herzegovina, *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d. Mostar*,¹⁸ are legally and functionally bundled with supply and generation activities. Compliance programs and/or officers are not in place.

Elektroprivreda BiH d.d. Sarajevo

- (18) *Elektroprivreda BiH d.d. Sarajevo* is a public enterprise registered as joint stock company. 90.37% of capital is owned by the Federation of Bosnia and Herzegovina, 9.63% by minority shareholders.¹⁹ The company's governance structure includes a general assembly composed of shareholder representatives, a supervisory board, the management²⁰ and an audit committee. The supervisory board consists of seven members who are appointed and dismissed by the general assembly.²¹

¹⁵ Official Journal No. 20/14.

¹⁶ According to the information provided in the Reply, deadlines of the Government's proposal are already outdated due to the long-lasting lack of approval by the Parliament.

¹⁷ *Javno Preduzeće Elektroprivreda Bosne i Hercegovine d.d. Sarajevo*; www.epbih.ba.

¹⁸ *Javno Preduzeće Elektroprivreda Hrvatske Zajednice Herceg Bosne d.d. Mostar*; www.ephzhhb.ba.

¹⁹ Cf. www.epbih.ba – about company - general information.

²⁰ The management is composed of Mr. *Admir Anđelić* (General Director), Mr. *Samir Selimović* (Executive Director for Production), Mr. *Elvir Lojić* (Executive Director for Distribution), Mr. *Zlatan Planinčić* (Executive Director for Supply and Trade), Mr. *Muhamed Kozadra* (Acting Executive Director for Economic Operations), Mrs. *Ružica Burić* (Executive Director for Legal Affairs and Human resources) and Mr. *Senad Salkić* (Executive Director for Capital Investment); cf. www.epbih.ba – about company - general information – organisation.

²¹ The members of the Supervisory Board are: Mr. *Izet Žigić* (President of the Supervisory Board), Mr. *Milenko Obad*, Mr. *Selvedin Subašić*, Mr. *Muhidin Zametica*, Mr. *Safet Isić*, Mr. *Vanja Bajrami*, and Mr. *Hasen Mašović*. The member of the Audit Committee are: Mr. *Almira Zulić-Burek*, Mrs. *Fikreta Bešović* and Mr. *Haris Jahić*. The members of the Audit Committee have been appointed at the 62th meeting of the General Assembly on 28.05.2020 for a period of four years from a date of appointment; cf. www.epbih.ba – about company - general information – organisation.

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(19) *Elektroprivreda BiH d.d. Sarajevo* is the parent company within the *EPBIH* concern, which includes several companies in the field of mining and manufacturing of equipment.²² However, there are no separate companies for distribution operation, generation and supply of electricity. Instead, the activities of generation,²³ distribution²⁴ and supply²⁵ based on licenses issued to *Elektroprivreda BiH d.d. Sarajevo* are performed by this legal entity and organised in units (called 'Directorates') as part of an integrated company structure under a common management. Electricity distribution and supply is organized in five regional sub-divisions – namely: *Elektrodistribucija Sarajevo*, *Elektrodistribucija Tuzla*, *Elektrodistribucija Zenica*, *Elektrodistribucija Bihać* and *Elektrodistribucija Mostar* – all part of *Elektroprivreda BiH d.d. Sarajevo* without separate legal identity. Generation is performed by four thermal power plants, *Kanj*, *Tuzla*, *Jablanica*, and *Salakovac* and the hydro power plant *Grabovica*.²⁶

(20) The company structure can be displayed as follows:²⁷

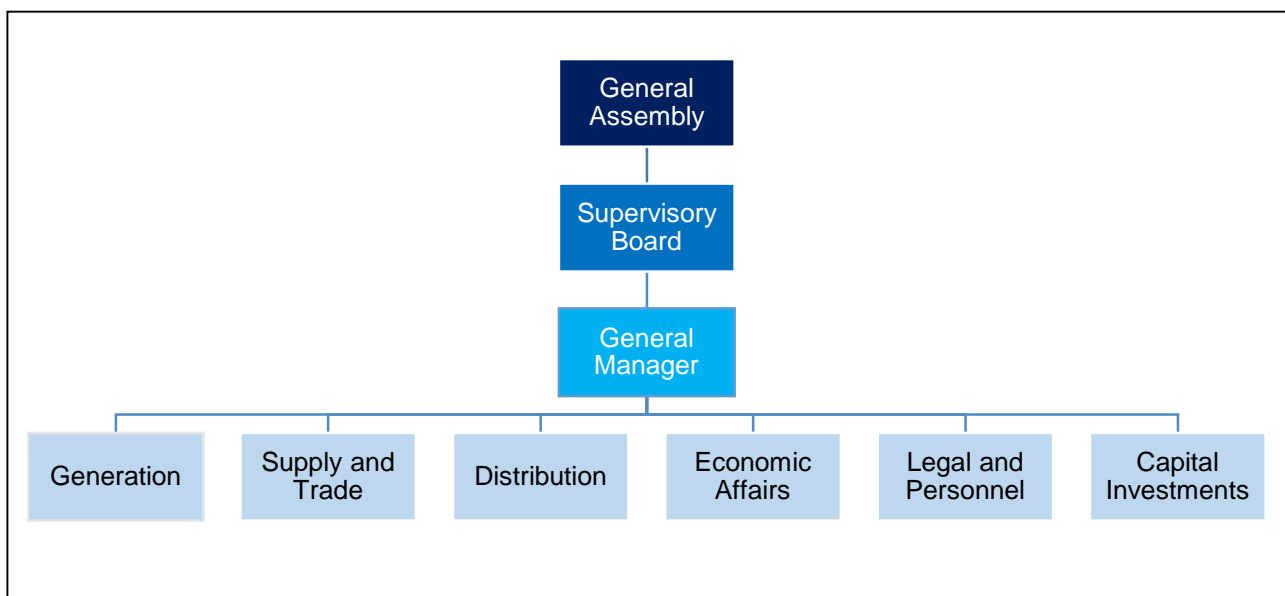


Figure 1: Company structure of *Elektroprivreda BiH d.d. Sarajevo*

Elektroprivreda HZHB d.d Mostar

²² The EPBIH Concern, as a form of co-operation of companies, was established in November 2009, by signature of an agreement on conduct of business between *Elektroprivreda BiH d.d. - Sarajevo* and its subsidiaries - seven coal mines, along with the former non-electric utility companies of *JP Elektroprivreda BiH d.d. - Sarajevo*; cf. www.epbih.ba/eng/page/epbih-concern.

²³ Generation license 06-03-734/32/12 issued by the Regulatory Commission for Energy in the Federation of Bosnia and Herzegovina (FERK) for the validity period of 01.01.2013-31.12.2022.

²⁴ Distribution license No. 06-03-735/34/12 issued by FERK for the validity period of 01.01.2013-31.12.2027.

²⁵ Supply license No. 06-03-755/143/16 issued by FERK for the validity period of 01.01.2017-31.12.2021.

²⁶ www.epbih.ba/eng/page/subsidiaries#distribution.

²⁷ Cf. <http://www.epbih.ba/eng/page/organization-of-the-company#company-management>.

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- (21) *Elektroprivreda HZHB d.d Mostar* is registered as a joint stock company.²⁸ 90% of capital is owned by the Federation of Bosnia and Herzegovina, 10% are owned by investment funds, banks and other legal and natural persons.²⁹ The company's governance structure includes a general assembly composed of shareholder representatives, a supervisory board, the management³⁰ and an audit committee. The supervisory board consists of six members and a president who are appointed and dismissed by the general assembly.³¹
- (22) Based on licenses issued to *Elektroprivreda HZHB d.d Mostar*, the company performs the activities of electricity supply,³² distribution³³ and generation³⁴ organised in units (called 'Directorates') that are part of a vertically integrated company structure under a common management.³⁵
- (23) The company is structured as follows:

²⁸ Registration number 1-3177.

²⁹ www.ephzhb.ba – about us – company profile – basic data.

³⁰ The management is composed of Mr. *Marinko Gilja* (General Manager), Mr *Robert Lesko* (Director for Legal Affairs), Mr. *Ante Tutiš* (Director for Economic Affairs), Mr. *Zoran Tabak* (Director for Production), Mr. *Ilija Bakalar* (Director for Distribution), Mr. *Ivica Prskalo* (Director for Supply) and Mr. *Drago Bago* (Director for Development); cf. www.ephzhb.ba – organisation – management.

³¹ The current members of the Supervisory Board are Mr. *Božo Perić* (President); Mr. *Zoran Buntić*; Mr. *Ivo Vincetić*; Mrs. *Karmela Miletić*; Mr. *Ivica Krivić*; Mr. *Alija Fitozović*; cf. www.ephzhb.ba – organisation – supervisory board.

³² Supply license No. 06-03-739-10/140 issued by FERK for the validity period of 01.01.2017-31.12.2021.

³³ Distribution license No. 06-03-737/34/12 issued by FERK for the validity period of 1.1.2013-31.12.2027. Transmission activities have been separated in 2006.

³⁴ Generation license No. 06-03-730/31/12 issued by FERK for the validity period of 01.01.2013-31.12.2022.

³⁵ On the performed activities see: www.ephzhb.ba – organisation – distribution / production / supply.

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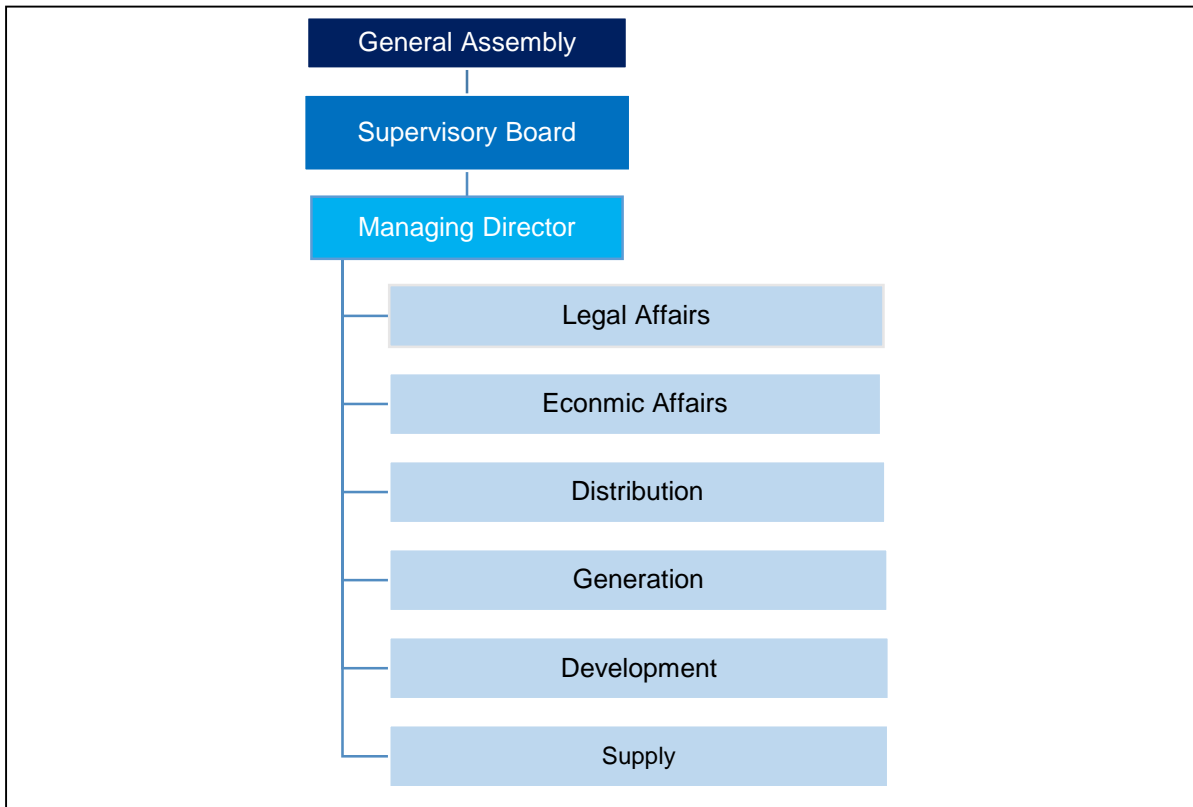


Figure 2: Company structure of *Elektroprivreda HZHB d.d Mostar*

2.2 Republika Srpska

(24) The electricity sector in Republika Srpska is governed by the Law on Energy of 2009³⁶ and the Electricity Law of July 2020.³⁷ Article 14(1) of the Law on Energy requires unbundling of energy activities, including electricity, but does not prescribe details of the unbundling requirements. Article 14(2) of the Energy Law reads that unbundling “*can be related to legal, functional and accounting unbundling*” while Article 14(1) leaves the final decision on the concrete unbundling concept to the Electricity Law. The previous Electricity Law of 2008³⁸ did not include rules for legal or functional unbundling: on the contrary, Article 39(3) explicitly entitled and required electricity distribution system operators to supply customers: “*The distributor [distribution system operator] has the right and obligation to perform supply system users and customers on its area*

³⁶ Adopted on 14 May 2009, Official Journal 49/2009.

