

Vienna, 12 October 2017
MK-ECS-2_15-S_O_02_12-10-2017

Subject: Request under Article 92 of the Treaty in Case ECS-2/15 S

Excellency,

Please find attached the Request for Sanctions in reference to Case ECS-2/15 S.
Please accept, the expression of my highest considerations.

Yours sincerely,

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

Janez Kopač

H.E. MR. VALDRIN LLUKA
MINISTER OF ECONOMIC DEVELOPMENT OF THE REPUBLIC OF KOSOVO*

H.E. MR. DRITON KUQI, MINISTER OF ECONOMY
OF THE REPUBLIC OF MACEDONIA

MS ANNE-CHARLOTTE BOURNOVILLE
EUROPEAN COMMISSION

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

REQUEST

In Case ECS-2/15 S

Submitted pursuant to Article 92 (1) of the Treaty establishing the Energy Community and Articles 39 to 42 of Procedural Act 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

seeking a Decision from the Ministerial Council that:

1. Failure of former Yugoslav Republic of Macedonia to implement Ministerial Council Decision 2016/06/MC-EnC, and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty.
2. Former Yugoslav Republic of Macedonia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/06/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2018.
3. The Secretariat is invited to monitor compliance of the measures taken by former Yugoslav Republic of Macedonia with the *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

has the honour of submitting the following Request to the Ministerial Council under Article 92(1) of the Treaty:

¹ Hereinafter: Dispute Settlement Procedures. Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty applied to Case ECS-2/15 and that case has been closed with adoption of Ministerial Council Decision 2016/06/MC-EnC on 14 October 2016. To cases initiated after 15 October 2015, including the present case ECS-2/15 S, the Dispute Settlement procedures of 2015 apply. However, there is no difference in substance between the Dispute Settlement Rules of 2008 and 2015 in relation to cases initiated under Article 92 of the Treaty.

I. Relevant Facts

- (1) On 30 January 2015, the Secretariat initiated dispute settlement procedures against former Yugoslav Republic of Macedonia by way of an Opening Letter under Article 12 of the Dispute Settlement Procedures for the failure to transpose and implement certain provisions of the Energy Community acquis communautaire related to electricity market opening and customers' eligibility² (Case ECS-2/15). Having not been satisfied by the respective replies sent by former Yugoslav Republic of Macedonia, the Secretariat sent a Reasoned Opinion under Article 13 of the Dispute Settlement Procedures on 27 April 2015 and submitted a Reasoned Request to the Ministerial Council under Article 28 of the Dispute Settlement Procedures on 13 May 2016. The Advisory Committee established under Article 32 of the Dispute Settlement Procedures delivered its Opinion on the Reasoned Request on 16 September 2016.
- (2) On 14 October 2016, the Ministerial Council adopted Decision 2016/06/MC-EnC on the failure by the Republic of former Yugoslav Republic of Macedonia to comply with certain obligations under the Treaty.³ This Decision reads as follows:

Article 1

Failure by the former Yugoslav Republic of Macedonia to comply with the Treaty

1. By failing to ensure that the customers eligible for the purchase of electricity from the supplier of their choice comprise all non-household customers, the former Yugoslav Republic of Macedonia has failed to comply with its obligations under Article 33(1) of Directive 2009/72/EC, as adapted by the Ministerial Council Decision 2011/02/MC-EnC.
2. For the reasons sustaining these findings, reference is made to the Reasoned Request.

Article 2

Follow-up

1. The former Yugoslav Republic of Macedonia shall take all appropriate measures to rectify the breaches identified in Article 1 and ensure compliance with Energy Community law immediately. The former Yugoslav Republic of Macedonia shall report regularly to the Secretariat and the Permanent High Level Group about the measures taken.
2. If the breach has not been rectified, the Secretariat is invited to initiate a procedure under Article 92 of the Treaty.

