

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

## Opinion 4/2017

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Albania – Certification of *Albgaz*

On 2 June 2017, the Energy Regulatory Authority of the Republic of Albania (hereinafter “ERE”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision on the certification of “*Albgaz*” *sh.a.* (hereinafter “*Albgaz*”), the transmission system operator (hereinafter “TSO”) for natural gas in Albania (hereinafter “the Preliminary Decision”). The Preliminary Decision was adopted on 26 May 2017<sup>1</sup> based on Articles 37, 50, 59, 68 and 80 of the Gas Sector Law<sup>2</sup>, Articles 6, 7, 8, 9, 10 and 11 of ERE’s Rules on the certification of the combined operator for natural gas (hereinafter “ERE’s Rules on Certification”),<sup>3</sup> and Article 15 of ERE’s Regulation on ERE’s organisation, operation and procedures.<sup>4</sup>

Pursuant to Article 10 of Directive 2009/73/EC (hereinafter “the Gas Directive”)<sup>5</sup> and Article 3 of Regulation (EC) No 715/2009 (hereinafter “the Gas Regulation”),<sup>6</sup> the Secretariat is required to examine the notified Preliminary Decision and deliver its Opinion to ERE as to the compatibility of such a decision with Articles 9 and 10(2) of the Gas Directive.

On 11 July 2017, a hearing on the unbundling of *Albgaz* took place at the premises of the Secretariat in Vienna with participation of relevant stakeholders. Following the hearing, ERE submitted to the Secretariat additional documents in support of the Preliminary Decision.

The Energy Community Regulatory Board (hereinafter “ECRB”) was requested by the Secretariat to provide its opinion on the Preliminary Decision pursuant to Article 3(1) of the Gas Regulation. However, the Secretariat did not receive the ECRB’s opinion by the date of the present Opinion.

<sup>1</sup> ERE Board Decision No 82 of 26 May 2017.

<sup>2</sup> Law of the Republic of Albania No 102/2015 of 23 September 2015 “On the Natural Gas Sector”.

<sup>3</sup> ERE Board Decision No 100 of 5 August 2015, as amended by ERE Board Decision No 129 of 31 October 2015.

<sup>4</sup> ERE Board Decision No 96 of 17 June 2016.

<sup>5</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

<sup>6</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

## I. Description of the notified Preliminary Decision

Natural gas transmission and distribution was initially part of the state-owned vertically integrated energy undertaking “Albpetrol” sh.a. (hereinafter “Albpetrol”)<sup>7</sup> which still today performs exploration and production of oil and natural gas. Albpetrol is also licensed by ERE for the trade in and supply of electricity.<sup>8</sup>

On 23 September 2015, the Parliament of the Republic of Albania adopted the Gas Sector Law, which transposes the Gas Directive and the Gas Regulation to the Albanian national legislation. Article 36 of the Gas Sector Law transposes the provisions on ownership unbundling of the TSO in compliance with Article 9 of the Gas Directive, including the rules pertaining to ownership unbundling of public companies as prescribed in Article 9(6) of the Directive.

On 11 February 2016, the Parliament of Albania adopted amendments to the Law on the Transformation of State-owned Enterprises,<sup>9</sup> which identifies public bodies responsible for exercising the state’s ownership and control rights in public companies. The amendments stipulate that the exercise of the ownership and control rights, including the right to appoint members of the supervisory boards, in public companies operating in the natural gas sector is performed in accordance with the Gas Sector Law.

Albgaz was established pursuant to Decision No 848 of the Council of Ministers of the Republic of Albania of 7 December 2016 (hereinafter “Decision No 848”),<sup>10</sup> and was registered as a joint stock company on 6 January 2017.<sup>11</sup> Pursuant to Paragraph 2 of Decision No 848, Albgaz is established as a combined operator for the transmission and distribution of natural gas in accordance with Article 80 of the Gas Sector Law.

The sole shareholder of Albgaz is the Republic of Albania, which owns 100% of shares in the company’s authorised capital. Pursuant to Paragraph 3 of Decision No 848, the state’s shareholding rights in Albgaz are exercised by the Ministry of Economic Development, Tourism,

<sup>7</sup> Previous Albetrol’s licenses authorising the transmission and distribution of natural gas were abolished by ERE following the establishment of Albgaz and its takeover of Alpetrol’s natural gas transmission and distribution assets.

<sup>8</sup> Alpetrol is authorised for hydrocarbon operations, including exploration and production of oil and natural gas, pursuant to the Law of the Republic of Albania No 7746 of 28 July 1993 “On Hydrocarbons (Exploration and Production)”, as amended. Albpetrol is also authorised by ERE for the trade in and supply of electricity (licenses No 381 T17 and No 382 F17 issued on 6 September 2017).

<sup>9</sup> Law of the Republic of Albania No 8/2016 of 11 February 2016 “On Amendments to the Law No 7926 of 20 April 1995 “On the Transformation of State-owned Enterprises into Commercial Companies”, as amended”.

<sup>10</sup> Decision No 848 of the Council of Ministers of the Republic of Albania of 7 December 2016 “On the establishment of the company “Albgaz” sh.a. and designation of public authorities representing the State as the owner of shares in companies “Albpetrol” sh.a. and “Albgaz” sh.a.”.

<sup>11</sup> Extract from the commercial register on the data of the joint stock company: status of registration of Albgaz sh.a. (NUIS L71306034U), issued by the National Business Center, dated 17 February 2017.

<b>Bank</b>	Raiffeisenlandesbank
<b>IBAN</b>	AT953200000015102825
<b>BIC</b>	RLNWATWW

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

Trade and Entrepreneurship of the Republic of Albania (hereinafter “MZHETTS”).<sup>12</sup> Paragraph 5 of Decision No 848 stipulates that the public body representing the state as a shareholder in Albpetrol is the Ministry of Energy and Industry of the Republic of Albania (hereinafter “MEI”).<sup>13</sup>

Albgaz is not yet licensed as a TSO. Pursuant to Article 37(1) of the Gas Sector Law, before an undertaking is licensed by ERE for the activities of a TSO, it is required to be certified according to the procedure laid down in the Law and the ERE’s Rules on Certification. On 16 August 2017, ERE opened the procedure for licensing Albgaz as a TSO,<sup>14</sup> which is to be closed by issuance of a license following the company’s final certification.

On 20 February 2017, Albgaz submitted to ERE an application for its certification under Article 37 of the Gas Sector Law and ERE’s Rules on Certification. Albgaz requests for its certification as of an ownership unbundled TSO in compliance with Article 36 of the Gas Sector Law.

The Preliminary Decision was adopted pursuant to the provisions of the Gas Sector Law, ERE’s Rules on Certification, and the application submitted by Albgaz together with the supporting documentation. ERE has also reviewed and analysed the Constitution of the Republic of Albania, Law on the State Administration,<sup>15</sup> Law on the Council of Ministers,<sup>16</sup> the amendments to the Law on the Transformation of State-owned Enterprises, other relevant laws, decisions of the Council of Ministers determining the scope of responsibilities of MEI and MZHETTS,<sup>17</sup> Decision No 848, and the case law of the Constitutional Court of the Republic of Albania.

In the Preliminary Decision, ERE came to the conclusion that Albgaz complies fully with the requirements of the provisions on ownership unbundling in conformity with Articles 37, 50, 59, 68 and 80 of the Gas Sector Law.

