

Opinion 3/17

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – Serbia – Certification of EMS

On 15 February 2017, the Energy Agency of the Republic of Serbia (hereinafter “AERS”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision on the certification of the Joint Stock Company *Elektromreza Srbije* (hereinafter “EMS”), the transmission system operator (hereinafter “TSO”) for electricity in Serbia (hereinafter “the Preliminary Decision”). The Preliminary Decision was adopted on 26 January 2016¹ based on Articles 39(1) and 49(3) in connection with Articles 101(1) and 102 of the Energy Law,² as well as Article 24 of the Rulebook on Energy License and Certification³ and Article 12 of the Statute of the AERS.⁴

Pursuant to Article 10 of Directive 2009/72/EC⁵ (hereinafter “the Electricity Directive”) and Article 3 of Regulation (EC) No 714/2009⁶ (hereinafter “the Electricity Regulation”) the Secretariat is required to examine the notified Preliminary Decision and deliver its Opinion to AERS as to the compatibility of such a decision with Article 10(2) and Article 9 of the Electricity Directive.

On 22 May 2017 a hearing with relevant stakeholders took place at the premises of the Secretariat in Vienna. On 31 May 2017, the Secretariat addressed AERS with a request for submission of additional documents, based on Article 10(7) of the Electricity Directive and Article 3(3) of the Electricity Regulation. AERS submitted most of the requested documents.

On 8 June 2017, the Secretariat received an Opinion on the Preliminary Decision by the Energy Community Regulatory Board (hereinafter “ECRB”), as requested pursuant to Article 3(1) of the Electricity Regulation.

¹ AERS Decision, No. 312-3/2016-C-I, adopted on 26.01.2017.

² Energy Law, adopted on 29.12.2014, Official Journal of the RS, No.145/2014.

³ Minister of Mining and Energy, Rulebook on Energy License and Certification No.10-00-00010/2015-04, 9.10.2015, Official Journal of the RS, No.87/15.

⁴ AERS Statute, Official Journal of the RS, No.52/05.

⁵ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

⁶ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

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I. The applicant - EMS

Today, EMS is the only TSO for electricity in Serbia. It was created by merging the entity *Elektroistok*, established by a decision of the Executive Council of the People's Republic of Serbia on 28 June 1958,⁷ with the System Operation Division from the public enterprise *Elektroprivreda Srbije* (hereinafter "EPS") pursuant to the Energy Law of 2004.⁸ EMS started operating as a public enterprise on 1 July 2005.⁹ By the Government's decision of 27 October 2016,¹⁰ EMS was transformed into a joint stock company,¹¹ EMS JSC Belgrade. The founder and only shareholder of EMS is the Republic of Serbia. The shareholding rights are exercised by the Government.

In 2006, EMS had been licensed¹² to perform electricity transmission¹³ and electricity transmission system operation.¹⁴ The license was valid for ten years and expired on 7 September 2016.¹⁵ On 23 December 2016, the Government of Serbia made a "conclusion" mandating EMS to continue performing the general interest activities electricity transmission and transmission system operation until new licenses are issued after the certification.¹⁶ At the hearing, it was explained that since the expiry of EMS licenses in September 2016, EMS indeed performs and operates transmission system activities based on the conclusion of the Government.

EMS is a member of ENTSO-E.¹⁷

II. Description of the notified Preliminary Decision

In December 2014, the Republic of Serbia adopted a new Energy Law to transpose the Third Energy Package. The Law includes provisions on unbundling and certification. Article 100 of the Energy Law requires unbundling of the electricity TSOs according to the ownership unbundling model.¹⁸

⁷ Decision No.379, 28.06.1958.

⁸ Article 171(2) Energy Law of 2004, Official Journal 84/04.

⁹ Government of Republic of Serbia, Decision No.023-297/2005-1, 27.01.2005.

¹⁰ Government of Republic of Serbia, Decision No.023-10172/2016, 27.10.2016.