Article 3

Addressees and entry into force

This Decision is addressed to the Parties and the institutions under the Treaty. It enters into force upon its adoption."

- (3) In the aftermath of Decision 2016/06/MC-EnC, former Yugoslav Republic of Macedonia was reminded several times of the obligations arising from it and necessary measures to implement in order to remedy the identified breach.

² Namely: Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks.

³ Annex I.

- (4) The Secretariat, in its Western Balkans 6 Electricity Monitoring Report of March 2017⁴, and of July 2017⁵ reiterated that former Yugoslav Republic of Macedonia still failed to adopt Third Energy Package compliant primary law and put particular emphasis on failure of former Yugoslav Republic of Macedonia to grant eligibility to all electricity customers. It was particularly stressed that the national Energy Law in force denies eligibility to households and to certain categories of small customers, which are envisaged to remain in the regulated segment until 30 June 2020.
- (5) The 22nd Energy Community Electricity Forum, in Athens on 31 May and 1 June 2017⁶, invited the governments of the Western Balkans, including former Yugoslav Republic of Macedonia, to adopt necessary decisions enabling the set-up of national electricity markets in compliance with the Third Energy Package and with the targets set by the 2015 Western Balkans Summit.
- (6) In the Implementation Report 2017, the Secretariat again emphasized that former Yugoslav Republic of Macedonia denied eligibility right beyond the established deadlines to a significant part of customers, and in particular to households, which are not allowed to switch before 2020⁷, as well as put a note on the present infringement case opened against former Yugoslav Republic of Macedonia⁸.
- (7) In the aftermath of Decision 2016/06/MC-EnC, former Yugoslav Republic of Macedonia continued to progressively open the electricity market and to grant eligibility in accordance with its Energy law as amended on 13 October 2014.⁹ Namely, the transmission system operator of former Republic of Macedonia published on its website a list of customers that become eligible within the deadlines set in the Energy Law. Namely, as an exception to Article 82(1) of the Energy Law according to which all customers shall be deemed eligible, Article 1810 of the amendments stipulates the categories of customers that shall remain captive, i.e. without the right to choose their supplier. Article 18 of the amendments reads:¹¹

“..., tariff customers are:

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

⁴ Western Balkans 6 Electricity Monitoring Report, Energy Community Secretariat, March 2017, available at: https://www.energy-community.org/dam/jcr:ffed9ec9-229a-4f98-a925-d54e0e52bbba/WB6_EL_032017.pdf.

⁵ Western Balkans 6 Electricity Monitoring Report, Energy Community Secretariat, July 2017, available at: https://www.energy-community.org/dam/jcr:751f707d-5eb8-4d6c-afde-d29c111e8dc1/EnC_WB6_EL_072017.pdf.

⁶ Conclusions of the 22nd Energy Community Electricity Forum, held in Athens, 31.05—1.06.2017, available at https://www.energy-community.org/dam/jcr:968436cb-0507-4523-be86-cc080c01937d/AF2017_Conclusions.pdf.

⁷ Energy Community Secretariat's Annual Implementation Report for year 2017, Section 7 former Yugoslav Republic of Macedonia, 7.1. Electricity.

⁸ *Ibid.*

⁹ Official Journal No.151, 15.10.2014.

¹⁰ Article 18 amends Article 197(1) of the existing Energy Law of 2011.

¹¹ Translation of Article 18 of the amendments to the Energy Law of October 2014 provided by the Secretariat.