³⁷ Official Gazette of RS, No.68/20 of 13.07.2020.

³⁸ Official Gazette of RS, No. 8/08 of 26.12.2008. This Law has been amended by Law no. 34/09 (08.04.2009), 92/09 (24.09.2009) and 01/11 (21.12.2010).

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of operation, if so specified in the license to perform this activity.” But Article 50(2) of the new Electricity Law of July 2020 transposes the requirement of Article 26(1) of Directive 2009/72/EC for legal, organisational and decision making unbundling of distribution system activities that are part of a vertically integrated undertaking from other non-distribution related company activities.

- (25) Article 50(4) items (1)-(5) of the 2020 Electricity Law transposes the functional unbundling obligations from Article 26(2)(a) and (b) and the first two sentences of litera (c) as well as Article 26(3) of Directive 2009/72/EC by requiring separation and independent decision making of the distribution system operator’s management, availability of sufficient human, technical, physical and financial resources for the performance of distribution system activities as well as a separate branding and communication identity.
- (26) Article 51 of the 2020 Electricity Law transposes the possibility stipulated in Article 26(2)(c) sentences three to five of Directive 2009/72/EC for the parent company to approve the financial plan of the distribution company but without interfering into the day to day business or individual decisions related to the construction or upgrading of the distribution network.
- (27) The obligation stemming from Article 26(d) of Directive 2009/72/EC to establish a compliance program and appoint a compliance officer is transposed in Article 48 of the 2020 Electricity Law.
- (28) According to its Article 147(1), the 2020 Electricity Law will enter into force on 1 January 2021. Pursuant to Article 140 of this Law, legal and functional unbundling shall be implemented within one year from the entry into force of the new Electricity Law, i.e. by 1 January 2022. In case of non-compliance within this deadline, Article 147(3) of the 2020 Electricity Law foresees a withdrawal of licenses.

Elektroprivreda Republike Srpske

- (29) In Republika Srpska electricity distribution, generation and supply are performed by *Elektroprivreda Republike Srpske* (ERS). The holding company *ERS* is registered as joint stock company which is 100% owned by the Government of Republika Srpska and consists of incorporated subsidiaries described below.³⁹ *ERS*’s governance structure includes a general assembly representing the shareholder, a supervisory board,⁴⁰ the management⁴¹ and an audit committee.⁴² The supervisory board consists of five members each who are appointed and dismissed by the general assembly. The activities of *ERS* are legally separated into five subsidiaries engaged in electricity generation, and five subsidiaries engaged in electricity distribution and supply.

³⁹ www.ers.ba – profile – history.

⁴⁰ The Supervisory Board is composed of Mrs *Slavica Injac* (President), Mr. *Nebojsa Rikalo* (Deputy President), Mr. *Milenko Đukić* and Mr. *Siniša Mandić*; cf. www.ers.ba.

⁴¹ The management of *ERS* is composed of Mr. *Luka Petrović* (Acting Director General), Mr. *Goran Vukoje* (Director for Technical Affairs) and Mr. *Borislav Grubač* (Director for Organisational and Legal Affairs), Mr. *Darko Milunović* (Executive Director for Economic and Financial Affairs) and Mr. *Jovica Vlatković* (Executive Director for Development and Investment).

⁴² The Audit Committee is composed of Mr. *Zoran Božić* (Chairman), Mr *Radomir Tabaković*, Mr. *Mile Balotic*, Mrs. *Jela Rikalo* and Mrs. *Dragana Pejić*.

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(30) Distribution and supply activities of *ERS*' continue to be performed within each of the five latter subsidiaries, based on licenses issued to each of the five companies.

(31) The electricity-related activities of *ERS* are organised in:

- five daughter companies engaged in electricity generation – *ZP Hidroelektrane na Trebišnjici ad Trebinje*, *ZP Hydroelectric Power Plants on Drina ad Visegrad*, *ZP Hidroelektrane na Vrbasu ad Mrkonjić Grad*, *ZP Rudnik and Thermal Power Plant Gacko a.d. Gacko*, *ZP Rudnik* and *Termoelektrana Ugljevik a.d. Ugljevik*;⁴³ and
- five subsidiaries engaged in electricity distribution and supply – *ZP Elektrokrajina a.d. Banja Luka*,⁴⁴ *ZP Elektro Doboj a.d. Doboj*,⁴⁵ *ZP Elektro Bijeljina a.d. Bijeljina*,⁴⁶ *ZP Elektrodistribucija Pale a.d. Pale*⁴⁷ and *ZP Elektrohercegovina a.d. Trebinje*.⁴⁸

⁴³ All daughter companies hold valid electricity generation licenses issued by the regulatory authority of Republika Srpska, REES; cf. www.reers.ba – register of licenses – electricity – generation.

⁴⁴ Registration No. 1074440; Unique Identification No. 4400855640000; www.elektrokrajina.com; distribution license issued by decision of REERS No. 01-467-10/12 effective as of 28.12.2012; supply license issued by decision of REERS No. 01-420-12/14/R-99-345 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

⁴⁵ Registration No. 01074628; Unique Identification No. 4400014500009; www.elektrodoboj.net; distribution license issued by decision of REERS No. 01-430-11/14/R-99-353 effective as of 28.12.2014; supply license issued by decision of REERS No. 01-431-5/14/R-99-349 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

⁴⁶ www.elektrobijeljina.com; distribution license issued by decision of REERS No. 01-425-14/14/R-99-352 effective as of 28.12.2014; supply license issued by decision of REERS No. 01-426-6/14/R-99-347 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

⁴⁷ Registration No. 1814788; Unique Identification No. 4400570050004; www.edbpale.com; distribution license issued by decision of REERS No. 01-453-11/12 effective as of 28.12.2012; supply license issued by decision of REERS No. 01-487-8/14/R-99-348 effective as of 28.12.2014.

⁴⁸ Registration No. 1814788; Unique Identification No. 4400570050004; www.elektrohercegovina.com; distribution license issued by decision of REERS No. 01-450-12/12 effective as of 28.12.2012; supply license issued by decision of REERS No. 01-423-10/14/R-99-346 effective as of 28.12.2014 and amended by decision No. 01-220-10/16/R-18-190.

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(32) The company structure can be displayed as follows:

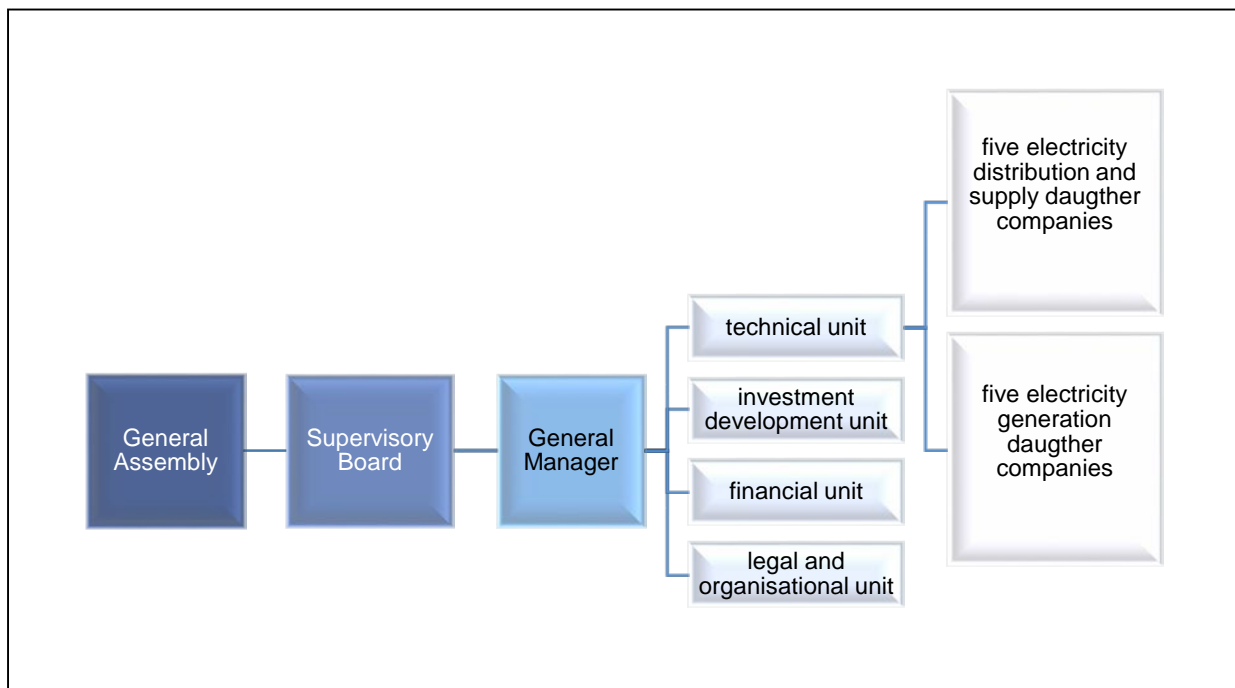


Figure 3: ERS structure

3. Relevant Energy Community Law

(33) Energy Community law is defined in Article 1 of the Dispute Settlement Procedures as “a *Treaty obligation* or [...] a *Decision addressed to [a Party]*”.

(34) Article 3 of the Dispute Settlement Procedures reads:

“(1) A Party fails to comply with its obligations under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law.

(2) 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.”

(35) 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.”

(36) Article 89 of the Treaty reads:

“The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.”

(37) Article 3 of Decision 2011/02/MC-EnC defines 1 January 2015 as deadline for transposition and implementation of the Third Energy Package, including Directive 2009/72/EC.

(38) Article 2(21) of Directive 2009/72/EC reads:

‘vertically integrated undertaking’ means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity.