¹¹ Serbian Business Registry Agency, Decision No. BD-88869/2016 of 08.11.2016. The modification of the legal form of the undertaking EMS was done by act No. 312-3/2016-C-I of 18.11.2016.

¹² License No. 0106/13-LE-PSU of 07.09.2006, valid for 10 years.

¹³ AERS Decision No. 312-277/2006-fl-I of 07.09.2006.

¹⁴ AERS Decision No. 312-278/2006-fl-I of 07.09.2006.

¹⁵ See: https://www.aers.rs/Index.asp?l=1&a=535&ed=3&id_ed=47&sid=1&tp=Zanpra (04.06.2017).

¹⁶ Government of Republic of Serbia, Conclusion 05 No. 312-12308/2016-1 of 23.12.2016.

¹⁷ See: <https://www.entsoe.eu/about-entso-e/inside-entso-e/member-companies/Pages/default.aspx> (04.06.2017).

¹⁸ Article 98 of the Energy Law.

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On 25 October 2016, *EMS* submitted an application for certification to AERS. After the change of the legal form as a consequence of the transformation from a public enterprise to a joint stock company, AERS invited the applicant to submit additional documentation.¹⁹

On 26 January 2017, AERS adopted the Preliminary Decision subject to the Secretariat's review in the present Opinion.

In its operative part, the Preliminary Decision certifies *EMS* under the ownership unbundling model. Moreover, the operative part of the Preliminary Decision requires *EMS*, within twelve months from the adoption of the final decision on certification, to

- *"take all necessary actions with authorised bodies of the Republic of Serbia in order to harmonise ruling regulations of the Republic of Serbia so as to comply with conditions concerning the independence of the transmission system operator;*

- *take all necessary activities with authorised bodies of the Republic of Serbia in order to register ownership rights over facilities which constitute the electricity transmission system or submit other proofs of its rights over them in line with the law."*

EMS is requested to inform AERS on the actions taken to comply with these conditions every three months. In case of non-compliance, the Preliminary Decision envisages that

"... the Energy Agency of the Republic of Serbia will launch a new certification procedure in order to re-evaluate the conditions for certification and adopt a decision on the withdrawal of the certificate referred to in item 1 hereof. "

III. Assessment of the Preliminary Decision

1. General

As the Secretariat has pointed out in previous Opinions²⁰ 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, 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 of Article 9 of the Electricity Directive, which the Republic of Serbia transposed by its Energy Law of 2014. In a market environment still prevailing in many Contracting Parties including Serbia, where energy activities are predominantly performed by public undertakings and are characterized by dominant positions on their respective

¹⁹ AERS Preliminary Decision, p.3.

²⁰ Secretariat Opinion1/16 of 3 February 2016 *TAP AG*; Secretariat Opinion1/17 of 23 January 2017 *OST*.

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markets, the separation of control and the prevention of conflicts of interest is of particular importance.

For cases where the state as 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,²¹ Article 9(6) of the Electricity Directive offers an ownership unbundling variant as an alternative to restructuring and privatization. Unlike in ownership unbundling cases under Article 9(1) of the Electricity 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 differentiates these situations from other cases of ownership unbundling and matter for the assessment. When relying on Article 9(6) of the Electricity Directive, as transposed into national law (*in casu* Articles 98-99 of the Energy Law), full achievement of the objective of Article 9(1) of the Electricity Directive needs to be ensured by the national regulatory authority proactively.

The Secretariat reviewed AERS's Preliminary Decision against that background.