- (8) This means that on 30 June each year, the national Transmission System Operator MEPSO publishes lists with customers that become eligible. After Decision 2016/06/MC-EnC, one such list was published with small non-household customers that became eligible on 30 June 2017 based on the consumption data for 2016 (for those higher than 500 MWh) and data on SMEs (based on employees and annual turnover).¹²
- (9) At the time of this Request, small customers of electricity with electricity consumption over 100 MWh in 2017 and all households and other small customers of electricity are still not eligible and are not allowed to choose their supplier freely.
- (10) Finally, several meetings took place between the Secretariat and high level representatives of the Macedonian Government,¹³ focusing on finding a way to rectify the breaches identified both in Decision 2016/08/MC-EnC concerning Case ECS-9/16 as well as in Decision 2016/06/MC-EnC related to breach of the provisions on market opening. Despite demonstrating willingness to pursue activities for complying with the Treaty, no tangible progress has been achieved for compliance with the Ministerial Council's Decision 2016/06/MC-EnC.
- (11) As will be reasoned below, the violation by former Yugoslav Republic of Macedonia of its obligations under the Treaty established by Article 1 of Decision 2016/06/MC-EnC continues and is to be qualified as a serious and persistent breach. Therefore, the Secretariat decided to follow-up on the Ministerial Council's request and to initiate a procedure under Article 92 of the Treaty.

II. Relevant Energy Community Law

- (12) 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 this Treaty”.

- (13) Article 76 of the Treaty reads:

“... A Decision is legally binding in its entirety upon those to whom it is addressed. ...”

- (14) 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.”

- (15) Article 92(1) of the Treaty reads:

¹²

See:

http://mepso.com.mk/CMS99/Content_Data/Dokumenti/%D0%9E%D0%9F%D0%95%D0%95%D0%98%D0%B7%D0%B2%D0%B5%D1%81%D1%82%D1%83%D0%B2%D0%B0%D1%9A%D0%B0/%D0%9B%D0%B8%D1%81%D1%82%D0%B8%202017/20170331%D0%9B%D0%B8%D1%81%D1%82%D0%B0%20%D0%BD%D0%B0%20%D0%BF%D0%BE%D1%82%D

¹³ On 07.06.2017, the Director of the Energy Community Secretariat had meetings with the Prime Minister of former Yugoslav Republic of Macedonia, Mr. Zoran Zaev, Deputy Prime Minister of in charge for economic affairs and coordination of economic departments, Mr. Kocho Angjushev and the Minister of Economy, Mr. Kreshnik Bekteshi in Skopje. In August 2017, two more meetings were held with the Deputy Prime Minister, Mr. Angjushev, one in Vienna (09.08.2017) and one in Skopje (29.08.2017).

“At the request of a Party, the Secretariat or the Regulatory Board, the Ministerial Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its obligations under this Treaty and may suspend certain of the rights deriving from application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty.”

(16) Annex I to the Energy Community Treaty reads:¹⁴

2. Each Contracting Party must ensure that the eligible customers within the meaning of the European Community Directives 2003/54/EC and 2003/55/EC are:

from 1 January 2008, all non-household customers;

from 1 January 2015, all customers.

(17) Annex I to the Energy Community Treaty reads:¹⁵

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

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

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

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

...

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

(c) from 1 July 2015, all customers.

(19) Article 37 of the Dispute Settlement Procedures (“Binding nature of the decision”) reads:

“The decision by the Ministerial Council shall be binding on the Parties concerned from the date of its adoption.”

(20) Article 38 of the Dispute Settlement Procedures (“Consequences of a decision establishing failure to comply”) reads:

“(1) Where the Ministerial Council establishes the existence of a breach of a Party’s obligation pursuant to Article 91 of the Treaty, the Party concerned shall take all appropriate measures to rectify the breach and ensure compliance with Energy Community law.

(2) The Secretariat, in accordance with Article 67(b) of the Treaty, shall review the proper implementation by the Party concerned of the decision by the Ministerial Council, and may again bring the matter before the Ministerial Council on the grounds of a failure to take the necessary measures to comply with the decision.”

(21) Article 39 of the Dispute Settlement Procedures (“Serious and persistent breach”) reads:

“The Ministerial Council shall establish the existence of a serious and persistent breach by a Party of its obligations under the Treaty taking into account the particularities of each individual case.”