However, ERE requested Albgaz to appoint a compliance officer subject to ERE’s approval within 3 months from the issuance of the final certification decision (hereinafter “the Final Decision”), and

<sup>12</sup> The Secretariat is aware that, in August 2017, MZHETTS was merged with the Ministry of Finance of the Republic of Albania thus forming a new Ministry of Finance and Economy of the Republic of Albania. For the purpose of the present Opinion all relevant references are provided to MZHETTS in line with the Preliminary Decision.

<sup>13</sup> The Secretariat is aware that, in August 2017, MEI was merged with the Ministry of Transportation and Infrastructure of the Republic of Albania thus forming a new Ministry of Infrastructure and Energy of the Republic of Albania. For the purpose of the present Opinion all relevant references are provided to MEI in line with the Preliminary Decision.

<sup>14</sup> ERE Board Decision No 127 of 16 August 2017 “On the opening of the procedure for the licensing of the company Albgaz sh.a. for the activity of the transmission of natural gas”.

<sup>15</sup> Law of the Republic of Albania No 90/2012 of 27 September 2012 “On the Organisation and Functioning of the State Administration”.

<sup>16</sup> Law of the Republic of Albania No 9000 of 30 January 2003 “On the Organisation and Functioning of the Council of Ministers”.

<sup>17</sup> Decision No 833 of the Council of Ministers of the Republic of Albania of 18 September 2013 “On determining the scope of the state responsibility of the Ministry of Energy and Industry”, as amended; Decision No 835 of the Council of Ministers of the Republic of Albania of 18 September 2013 “On determining the scope of the state responsibility of the Ministry of Economic Development, Tourism, Trade and Entrepreneurship”, as amended.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

to draft and submit to ERE the report required under TSO's Compliance Programme<sup>18</sup> not later than in 12 months after the issuance of the Final Decision in compliance with Article 21 of the Gas Directive and Article 47 of the Gas Sector Law.

## II. Assessment of the Preliminary Decision

### 1. General remarks

As the Secretariat has pointed out in its previous Opinions,<sup>19</sup> the unbundling provisions were designed to separate, in vertically integrated undertakings, control over transmission system operation as a natural monopoly, on the one hand, and production and supply activities as competitive activities, on the other hand, as well as to eliminate a potential conflict of interest between transmission and other activities performed by vertically integrated undertakings. This objective is best fulfilled by implementation of the ownership unbundling model under Article 9 of the Gas Directive, which is transposed in Albania by Article 36 of the Gas Sector Law.

In a market environment still prevailing in many Contracting Parties, including Albania, where energy activities are predominantly performed by public undertakings and/or characterised by dominant positions on their respective markets, the separation of control and the prevention of conflicts of interest is of particular importance. For these cases, *i.e.* where the state as an owner engages in more than one energy-related activity and is thus to be considered a vertically integrated undertaking within the meaning of European energy law,<sup>20</sup> Article 9(6) of the Gas Directive offers an ownership unbundling option that is an alternative to restructuring and privatisation. Unlike in ownership unbundling cases under Article 9(1) of the Gas Directive, in situations covered by Article 9(6) the tie of control within the vertically integrated undertaking is not fully severed. The continued exercise of public ownership as well as constitutional and political links differentiate these situations from other cases of ownership unbundling and matter for the assessment. When relying on Article 9(6) of the Gas Directive, as transposed into national law (*in casu* Article 36(5) of the Gas Sector Law), full achievement of the objective of Article 9(1) of the Directive needs to be ensured by the national regulatory authority proactively. The Secretariat reviewed the Preliminary Decision against this background.

### 2. Application of the ownership unbundling provisions to Albqaz

When assessing the compliance of the Preliminary Decision with the unbundling model enshrined in Article 9 of the Gas Directive, the following aspects matter in particular:

<sup>18</sup> ERE Board Decision No 77 of 26 May 2017 "On approval of the Compliance Programme of the natural gas transmission system operator".

<sup>19</sup> *E.g.* Secretariat's Opinion 1/16 of 3 February 2016 on certification of TAP AG, and Opinion 1/17 of 23 January 2017 on certification of OST.

<sup>20</sup> See, for example: Commission's Opinion on certification of *Vorarlberger Übertragungsnetze (VÜN)*, C(2012) 2244 final, 29.3.2012, p. 4, and Opinion on certification of *Augstsprieguma tīkls*, C(2012) 9108 final, 3.12.2012, p. 2.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

- a) the undertaking to be certified needs to be the owner of the transmission assets as required by Article 9(1)(a) of the Gas Directive;
- b) the undertaking to be certified needs to perform the functions and tasks of a TSO as required by Article 9(1)(a) of the Gas Directive; and
- c) control over and exercising any rights in the undertaking to be certified need to be separated from control over and exercising any rights in undertakings involved in production or supply of natural gas and electricity as required by Article 9(1)-(3),(6),(7) and (12) of the Gas Directive.

a. *Ownership of the natural gas transmission system*

Article 9(1)(a) of the Gas Directive (as transposed by Article 36(1) of the Gas Sector Law) requires that “each undertaking which owns a transmission system acts as a transmission system operator”. This means in principle that the undertaking applying for certification is the owner of the natural gas transmission assets, *i.e.* the natural gas transmission system. Only in exceptional cases the European Commission has accepted that where the TSO does not own the transmission system the rights to manage the system were provided to the TSO through a lease or concession agreement, *i.e.* if these legal titles could be regarded as granting the TSO with rights equivalent to those of an owner.<sup>21</sup>

At the date of the present Opinion, there is no sufficient evidence available to prove that Albgaz is *de jure* owner of all transmission assets. In the Preliminary Decision, ERE concluded that the transmission system assets previously owned by Albpetro were transferred to Albgaz on the basis of Decision No 848.<sup>22</sup> However, the final deadline for evidencing the asset registration was set for 30 September 2017. At the hearing of 11 July 2017, Albgaz explained that the ownership registration of transmission system assets in the name of Albgaz was still ongoing and that certificates by the Real Estate Registration Office (cadastre) had not yet been issued in the name of Albgaz. Similarly, in its decision on the opening of the licensing procedure of Albgaz,<sup>23</sup> ERE stated that some of the property, which is due to be transferred to Albgaz, still “*belongs to Albpetro and is expected to be registered in the name of Albgaz*”. Subsequently, the Secretariat was informed that certificates proving the registration of the ownership of natural gas transmission assets in the name of Albgaz had been issued by the cadastre in August 2017 without, however, providing the copies of such certificates as requested.

<sup>21</sup> See, for example: Commission’s Opinion on certification of *REN Rede Electrica Nacional S.A. and REN Gasodutos S.A.*, C(2014) 3255 final, 12.05.2014, p. 3-4, and Opinion on certification of *Transelectrica D.A.*, C(2015) 7053 final, 12.10.2015., p. 5-6.

<sup>22</sup> Preliminary Decision, p. 45-46, 53-54.