2. Application of the ownership unbundling provisions to EMS

When assessing the compliance of the Preliminary Decision with the unbundling model enshrined in the Electricity Directive, the Secretariat outlined in its previous Opinions²² that the following aspects matter in particular:

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

a. Ownership of the electricity transmission system

Article 9(1)(a) of Directive 2009/72/EC 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 assets, i.e. the transmission system. Only in exceptional cases the European Commission has accepted that where the TSO does not own the

²¹ See, for instance, Commission's Opinions on certification of *Vorarlberger Übertragungsnetze (VÜN)* C(2012) 2244 final of 29.3.2012, at p. 4; on certification of *Augstsprieguma tržki* C(2012) 9108 final of 3.12.2012, at p. 2.

²² Secretariat Opinion 1/17 of 23 January 2017 OST.

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transmission system, the rights to manage the system were provided to the TSO through arrangements such as lease or concession agreements.²³

In the case of *EMS*, Article 409 of the Energy Law of 2014 establishes the ownership of *EMS* over the power network which hitherto was owned by the Republic of Serbia. Within two years from the entry into force of the Law, the TSO and the system users shall conclude an agreement on transfer of ownership rights on the transmission facilities owned by these system users.²⁴ The TSO shall also acquire ownership over the facilities it has constructed with its own funds or acquired in other legal transactions until the Law entered into force.²⁵ Articles 410 and 411 of the Energy Law stipulate the procedure for registration of ownership rights over the transmission assets.

It follows from the Preliminary Decision and the accompanying documentation that *EMS* failed to submit adequate evidence for the establishment of ownership rights and other rights over all transmission assets (as listed in the Preliminary Decision),²⁶ namely excerpts from real estate registry (cataster). *EMS*, which is to own the electricity network pursuant to Article 409(1) of the Energy Law, has evidently still not been registered as an owner of all transmission assets in the public real estate register.

However, according to the information provided at the hearing of 22 May 2017 and the documentation submitted upon Secretariat's request after the hearing,²⁷ *EMS* has submitted applications for the registration of its ownership rights over the remaining facilities within the deadline prescribed in the Law. The decision of the relevant cadaster authorities is still pending. At the hearing, *EMS* explained that the delays are out of its own sphere of influence and have to do rather with lack of software at the cadaster authorities etc. The Secretariat concurs with the ECRB²⁸ that in a situation such as in the case at hand, 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. This is even more so as Article 409 of the Energy Law establishes ownership of *EMS* over transmission assets as a matter of principle. Moreover, the Secretariat agrees with AERS that in this respect, the duty on *EMS* to inform the regulatory authority on the ongoing procedure for registration of transmission assets every three months, and to conclude the procedure within twelve months upon certification is suitable for the purpose to establish *EMS*' formal ownership over the assets.

²³ See: Commission's Opinion on certification of *REN Rede Electrica Nacional S.A.* and *REN Gasodutos S.A.*, C(2014) 3255 final, 12.05.2014 and Commission's Opinion on certification of *Transelectrica D.A.*, C(2015) 7053 final, 12.10.2015.

²⁴ Article 409(2) Energy Law of 2014.

²⁵ Article 409(3) Energy Law of 2014.

²⁶ AERS Preliminary Decision, pp.9-10

²⁷ AERS submitted a table with the ownership status of all transmission assets. EMS Report submitted to AERS on the activities undertaken to effect compliance with the condition no.2 from the Preliminary Decision, No. 312-3/2016-C-I, 19.05.2017.

²⁸ ECRB opinion, para.19.

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b. The applicant undertaking performs core tasks as operator of the transmission system

Article 9(1)(a) of the Electricity Directive requires 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 Electricity Directive. It follows from this definition that the key elements for an undertaking to be considered a transmission system operator are the operation, the maintenance and the development of a transmission network.²⁹

A regulatory authority’s assessment in this respect needs to establish in particular whether a given undertaking is by law and in fact actually performing these core tasks, and whether it disposes of the necessary (human, technical, financial) resources for this.³⁰

AERS failed to analyse compliance with this requirement in its Preliminary Decision. Instead, AERS refers to the licenses issued to *EMS*, as well as to the Government’s “conclusion” that *EMS* shall continue performing the activities of a TSO until new licenses are issued after certification.³¹