¹⁴ Annex I of the Treaty before the amendments of the Treaty with Ministerial Council Decision D/2011/02/MC-EnC. This text is relevant as a specific reference to the obligations undertaken by former Yugoslav Republic of Macedonia regarding market opening with signing the Energy Community Treaty.

¹⁵ Amended by Article 1 of Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.

(22) Article 40 of the Dispute Settlement Procedures (“Request”) reads:

“(1) A Party, the Secretariat or the Regulatory Board may request the Ministerial Council to determine the existence of a serious and persistent breach without a preliminary procedure.

(2) The request may follow up on a prior decision taken by the Ministerial Council under Article 91 of the Treaty or raise a new issue.

(3) The request shall set out the allegations against the Party concerned in factual and legal terms. It shall also contain a proposal as to concrete sanctions to be taken in accordance with Article 92(1) of the Treaty.”

(23) Article 41 of the Dispute Settlement Procedures (“Decision-making procedure”) reads:

“(1) The Presidency shall, within seven days after receiving it, forward the request to the Party concerned and ask it for a reply to the allegations made in the request.

(2) The Presidency and the Vice-Presidency may ask the Advisory Committee for its written opinion.

(3) The decision by the Ministerial Council on the existence of a serious and persistent breach shall be taken in accordance with Articles 92(1) and 93 of the Treaty.

(a) The decision taken by the Ministerial Council shall be made publicly available on the Secretariat’s website.”

(24) Article 42 of the Dispute Settlement Procedures (“Sanctions”) reads:

“(1) In the decision establishing the existence of a serious and persistent breach, the Ministerial Council shall determine sanctions in accordance with Article 92(1) of the Treaty and specify a time-limit.

(2) The obligations of the Party concerned under the Treaty shall in any case continue to be binding on that Party.

(3) The Ministerial Council shall at each subsequent meeting verify that the grounds continue to apply on which the decision establishing the existence of a serious and persistent breach was made and sanctions were imposed.”

III. Legal Assessment

1. Introduction

aa. The binding nature of a Ministerial Council Decision

(25) A Decision taken by the Ministerial Council has binding effect vis-à-vis the Party concerned. This follows from Article 76 of the Treaty and Article 37 of the Dispute Settlement Procedures. As a consequence, Parties are under an obligation to implement Decisions in their domestic legal systems (Articles 6 and 89 of the Treaty).

(26) In the case of a Decision taken under Articles 91 and/or 92 of the Treaty, such as Decision 2016/06/MC-EnC, the obligation to implement amounts to an obligation to fully rectify the breaches identified and to ensure compliance with Energy Community law. This is expressly stipulated in Article 38(1) of the Dispute Settlement Procedures. In Article 2(1) of Decision 2016/06/MC-EnC, the Ministerial Council urged former Yugoslav Republic of Macedonia to immediately take all appropriate measures to that effect as well as report regularly to the Secretariat and the Permanent High Level Group about measures taken.

- (27) The non-implementation of a Ministerial Council Decision under Article 91 or 92 by the Party concerned in itself constitutes a breach of Energy Community law. Once a Decision establishing a breach has been adopted, it is not possible any longer for that Party to contest the validity or the lawfulness of that Decision. The Treaty does not foresee an appeal against Decisions of the Ministerial Council, the supreme decision-maker under the Treaty. If a Party wants to challenge the position taken by the Secretariat in the course of a dispute settlement procedure, it needs to do so during the procedure leading up to the Decision by the Ministerial Council under Article 91 of the Treaty. Once that Decision is taken, the Party is precluded from raising any arguments challenging the findings contained in the Decision. Otherwise legal certainty and the binding effect of decisions would be frustrated. The only pathway the Treaty envisages for setting aside a Decision by the Ministerial Council under Article 91 or 92 of the Treaty is a request for revocation under Article 91(2) or Article 92(2) of the Treaty respectively.
- (28) It follows from the binding effect of decisions under Energy Community law that former Yugoslav Republic of Macedonia is obliged to implement Decision 2016/06/MC-EnC. Subsequent changes to domestic legislation or regulatory practice, as well as any legal and corporate reforms would thus affect the present Request only to the extent they result in effective rectification of the breaches identified by the Ministerial Council, i.e. ensure that customers eligible for the purchase of electricity from the supplier of their choice comprise non-household and household customers in compliance with requirements of Article 33(1) of the Directive 2009/72/EC, as adapted by the Ministerial Council Decision 2011/02/MC-EnC.