(39) Article 2(35) of Directive 2009/72/EC reads:

‘electricity undertaking’ means any natural or legal person carrying out at least one of the following functions: generation, transmission, distribution, supply, or purchase of electricity, which is responsible for the commercial, technical or maintenance tasks related to those functions, but does not include final customers.

(40) Article 26 of Directive 2009/72/EC reads:

1. Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking.

2. In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:

(a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;

(b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

(c) the distribution system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks

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(d) the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 35(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.

3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4. Contracting Parties may decide not to apply paragraphs 1, 2 and 3 to integrated electricity undertakings serving less than 100000 connected customers, or serving small isolated systems.

4. Legal Assessment

(41) Article 26 of Directive 2009/72/EC in conjunction with Ministerial Council Decision 2011/02/MC-EnC obliges the Contracting Parties, including Bosnia and Herzegovina, to transpose into national legislation, as well as to implement the requirement of functional and legal unbundling of electricity distribution system operators, including the establishment of a compliance programme and compliance officer no later than 1 January 2015. These provisions are mandatory and have to be transposed and practically implemented in the jurisdiction of each of the Contracting Parties.⁴⁹

(42) Transposition and implementation of functional and legal unbundling of electricity distribution system operators was already an obligation for Bosnia and Herzegovina under the Second Internal Energy Market Package,⁵⁰ with the exception of the requirement to introduce a compliance officer.⁵¹

(43) In the absence of State legislation governing the activities of electricity distribution, supply and generation, the legal framework in the competent entities need to be compliant with Energy Community law, both on the levels of legislation and its application in practice. Consequently,

⁴⁹See as well: paragraph (2) of the Reasoned Opinion in case ECS-9/13.

⁵⁰ Cf. Article 26 of Directive 2003/54/EC.

⁵¹ A compliance program was, however, already required under the Second Internal Energy Market Package.

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the following assessment analyses compliance of the entities' legislation with the requirements of Directive 2009/72/EC.

- (44) In its analysis, the Secretariat is aware of and respects the constitutional structure of Bosnia and Herzegovina and the division into two entities. At the same time, the State of Bosnia and Herzegovina as a Contracting Party to the Treaty, not its entities, assumes responsibility for compliance with the acquis. Under Article 3(2) of the Dispute Settlement Procedures, this includes „*any measure by the public authorities of the Party (central, regional or local [...]) [...]*“. Any failure of Republika Srpska and/or the Federation of Bosnia and Herzegovina to comply with the acquis is thus attributable to the State of Bosnia and Herzegovina as a Party to the Treaty.⁵²
- (45) The exemption of Article 26(4) of Directive 2009/72/EC for integrated electricity undertakings serving less than 100000 connected customers only applies to the electricity distribution operator of Brčko District, *Komunalno Brčko*.⁵³ Compliance by the latter thus, is out of the scope of the present case.

4.1 Incorrect transposition of the requirements for unbundling of electricity distribution system operators

- (46) In the Federation of Bosnia and Herzegovina Article 46 of the Law on Electricity requires legal and functional unbundling of electricity distribution system operators in line with Article 26(2)(a), (b) and (c) of Directive 2009/72/EC. However, the legislation of Federation of Bosnia and Herzegovina fails to correctly transpose the requirements of Article 26(2)(d) and Article 26(3) of Directive 2009/72/EC by lacking an obligation to introduce a compliance program and officer and failing to require the creation of a separate corporate identity of the distribution system operator from the supply activities of the vertically integrated undertaking.
- (47) The requirement of Article 114 of the Law on Electricity for development of a program for restructuring the electricity sector in the Federation of Bosnia and Herzegovina, has not been met: namely, the draft program of December 2019 has not been formally adopted by the Parliament of the Federation of Bosnia and Herzegovina. In the absence of any legal effect, having prepared but not yet adopted and entered into force the reconstruction programs cannot

⁵² See also: Opinion of the Advisory Committee on case ECS-1/14, chapter 4; Secretariat, Reasoned Request on case ECS-8/11, paragraphs 48 and 49; cases 227-230/85 *Commission v Belgium* [1988] ECR I-1, paragraphs 9 and 10. The Court of Justice held that ‘*the State is free to delegate powers to its domestic authorities as it considers fit and to implement directives by means of measures adopted by regional or local authorities,*’ but that ‘*division of powers does not however release it from the obligation to ensure that the provisions of the directive are properly implemented in national law.*’ According to established case law, a State ‘*may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law.*’

⁵³ www.komunalno.ba.

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be considered as measures transposing the requirements of Article 26(2)(d) and Article 26(3) of Directive 2009/72/EC.⁵⁴

- (48) The failure to correctly transpose the requirements of the *acquis* is attributable to Bosnia and Herzegovina under Article 3(2) of the Dispute Settlement Procedures.
- (49) Since the requirements for functional unbundling of distribution system operators are not transposed in the legislation covering the whole territory of Bosnia and Herzegovina, the Secretariat concludes that Bosnia and Herzegovina fails to comply with the obligation to transpose Article 26(2)(d) and Article 26(3) of Directive 2009/72/EC.

4.2 Failure to implement the requirements for unbundling of electricity distribution system operators

4.2.1 Lack of legal unbundling

Directive 2009/72/EC requires that distribution is performed by a separate ‘network’ company. According to Article 26(1) of Directive 2009/72/EC distribution companies must be established as legally separate companies which may be a subsidiary of a vertically integrated electricity company. The precise legal form of the subsidiarity depends on national law.

Federation of Bosnia and Herzegovina

- (50) In the Federation of Bosnia and Herzegovina the two distribution system operators, *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar* both have a fully integrated structure, performing activities of distribution, supply and generation under a common management. Consequently, legal separation of electricity distribution activities from electricity supply and generation is not in place. The lack of legal unbundling of *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar* amounts to a breach of Article 26(1) of Directive 2009/72/EC.

Republika Srpska

- (51) In Republika Srpska electricity activities of the mother company *ERS* are legally separated into five subsidiaries engaged in electricity generation, and five subsidiaries engaged in electricity distribution and supply.
- (52) In other words, the legal unbundling requirement is only complied with respect to the separation of distribution from generation activities. Distribution and supply activities of *ERS*, however, continue to be bundled within the five subsidiaries. This amounts to a breach of Article 26(1) of Directive 2009/72/EC.

⁵⁴ See, to that effect, Case C-430/98 *Commission v Luxembourg*, paragraphs 8-13, Case C-648/13 *Commission v Poland*, paragraphs 129-132.

Conclusion

(53) Since the failure to correctly implement Article 26(1) of Directive 2009/72/EC in the Federation of Bosnia and Herzegovina and in Republika Srpska is attributable to Bosnia and Herzegovina under Article 3(2) of the Dispute Settlement Procedures, the Secretariat concludes that Bosnia and Herzegovina fails to comply with the obligations for timely implementation of Article 26(1) of the Directive 2009/72/EC.

2.2.2 Lack of functional unbundling

(54) In addition to the requirement of legal unbundling, the formally independent distribution companies must also be separate in term of their organisation and decision making. Management separation is the key requirement to ensure that distribution system operators act independently of supply and generation activities within the same vertically integrated undertaking or concern, and to avoid actual or potential conflicts of interest. Article 26(2) and (3) of Directive 2009/72/EC requires a number of elements of functional unbundling of the DSO related to independence of its management, effective decision-making rights of the entity in charge of the distribution activities, the establishment of a compliance officer and programme, the availability of necessary resources (including human, technical, physical and financial) to be at the distribution system operator's disposal in order to fulfil its tasks. It also requires a clear separation of branding and communication of the distribution activities from those of supply.⁵⁵

(55) The obligation of management separation prescribed in Article 26(2)(a) of Directive 2009/72/EC requires that the persons responsible for the management of distribution activities do not participate in company structures of the vertically integrated undertaking and are not responsible, directly or indirectly, for the day-to-day operation of production, transmission or supply activities. Article 26(2)(b) of Directive 2009/72/EC further requires that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently.

(56) The concrete measure to safeguard independence of management of the distribution system operator and its independent decision making are left to the individual Contracting Party.⁵⁶ The

⁵⁵ Commission Staff Working Paper, chapter 3.3.

⁵⁶ Commission Staff Working Paper, chapter 3.3.1. lists a few examples that may put at risk independence and possible measures: *"Independence of the persons responsible for the distribution system operator's management may be e.g. put into jeopardy by their salary structure, notably if their salary is based on the performance of the holding company or of the production or supply company, as this may create conflicts of interest. Also the transfer of managers from the DSO to other parts of the company and vice versa may entail a risk of conflicts of interest [...]. Conflicts of interest for the network management may also arise if the DSO directly or indirectly holds shares in the related supply or production company and obtains a financial interest in its performance. Likewise, the issue of shareholding on a personal basis of the managers of the DSO can give rise to concerns [...]. Decisions of the parent company to replace one or more members of the management of the DSO may also undermine the independence of the DSO [...], notably if the reasons for replacement of members of the management have not been established beforehand in the charter of the DSO. [...] When shaping the*

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independence requirement goes beyond the top management of the distribution system operator and must also include the operational (middle) management of the distribution system operator.⁵⁷

- (57) To guarantee independence of the distribution system operator and its management, Article 26(2)(c) of Directive 2009/72/EC further requires that the distribution system operator must have effective decision-making rights, independent from other parts of the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the network. To fulfil this requirement, the distribution system operator must have at its disposal the necessary resources, including human, technical, physical and financial resources, in order to fulfil its tasks of operating, maintaining and developing the network. This means that the distribution system operator may not unduly rely on the services of other parts of the vertically integrated undertaking. Where such services are provided, they must be provided at market conditions and laid down in a contractual arrangement to exclude cross-subsidies between the distribution system operator to other parts of the vertically integrated undertaking.⁵⁸
- (58) According to Article 26(3) of Directive 2009/72/EC, a clear separation of the distribution system's identity must be ensured in communication and branding as well as premises, services and infrastructure. This requirement aims at excluding confusion between the system operation activities and those of supply and generation. To prevent such confusion, the compliance program required by Article 26(2)(d) of Directive 2009/72/EC should include rules for the behaviour of employees of a distribution system operator vis-à-vis network customers, to ensure they refrain from any reference to the related supply or generation business in their contacts with customers. Moreover, the distributions system operator must be situated in a separate office from the other parts of the vertically integrated company and have a different logo and corporate identity.⁵⁹
- (59) Pursuant to Article 26(2)(d) of Directive 2009/72/EC, functional unbundling finally requires the establishment of a compliance program and appointment of a compliance officer. The main purpose of a compliance programme is to provide a formal framework that guarantees that the network activities, individual employees and the management of the distribution system operator behave truly independent. Safeguard elements of the compliance program should therefore contain rules of conduct that preserve the confidentiality of commercially sensitive and commercially advantageous information required by Article 27 of Directive 2009/72/EC by

rules on independence of the staff and the management of the DSO, the detailed provisions on independence of the staff and the management of the ITO as laid down in Article 19 Electricity [...] Directive may serve as a point of reference, where appropriate.

⁵⁷Commission Staff Working Paper, chapter 3.3.1. See as well: *Ch. Jones and E. Cabau* in: EU Energy Law, Volume 1: The Internal Energy Market (fourth edition), paragraphs 5.41 and 5.42.

⁵⁸ Commission Staff Working Paper, chapter 3.3.1. See as well: *Ch. Jones and E. Cabau* in: EU Energy Law, Volume 1: The Internal Energy Market (fourth edition), paragraph 5.32.