<sup>23</sup> See ERE’s comment regarding Albgaz’s compliance with Article 9(1)(v) of the Conditions and procedure for issuance, modification, transfer and revocation of licenses for activities in the natural gas sector (ERE Board Decision No 97 of 4 July 2017) in ERE Board Decision No 127 of 16 August 2017 “On the opening of the procedure for the licensing of the company Albgaz sh.a. for the activity of the transmission of natural gas”.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

At the same time, Albgaz confirmed at the hearing that all transmission system assets already feature on the company’s balance sheet as its property and the company is in principle allowed to pledge such property for acquiring the financing on capital markets. It also follows from decisions by MZHETTS<sup>24</sup> that the transmission pipelines and related facilities and equipment (such as compressor stations and metering equipment), as well as adjacent land and buildings were deducted from Albgaz’s capital and transferred to the authorised capital of Albgaz.<sup>25</sup>

Considering the above, the Secretariat has no reason to doubt that the gas transmission system assets are already managed and operated by Albgaz. The Secretariat further recalls its Opinion 3/17 where it found that “*where the TSO has taken all necessary steps to formally register the assets constituting the transmission system in time and according to the rules, the requirement for a TSO to own the transmission system can be satisfied*”.<sup>26</sup> The Secretariat thus agrees with ERE’s findings that Albgaz in principle complies with the requirement of asset ownership. However, it requests ERE to include in the Final Decision the duty on Albgaz to report on monthly basis to ERE on the ongoing procedure for registration of transmission assets, and to conclude the procedure within six months upon certification.

*b. The applicant undertaking performs core tasks of a transmission system operator*

Article 9(1)(a) of the Gas Directive requires also that the undertaking in question “*acts as a transmission system operator*”. The notion of transmission system operator is defined by Article 2 No 4 of the Gas Directive. It follows from this definition that the key elements for an undertaking to be considered a TSO are the operation, the maintenance and the development of a transmission network.<sup>27</sup> A regulatory authority’s assessment in this respect needs to establish in particular whether a given undertaking is by law and factually performing the core tasks of a TSO, and whether it disposes of the necessary (human, technical, financial) resources for this.<sup>28</sup>

The Secretariat has no reason to doubt that Albgaz, despite having been established only recently, *de jure* and *de facto*, performs the core tasks of a TSO, and disposes of human, technical and financial resources necessary to perform such tasks.

Firstly, task and responsibilities of the TSO are set out in Article 41 of the Gas Sector Law in compliance with Article 13 of the Gas Directive. Furthermore, it follows from the Preliminary Decision and supporting documents that Albgaz was established specifically to perform natural gas

<sup>24</sup> Order No 550/1 of MZHETTS of 2 February 2016 “On reduction of the capital of the company Albgaz”, and Order No 550/3 of MZHETTS of 5 May 2016 “On regulating the capital of the company Albgaz”.

<sup>25</sup> Accounting report on the list of assets on the basis of the Order No 550/1 of 2 February 2016 that will serve for the establishment of the natural gas transmission and distribution center, dated 11 April 2016.

<sup>26</sup> Secretariat’s Opinion 3/17 of 15 June 2017 on certification EMS.

<sup>27</sup> Secretariat’s Opinion 1/16 of 3 February 2016 on certification TAP AG.

<sup>28</sup> Commission’s Opinion on certification of VÜN, C(2012) 2244 final, 29.3.2012.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

transmission activities<sup>29</sup> and that the company's bylaws cover all the key elements of its performance as of a TSO, including operation, maintenance and development of a transmission network.<sup>30</sup>

Secondly, the Secretariat understands that all technical resources and services necessary to perform natural gas transmission activities have already been transferred from Albgaz to Albgaz. At the oral hearing on 11 July 2017, Albgaz stated that it has 114 employees, which the Secretariat considers sufficient to perform transmission activities at this stage of development. The Secretariat also considers that Albgaz's organisational structure<sup>31</sup> covers all functional fields attributable to the TSO, and that its capital structure is sound.<sup>32</sup>

However, a core function of a TSO consists in granting and managing non-discriminatory third-party access to system users, including collecting of access and congestion charges.<sup>33</sup> While this task has been transposed by Article 42 of the Gas Sector Law, in reality Albgaz has currently only one customer for its transmission services, Albgaz. As became clear at the oral hearing, the services are not provided on the basis of contractual terms and currently not remunerated by a network tariff, as the provisional transmission tariff set by ERE expired on 20 September 2017.<sup>34</sup> The procedure for adoption of a transmission tariff methodology, which is a precondition for setting a new tariff, has just been opened by ERE on 6 September 2017.<sup>35</sup> At the oral hearing, Albgaz explained that the company currently negotiates with Albgaz a transmission contract to be concluded once a new transmission tariff has been set by ERE. Consequently, Albgaz currently provides its services on a non-regulated basis, which is not in line with Energy Community law.

In this respect, the Secretariat acknowledges that Albgaz has just recently started its operations and that Albania's natural gas market is currently very limited. However, the Secretariat also notices that regulated network access and its management by the TSO is one of the central pillars of the Energy Community *acquis* on gas. It therefore requests that ERE, as a precondition for issuance of a Final Decision, ensures that the natural gas transmission tariff methodology is adopted, and tariffs for Albgaz's services (for all potential system users) are set.

<sup>29</sup> Paragraph 12 of the Extract from the commercial register on the data of the joint stock company: status of registration of Albgaz sh.a. (NUIŠ L71306034U), issued by the National Business Center, dated 17 February 2017.

<sup>30</sup> Article 3 of the Statutes of Albgaz as adopted by the General Assembly on 5 January 2017.

<sup>31</sup> Organisational structure of Albgaz: <http://albgaz.al/organigramal/>; description of the company's functional units is attached to Albgaz's application for certification (No 03/10 Prot.) and assessed in the Preliminary Decision (p. 40-44).

<sup>32</sup> Registered capital of Albgaz, based on Paragraph 2 of Decision No 848 is ALL 359.068.000,00.

<sup>33</sup> Commission Staff Working Paper – Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – the Unbundling Regime, 22 January 2010, Section 2.2., p. 8.

<sup>34</sup> Paragraphs 1 and 2 of ERE Board Decision No 90 of 7 June 2017.

<sup>35</sup> ERE Board Decision No 142 of 6 September 2017 "On the opening of the procedures for approval of the Methodology for calculation of natural gas transmission and distribution tariffs".

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

*c. Separation of control over transmission from production/supply*

The Preliminary Decision assesses Albgaz’s compliance with the ownership unbundling model against Article 36(5) of the Gas Sector Law, the provision transposing Article 9(6) of the Gas Directive. Article 9(6) provides that two separate public bodies may be seen as two distinct persons within the meaning of Article 9(1) and (2) of the Gas Directive, and may control production and supply activities, on one hand, and transmission activities on the other hand. The notion of control is further defined by the Merger Regulation<sup>36</sup> and includes the rights enumerated in Article 9(1)(b), (c) and (d) and (2) of the Gas Directive, including the power to exercise voting rights, the holding of majority share and the power to appoint members or the TSO’s corporate bodies and those legally representing the TSO.<sup>37</sup>

The Secretariat agrees with ERE that MZHETTS and MEI, representing the state’s shares in Albgaz and Albp petrol respectively in accordance with Decision No 848, in principle qualify as public bodies within the meaning of Article 9(6) of the Gas Directive.<sup>38</sup>

In order to fully achieve the objective of Article 9 of the Gas Directive – the prevention of potential and actual conflicts of interest – and to ensure unbundling of undertakings controlled by public bodies on equal footing with private undertakings, Article 9(6) of the Gas Directive cannot be interpreted in a formalistic manner. The separation of control between the two public bodies in question must be effective in the sense that it ensures the full independence of the public body controlling a TSO from any other entity controlling generation and supply activities.