bb. Measures under Article 92 of the Treaty

- (29) Besides triggering a self-standing obligation of the Party concerned to rectify any breaches identified in a previous Decision under Article 91(1) or Article 92(1) of the Treaty, Article 92(1) of the Treaty opens the possibility for further follow-up measures to be taken against the Party violating Energy Community law, namely (1) the determination of a serious and persistent breach of the obligations under the Treaty, and (2) the suspension of certain rights deriving from the application of the Treaty.
- (30) Article 42(1) of the Dispute Settlement Procedures links these two measures in the sense that a decision establishing the existence of a serious and persistent breach mandatorily “shall” include a decision on sanctions in accordance with Article 92(1) of the Treaty, leaving discretion only for the decision on the nature of the sanctions to be imposed. Contrary to this, in its case law in Cases ECS-8/11 and 9/13, the Ministerial Council has followed an approach of separating these two measures. It has first established a serious and persistent breach,¹⁶ and only in cases where the serious and persistent breach has not been rectified, it has imposed measures related to suspension of certain rights deriving from the application of the Treaty.¹⁷ Therefore, in the present Request the Secretariat requests a decision by the Ministerial Council on establishing serious and persistent breach only. The Secretariat reserves the right to request measures related to suspension of certain rights deriving from the application of the Treaty subject to another request under Article 92(1) of the Treaty.
- (31) Furthermore, decisions under Article 92 of the Treaty do not require a preliminary procedure of the type applicable to decisions pursuant to Article 91 of the Treaty. The fact that the

¹⁶ See: Ministerial Council Decision D/2014/04/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina in Case ECS-8/11, dated 23 September 2014; Ministerial Council Decision D/2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty in Case ECS-9/13, dated 14 October 2016.

¹⁷ Ministerial Council Decision D/2015/10MC-EnC: on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty, in Case ECS-8/11, dated 16 October 2015.

present Request is a follow-up to the Ministerial Council's Decision concluding Case ECS-2/15 means that a comprehensive preliminary procedure has already been carried out during which former Yugoslav Republic of Macedonia was given ample opportunity to be heard. This procedure also introduced the Ministerial Council to the subject-matter of the present Request.

- (32) Moreover, unlike Article 91 of the Treaty, Article 92 of the Treaty does not require a reasoning of the Request made to the Ministerial Council. Nevertheless, the Secretariat in accordance with Article 40(3) of the Dispute Settlement Procedures will set out the factual background and the main legal reasons for submitting the present Request.
- (33) Article 92(1) of the Treaty resembles Article 7 of the EU Treaty (TEU). This provision was introduced into the TEU by the Treaty of Amsterdam as an instrument of ensuring that EU Member States respect certain common values. In essence, it is a diplomatic or political rather than a legal procedure. Whether or not this procedure is suitable for the enforcement of the Treaty is not for the Secretariat to decide. It notes, however, that the European Commission considers that "the procedure laid down by Article 7 of the Union Treaty ... is not designed to remedy individual breaches".¹⁸ Similarly, the report by the Ministerial Council's High Level Reflection Group comes to the conclusion that "the current political approach of 'suspending certain rights' in reaction to a serious and persistent breach' does not satisfy the standards of an Energy Community based on the rule of law".¹⁹
- (34) As a decision under Article 7 TEU has so far not been taken within the EU,²⁰ no precedence of relevance under Article 94 of the Treaty exists. In this situation, the Secretariat will base itself on the travaux préparatoires and the aforementioned interpretation issued by the European Commission when applying Article 92(1) of the Treaty to the present case. This was also the case in Secretariat's Requests under Article 92 of the Treaty in Cases ECS-8/11 and 9/13.
- (35) In the following, the Secretariat will submit that failure of former Yugoslav Republic of Macedonia, at the date of this Request, to implement Decision 2016/06/MC-EnC constitutes a serious and persistent breach of the Energy Community law.