⁵⁹ *Ch. Jones and E. Cabau* in: EU Energy Law, Volume 1: The Internal Energy Market (fourth edition), paragraphs 5.34, 5.70 and 5.71 and Commission Staff Working Paper, chapter 3.3.3.

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clearly defining the information that is considered confidential and how such information must be treated.⁶⁰ To enforce the rules of conduct, sanctions should apply in case of an infringement of the established rules. The compliance programme must be actively implemented and promoted through specific policies and procedures such as, e.g., regular and visible support of the management for the compliance programme via active communication to the staff; written commitment of staff to the compliance programme by signing up to the compliance; or training on compliance, in particular for new staff.⁶¹

(60) Article 26(2)(d) of Directive 2009/72/EC also requires the appointment of a compliance officer who has to be fully independent and must have access to all the necessary information of the distribution system operator to comply with its obligation to develop and an annual report, setting out the measures taken to implement the requirements of Article 26(2)(a), (b) and (c) as well as (3) of Directive 2009/72/EC.⁶² This report has to be sent to the national regulatory authority and must be published.

Federation of Bosnia and Herzegovina

(61) Separation of management for distribution services from supply and generation activities and independent decision making for distribution activities are neither in place in *Elektroprivreda BiH d.d. Sarajevo* nor in *Elektroprivreda HZHB d.d Mostar*. In both companies, the Directorate for Distribution is part of an integrated company structure accountable to the common management, namely a General Manager, in the same manner as the Directorate for Supply and Supply and Trade and the Directorate for Generation.

(62) This set up does not meet the management separation requirement of Article 26(2)(a)-(c) of Directive 2009/72/EC. Performance of distribution, supply and generation under a single management does not satisfy the requirement for separation and independence of the distribution system management and its decision making from the management of the supply and generation activities of the integrated company. Not only it does not prevent the general management to give instructions regarding the day-to-day business of the distribution activities, but envisages this as the default mode.

(63) Based on the assessment above, there is only one company as legal entity, one management of the several units / directorates. There is no separate and effective decision making related to

⁶⁰ Article 27 of Directive 2009/72/EC requires distribution operators to “preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.”

⁶¹ Commission Staff Working Paper, chapter 3.3.3. See as well: *Ch. Jones and E. Cabau* in: *EU Energy Law*, Volume 1: *The Internal Energy Market* (fourth edition), paragraph 5.65.

⁶² When defining the specific rules and guarantees for the independence of the compliance officer of the distribution operator, the rules applicable to the compliance officers of Independent Transmission System Operators as laid down in Article 21(2) of Directive 2009/72/EC may serve as a point of reference. Cf. Commission Staff Working Paper, chapter 3.3.3.

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distribution and independent from the other parts of the vertically integrated undertaking because only the company management takes all decisions and not the different units.

- (64) The Reply did not provide any information on any company internal measures for either *Elektroprivreda BiH d.d. Sarajevo* or *Elektroprivreda HZHB d.d Mostar* capable to ensure effective separation of decision making of the companies' distribution activities from supply or generation. A compliance program and compliance officer are neither required by the legislation in force in the Federation of Bosnia and Herzegovina, nor established in practice in either company. This is a breach of Article 26(2)(d) of Directive 2009/72/EC.
- (65) Finally, separate branding and communication identities or premises do not exist. The distribution services are not marketed under separate logos, postal addresses or advertisements. Instead, both *Elektroprivreda BiH d.d. Sarajevo* and *Elektroprivreda HZHB d.d Mostar* use the same logo, postal addresses and advertisement regardless of whether distribution services or electricity as a commodity is marketed. This does not meet the requirement of Article 26(3) of Directive 2009/72/EC to prevent the distribution system operator to take advantage of its vertical integration and distort competition by creating confusion in respect of the identity of the supply branch.

Republika Srpska

- (66) Besides the lack of legal unbundling of distribution and supply activities, also the functional unbundling requirements for separation of management for electricity distribution services from electricity supply are not met in Republika Srpska. Article 50 in conjunction with Article 140 and 147(1) of the new Electricity Law require functional unbundling only by 1 January 2022. The five distribution and supply subsidiaries of *ERS* are managed by a common management, which does not qualify for separate and independent decision making for distribution system activities from supply and infringes Article 26(2)(a)-(c) of Directive 2009/72/EC.
- (67) There are no internal measures in place within the *ERS* subsidiaries concerned capable to ensure effective separation of decision making of the companies' distribution activities from supply. A compliance program and compliance officer are not established in any of the five distribution and supply daughter companies of *ERS*. This is a breach of Article 26(2)(d) of Directive 2009/72/EC.
- (68) Based on the assessment above, there is only one company as legal entity, one management of the several units / directorates. There is no separate and effective decision making related to distribution and independent from supply because only the company management takes all decisions and not the different units.
- (69) Also, separate branding and communication identities or premises are not implemented: all five distribution and supply subsidiaries operate under a common logo, postal address and

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advertisement. While distribution and supply are legally separated from the mother company⁶³ there is no differentiation between the distribution and supply companies. All five companies do not brand or advertise supply and distribution services separately nor have separated premises for these activities. Finally, a compliance program and officer are not established in any of them.

(70) By consequence, Bosnia and Herzegovina fails to implement the requirements of the *acquis* for functional unbundling of its electricity distribution system operators as required by Article 26 paragraph (2) *litera* (a), (b), (c) and (d) and Article 26(3) of Directive 2009/72/EC.

Conclusion

(71) Since the failure to correctly implement the requirements for functional unbundling in the Federation of Bosnia and Herzegovina and in Republika Srpska is attributable to Bosnia and Herzegovina under Article 3(2) of the Dispute Settlement Procedures, the Secretariat concludes that Bosnia and Herzegovina fails to comply with the obligations for timely implementation of Article 26 (2)(a), (b), (c) and (d) and (3) of Directive 2009/72/EC Article 26 (2)(a), (b), (c) and (d) and (3) of Directive 2009/72/EC.

5. Conclusions

(72) Based on the assessment in the preceding paragraphs, the Secretariat must conclude that, by failing to transpose the requirements of Article 26(2)(d) and Article 26(3) of Directive 2009/72/EC in the Federation of Bosnia and Herzegovina, by failing to implement legal unbundling in the Federation of Bosnia and Herzegovina and Republika Srpska in line with the requirements of Article 26(1) of Directive 2009/72/EC, by failing to implement functional unbundling of *Elektroprivreda BiH d.d. Sarajevo*, *Elektroprivreda HZHB d.d Mostar* and *ERS* in line with the requirements of Article 26 (2)(a), (b), (c) and (d) and (3) of Directive 2009/72/EC, Bosnia and Herzegovina fails to fulfil its obligations under the Treaty.

(73) In accordance with Article 13 of the Dispute Settlement Procedures, the Government of Bosnia and Herzegovina is requested to rectify the breach of the Treaty and notify any related measures

by 11 January 2021

the latest to the Secretariat.

(74) Should Bosnia and Herzegovina wish to comply with the Treaty, the Secretariat, acting under Article 67 of the Treaty, is prepared to help in rectifying the identified case of non-compliance and providing concrete assistance.

⁶³ The statutes of all five distribution and supply daughter companies establish an own trademark and logo for each of them but, that logo is to be used together with the logo and trademark of the mother company *ERS*.

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Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

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Furthermore, in accordance with Article 15 of the Dispute Resolution and Negotiation Centre Rules, Bosnia and Herzegovina may also request that the present dispute is mediated by a neutral third-party mediator. Should Bosnia and Herzegovina wish to benefit from this option, it should notify the Legal Counsel of such a request in line with Article 15(1) of the Dispute Resolution and Negotiation Centre Rules by 11 December 2020.

Vienna, 11 November 2020



Janez Kopač
Director



Dirk Buschle
Legal Counsel/Deputy Director



BOSNIA AND HERZEGOVINA
MINISTRY OF FOREIGN TRADE AND ECONOMIC RELATIONS

No: 09-1-28-374/2/20

Sarajevo, December 8, 2020

ENERGY COMMUNITY SECRETARIAT

Am Hof 4

1010 Vienna, Austria

Subject: Reasoned Opinion in relation to the Case ECS-5/17 - Status of implementation of unbundling of distribution and supply activities in Bosnia and Herzegovina, reply – being submitted

Dear Sir/s,

As part of the reply to the Reasoned Opinion in the Case ECS-5/17 sent to Bosnia and Herzegovina by the Energy Community Secretariat due to failure to comply with the Energy Community Treaty, we were asked to state the status of implementation of unbundling of electricity distribution and supply activities in BiH. Acting on your request, we inform you of the following:

Federation of Bosnia and Herzegovina

The Law on Electricity in the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH" No. 66/13, 94/15 and 54/19) stipulates that the restructuring of existing electricity companies will be carried out in accordance with the Program for Restructuring the Electricity Sector in the Federation BiH, which should be adopted by the Government on the basis of valid regulations and with the consent of the Parliament of the Federation of BiH. Namely, in order to initiate activities on the legal unbundling of distribution activities, it is necessary to adopt the Program on Restructuring the Electricity Sector in the Federation of BiH by the FBiH Government with the consent of both houses of the FBiH Parliament. The Government of the Federation of BiH, at its 203rd session held on December 12, 2019, decided to adopt the Program on Restructuring the Energy Sector in the Federation of Bosnia and Herzegovina, which was sent for approval to the Parliament of FBiH. The House of Representatives of the Parliament of the Federation of BiH is at its 10th regular session, held on January 29, 2020 considered the Decision on giving consent and made a decision on giving consent to the Program with conclusions instructing the Government of the Federation of BiH to make changes to the deadlines for the implementation of the first and second phases of the Program on Restructuring the Energy Sector in the Federation of BiH so that:

The deadline for the determined activities of the first phase in terms of implementation (accounting unbundling of all electricity activities, and legal and management unbundling-formation only for distribution companies (DSOs) when it comes to distribution activities) is set as 36 months from the date of obtaining the consent of the FBiH Parliament to the Program on Restructuring the Energy Sector. Also, the deadline for the identified activities of the second phase in terms of implementation (full implementation of accounting and management unbundling with the

application of transfer prices between activities within power companies and Additional Analysis) is set as 60 months from the date of obtaining consent of the Parliament of the Federation of BiH for restructuring the energy sector, and the Program is sent to the House of Peoples of the Parliament of the Federation of BiH for consideration. Once the Parliament of the Federation of BiH approves the Program, we are of the opinion that the process of unbundling of distribution and supply activities will be completed within the planned deadline.

JP Elektroprivreda BiH d.d. Sarajevo has implemented key activities regarding the accounting unbundling of distribution and electricity supply activities: The Rulebook on Internal Prices in the EP BiH has been adopted;

In accordance with the adopted Rulebook on Internal Prices in the EP BiH, the development of separate financial reports is performed for the distribution and supply activities for internal use; The permanent assets of EP BiH were allocated according to energy activities (fixed assets of distribution and supply were separated).

The EP BiH is preparing the Study entitled 'Concept of the new organization of the EP BiH with a focus on the organizational unbundling of distribution activities and adaptation to business on the open electricity market'. The key focus of this Study is the optimal method of organizational unbundling of distribution and supply activities within the EP BiH and the comprehensive delineation of business processes of distribution and supply vertically in all segments (Directorate and subsidiaries). JP Elektroprivreda BiH planned the following activities:

Completion, consideration and adoption of the Study 'Concept of the new organization of EP BiH with a focus on organizational unbundling of distribution activities and adaptation to business on the open electricity market' - deadline: June 30, 2020;

Preparation and adoption of documents and general acts of the Company required for organizational unbundling of distribution activities within EP BiH on the basis of the adopted Study (amendments to the Statute, Rulebook on organization, Systematization of jobs,...) - deadline: October 31, 2020.