Firstly, a TSO and the public or private body controlling it may, in principle, not be engaged in production and supply activities.<sup>39</sup>

Secondly, the regulatory authority tasked to certify the TSO needs to establish, *de jure* and *de facto* independence between the two public bodies tasked to exercise control over the state-owned undertakings in question, including the prevention of any common influence of a third public or private entity.<sup>40</sup> For that purpose, the public body controlling the TSO must have clearly defined and delineated competences, must carry out the tasks assigned to it by Energy Community and

<sup>36</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

<sup>37</sup> Article 9(2) of the Gas Directive and Article 36(3) of the Gas Sector Law.

<sup>38</sup> See, for example: Commission’s Opinion on certification of *Energinet* (gas), C(2012) 88, 9.01.2012; Opinion on certification of *VUN* (electricity), C(2012) 2244 final, 29.3.2012; Opinion on certification of *Affärsverket svenska kraftnät*, C(2012) 3011, 30.04.2012; Opinion on certification of *TenneT*, C(2012) 6258, 06.09.2012; Opinion on certification of *GTS*, C(2013) 4205, 01.07.2013; and Opinion on certification of *Litgrid*, C(2013) 4247, 04.07.2013.

<sup>39</sup> See: Commission’s Opinion on certification of *National Grid*, C(2012)2735, 19.04.2012, p.4; Opinion on certification of *Societa Gasdotti Italia S.p.A.*, C(2013) 380 final, 23.01.2013, p. 2; and Opinion on certification of *REN Rede Electrica Nacional S.A.* and *REN Gasodutos S.A.*, C(2014) 3255 final, 12.05.2014.

<sup>40</sup> Commission Staff Working Paper, *Idem.*, Section 2.2, p. 10.



**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

national law in full autonomy and may not be subordinated to public or private entities controlling energy production or supply undertakings.<sup>41</sup>

Thirdly, the fact that the two public bodies in question remain part of the same vertically integrated undertaking, the state, may require the introduction of additional safeguards within the organisation of the TSO to ensure its full independence in day-to-day decision-making. Where one of the two public bodies in question also exercises policy-making functions, which may actually or potentially affect the decision-making of the TSO, full independence may also call for the introduction of additional organisational measures within the public body concerned.

(i) *The transmission system operator is not engaged in production/supply activities*

The ownership unbundling provisions require that a TSO (or the body exercising control over it) may not be engaged in the production of energy nor in its purchase and sale. Derogations may be possible where such activities are “*truly incidental to the core activity of an undertaking ..., and the quantity of energy is also insignificant*”.<sup>42</sup>

The Secretariat has no reason to doubt that Albgaz currently is not engaged in any other activity not related to the transmission and distribution of natural gas, and in particular in natural gas production and/or supply relations, and that MZHETTS does not exercise control or any right over an undertaking performing any of the functions of production or supply.

(ii) *Competences and control are effectively separated between the public bodies involved*

The Secretariat agrees with ERE’s finding that in general, MZHETTS and MEI have the necessary competences and tools to exercise control over Albgaz and Albpetrol respectively in a legally and factually independent manner.

*Separation of competences between the Ministries*

The Constitution of the Republic of Albania, in its Article 102(4), provides that a Minister “*within the principal directions of general state policy, directs, under his responsibility, actions for which he has powers*”. The general state policy is determined by the Council of Ministers, the collegial body forming the Government. Competences granted to the Minister, on the other hand, seem to fall under the Ministry’s exclusive competence.<sup>43</sup>

<sup>41</sup> See, for comparison: Commission’s Opinion on certification of *Slovenská elektrizačná prenosová sústava a.a.*, C(2013) 5376 final, 9.08.2013; Opinion on certification of *Polskie Sieci Elektroenergetyczne S.A.*, C(2014) 2471 final, 09.04.2014; Opinion on certification of *GAZ-SYSTEM S.A.*, C(2014) 5457 final, 25.07.2014; and Opinion on certification *Magyar Gáz Tranzit Zrt.*, C(2015) 1046 final, 17.02.2015.

<sup>42</sup> Commission’s Opinion on certification of *Thanet*, C(2013) 2566 final, 26.4.2013.

<sup>43</sup> Secretariat’s Opinion 1/17 of 23 January 2017 on certification of *OST*.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

Moreover, Article 3(5) of Law on the State Administration stipulates that „*according to the principle of clarity in the defining and the distribution of the responsibilities, the allocation and assignation of the functions and administrative duties, between the organs, institutions and administrative units, shall be specific, to avoid overlaps, to be transparent and public in the appropriate way.*” According to Article 5 of the same Law, the Council of Ministers, based on a proposal of the Prime Minister, defines the activities under the responsibility of each Ministry, while the “*Minister is responsible in front of the Council of Ministers and the Parliament for the whole activity of the Ministry.*” According to Article 22 of that Law, “*every minister is responsible for overseeing of the activity of the ministry, the subordinate institutions and autonomous agencies within the relative field of state responsibility.*”

By Decision No 848, the Council of Ministers established control of MZHETTS as exclusive representative of the state’s shares in Albgaz, whereas MEI was appointed in the same capacity as the body exercising control over the state’s natural gas production assets managed by Albpetrol. The Minister personally represents the respective Ministry in the companies’ general assemblies. As was clarified in the Preliminary Decision<sup>44</sup> and during the hearing on 11 July 2017, control over publicly owned joint-stock companies by the competent Ministries representing the state’s shares is being exercised in accordance with the Law on Entrepreneurs and Companies,<sup>45</sup> *i.e.* based on general corporate law rather than public law. Consequently, the rights stemming from the state’s shares in Albgaz, including voting rights, are *de jure* exercised by MZHETTS autonomously and not under the influence of MEI and *vice versa*, thus complying with Article 9(1)(b) of the Gas Directive.

Furthermore, the Secretariat agrees that both Ministries are *de jure* independent in terms of appointing the members of the corporate bodies of their respective companies as required by Article 9(1)(c) of the Gas Directive. The amendments to the Law on the Transformation of State-owned Enterprises adopted on 11 February 2016 provide that the “*exercise of the right of representatives of State property, including the right to appoint members of the supervisory boards in the gas sector companies, shall be done in accordance with the provisions of the Gas Sector Law.*” Decision No 848 was subsequently adopted under the Gas Sector Law, thus mandating MZHETTS and MEI to appoint the members of the supervisory boards of respective undertakings under their control.<sup>46</sup> Moreover, according to Article 135 of the Law on Entrepreneurs and Companies, one of the rights of the general assembly (with MZHETTS being a sole shareholder of Albgaz, and MEI of Albpetrol, and thus represented in the general assemblies thereof by their respective Ministers), is the appointment and dismissal of the supervisory and administrative board members. Finally, the Statutes of Albgaz also envisage that the general assembly appoints the supervisory board members.<sup>47</sup> In this capacity, both Ministers in charge have already adopted decisions appointing the supervisory board members of Albgaz and Albpetrol respectively.<sup>48</sup>

<sup>44</sup> Preliminary Decision, p. 33-34.

<sup>45</sup> Law No 9901 of the Republic of Albania of 14 April 2008 “On entrepreneurs and companies”.

<sup>46</sup> Paragraph 6(b) of CoM Decision No 848.