2. *Continued existence of a breach*

- (36) The Secretariat submits that former Yugoslav Republic of Macedonia continues to breach Article 1 of Decision 2016/08/MC-EnC and provisions of the *acquis communautaire* referred to therein.
- (37) As described above, the Secretariat assumed a proactive role in helping former Yugoslav Republic of Macedonia and advising on necessary measures for rectifying the breaches identified by the Ministerial Council. In close cooperation with the Government, the Secretariat assisted in developing the relevant draft legislation for transposing the Third Energy Package, by which the breach could be rectified. Despite the Secretariat's assistance as well as numerous reminders and several meetings, more than a year after the Ministerial

¹⁸ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, p. 7.

¹⁹ Report of the High Level Reflection Group, p. 20.

²⁰ The European Commission has recently issued a recommendation to Poland stating that in case the Polish authorities take any measures that will aggravate the systemic threat to the rule of law, the Commission is ready to immediately activate Article 7 TEU (Commission Recommendation of 26.7.2017 regarding the rule of law in Poland C(2017) 5320 final). Furthermore, in the case of Hungary, the European Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 TEU (European Parliament resolution of 17 May 2017 on the situation in Hungary 2017/2656(RSP)).

Council meeting in October 2016 no tangible results in compliance with Energy Community law have been achieved. This Contracting Party has not also adopted changes to the Energy Law in force aimed at rectifying the breach.

- (38) In particular, at the date of this Request, former Yugoslav Republic of Macedonia continues to deny eligibility to small non-household customers (defined as having below 50 employees and 10 million total annual revenue or total assets) and all household customers in breach of Energy Community law:
- **as regards small non-household customers**, Article 18 of the amendments to the Energy Law of October 2014 provide that small non-household customers with electricity consumption over 100 MWh and 25 MWh would become eligible only after 30 June 2018 and 2019 respectively. All other small non-household customers with consumption below 25 MWh will become eligible only in July 2020.
 - **as regards household customers**, Article 18 of the amendments of the Energy Law of October 2014 stipulates that all household customers must continue to be supplied as “tariff customers” (i.e. without the right to choose their supplier) until July 2020; by thus postponing eligibility to household customers beyond the established deadline of 1 January 2015 by another 6 years.
- (39) Despite steps are being taken to open the electricity market after Decision 2016/06/MC-EnC has been adopted, those relate to following the deadlines set in the Energy law and do not rectify the breach identified by the Ministerial Council. Namely, at the time of this Request, small customers of electricity with electricity consumption over 100 MWh and below, and all households are still not eligible and are not allowed to choose their supplier freely.
- (40) It follows also from the binding nature of the Ministerial Council Decision 2016/06/MC-EnC that any progress in achieving compliance would affect the present Request only to the extent they result in effective rectification of the breaches identified by the Ministerial Council. Nevertheless, in the case at hand, since former Yugoslav Republic of Macedonia has only continued progressively ensuring eligibility to customers in line with the Energy Law as amended in 2014, and without taking any step to rectify the breaches identified by the Ministerial Council in Decision 2016/06/MC-EnC, the Secretariat considers these measures as insufficient to rectify those breaches.
- (41) In conclusion, the Secretariat submits that former Yugoslav Republic of Macedonia, in the aftermath of Decision 2016/06/MC-EnC, failed to rectify the breaches of its obligations under the Treaty as listed in Article 1 of that Decision.