Adjustment of documents and general acts of the Company related to the accounting unbundling of distribution activities and other electricity activities in accordance with organizational changes - deadline: December 31, 2020.

Implementation of activities on legal unbundling of distribution activities (formation of DSO as a legal entity 100% owned by EP BiH) - within 36 months from the date of giving consent of both houses of the Parliament of the Federation of Bosnia and Herzegovina to the "Program on Restructuring the Energy Sector in the Federation of Bosnia and Herzegovina".

The Public Company "Elektroprivreda HZ HB" d.d. Mostar also contributed to the Program of Restructuring the Energy Sector in the Federation of Bosnia and Herzegovina, both through comments on the proposed amendments, and through proposals for improving the submitted Program, all with the aim of adopting a quality and operationally applicable document. The company is currently conducting substantive analyses and preparing document templates that will enable the steps necessary to complete the activities to separate the DSOs from the vertically integrated company in accordance with the deadlines defined in the Program, and after it receives the necessary consent of the competent institutions.

JP Elektroprivreda BiH d.d. Sarajevo and JP "Elektroprivreda HZ HB" d.d. Mostar stated that the process of unbundling of distribution and supply activities could be completed in a shorter period of time compared to the Program planned deadline.

Republika Srpska

As part of the analysis of the compliance of entity legislation with the requirements of Directive 2009/72/EC, the Energy Community Secretariat in the Reasoned Opinion in the case ECS-5/17 presents the facts related to the adoption and specific articles of the Law on Electricity which prescribe unbundling (Official Gazette of RS No. 68/20) adopted in June 2020, and which enters into force on January 1, 2021. It can be noticed that the Secretariat through the document states that the provisions of Directive 2009/72/EC referred to unbundling, are transposed through the provisions of the Law on Electricity. So, it is concluded that the request of Article 26, paragraph (1)

of Directive 2009/72/EC for legal and organizational unbundling was transposed, as well as unbundling in decision-making, related to the activities of the distribution system that are part of the vertically integrated company from other activities of the company with distribution. It is also noted that the functional separation obligations referred to in Article 26 (2) (a) and (b) and the first two sentences of litera (c) as well as Article 26 (3) of Directive 2009/72/EC requiring separation and independent decision-making of the distribution system operator's management, availability of sufficient human, technical, physical and financial resources for the performance of distribution system activities as well as a separate branding and communication identity. In addition to the above mentioned, it can be pointed out that the Secretariat notes, among other things, the proper transposition of the provisions on the establishment of the compliance program and the appointment of compliance officers.

In the part of the Reasoned Opinion related to the implementation of the requirement, it is stated that the requirement for legal unbundling was in compliance only in a view to the unbundling of distribution from generation activities. Also, it is stated that besides the lack of legal unbundling of distribution and supply activities, functional unbundling requirements for separation of management for electricity distribution services from electricity supply are not met in Republika Srpska. This comprises that there are no internal measures that could ensure the effective separation of decision-making on the company's distribution activities from supply, as if there are no separate branding and communication identities, nor premises.

Taking into account the above mentioned remarks regarding the provision of measures to ensure the legal and functional unbundling of electricity distribution in practice, it is necessary to bear in mind the following:

In the context of this information, it is necessary to take into account the specific actions performed by the companies, which are subject to unbundling, during the previous period until the entry into force of the Law on Electricity. Accordingly, in August 2018, MH "ERS" initiated activities on the reorganization of distribution companies in the system of MH "ERS", with the aim of separating market from non-market activities in the electricity sector, i.e. with the aim of unbundling activities in order to adapt to the Law on Electricity Provisions.

The project of reorganization of electricity distribution companies in the system of MH "ERS" and the establishment of public supply is one of the most complex transformation projects in the region. The project has been implemented in cooperation with the consulting company "PWC Savjetovanje" d.o.o. (the same company drafted the RS Energy Strategy), hired by the Government of the United Kingdom (Great Britain). The project lasted for 18 months filled with dedicated work on the analysis of the situation, defining a new method of working and detailed design.

The project plan for the restructuring of electricity distribution companies began with an analysis of the situation and a framework design with the implemented activities which covered a strategic review, financial and regulatory analysis, technical analysis, organization analysis, process and financial comparison, and a framework design of a new operating model (organization). Thanks to these activities, a common understanding of the current situation in electricity distribution companies in the MH ERS system has been achieved.

As a next step, a detailed design has been developed covering standardization, centralization and raising the efficiency of work of all electricity distribution companies that employ 4,200 workers. The detailed design is the result of a compromise between good industrial practices and real needs and possibilities of electricity distribution in the MH "ERS" system.

From October 15, 2019, after the detailed design phase, the implementation which is currently in full swing has begun with an active work on three key areas of distribution activities reorganisation, the public supply establishment and the separation of electricity generation activity from distribution companies.

By December 31, 2020, the goal is to complete the activities by the adoption of the new organization of distribution system operators (DSOs) and public supply (PS) by using an interim

agreement on mutual relations for one part of business processes, until all conditions for legal establishment of DSO and PS are met, in accordance with the Law on Electricity and other legal-regulatory preconditions for obtaining a licence. In addition, by the end of the year, intensive activity is planned on the development of bases for PS support processes as well as intensive testing of all IT (billing) functionalities, while with the entry into force of the new DSO organization most processes can function smoothly.

On November 30, 2020, the evaluation of production facilities value was completed, and the structuring of the transaction has begun with the planned completion in the 1st quarter of 2021 related to the actions of separating the activities of RES (low-power power plants as part of electricity distribution companies - mostly hydro power plants) from electricity distribution companies. Once all the legal and regulatory preconditions to obtain the permit for legal establishment have been met, the objective is to complete legal unbundling from March 1, 2021, and start a completely independent operation of DSOs that will perform distribution activities, and public supply and generation from RES as market activities.

The reorganisation of electricity distribution companies inevitably led to the reorganisation of the Distribution Directorate, which provided for development of the Compliance Program in the six-month work plan, and the establishment of the Compliance Service, in accordance with Article 26 paragraph (d) of Directive 2009/72/EC that is transposed into the provisions of Article 48 of Law on Electricity of the Republika Srpska, which enters into force on January 1, 2021.

In addition, in favour of the unbundling, it should be borne in mind that the provisions of the Rulebook on Eligible Customer Supply and Supplier Switching, ("Official Gazette of Republika Srpska" nos. 117/14, 50/16 and 29/19) from September 1, 2019, all customers on medium and high voltage have lost the possibility to be supplied by electricity distribution companies in the transitional period, after which they chose a supplier on the free market. Also, as of January 1, 2020, some of the remaining low-voltage customers, who are not subject to universal service, and who were supplied by electricity distribution companies, have lost that possibility, so that the current supply of electricity by electricity distribution companies can be used only by those customers who are entitled to universal service provision. Expressed as a percentage, about 60% of the energy delivered to domestic customers in the context of retail (supply) belongs to universal service, which is currently provided by electricity distribution companies. However, even for customers who use the universal service, there are no formal obstacles to freely choosing a customer in the market.

Conclusion

Bosnia and Herzegovina would like to emphasize the fact that measures and activities have already been taken, and that the planned activities are being implemented even in the circumstances of the pandemic caused by the spread of the COVID-19 virus, which represents a clear commitment of Bosnia and Herzegovina to rectify infringement, and that this presentation is a sufficient basis for dismissing the case.

Respectfully,

MINISTER

Staša Košarac

Broj: 03-02-727/2019
Sarajevo, 13.12.2019. godine

**PARLAMENT FEDERACIJE
BOSNE I HERCEGOVINE**

Bosna i Hercegovina
Federacija Bosne i Hercegovine
**PARLAMENT FEDERACIJE
SARAJEVO**

Primljeno	13-12-2019		
Org. jed.	Broj	Priloga	Vrijednost
	01,02-02-	2420	19

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- **Predstavnički dom**
gosp. Mirsad Zaimović, predsjedavajući

- **Dom naroda –**
gosp. Tomislav Martinović, predsjedavajući

Poštovani,

Vlada Federacije Bosne i Hercegovine je na 203. sjednici, održanoj 12.12.2019. godine, donijela Odluku o donošenju Programa o prestrukturiranju elektroenergetskog sektora u Federaciji Bosne i Hercegovine.

U skladu sa članom 114. stav 1. Zakona o električnoj energiji u Federaciji Bosne i Hercegovine („Službene novine Federacije BiH“, broj 66/13, 94/15 i 54/19), radi razmatranja i davanja saglasnosti, dostavljam PROGRAM O PRESTRUKTURIRANJU ELEKTROENERGETSKOG SEKTORA U FEDERACIJI BOSNE I HERCEGOVINE.

S poštovanjem,

Prilog: kao u tekstu



PREMIJER

Fadi Novalić

GOVERNMENT

Na osnovu člana 19. stav 2. Zakona o Vladi Federacije Bosne i Hercegovine („Službene novine Federacije BiH“, br.1/94, 8/95, 58/02, 19/03, 2/06 i 8/06) i člana 114. stav 2. Zakona o električnoj energiji („Službene novine Federacije BiH“, br. 66/13, 94/15 i 54/19), Vlada Federacije Bosne i Hercegovine, na prijedlog Federalnog ministarstva energije, rudarstva i industrije, na 203. sjednici održanoj 12.12.2019. godine, donosi

**ODLUKU
O DONOŠENJU PROGRAMA O PRESTRUKTURIRANJU
ELEKTROENERGETSKOG SEKTORA U FEDERACIJI BOSNE I HERCEGOVINE**

I

Ovom odlukom donosi se Program o prestrukturiranju elektroenergetskog sektora u Federaciji Bosne i Hercegovine (u daljnjem tekstu: Program prestrukturiranja).

II

Program prestrukturiranja iz tačke I je sastavni dio ove odluke.

III

Zadužuje se Generalni sekretarijat Vlade Federacije Bosne i Hercegovine da Program prestrukturiranja iz tačke I ove odluke dostavi Parlamentu Federacije Bosne i Hercegovine radi razmatranja i davanja saglasnosti.

IV

Stupanjem na snagu ove odluke prestaje da važi Odluka o donošenju Programa o prestrukturiranju elektroenergetskog sektora u Federaciji Bosne i Hercegovine („Službene novine Federacije BiH“, broj: 62/19).

V

Ova odluka stupa na snagu narednog dana od dana objavljivanja u „Službenim novinama Federacije BiH“, a početak će se primjenjivati kada Parlament Federacije Bosne i Hercegovine da saglasnost na Program prestrukturiranja iz tačke I ove odluke.

V. broj: 1449/2019
12.12.2019. godine
Sarajevo



PREMIJER
Fadil Novalić

**Bosna i Hercegovina
Federacija Bosne i Hercegovine
Vlada Federacije Bosne i Hercegovine**

**Program o prestrukturiranju
elektroenergetskog sektora u Federaciji BiH**

Decembar 2019. godine

Program o prestrukturiranju elektroenergetskog sektora u Federaciji BiH

Uvod

Bosna i Hercegovina je potpisnik Ugovora o uspostavi Energetske zajednice (*The Energy Community Treaty*) koji je na snazi od 1. jula 2006. godine. Time je preuzeta obaveza preuzimanja i implementacije pravne stečevine Europske unije koja se, između ostalog, odnosi na tržište električne energije. Ovim ugovorom strane su se obavezale da između sebe uspostave zajedničko tržište električne energije koje će funkcionirati po standardima tržišta energije u Europskoj uniji sa kojim će se u konačnici integritirati. Na taj način biće kreirano najveće interno tržište za električnu energiju na svijetu.