<sup>47</sup> Article 13.2(d) of the Statutes of Albgaz as adopted by the General Assembly on 5 January 2017.

<sup>48</sup> Order No 56 of MZHETTS of 5 January 2017; Order No 448 of MEI of 29 December 2016.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

According to the Statutes of Albgaz, the supervisory board is in charge of appointing the chief executive officer (the Executive Director) of the company.<sup>49</sup> Albgaz’s Executive Director was appointed by the company’s supervisory board on 5 January 2017.<sup>50</sup> The Secretariat has no reason to doubt that the formation of supervisory and management bodies of Albgaz and Albpetro took place in any way differently from what is envisaged by general corporate law.

Moreover, Article 9(1)(d) of the Gas Directive prohibiting the same person from being a member of the board of both a producer/supplier and a TSO has been complied with, as a review of the respective decisions appointing the supervisory boards and the administrators of Albgaz and Albpetro confirms. Neither of Albgaz’s supervisory board members or the Executive Director acts also as a member of the supervisory nor management bodies in Albpetro, and *vice versa*.<sup>51</sup>

However, the Secretariat has been informed that at least two of Albgaz’s supervisory board members – Mr Tommy Kola and Mr Stavri Dhima – were employed by MEI at the date of their appointment to the supervisory board and still remain employed by MEI at the date of the present Opinion. Furthermore, Mr Tommy Kola was also appointed supervisory board member of *OSHEE sh.a.*,<sup>52</sup> a company engaged in supply of electricity.<sup>53</sup>

The Secretariat considers this arrangement as an obstacle to the factual independence and true separation<sup>54</sup> of the two Ministries and the two companies under their respective control as required by Article 9(6) of the Gas Directive. In particular, the fact that MEI exercises control over energy production and supply companies as well as policy-making functions in the natural gas sector calls for a strict functional and personal separation of staff employed by that Ministry from the corporate governance structures created to control and independence of transmission system operation.

In particular, the appointment of two employees of MEI by MZHETTS raises considerable doubts as to the true independence of MZHETTS in selecting the candidate supervisory board members of Albgaz. MEI staff’s representation in Albgaz’s supervisory board also creates a manifest risk of conflict of interests as these staff members are supposed to act, at the same time, in the interest of the TSO as supervisory board members, and of a public body (MEI) which exercises control over the natural gas production company (Albpetro) as well as policy-making functions. This conflict of interest includes also the risk of using information in either of the two functions for respective other function. In view of the significance of the risk of conflict of interest implicit in these dual functions,

<sup>49</sup> Article 19.2 of the Statutes of Albgaz as adopted by the General Assembly on 5 January 2017.

<sup>50</sup> Decision No 2 of the Supervisory Board of Albgaz of 5 January 2017.

<sup>51</sup> See: Paragraphs 14-31 of the Extract from the commercial register on the data of the joint stock company: status of registration of Albgaz sh.a. (NUIS L71306034U), issued by the National Business Center, dated 17 February 2017; and Paragraphs 14-31 of the Extract from the commercial register on the data of the joint stock company: status of registration of Albpetro sh.a. (NUIS J82916500U), issued by the National Business Center, dated 29 September 2017.

<sup>52</sup> See: Paragraph 25 of the Extract from the commercial register on the data of the joint stock company: status of registration of OSHEE sh.a. (NUIS K72410014H), issued by the National Business Center, dated 29 September 2017.

<sup>53</sup> OSHEE sh.a. carries out electricity supply activities pursuant to ERE Board Decision No 112 of 8 July 2016.

<sup>54</sup> Commission Staff Working Paper, *Idem.*, Section 2.2, p. 10.

<b>Bank</b>	Raiffeisenlandesbank
<b>IBAN</b>	AT953200000015102825
<b>BIC</b>	RLNWATWW

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

the Secretariat considers a declaration on the separation of interests as signed by Mr Stavri Dhima<sup>55</sup> as not sufficient to contain it.

Moreover, the Secretariat recalls that Article 9(3) of the Gas Directive requires that ownership unbundling applies also across the natural gas and electricity markets,<sup>56</sup> thereby prohibiting joint influence over an electricity generator or supplier and a natural gas TSO. Against this background, and on the same grounds as outlined above, the Secretariat considers that appointment of Mr Tommy Kola to the supervisory boards of both the natural gas TSO (Albgaz) and the electricity supplier (OSHEE) as another cause for a significant risk of conflict of interests.

Consequently, the Secretariat requests ERE to oblige Albgaz and/or MZHETTS to replace MEI's representatives in the company's supervisory board with members not employed with MEI or the energy production and/or supply undertakings controlled by it not later than in one month following the adoption of the Final Decision.

*Competences of MEI related to Albgaz under the Gas Sector Law*

In its preliminary decision, ERE elaborates on the competences that MEI retains under the Gas Sector Law,<sup>57</sup> in particular competences specifically affecting the decision-making by Albgaz related to network planning and construction. This includes the right of MEI to define the National Energy Strategy and prepare programs for, *inter alia*, “*development policies in the natural gas sector*” (Article 5 of the Gas Sector Law), the approval by the Council of Ministers of construction and utilisation, *inter alia*, of “*natural gas transmission and distribution pipelines*”, “*interconnections of the Albanian natural gas system with the neighbouring systems*” and “*any other facility, equipment and installation falling under natural gas sector*” upon proposal of MEI (Article 11 of the Gas Sector Law), and the right to give an opinion to ERE when the latter exercises its competences in relation to the TSO's ten-year network development plan (Article 46(10) of the Gas Sector Law). The Secretariat further notes that Decision No 848 explicitly provides that MEI “*exercises its rights in Albgaz pursuant to the [Gas Sector Law] and within its state responsibility field*”.<sup>58</sup> The Gas Directive, on the other hand, requires that the owner of the transmission system, *i.e.* the TSO, is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning,<sup>59</sup> and discharges this responsibility in full autonomy.

Similar issues were addressed by the Secretariat in its Opinion 1/17 concerning the unbundling of the Albanian electricity TSO, *i.e.* OST. The Secretariat's concerns were also discussed at the hearing held on 11 July 2017.

<sup>55</sup> Declaration on the separation of the activities in energy undertakings related to the production, generation and/or supply of natural gas and/or electricity, signed by Mr Stavri Dhima on 18 February 2017.

<sup>56</sup> Commission's Opinion on certification of *Elering AS* (gas), C(2016) 8255, 02.12.2016.

<sup>57</sup> Preliminary Decision, p. 9-20.

<sup>58</sup> Paragraph 4 of CoM Decision No 848.

<sup>59</sup> Commission Staff Working Paper, *Idem.*, Section 2.2, p. 8.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

As regards the competences of MEI under Article 5 of the Gas Sector Law, the Secretariat deems them to be of a general policy nature rather than a specific involvement in the activities and tasks of the TSO. They will be discussed below.