aa. Seriousness of the breach

- (42) In a Communication of 2005 concerning the EU pre-Lisbon infringement action procedure, the Commission stated that “[a]n infringement concerning non-compliance with a judgment is always serious”.²¹ It can be argued that this statement is applied by analogy to the situation at hand. Given that Article 92 of the Treaty was modeled on Article 7 TEU, the Secretariat also considers relevant the Communication of 2003 which offers a view on what qualifies a breach as serious. Within this procedure, the breach in question must go beyond specific situations and concern a more systematic problem. In order to determine the

²¹ Communication from the Commission, SEC(2005) 1658, section 16. See ECJ C-169/13, *Commission v Italy*, ECLI:EU:C:2014:2407, para. 100; ECJ C-378/13, *Commission v Greece*, ECLI:EU:C:2014:2405, paras. 37, 72.

seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach.

- (43) Open electricity markets are of principal importance for the achievement of the objectives of the internal energy market and the Treaty establishing the Energy Community. To ensure eligibility to all customers so that they may freely choose their supplier, is a key requirement and constitutes a precondition to the opening of the electricity market and the development of competition. In particular, Recital 57 of the Preamble of Directive 2009/72/EC emphasizes that promoting fair competition and easy access for different suppliers should be of the utmost importance for Contracting Parties in order to allow consumers to take full advantage of the opportunities of the liberalised internal market in electricity. Furthermore, such necessity is also a precondition to the market development at a regional level and access of suppliers of other Contracting Parties to said national electricity market.
- (44) The failure by former Yugoslav Republic of Macedonia to grant eligibility to all customers concerns and challenges one of the fundamental elements of Directive 2009/72/EC as extended to the Contracting Parties. Alleged concerns of former Yugoslav Republic of Macedonia as regards security of supply and avoidance of prices' shocks to household customers and small non-households customers could have been addressed by means of other mechanisms available under the Directive, as it was set out in details by the Secretariat in its Reasoned Request in Case ECS-2/15, submitted to and accepted by the Ministerial Council.
- (45) The failure to implement Decision 2016/06/MC-Enc, by seriously delaying market opening, must be considered a serious and consistent breach and a denial of a very essential element of the European electricity market model as enshrined in the Directive.
- (46) The following consequences resulting from the non-implementation of this key element of Directive 2009/72/EC further exacerbate the seriousness of the breach and substantially impact the transposing of other acquis from the concerned Contracting Party.
- (47) *Firstly*, the obligation for market opening is not a new requirement introduced only with the Third Energy Package. In fact, the date for complete market opening was set already back in 2006 in the Energy Community Treaty itself. Annex I to the Treaty, before being amended in 2011²² adapted the deadlines stipulated in Article 21(1)b) and c) of Directive EC/2003/54,²³ and required the Contracting Parties to ensure eligibility from 1 July 2008 for all non-household customers and from 1 July 2015 for all customers. After the adoption of the Third Energy Package, the obligation for opening the electricity markets is stipulated in Article 33(1) of Directive EC/2009/72. Article 17 of Decision 2011/02/MC-EnC adapted the market opening deadlines of Directive EC/2009/72 in line with the status quo ante, i.e. 1 July 2008 for all non-household customers and 1 July 2015 for all customers. Therefore, without rectifying the breach related to market opening an implementation of Directive 2009/72/EC, to which former Yugoslav Republic of Macedonia committed by Decision of the Ministerial Council of 2011 on incorporating the so-called Third Package into the Energy Community is impossible. And such no transposition of the Third Energy Package is subject to a separate request under Article 92 of the Treaty in Case ECS-9/16 S.

²² Article 1(2) Ministerial Council Decision D/2011/02/MC-EnC.

²³ Article 21(1)b) and c) of Directive EC/2003/54 required Member States to ensure eligibility as from 1 July 2004 for all non-household customers and from 1 July 2007 for all customers.