Osnovni cilj Energetske zajednice, sa aspekta tržišta električne energije, je kreiranje stabilnog i jedinstvenog regulatornog okvira i tržišnog prostora koji obezbjeđuje pouzdano snabdijevanje električnom energijom i može privući investicije u sektore.

U 2011. godini pravna stečevina EU za članice Energetske zajednice je proširena dijelom EU propisa koji sačinjavaju tzv. „Treći energetska paket“, koji su postali pravno obavezujući i za ugovorne strane Energetske zajednice, uz rok za transpoziciju u domaće zakonodavstvo i implementaciju u praksi do 1. januara 2015. godine.

Sa aspekta obaveza elektroprivrednih preduzeća u BiH i uspostave tržišta električne energije, najvažnija je Direktiva 2009/72/EC o zajedničkim pravilima unutrašnjeg tržišta električne energije od 13. jula 2009. godine. Ova Direktiva utvrđuje zajednička pravila za proizvodnju, prenos, distribuciju i snabdijevanje električnom energijom, koja uključuju odredbe za zaštitu potrošača, sa ciljem da se poboljšaju i integrišu konkurentna tržišta za električnu energiju. Ona utvrđuje pravila koja se odnose na organizaciju i funkcionisanje elektroenergetskog sektora, pitanje razdvajanja mrežnih djelatnosti, otvoren pristup tržištu, uslove i postupke koji se primjenjuju pri raspisivanju tendera i izdavanju energetske dozvola, te na rad prenosnog i distributivnog sistema. Njom se takođe utvrđuju obaveze u pogledu univerzalnih usluga i prava potrošača električne energije, kao i pojašnjavaju obaveze u vezi konkurencije, kao i uloga regulatornih tijela.

Zakon o električnoj energiji u FBiH („Službene novine Federacije BiH” br: 66/13, 94/15 i 54/19) stupio je na snagu 05.09.2013. godine. Zakon donosi značajan obim izmjena i novih rješenja u odnosu na prethodni zakon. Pri tome je najvažniji uticajni faktor bila obaveza usklađivanja zakonodavnog okvira u BiH sa pravnom stečevinom EU, a na osnovu Ugovora o Energetskoj zajednici, kao i Sporazuma o stabilizaciji i pridruživanju.

Zakonom o električnoj energiji utvrđeno je da će prestrukturiranje postojećih elektroprivrednih preduzeća biti izvršeno u skladu s Programom o prestrukturiranju elektroenergetskog sektora u Federaciji BiH (u daljem tekstu: Program), koji donosi Vlada Federacije BiH uz saglasnost Parlamenta Federacije BiH.

Osim navedenog, na prestrukturiranje elektroenergetskog sektora uticat će politike i ciljevi EU u kontekstu energetske tranzicije i klimatskih promjena, odnosno preuzete obaveze Bosne i Hercegovine na osnovu međunarodnih sporazuma.

Sažetak

Ovaj Program povezan je sa drugim aktivnostima koje se dešavaju u elektroenergetskom sektoru što uključuje:

- Funkcionisanje regulatornih komisija nadležnih za energiju u Bosni i Hercegovini i Federaciji Bosne i Hercegovine u zakonima predviđenom obimu, posebno u pogledu neovisnosti i stvaranja pretpostavki za funkcionisanje tržišta električne energije i odvajanja reguliranih i tržišnih djelatnosti,
- Modernizaciju i prestrukturiranje rudnika uglja.

Ključne promjene koje će, putem faznih aktivnosti, biti obuhvaćene ovim programom proističu iz zahtjeva Direktive 2009/72/EC o zajedničkim pravilima unutrašnjeg tržišta električne energije, odnosno, Zakona o električnoj energiji u Federaciji BiH i odnose se na:

- Funkcionalno razdvajanje svih djelatnosti što podrazumijeva:
 - Računovodstveno razdvajanje svih djelatnosti što znači odvojeno vođenje poslovnih knjiga i sačinjavanje i objavljivanje odvojenih finansijskih izvještaja za elektroprivredne djelatnosti i
 - Razdvajanje poslovnog upravljanja djelatnosti što znači razdvojeno i nezavisno ostvarivanje međusobnih komercijalnih interesa, razdvajanje upravljačke strukture i izbjegavanje konflikta interesa.
- Pravno razdvajanje i nezavisnost za djelatnost distribucije (pravni oblik, organizacija i donošenja odluka).
- Računovodstveno razdvajanje djelatnosti snabdijevanja na regulisano i tržišno snabdijevanje

Promjene su najznačajnije u slučaju djelatnosti distribucije gdje je potrebna nezavisnost od ostalih djelatnosti, koja uključuje i pravni oblik. To znači da će postojeća elektroprivredna preduzeća formirati zavisna društva koja će obavljati djelatnost distribucije i imati status operatora distributivnog sistema.

Prestrukturiranje elektroprivrednih preduzeća je planirano u više faza.

Prva faza prestrukturiranja podrazumijeva realizaciju računovodstvenog razdvajanja svih elektroprivrednih djelatnosti, a samo kada je u pitanju djelatnost distribucije, i upravljačkog i pravnog razdvajanja (formiranje preduzeća za Distribuciju-ODS).

Vremenski okvir za ovu fazu je 15 mjeseci od dana dobijanja saglasnosti Parlamenta Federacije Bosne i Hercegovine na Program o prestrukturiranju elektroenergetskog sektora u Federaciji BiH.

Tokom ove faze bi se donio dugoročni plan tranzicije za sektor proizvodnje uglja u JP EP BiH uzimajući u obzir globalni proces dekarbonizacije i transformacije elektroenergetskog sektora. Uvažavajući potrebe za ugljem koje će proisteći iz ovih planova i aktuelno tehnološko i finansijsko stanje svakog pojedinačnog rudnika, bit će pripremljeni pojedinačni planovi za prestrukturiranje svakog rudnika u sastavu Koncerna JP EPBiH s ciljem modernizacije, sigurne i stabilne proizvodnje za

dostizanje produktivnosti potrebne za održivo poslovanje. Program prestrukturiranja rudnika uključuje i izradu planova za socijalno zbrinjavanje eventualnog viška radnika. Vremenski okvir za realizaciju ovih aktivnosti je 15 mjeseci od dana dobijanja saglasnosti Parlamenta Federacije Bosne i Hercegovine na Program o prestrukturiranju elektroenergetskog sektora u Federaciji BiH.

Druga faza podrazumjeva potpunu implementaciju i zaživljavanje u praksi računovodstvenog i upravljačkog razdvajanja uz primjenu transfernih cijena između djelatnosti distribucije i ostalih djelatnosti unutar elektroprivrednih preduzeća, te dostizanje upravljačke neovisnosti djelatnosti distribucije.

Istovremeno, elektroprivredna preduzeća bi uradila dodatne cjelovite analize, na osnovu kojih bi se donijele odluke u vezi upravljačkog razdvajanja i eventualnog pravnog razdvajanja ostalih elektroprivrednih djelatnosti, kao i u pogledu prestrukturiranja djelatnosti rudarstva, vodeći računa o odabranom statusu djelatnosti proizvodnje i budućim potrebama zamjenskih kapaciteta u termoelektranama.

Tokom ove faze bi se implementirali planovi za održivo poslovanje rudnika utvrđeni u prvoj fazi.

Ovisno od urađenih analiza i navedenih odluka iz druge faze, a uz prethodnu saglasnost Vlade Federacije Bosne i Hercegovine, pristupilo bi se implementaciji odluka što predstavlja treću fazu Programa.

Faza 1 – Računovodstveno i upravljačko razdvajanje djelatnosti

Faza 1 je prvi korak ka novom uređenju elektroenergetskog sektora i reorganizaciji elektroprivrednih preduzeća. Tokom ovog perioda, elektroprivredna preduzeća će izvršiti funkcionalno razdvajanje koje uključuje:

- Razdvajanje računa u internom računovodstvu vertikalno integrisanog društva na način da:
 - odvojeno vodi poslovne knjige i računovodstvo za elektroprivredne djelatnosti proizvodnje, distribucije, snabdijevanja i trgovine električnom energijom,
 - odvojeno vodi poslovne knjige i računovodstvo za druge neelektroprivredne djelatnosti koje obavlja,
 - sačini i objavi odvojene finansijske izvještaje (bilans stanja, bilans uspjeha, izvještaj o novčanim tokovima) i druge izvještaje za svaku elektroprivrednu djelatnost i neelektroprivrednu djelatnost odvojeno, a u skladu sa propisima kojim se uređuje računovodstvo i revizija i
 - obezbjedi nezavisnu reviziju finansijskih izvještaja
- Razdvajanje poslovnog upravljanja djelatnosti distribucije s ciljem:
 - obezbjeđenja odvojenog poslovnog upravljanja u odnosu na druge elektroprivredne djelatnosti kojim se obezbjeđuje razdvojeno i nezavisno ostvarivanje međusobnih komercijalnih interesa,
 - obezbjeđenja uslova da lica koja su u upravljačkoj strukturi u djelatnosti distribucije ne mogu biti članovi u upravljačkoj strukturi vertikalno integrisanog društva i obrnuto,

- obezbjeđenja uslova da lica zaposlena u djelatnosti distribucije ne mogu obavljati poslove u drugoj elektroprivrednoj djelatnosti i obrnuto.
- Razdvajanje poslovnog upravljanja ostalih djelatnosti će se vršiti na osnovu dodatnih cjelovitih analiza koje će uraditi elektroprivredna preduzeća i, na osnovu njih, donesenih odluka u vezi upravljačkog razdvajanja i eventualnog pravnog razdvajanja ostalih elektroprivrednih djelatnosti (faze 2 i 3)

Tokom Faze 1 elektroprivredna preduzeća će računovodstveno razdvojiti sredstva i obaveze različitih djelatnosti – proizvodnje, distribucije, snabdijevanja, trgovine i sporednih djelatnosti, usvojiti nove organizacije i alocirati zaposlene i izmjeniti statute i druge interne akte.

U cilju potpunog računovodstvenog razdvajanja biće uspostavljen model transfernih cijena između djelatnosti unutar elektroprivrednih preduzeća.

U drugom dijelu ove faze elektroprivredna preduzeća će pripremiti neophodne dokumente i odluke za formiranje i registraciju preduzeća za djelatnost distribucije električne energije koja će biti u vlasništvu elektroprivrednih preduzeća i koja će obavljati funkciju Operatora distributivnog sistema i biti nadležni za pogon, upravljanje, održavanje, izgradnju i razvoj distributivnog sistema, a koja obavezno posjeduju dozvolu-licencu za obavljanje djelatnosti distribucije.

Elektroprivredna preduzeća su dužna pravovremeno dostaviti Regulatornoj komisiji za energiju u Federaciji BiH (FERK) zahtjeve za prenos licenci za djelatnost distribucije. Početak rada novoformiranih distributivnih preduzeća je 15 mjeseci od dana dobijanja saglasnosti Parlamenta Federacije Bosne i Hercegovine na Program prestrukturiranja elektroenergetskog sektora u Federaciji BiH.