With regard to the right of MEI to propose the approval (or rejection) to the Council of Ministers of any new energy infrastructure to be constructed by the TSO, as stipulated in Article 11 of the Gas Sector Law, MEI explained in the OST certification procedure that the political significance of such a decision, especially in case of interconnectors depending on an arrangement between two sovereign states.<sup>60</sup> The Secretariat was and is still not convinced by that line of argument. Going even beyond MEI's influence on the construction of infrastructure in the electricity sector, MEI's key role in the approval procedure at the Council of Minister in the natural gas sector is extended so as to cover all natural gas transmission and distribution pipelines, and not only interconnectors, as well as any other natural gas facility, equipment and installations.<sup>61</sup> This gives MEI a comprehensive influence over the development of the entire gas infrastructure of national as well as of regional importance to the detriment of the TSO's autonomy over such development as required by the *acquis*. European energy law tasks the TSOs alone to develop secure, reliable and efficient transmission systems, *inter alia*, through Article 13(1)(a) of the Gas Directive. Article 2 No 4 of the same Directive defines a TSO as "*a natural or legal person responsible for [...] developing the transmission system in a given area, and where applicable, its interconnections with other systems [...].*"

In Opinion 1/17 on the certification of OST, the Secretariat explained that European law in principle does not preclude the Council of Ministers and/or Parliament to conclude intergovernmental agreements with the neighbouring state in question to govern certain aspects the bilateral relations that are created by the implementation of such a decision. However, the competence of MEI and the Council of Ministers to approve the construction of natural gas transmission pipelines, interconnectors, and any other natural gas facility, equipment and installation encroaches upon the independence of the TSO and the body exercising control under corporate law over it, *i.e.* MZHETTS. Moreover, the Secretariat already recalled the European Commission's case practice "*whereby a person holding interests in gas production and supply at the same time has a decisive say in whether or not important investments in gas transmission infrastructure can go ahead or not, the incentive arises to abuse the control over the investments in the TSO with a view to favour the generation or supply interests, in casu by keeping potential competitors out of the market through preventing investments from taking place.*"<sup>62</sup>

The Secretariat therefore considers that the right of MEI to propose approval or rejection of natural gas transmission system developments to the Council of Ministers fails to comply with the Directive's prohibition for MEI to exercise "any right" over Albgaz. This non-compliance is not

<sup>60</sup> Secretariat's Opinion 1/17 of 23 January 2017 on certification of OST.

<sup>61</sup> Article 11 of the Gas Sector Law cf. Article 31 of the Law No 43/2015 of the Republic of Albania of 30 April 2015 "On the power sector" (the Power Sector Law).

<sup>62</sup> Commission's Opinions on certification of *Gas Transport Services B.V*, C(2013) 4205 final, 1.7.2013; and Opinion on certification of *TenneT*, C(2013) 4206 final, 1.7.2013.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

addressed by ERE in the Preliminary Decision, nor do any solutions for relevant remedial measure follow therefrom. In this respect, the Secretariat notes that in its Final Decision in the OST certification procedure of 15 March 2017,<sup>63</sup> ERE concluded “*that this objective [of compliance] can be achieved through the promotion of inter-institutional cooperation by OST and the Ministry of Economy, for the implementation of amendments in the primary and secondary legislation, concerning the transfer of powers from the Ministry of Energy and Industry to OST’s shareholder, i.e. the Ministry of Economic Development, Trade, Tourism and Entrepreneurship.*” To the Secretariat’s knowledge, no such amendments have been adopted so far. Nor the Secretariat was provided with any proof that such an “*inter-institutional cooperation*” is able to result in any tangible outcome remedying the above-indicated non-compliance without the adoption, as a priority action, of necessary amendments to the primary law, *i.e.* the Gas Sector Law.

The Secretariat therefore requests ERE, in its Final Decision, to require for the adoption and entry into force of the necessary amendments to Article 11 of the Gas Sector Law as a condition subsequent within a reasonable transitional period in order for the certification to remain valid.<sup>64</sup>

As regards the obligation of ERE to request the MEI’s opinions on Albgaz’s draft ten-year network development plans before approval as well as on any measures taken by ERE in the context of monitoring and ensuring compliance with the plan once adopted (Article 46(10) of the Gas Sector Law), MEI explained at the hearing of 11 July 2017 that it has separate structural units dealing with its policy functions in relations with Albgaz as the TSO, and exercise of the shareholding rights in relations with Albpetrol and electricity production/supply undertakings respectively, with different directors subordinated to MEI’s Secretary-General. Evidently, any opinion under Article 46(10) of the Gas Sector Law would thus be prepared by the administrative (energy policy) department inside the Ministry of Energy, and not by the department dealing with MEI’s shareholding rights in state-owned energy undertakings. However, the Secretariat remains concerned<sup>65</sup> that MEI could be biased by its control over Albpetrol as well as electricity generation and supply undertakings when giving such an opinion, and that such a bias can result in negative effects on the development of the network.<sup>66</sup> While a separation of MEI’s structural units may be considered appropriate and sufficient to prevent general conflicts of interest<sup>67</sup> between MEI’s policy-making role in the energy sector (including transmission) and its control over the production and supply activities in Albania (see below), Article 46(10) of the Gas Sector Law establishes a competence specifically affecting the TSO’s autonomy related to the exercise of one of the core functions attributed to it by Energy Community law, network planning. A mere separation of tasks within MEI

<sup>63</sup> ERE Board Decision No 43 of 15 March 2017.

<sup>64</sup> Commission’s Opinion on certification of *Elering AS* (electricity), C(2013) 7188, 24.10.2013, p. 3; and Opinion on certification of *TenneT TSO B.V.*, C(2016) 3987 final, 22.06.2012, p. 6.

<sup>65</sup> Secretariat’s Opinion 1/17 of 23 January 2017 on certification of *OST*.

<sup>66</sup> Commission’s Opinion on certification of *Gas Transport Services B.V.*, C(2013) 4205 final, 01.07.2013.

<sup>67</sup> Similarly, the Commission considered that non-discrimination rules and compliance rules are not sufficient to remove concerns with respect to the compatibility of the influence of a Ministry controlling generation and supply over investment decisions related to TSO. See: Commission’s Opinion on certification of *TenneT TSO B.V.*, C(2016) 3987 final, 22.06.2016.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

does not rule out a potential or actual conflict of interest within MEI. The Secretariat notes that also the European Commission has considered incompatible with the exercises competences over TSOs, in particular related to decisions on investments.<sup>68</sup>

To ensure the independence of a TSO in transmission planning, the Secretariat repeatedly proposes to empower MZHETTS to issue opinions concerning the network development plan to ERE.<sup>69</sup> It has to be clarified through necessary legislative amendments that the Ministry responsible for energy means MZHETTS as a “*successor Ministry responsible for the energy sector*” pursuant to the definition in the Gas Sector Law. Furthermore, it would have to be stipulated that MEI has no right to interfere with the TSO’s autonomy over network development and investment planning, and necessary shareholder’s decisions are taken exclusively by MZHETTS. MEI’s role in this regard should be equal to that of any other stakeholder in the gas sector and may not go beyond submission of proposals in the course of public consultations regarding draft decisions by ERE and/or TSO. Besides, it would be necessary that ERE makes Albgaz’s certification dependent also on amendments to the Council of Ministers Decisions No 833 and 835,<sup>70</sup> so that the tasks granted to MEI in relation to Albgaz can be transferred to MZHETTS. In this way, MZHETTS, in its capacity of a shareholder of Albgaz would be empowered to exercise its competences to take decisions on investments in line with Article 13(2)(a) and (b) of the Statutes of Albgaz.