- (48) *Secondly*, without transposing and implementing the Third Energy Package by 2015, former Yugoslav Republic of Macedonia could not ensure, amongst others, an attractive investment environment, development of competitive and liquid energy market, as well as regional and EU integration of the electricity and gas markets.
- (49) *Thirdly*, the breach by former Yugoslav Republic of Macedonia of Article 33(1) of Directive 2009/72/EC is also exceptional in the Energy Community. All other Contracting Parties have transposed correctly the requirements of the Directive and have allowed a choice of supplier to each non-household and household customer. This singularity underlines the seriousness of the breach subject to this Request.
- (50) *Finally*, the Communication by the European Commission on Article 7 TEU of 2003 – upon which Article 92 of the Treaty was modeled – suggests that, as in the European Union, the Ministerial Council of the Energy Community disposes of a discretionary power to determine that there is a serious and persistent breach. In view of the above, the Secretariat concludes that failure of former Yugoslav Republic of Macedonia to implement Decision 2016/06/MC-EnC amounts to a serious breach.

bb. Persistence of the breach

- (51) According to the European Commission, for a breach to be persistent, it must last some time.²⁴ Former Yugoslav Republic of Macedonia has failed to comply with obligations under Article 33(1) of Directive 2009/72/EC as adapted by the Ministerial Council Decision since January 2015 for household customers and since 2014 for a significant part of the non-household customers.
- (52) As detailed above, the dates by which full market opening should have been ensured, date back to 2006 and the adoption of the Energy Community Treaty. Those deadlines, as taken over by the Directive 2009/72/EC, require full market opening for all non-household customers by 2008 and for all household customers by 2015. The Court of Justice of the European Union has affirmed that time limits prescribed within a Directive for implementing certain provisions of that Directive are of special importance “since the implementing measures are left to the discretion of the Member States and would be ineffective if the desired aims are not achieved with the prescribed time-limits”.²⁵
- (53) The Secretariat therefore submits that former Yugoslav Republic of Macedonia is in breach of its obligations to ensure full market opening for all non-household customers for nine years, and for all household customers for three years.
- (54) The Secretariat recalls that former Yugoslav Republic of Macedonia has been constantly reminded of its breach in the Secretariat’s Implementation Reports and its bilateral communication, as well as by numerous Ministerial Council and Permanent High Level Group meetings, without any tangible progress so far.
- (55) As noted above, despite Decision 2016/06/MC-EnC, former Yugoslav Republic of Macedonia has not yet rectified the breach subject to this Request. Failure to comply with legally binding decisions of the Ministerial Council as regards such a serious breach for more than one year already amounts to a persistent breach.

²⁴ Ibid. 28, p. 8.

²⁵ Case C-52/75 Commission v Italy, [1976] ECR 277, para. 10, ECLI:EU:C:1976:29.

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community in accordance with Article 92(1) of the Treaty to declare that:

1. Failure of former Yugoslav Republic of Macedonia to implement Ministerial Council Decision 2016/06/MC-EnC, and thus to rectify the breaches identified in this Decision constitutes a serious and persistent breach within the meaning of Article 92(1) of the Treaty
2. Former Yugoslav Republic of Macedonia shall take all appropriate measures to rectify the breaches identified in Ministerial Council Decision 2016/06/MC-EnC in cooperation with the Secretariat and shall report to the Ministerial Council about the implementation measures taken in 2018.
3. The Secretariat is invited to monitor compliance of the measures taken by former Yugoslav Republic of Macedonia with the *acquis communautaire*. If the breaches have not been rectified by 1 July 2018, the Secretariat is invited to initiate a procedure for imposing measures under Article 92 of the Treaty.

On behalf of the Secretariat of the Energy Community

Vienna, 12 October 2017



Janez Kopač
Director



Dirk Buschle
Deputy Director / Legal Counsel

List of Annexes

Annex I Ministerial Council Decision 2016/06/MC-EnC