Based on its own long-standing experience and cooperation with *EMS*, the Secretariat has no doubts that *EMS* satisfies the criteria for performing the tasks of a transmission system operator in practice. The question whether *EMS* may also lawfully exercise these activities in the absence of a valid license (and whether “conclusions” of a Government can replace such a license) is not relevant in this context, as the license depends on the certification which is subject to the present Opinion. Without being unbundled and certified in line with the Electricity Directive, *EMS* cannot obtain a license and lawfully operate under Serbian and European energy law. Hence the possession of a valid license cannot be made a precondition for the certification.

c. Separation of control over transmission from electricity generation/supply

The Preliminary Decision assesses *EMS*’s compliance with the ownership unbundling model against Articles 98 and 99 of the Energy Law, the provisions transposing Article 9(1) and (6) of the Electricity Directive respectively. 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 Electricity 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 Regulation³² and includes the rights enumerated in Article 9(1)(b), (c) and (d) and (2) of the Electricity Directive, including the power to exercise voting rights, the holding of majority share and the power to appoint members of the TSO’s corporate bodies and those legally representing the TSO.³³

²⁹ Secretariat Opinion1/16 of 3 February 2016, *TAP AG*.

³⁰ Commission’s Opinion on certification of *VÜN C(2012) 2244* final of 29.3.2012.

³¹ *Supra*.

³² Council Regulation (EC) No 139/2004 of 20 January 2004 on the, Official Journal L 24, 29.01.2004, p. 1-22.

³³ Article 9(2) of Directive 2009/72/EC and Article 54(4) of the Power Sector Law.

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In its first Opinion delivered on Article 9(6) of the Electricity Directive,³⁴ the Secretariat elaborated on the test for assessments of compliance with that provision, focusing on the objective of that provision, namely to ensure an effective separation of control between the two public bodies in question capable of potential and actual conflicts of interest within the State structures controlling different energy activities. In the certification procedure giving rise to that Opinion – the unbundling of the TSO of Albania – however, two separate public bodies (the Ministry of Economy, on the one hand, and the Ministry of Energy, on the other hand) had been designated to control, respectively, transmission system operation and generation/supply activities. Such designation constitutes the first and indispensable requirement for compliance with Article 9(6) of the Electricity Directive. As the Secretariat stated in the *OST* Opinion, “*the public or private body controlling it [the transmission system operator] may in principle not be engaged in electricity generation and supply activities.*”³⁵ This requirement has not been complied with in the context of the present proceedings.

The Preliminary Decision itself provides an overview only of the modalities of the ownership and representation of the state bodies in *EMS* as well as in the electricity generation and supply company *EPS*, without assessing compliance with the requirement of independence of the TSO prescribed by Articles 98 and 99 of the Energy Law and the respective provisions of the Electricity Directive in detail. AERS concludes that no evidence has been submitted for compliance with Article 98 of the Energy Law as one public body, the Government exercises control over both the transmission system operator (*EMS*) and an energy entity performing electricity production and supply (*EPS*).³⁶ AERS further acknowledges that compliance with the requirements of the ownership unbundling model necessitates amendments to the legal framework of Serbia, including potentially the Law on Government, the Law on Ministries and the Law on Energy.

The Secretariat agrees with that conclusion.

The applicant, *EMS*, is a joint stock company. The founder and only shareholder of the undertaking is the Republic of Serbia and the owner's rights are exercised by the Government. The company's corporate governance bodies are the Assembly (of shareholders) and the Board of Directors with a General Manager as chief executive officer. The Assembly, inter alia, decides on investments and loans. The General Manager chairs the Board of Directors and appoints its six executive members. Both the representatives in the Assembly (Assembly Chair and its five members) as well as the General Manager are appointed by the Government.³⁷ The Government thus directly and fully controls *EMS* within the meaning of Article 9(1) of the Electricity Directive,

³⁴ Secretariat Opinion1/17 of 23 January 2017 *OST*.