Elektroprivredna preduzeća su dužna da, u skladu sa Zakonom o električnoj energiji u Federaciji BiH i Direktivom 2009/72/EC o zajedničkim pravilima za unutrašnje tržišta električne energije, osiguraju nezavisnost Operatora distributivnog sistema na način da:

- Operator distributivnog sistema koji je u njihovom sastavu, funkcionise nezavisno u pogledu svog pravnog oblika, organizacije i donošenja odluka, od drugih djelatnosti koje se ne odnose na djelatnost distribucije.
- Nezavisnost Operatora distributivnog sistema, ne uključuje obavezu da se vlasništvo nad sredstvima distributivnog sistema odvoji od vertikalno integriranog poduzeća.
- Nezavisnost Operatora distributivnog sistema se osiguravaju na način da:
 - članovi uprave Operatora distributivnog sistema ne smiju učestvovati direktno i indirektno u upravljanju u drugim elektroprivrednim djelatnostima elektroprivrednog vertikalno integrisanog društva,
 - primjenom odgovarajućih mjera obezbjediti nezavisnost, profesionalnost i odgovornost u radu članova uprave,
 - Operator distributivnog sistema ima pravo nezavisnog odlučivanja o sredstvima potrebnim za pogon, održavanje i razvoj distributivnog sistema.
- Nezavisnost Operatora distributivnog sistema ne odnosi se na pravo elektroprivrednog vertikalno integrisanog društva da Operatoru distributivnog sistema odobrava godišnji finansijski plan i postavlja ili određuje granice zaduženosti. Odobreni finansijski plan treba da omogući normalno funkcioniranje distribucijskog sistema.

- Vertikalno integrisano društvo nema pravo da Operatoru distributivnog sistema daje uputstva u vezi tekućeg poslovanja i odlučuje o investicijama u distributivni sistem koje ne premašuju uslove iz odobrenog finansijskog plana.

Tokom ove faze će se donijeti dugoročni plan tranzicije za sektor proizvodnje uglja u JP EP BiH uzimajući u obzir globalni proces dekarbonizacije i transformacije elektroenergetskog sektora.

Uvažavajući potrebe za ugljem koje će proisteći iz ovih planova i aktuelno tehnološko i finansijsko stanje svakog pojedinačnog rudnika, bit će pripremljeni pojedinačni planovi za prestrukturiranje svakog rudnika u sastavu Koncerna JP EPBiH s ciljem modernizacije, sigurne i stabilne proizvodnje za dostizanje produktivnosti potrebne za održivo poslovanje. Program prestrukturiranja rudnika uključuje i izradu planova za socijalno zbrinjavanje eventualnog viška radnika.

Ovi planovi će obuhvatiti organizacijsko, tehničko-tehnološko i finansijsko prestrukturiranje, te sadržavati ključne pretpostavke i očekivane efekte. Biće razrađene pojedinačne aktivnosti i utvrđeni rokovi za svaku aktivnost i specificirani konkretni indikatori realizacije ciljeva. Planovi će biti kreirani tako da omoguće:

- Rast produktivnosti u obimu koji će omogućiti dostizanje ekonomski održivog poslovanja rudnika i smanjivanja zatečenih obaveza;
- Dostizanje konkurentnih proizvodnih cijena uglja tako da se održe konkurentne cijene električne energije iz termoelektrana i
- Postizanje veće sigurnosti na radu.

Vlada Federacije BiH, Federalno ministarstvo energije, rudarstva i industrije i Regulatorna komisija za energiju u Federaciji Bosne i Hercegovine će donijeti podzakonske akte utvrđene zakonom. Nadležna ministarstva će izvršiti analize i pripremiti prijedloge ili inicijative za izmjene ključnih zakona, kao što su Zakon o javnim preduzećima i Zakon o javnim nabavkama, koje su neophodne za implementaciju zahtjeva za računovodstveno i upravljačko razdvajanje i neovisnost djelatnosti, funkcionisanje nabavki između povezanih društava i funkcionisanje tržišnih djelatnosti u konkurentskom okruženju. Ove aktivnosti će biti realizirane tako da izmjene zakona budu donešene najkasnije do isteka 5 mjeseci od dana dobijanja saglasnosti Parlamenta Federacije Bosne i Hercegovine na Program o prestrukturiranju elektroenergetskog sektora u Federaciji BiH.

Faza 2 – Komercijalizacija i dodatne analize

Tokom ove faze djelatnosti će funkcionirati potpuno računovodstveno razdvojeno. U potpunosti će zaživjeti primjena transfernih cijena između djelatnosti unutar elektroprivrednih preduzeća. Operatori distributivnog sistema će raditi kao zasebna preduzeća, operativno i upravljački neovisna od vladajućeg društva.

Istovremeno svaka djelatnost će djelovati kao da je komercijalno društvo u mjeri u kojoj to bude moguće, raditi na racionalizaciji poslovanja s ciljem pripreme za poslovanje u dereguliranom okruženju što uključuje rast produktivnosti i konkurentnosti, te ispuniti obaveze utvrđene zakonom, podzakonskim aktima i licencama za djelatnosti.

Kako bi se poboljšala efikasnost u svakodnevnom poslovanju i produktivnost bilo koje djelatnosti biće im dati određeni stepen samostalnosti kako bi mogla upravljati operativnim poslovanjem.

Elektroprivredna preduzeća, kao vladajuća društva, i njihovi organi će reducirati operativne odgovornosti za djelatnosti proizvodnje, snabdjevanja i trgovine, ali će nastaviti obavljati korporativne funkcije za potrebe djelatnosti i zavisnih društava, te usmjeriti svoje djelovanje na strateška pitanja, razvoj, kapitalne investicije, nove djelatnosti, donošenje planova i utvrđivanje ciljeva, te nadzor nad poslovanjem djelatnosti i zavisnih društava.

S ciljem modernizacije i poboljšanja poslovanja, tokom ove faze će se implementirati planovi za održivo poslovanje rudnika utvrđeni u prvoj fazi,.

Istovremeno, elektroprivredna preduzeća će, vodeći računa o statusu deregulacije i zaživljavanja tržišta, pravnom i regulatornom okviru i ulasku konkurencije, uraditi dodatne analize uvažavajući stečena iskustva i efekte do tada urađenog prestrukturiranja, razdvajanja poslovnog upravljanja, te na osnovu toga, donijeti odluke u vezi formiranja zavisnih društava za elektroprivredne djelatnosti proizvodnje i snabdjevanja.

Također, donijeti će odluke u pogledu prestrukturiranja djelatnosti rudarstva, vodeći pri tome računa o organizacionom statusu djelatnosti proizvodnje i budućim potrebama zamjenskih kapaciteta u termoelektranama.

Navedene odluke sa razrađenim planom implementacije će biti odobrene od strane Vlade Federacije BiH, te je predviđeno da se ova faza realizuje u roku 30 mjeseci od dana dobijanja saglasnosti Parlamenta Federacije Bosne i Hercegovine na Program o prestrukturiranju elektroenergetskog sektora u Federaciji BiH.

Faza 3 – Korporatizacija

Tokom treće faze će se pristupiti implementaciji odluka i planova odobrenih u fazi 2.,

Ovisno od istih. mogu biti formirana nova zavisna društva za sve ili pojedine djelatnosti. U tom slučaju u ovoj Fazi bi se, na nivou elektroprivrednih preduzeća, u skladu sa ranije donesenim odlukama, donijeli potrebni dokumenati za formiranje i rad novih zavisnih društava za proizvodnju i snabdijevanje.

Djelatnost trgovine koja uključuje i upravljanje proizvodnim portfoliom, elektroprivreda, kao balansno odgovorna strana, bi ostala na nivou vladajućeg društva u odgovarajućem organizacijskom obliku. Također u ovoj fazi pristupilo bi se registraciji novih zavisnih društava. Na kraju Faze 3 sa radom otpočinju novouspostavljena zavisna društva.

Number: 03-02-727/2019

Sarajevo, 13.12.2019.

**PARLIAMENT OF FEDERATION OF
BOSNIA AND HERZEGOVINA**

- **House of Representatives**

Mr. Mirsad Zaimovic, chairman

- **House of Peoples**

Mr. Tomislav Martinovic, chairman

Dear Sirs,

The Government of the Federation of Bosnia and Herzegovina, at its 203rd session, held on December 12, 2019, passed the Decision on the adoption of the Program for the restructuring of the electricity sector in the Federation of Bosnia and Herzegovina.

In accordance with Article 114, paragraph 1 of the Law on Electricity in the Federation of Bosnia and

Herzegovina ("Official Gazette of the Federation of BiH", No. 66/13, 94/15 and 54/19), for the consideration and approval, I submit the PROGRAM FOR RESTRUCTURING OF THE ELECTRICITY SECTOR IN THE FEDERATION OF BOSNIA AND HERZEGOVINA.

Sincerely,

PRIME MINISTER

Fadil Novalic

Based on Article 19, paragraph 2. Law on the Government of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH", No. 1/94, 8/95, 58/02, 19/03, 2/06 and 8/06) and Article 114, paragraph 2. Law on Electricity ("Official Gazette of the Federation of BiH",

No. 66/13, 94/15 and 54/19), The Government of the Federation of Bosnia and Herzegovina, at the proposal of the Federal Ministry of Energy, mining and industry, at the 203rd session held on 12.12.2019 makes a

DECISION

ON THE ADOPTION OF THE PROGRAM FOR RESTRUCTURING OF THE ELECTRICITY SECTOR IN THE FEDERATION OF BOSNIA AND HERZEGOVINA

I

This decision adopts the Program for Restructuring the Electricity Sector in Federation of Bosnia and Herzegovina (hereinafter: the Restructuring Program).

II

The restructuring program from item I is an integral part of this decision.

III

The General Secretariat of the Government of the Federation of Bosnia and Herzegovina is responsible to submit the Restructuring Program from item I of this decision to the Parliament of the Federation of Bosnia and Herzegovina for the purpose of consideration and consent.

IV

With the entry into force of this decision, the Decision on the adoption of the program for restructuring of the electricity sector in the Federation of Bosnia and Herzegovina shall cease to be valid ("Official Gazette of the Federation of BiH", No. 62/19).

V

This Decision shall enter into force on the day following that of its publication in the "Official Gazette of the Federation of BiH", and shall begin to apply when the Parliament of the Federation of Bosnia and Herzegovina gives consent to the Restructuring Program from the item I of this decision.

Number: 1449/2019
12.12.2019.
Sarajevo

PRIME MINISTER
Fadil Novalic

**Bosnia and Herzegovina
Federation of Bosnia and Herzegovina
Government of Federation of Bosnia and Herzegovina**

**Program for Restructuring of the
Electricity Sector in Federation of Bosnia and Herzegovina**

December, 2019

Program for Restructuring of the Electricity Sector in Federation of Bosnia and Herzegovina

Introduction

Bosnia and Herzegovina is a signatory to the Energy Community Treaty, which has been in force since 1 July 2006. This undertakes to take over and implement the *acquis communautaire*, which, *inter alia*, relates to the electricity market. With this agreement, the parties undertook to establish a common electricity market that will function according to the standards of the energy market in the European Union, with which they will ultimately integrate. In that way, the largest internal market for electricity in the world will be created.

The main goal of the Energy Community, from the aspect of the electricity market, is to create a stable and unique regulatory framework and market space that provides a reliable supply of electricity and can attract investment in sectors.

In 2011, the *acquis communautaire* for members of the Energy Community was extended by part of EU regulations consisting of the so-called "Third Energy Package", which have become legally binding for the contracting parties of the Energy Community, with a deadline for transposition into domestic legislation and implementation in practice by January 1, 2015.