In this respect, the Secretariat repeatedly notes that no amendments, as indicated in ERE’s Final Decision in the OST certification procedure, have been adopted so far. Nor the Secretariat has any reason to expect for any tangible outcome remedying the above-indicated non-compliance without the adoption, as a priority action, of necessary amendments to the primary law, *i.e.* the Gas Sector Law, and related secondary legislation acts.

The Secretariat therefore again requests ERE, in its Final Decision, to require the full transfer of tasks related to Albgaz to its sole shareholder, MZHETTS. And, for this purpose, to require for the adoption and entry into force of the necessary amendments to the Gas Sector Law and to Council of Ministers Decisions No 833 and 835 as a condition subsequent within a reasonable transitional period in order for the certification to remain valid.

### *The role of the Prime Minister*

Article 9(6) of the Gas Directive precludes a third public body such as the Prime Minister or, as the case may be, the President, from giving instructions as regards the responsibilities of the two

<sup>68</sup> See: Commission’s Opinion on certification of *Gas Transport Services B.V.*, C(2013) 4205 final, 01.07.2013; Opinion on certification of *Amber Grid*, C(2015) 2135 final, 23.03.2015; and Opinion on certification of *TenneT TSO.B.V.*, C(2016) 3987, 22.06.2016.

<sup>69</sup> Secretariat’s Opinion 1/17 of 23 January 2017 on certification of *OST*.

<sup>70</sup> Decision No 833 of the Council of Ministers of the Republic of Albania of 18 September 2013 “On determining the scope of the state responsibility of the Ministry of Energy and Industry”, as amended; Decision No 835 of the Council of Ministers of the Republic of Albania of 18 September 2013 “On determining the scope of the state responsibility of the Ministry of Economic Development, Tourism, Trade and Entrepreneurship”, as amended.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

public bodies designated to control the undertakings performing the functions of the TSO and production/supply, respectively.<sup>71</sup> In the Preliminary Decision, ERE elaborates on such powers, in particular on the competence of the Prime Minister and its limits *vis-à-vis* individual Ministries, in the light of Albania's constitutional principles, the separation of powers enshrined in national law, and case-law of the Constitutional Court of Albania.<sup>72</sup>

Based on extensive explanations provided by ERE in the Preliminary Decision and the hearing of 11 July 2017, as having regard to its considerations in Opinion 1/17 on the certification of OST, the Secretariat has no reason to doubt that the above considerations are not only enshrined in Albania's law by letter but also represent its constitutional reality.

*(iii) The governance of the TSO and the public bodies involved in the energy sector allow for full independence in day-to-day decision-making*

Article 9(6) of the Gas Directive does not only require structural changes between the public bodies involved in the energy sector but also within the TSO itself and within individual public bodies to the extent this is required by the achievement of the objective of ownership unbundling, the prevention of potential and actual conflicts of interest. While a formal separation of competences on the level of government constitutes an important *sine qua non* for unbundling of state-owned TSO, full independence of network operation from production and supply interests also requires measures related to, *inter alia*, the elimination of exchanges of any confidential information on a daily basis.<sup>73</sup> Given that under Article 9(6) of the Gas Directive, the TSO continues to operate within the state as if it were a vertically integrated undertaking, this is of particular importance. Hence, the state must have effective measures in place to prevent undue coordination, discriminatory behaviour and undue dissemination of confidential information, including at the level of supporting staff and administration.<sup>74</sup> To what extent this requires more detailed ring-fencing measures and an increased regulatory oversight is to be assessed on a case-by-case basis.

*Safeguard measures within the TSO*

The Preliminary Decision is based largely on ERE's Rules on Certification which make obligatory certain measures meant to increase the operational independence of the TSO. This includes Article 8(1)(q) of ERE's Rules on Certification requiring for the prevention form disclosure of

<sup>71</sup> See, for comparison: Commission's Opinion on certification of *Energinet.dk* (gas), C(2012) 88, 9.01.2012; Opinion on certification of *VÜN*, C(2012) 2244 final, 29.3.2012; Opinion on certification of *ČEPS* (electricity), C(2012) 7059 final, 04.10.2012; Opinion on certification of *TenneT TSO B.V.*, C(2013) 4206 final, 01.07.2013; Opinion on certification of *Gas Transport Services B.V.*, C(2013) 4205 final, 01.07.2013; Opinion on certification of *Slovenská elektrizačná prenosová sústava a.a.*, C(2013) 5376 final, 09.08.2013; and Opinion on certification of *GAZ-SYSTEM S.A.*, C(2014) 5457 final, 25.07.2014.

<sup>72</sup> Preliminary Decision, p. 26-32.

<sup>73</sup> Recital 12 of the Gas Directive.

<sup>74</sup> See, for comparison: Commission's Opinion on certification of *Energinet* (gas), C(2012) 88, 9.01.2012; and Opinion on certification of *Vorarlberger Übertragungsnetze (VÜN)*, C(2012) 2244 final, 29.3.2012.



**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

confidential and other commercially sensitive information possessed by the TSO. Article 8(1)(p)(iii) of ERE's Rules on Certification also require that the TSO's management and authorised representatives declare their interests stating that such persons do not participate in activities of energy undertakings engaged in the production, distribution and/or supply of natural gas and/or electricity. These two requirements were made an explicit condition on Albgaz in the Preliminary Decision.<sup>75</sup> Furthermore, Albgaz's Code of Ethics<sup>76</sup> elaborates on how the confidential and other commercially sensitive information is protected (Article 16.3) and how conflicts of interest will be handled (Article 16.8). Besides being applicable to the management of Albgaz, the Code of Ethics also applies to all Albgaz's employees, thereby binding them to respect the provisions on preventing conflict of interest and protecting confidential information.

Furthermore, the Annex to ERE's Rules on Certification, *inter alia*, requires the TSO to have a commercial identity (brand) distinguished from other undertakings, to be officially registered as a legal entity under Albanian law, and prohibits the use of IT, security and access systems and buildings occupied by the TSO together with undertakings active in productions and supply as well as the use of the same service providers contracted for IT, security and access services. Albgaz's compliance with these requirements was assessed by ERE in the Preliminary Decision.<sup>77</sup>

Finally, the Preliminary Decision assesses Albgaz's compliance with regard to the requirement for independent auditing of the company's financial results. According to the Law on Entrepreneurs and Companies, the financial auditors of the undertakings are to be appointed by the General Assembly, *i.e.* MZHETTS in case of Albgaz. Corresponding requirement is also established in Article 16.3(e) of the Statutes of Albgaz. At the hearing of 11 July 2017, MZHETTS stated that *Albgaz* is financially independent company, as it does not require financing from the state budget. In accordance with Article 135 of the Law on Entrepreneurs and Companies, MZHETTS explained that, acting as a sole shareholder of *Albgaz*, it approves the company's financial (investment) plan,<sup>78</sup> and financial statements further audited by an independent auditor.

The ownership unbundling model is meant to ensure a situation in which discrimination can be excluded based on ownership structure of the TSO.<sup>79</sup> In cases under Article 9(6) of the Gas Directive, where the control remains within the structures of the state, additional behavioural safeguards may be required to ensure the independent operation of the network. While the Secretariat agrees with the Preliminary Decision that the abovementioned measures are supportive in the avoidance of conflicts of interest and the sharing of confidential information, it considers it beneficial beyond these measures to request Albgaz to implement a compliance programme and appoint a compliance officer. As noted by the Secretariat and the ECRB on previous occasion, "*the concept* [of ownership unbundling in line with Article 9(6) of the Gas

<sup>75</sup> Preliminary Decision, p. 36-39, 59-64.