From the aspect of obligations for electric power companies in BiH and the establishment of the electricity market, the most important is Directive 2009/72/EC on common rules of the internal electricity market of 13 July 2009. This Directive lays down common rules for the generation, transmission, distribution and supply of electricity, which include provisions for consumer protection, with a goal of improving and integrating competitive electricity markets. It establishes rules related to the organization and functioning of the electricity sector, the issue of unbundling of network activities, open market access, conditions and procedures applied in tendering and issuing energy permits, and the operation of the transmission and distribution system. It also sets out obligations regarding universal service and the rights of electricity consumers, as well as clarification of competition obligations, and the role of regulatory bodies.

The Law on Electricity in the FBiH ("Official Gazette of the Federation of BiH" No. 66/13, 94/15 and 54/19) entered into force on 05.09.2013. The law brings a significant scope of changes and new solutions compared to the previous law. The most important influencing factor was the obligation to harmonize the legislative framework in BiH with the *acquis communautaire*, based on the Energy Community Treaty, as well as the Stabilization and Association Agreement.

The Law on Electricity stipulates that the restructuring of existing electricity companies will be carried out in accordance with the Program on Restructuring the Electricity Sector in the Federation of BiH (hereinafter: the Program), adopted by the Government of the Federation of BiH with the consent of the Parliament of the Federation of BiH.

In addition to the above mentioned, the restructuring of the electricity sector will be affected by EU policies and objectives in the context of energy transition and climate change, *i.e.*, the obligations of Bosnia and Herzegovina according to international agreements.

Summary

This Program is related to other activities that take place in the electricity sector, which includes:

- Functioning of regulatory commissions responsible for energy in Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina in the range provided by laws, especially with regard to independence and creating preconditions for the functioning of the electricity market and separation of regulated and market activities,
- Modernization and restructuring of coal mines.

The key changes that will be covered by this program through phased activities stem from the requirements of Directive 2009/72 / EC on common rules of the internal market of electricity, i.e., the Law on Electricity in the Federation of BiH and relate to:

- Functional unbundling of all activities, which includes:
 - Accounting unbundling of all activities, which means separate keeping of business books and preparation and publication of separate financial statements for electricity activities and
 - Unbundling of business management activities, which means separate and independent realization of mutual commercial interests, unbundling of management structure and avoidance of conflicts of interest.
- Legal unbundling and independence for the distribution activity (legal form, organization and decision-making).
- Accounting unbundling of supply activities into regulated and market supply

The changes are most significant in the case of distribution activities where independence from other activities is required, which includes a legal form. This means that the existing electric power companies will form subsidiaries that will perform the activity of distribution and have the status of distribution system operators.

The restructuring of power companies is planned in several phases.

The first phase of restructuring implies the realization of the accounting unbundling of all electricity activities, and only when it comes to the distribution activity, and the management and legal separation (formation of the Distribution Company-ODS).

The time frame for this phase is 15 months from the date of obtaining the consent of the Parliament of the Federation of Bosnia and Herzegovina to the Program for Restructuring the Electricity Sector in the Federation of BiH.

During this phase, a long-term transition plan for the coal production sector in the JP EP BiH would be adopted, taking into account the global process of decarbonization and transformation of the electricity sector. Taking into account the needs for coal that will arise from these plans and the current technological and financial condition of each individual mine, individual plans will be prepared for restructuring each mine within the Concern JP EPBiH with the aim of modernization, safe and stable production to achieve productivity needed for sustainable business. The mine restructuring program also

includes the development of plans for the social care of possible redundancies. The time frame for the implementation of these activities is 15 months from the date of obtaining the consent of the Parliament of the Federation of Bosnia and Herzegovina to the Program for the restructuring of the electricity sector in the Federation of BiH.

The second phase implies full implementation and implementation in the practice of accounting and management unbundling with the application of transfer pricing between distribution activities and other activities within power companies, and achieving management independence of distribution activities.

At the same time, power companies would conduct additional comprehensive analyzes, based on which decisions would be made regarding the management unbundling and possible legal unbundling of other power companies, as well as regarding the restructuring of mining, taking into account the selected production status and future replacement capacity in thermal power plants. .

During this phase, the plans for sustainable operation of the mine established in the first phase would be implemented.

Depending on the performed analyzes and the mentioned decisions from the second phase, and with the prior consent of the Government of the Federation of Bosnia and Herzegovina, the implementation of decisions would be approached, which is the third phase of the Program.

Phase 1 – Accounting and Management Unbundling of Activities

Phase 1 is the first step towards new arrangement of the electricity sector and the reorganization of electricity companies. During this period, power companies will perform functional unbundling that includes:

- Unbundling of accounts in the internal accounting of a vertically integrated company in such a way that:
 - keeps separate books and accounting for the electricity generation, distribution, supply and trade of electricity,
 - keeps separate books and accounting for other non-electricity activities they perform,
 - prepare and publish separate financial statements (balance sheet, income statement, cash flow reporting) and other reports for each electricity and electricity activity separately, and in accordance with the regulations governing accounting and auditing, and
 - provide independent audit of financial statements
- Unbundling of business management of distribution activities with the aim of:
 - providing separate business management in relation to other electric power activities, which ensures separate and independent realization of mutual commercial interests,

- ensuring the conditions that persons who are in the management structure in the distribution activity cannot be members in the management structure of a vertically integrated company and vice versa,
 - providing conditions for employment in distribution activities cannot perform activities in other electricity activity and vice versa.
- Unbundling of business management to other activities will be done on the basis of additional comprehensive analyzes to be performed by power companies and, based on them, decisions made regarding management unbundling and possible legal unbundling of other power companies (phases 2 and 3)

During Phase 1, power companies will account for the separation of assets and liabilities of various activities – generation, distribution, supply, trade and ancillary activities, adopt new organizations and allocate employees and amend statutes and other internal acts.

For the purpose of complete account unbundling, a model of transfer prices between activities within electric power companies will be established.

In the second part of this phase, electric power companies will prepare the necessary documents and decisions for the formation and registration of electricity distribution companies that will be owned by power companies and which will perform the function of distribution system operator and be responsible for operation, management, maintenance, construction and development of distribution system, and which will have to have a license to perform distribution activities.

Electric power companies are obliged to timely submit to the Energy Regulatory Commission of the Federation of BiH (FERK) requests for the transfer of licenses for distribution activities. The start of operation of the newly formed distribution companies is 15 months from the date of obtaining the consent of the Parliament of the Federation of Bosnia and Herzegovina on the Restructuring Program of the Electricity Sector in the Federation of BiH.

Electricity companies are obliged, in accordance with the Law on Electricity in the Federation of BiH and Directive 2009/72/EC on common rules for internal electricity markets, to ensure the independence of the Distribution System Operator in the following ways:

- The distribution system operator that is part of them, operates independently in terms of its legal form, organization and decision-making, from other activities not related to the distribution activity.
- The independence of the Distribution System Operator does not include the obligation to unbundle the ownership of the distribution system assets from the vertically integrated company.
- The independence of the Distribution System Operator is ensured by:
 - members of the management board of the Distribution System Operator may not participate directly and indirectly in the management of other electricity activities of the electricity company vertically integrated company,

- ensure the independence, professionalism and responsibility in the work of members of the management board by applying appropriate measures,
 - The distribution system operator has the right to independently decide on the funds required for the operation, maintenance and development of the distribution system.
- The independence of the Distribution System Operator does not apply to the right of the vertically integrated electricity company to approve the annual financial plan to the Distribution System Operator and to set or determine indebtedness limits. The approved financial plan should enable the normal functioning of the distribution system.
 - The vertically integrated company does not have a right to give instructions to the Distribution System Operator regarding current operations and decide on investments in the distribution system that do not exceed the conditions from the approved financial plan.

During this phase, a long-term transition plan for the coal production sector will be adopted in the JP EP BiH, taking into account the global process of decarbonization and transformation of the electricity sector.

Taking into account the needs for coal arising from these plans and the current technological and financial condition of each individual mine, individual plans will be prepared for the restructuring of each mine within the Group EPBiH with the aim of modernization, safe and stable production to achieve productivity needed for sustainable business. The mine restructuring program also includes the development of plans for the social care of possible redundancies.

These plans will include organizational, technical-technological and financial restructuring, and contain key assumptions and expected effects. Individual activities will be elaborated and deadlines for each activity will be determined and specific indicators for the realization of goals will be specified. Plans will be created to allow:

- Productivity growth to the extent that will enable the achievement of economically viable mine operations and reduction of existing liabilities;
- Achieving competitive coal production prices by maintaining competitive electricity prices from thermal power plants and
- Achieving greater safety at work.

The Government of the Federation of BiH, the Federal Ministry of Energy, Mining and Industry and the Energy Regulatory Commission of the Federation of Bosnia and Herzegovina shall issue secondary legislation established by law. Competent ministries will analyze and prepare proposals or initiatives to amend key laws, such as the Law on Public Enterprises and the Law on Public Procurement, which are necessary to implement the requirements for accounting and management unbundling and independence of activities, procurement between affiliated companies and the functioning of market activities in a competitive environment. These activities will be implemented so that the amendments to the law will be adopted no later than 5 months from the date of obtaining the consent of the Parliament of the Federation of Bosnia and Herzegovina to the Program for Restructuring the Electricity Sector in the Federation of BiH.

Phase 2 – Commercialization and Additional Analyzes

During this phase, the activities will function completely separately from accounting. The application of transfer prices between activities within electric power companies will be fully implemented. Distribution system operators will operate as separate companies, operationally and managerially independent of the parent company.

At the same time, each activity will act as if it is a commercial company, to the extent possible, work on streamlining operations to prepare for operations in a deregulated environment that includes productivity and competitiveness growth, and meet obligations under law, regulations and licenses.

In order to improve the efficiency of day-to-day operations and the productivity of any business, a certain degree of independence will be given in order to be able to manage operational business.

Electric power companies, as governing companies, and their bodies will reduce operational responsibilities for generation, supply and trade activities, but will continue to perform corporate functions for the needs of activities and subsidiaries, and focus their activities on strategic issues, development, capital investments, new activities, making plans and setting goals, and supervising the operations of activities and subsidiaries.

With the aim of modernizing and improving the business, during this phase, the plans for sustainable operation of the mine determined in the first phase will be implemented.

At the same time, electric power companies will, taking into account the status of deregulation and market revival, legal and regulatory framework and entry of competition, make additional analyzes taking into account the gained experience and the effects of restructuring, unbundling of business management, and based on that, make decisions on forming subsidiaries for electricity generation and supply activities.

It will also make decisions regarding the restructuring of the mining activity, taking into account the organizational status of the production activity and the future needs of replacement capacities in thermal power plants.

These decisions with an elaborated implementation plan will be approved by the Government of the Federation of BiH, and it is envisaged that this phase will be implemented within 30 months from the date of obtaining the consent of the Parliament of the Federation of Bosnia and Herzegovina.

Phase 3 – Corporatization

During the third phase, the implementation of decisions and plans approved in phase 2 will begin.

Depending on those new subsidiaries may be formed for all or certain activities. In that case, in this Phase, at the level of electric power companies, in accordance with previously made decisions, the necessary documents for the formation and operation of new subsidiaries for production and supply would be adopted.

The activity of trade, which includes the management of the production portfolio, the electric power industry, as a balance responsible party, would remain at the level of

the ruling company in the appropriate organizational form. Also at this stage, the registration of new subsidiaries would be approached. At the end of Phase 3, the newly established subsidiaries will start operating.