<sup>76</sup> Code of Ethics of Albgaz as approved by the Executive Director of Albgaz (No 03/11 Prot. of supplementary documents submitted by Albgaz to ERE together with the application for certification).

<sup>77</sup> Preliminary Decision, p. 53-55.

<sup>78</sup> Order No 536/1 of MZHETTS of 5 February 2017 "On approval of the economic programme of Albgaz for 2017".

<sup>79</sup> Commission's Opinion on certification of *Snam Rete Gas S.p.A.*, C(2013) 5961 final, 13.09.2013.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

Directive] *must at least be accompanied by strict compliance reporting and continuous regulatory monitoring*".<sup>80</sup> The Secretariat notices that the TSO's Compliance Programme was already adopted by ERE in accordance with Article 21 of the Gas Directive<sup>81</sup> and concurs with ERE's additional requirement on Albgaz to appoint its compliance officer subject to ERE's approval within 3 months from the issuance of the Final Decision and to draft and submit to ERE the report required under the Compliance Programme not later than in 12 months after the issuance of the Final Decision.

### *Safeguard measures within MEI*

The area under the responsibility of MEI is defined in Council of Ministers Decision No 833 as including the drafting and implementation of policies, *inter alia*, in the state's responsibility area of the natural gas sector. Under the Gas Sector Law, MEI shall develop the national energy strategy, developing policies and programmes for implementation of natural gas sector objectives, and is responsible for monitoring of such policies and programmes as well as for supervision of the security of natural gas supply (Articles 5 and 6). MEI also proposes for the Council of Minister's adoption technical and safety rules in the natural gas sector under Article 10 of the Gas Sector Law. Article 88(1) of the Gas Sector Law tasks MEI with the development of a natural gas market model which, when adopted by the Council of Ministers, will affect directly (also) the TSO. As the public body exercising control over the main production and supply activities in the country performed by Albgaz and electricity undertakings, there is a risk that MEI may be biased when exercising its policy-making functions.

At the hearing of 11 July 2017, MEI explained once again its internal restructuring,<sup>82</sup> noting that it has separate structural units dealing with its different fields of competence, *i.e.* administrative powers (such as natural gas policy-making in relations with Albgaz as the TSO) and shareholding rights (in relations with Albpetrol and other production/supply undertakings) in particular, with different directors subordinated to MEI's Secretary-General. As already explained in the Opinion 1/17 on the certification of OST, the Secretariat considers that sufficient under the condition that the Compliance Programme to be implemented by Albgaz also covers monitoring of the separation of competences within MEI.<sup>83</sup>

#### *d. Vertical relations between natural gas and electricity markets*

The Secretariat reiterates that Article 9(3) of the Gas Directive requires that ownership unbundling applies also across the natural gas and electricity markets,<sup>84</sup> thereby prohibiting joint influence over

<sup>80</sup> Secretariat's Opinion 1/17 of 23 January 2017 on certification of OST.

<sup>81</sup> ERE Board Decision No 77 of 26 May 2017 "On approval of the Compliance Programme of the natural gas transmission system operator".

<sup>82</sup> Secretariat's Opinion 1/17 23 of January 2017 on certification of OST.

<sup>83</sup> See respective competence of the Compliance Officer under Paragraphs 60 and 69 of the TSO's Compliance Programme adopted by ERE Board Decision No 77 of 26 May 2017.

<sup>84</sup> Commission's Opinion on certification of *Elering AS*, C(2016) 8255, 02.12.2016.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

an electricity generator or supplier and natural gas TSO, or a natural gas producer or supplier and electricity TSO. Compliance with this provision has not been assessed in the Preliminary Decision. It matters for Albgaz’s certification as the state fully owns OSHEE, an undertaking engaged in distribution and supply of electricity, and KESH, an electricity generator and trader.

Considering ERE’s Final Decision on certification of OST,<sup>85</sup> and in particular noting that MZHETTS, Albgaz’s shareholder, exercises the state’s corporate rights over the electricity TSO (OST), whereas MEI, Albpetro’s shareholder, over OSHEE and KESH, the Secretariat considers that separation sufficient to prove the principle absence of vertical relations between natural gas and electricity markets within the context of the present certification procedure. This shall be without prejudice to the Secretariat’s above-indicated non-compliance caused by the same person being appointed as a supervisory board member in Albgaz and OSHEE, and the need to undertake respective remedying measures.

The Secretariat invites ERE to elaborate in its Final Decision on the application of the unbundling rules across natural gas and electricity sectors and their implementation in Albania.<sup>86</sup>

### III. Conclusions

Against this background, the Secretariat supports certification of Albgaz in line with the Preliminary Decision, subject to the following remarks. The Secretariat requests that ERE:

- a) *before issuing the Final Decision, ensures that the natural gas transmission tariff methodology is adopted, and tariffs for Albgaz’s services (for all potential system users) are set;*
- b) *includes in the Final Decision the duty on Albgaz to report on monthly basis to ERE on the ongoing procedure for registration of transmission assets, and to conclude the procedure within six months following the adoption of the Final Decision;*
- c) *includes in the Final Decision the duty of Albgaz and/or MZHETTS to replace MEI’s representatives in the company’s supervisory board with members not employed with MEI or the energy production and/or supply undertakings controlled by it not later than in one month following the adoption of the Final Decision;*
- d) *includes in its Final Decision the requirement for the adoption and entry into force of necessary amendments to Article 11 of the Gas Sector Law as a condition subsequent within a reasonable transitional period in order for the certification to remain valid;*
- e) *includes in its Final Decision the requirement for the full transfer of tasks related to Albgaz to its sole shareholder, MZHETTS, and, for this purpose, the requirement for the adoption and entry into force of the necessary amendments to the Gas Sector Law and*

<sup>85</sup> ERE Board Decision No 43 of 15 March 2017.

<sup>86</sup> Similarly, the Commission – even though aware that separation between ministries has been ensured in Romania - it nonetheless invited ANRE to provide such assessment in its final decision. See: Commission’s Opinion on certification of *Transelectrica D.A.*, C(2015) 7053 final, 12.10.2015.

**Energy Community Secretariat**

Am Hof 4, Level 5, 1010 Vienna, Austria

<b>Phone</b>	+43 (0)1 535 2222
<b>Email</b>	contact@energy-community.org
<b>Web</b>	www.energy-community.org

- to Council of Ministers Decisions No 833 and 835 as a condition subsequent within a reasonable transitional period in order for the certification to remain valid;*
- f) *elaborates in its Final Decision on the application of the unbundling rules across natural gas and electricity sectors and their implementation in Albania.*

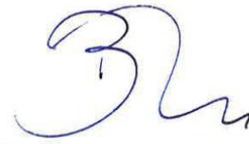
Pursuant to Article 3 of the Gas Regulation, ERE shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of Albgaz. ERE shall also communicate its final decision to the Secretariat and publish its decision together with the Secretariat's Opinion.

The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. ERE is invited to inform the Secretariat within five working days following receipt whether and why it considers that this document contains confidential information which it wishes to have deleted prior to such publication.

Vienna, 2 October 2017



Janez Kopač  
Director



Dirk Buschle  
Deputy Director/Legal Counsel