³⁵ See: Commission's Opinion on certification of *National Grid*, C(2012)2735, 19.04.2012, p.4 or Italy and Spain, see: Commission's Opinion, certification of *Societa Gasdotti Italia S.p.A.*, C(2013) 380 final, 23.01.2013, p.2) Commission's Opinion on certification of *REN Rede Electrica Nacional S.A.* and *REN Gasodutos S.A.*, C(2014) 3255 final, 12.05.2014).

³⁶ AERS Preliminary Decision, p. 7-8.

³⁷ Statute of *EMS* and Amendments to the Memorandum of Association of the Public Enterprise *EMS*, Official Gazette No 88/16.

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The Government also owns and directly and fully controls the public enterprise *EPS*. *EPS* is the dominant electricity supply³⁸ and generation³⁹ undertaking in Serbia. The corporate governance bodies of *EPS* include the Supervisory Board and the Executive Manager. The Government appoints the members of the Supervisory Board (Chairman and its four members) as well as the General Manager.⁴⁰ Through its control over *EPS*, the Government is thus engaged and exercises control in the production of electricity as well as in its purchase and sale. Given the share of *EPS* in these markets in Serbia, the activities are not “truly incidental to the core activity of an undertaking ... , and the quantity of energy is also insignificant”.⁴¹

Hence, for both state-owned undertakings (*EMS* and *EPS*) the Government is the only public body that exercises the rights of the owner, including voting rights and the rights to appoint the members of the management bodies representing them. As the Ministry of Mining and Energy explained at the hearing, the Government is the only public body adopting legally binding decisions in relation to the activities of *EMS* (and the other state-owned energy undertakings) when so required by the undertakings’ corporate structure and the law. The Government and only the Government is the legal person which “represents the Republic of Serbia and it exercise the rights and obligations which the Republic of Serbia has as the founder of public enterprises”.⁴² The role of Ministries is limited to preparing drafts for Governmental decisions, and providing opinions on such drafts prepared by other Ministries.

Thus, separation of control within the State in line with Article 9(6) read in conjunction with Article 9(1)(b) and (c) of the Electricity Directive has not taken place even in its most basic requirement, the designation of two public bodies. The formal separation of competences between public bodies constitutes a *sine qua non* for unbundling of a state-owned TSO.⁴³ In the Secretariat’s view, *EMS* cannot be certified as compliant with the Electricity Directive’s provisions on ownership unbundling for this reason alone.

At the hearing, it further became clear that besides exercising its shareholder rights through representatives in both companies’ corporate structures, the Government’s approval is also needed for certain decisions adopted by the assembly of *EMS*, as well as of those adopted by the Supervisory Board of *EPS*. The areas concerned include annual working plans, dividends distributed to the state budget, and acquisitions. Moreover, investment decisions and decisions concerning loans above 1.000.000 EUR require Government approval. The Government is thus not

³⁸ License No. 0171/15-LE-CH од 23.12.2015 , issued by AERS Decision No. 312-137/2015-L-I of 23.12.2015, valid for 10 years.

³⁹ License No. 0171/15-LE-CH of 23.12.2015, issued by AERS Decision No 312-119/2016-L-I of 10.02.2017, valid for 30 years.

⁴⁰ See: Company profile available at: http://www.eps.rs/Eng/Documents/CompanyProfileEPS_EN_20170210_fin%20e.pdf (04.06.2017).

⁴¹ Commission’s Opinion on certification of *Thanet*, C(2013) 2566 final of 26.4.2013.

⁴² Article 4 of Law on the Government “Official Journal of the Republic of Serbia” No. 55/2005, 71/2005, 101/2007, 65/2008, 16/2011, 68/2012 - decision of the Constitutional Court, 72/2012, 7/2014 - decision of the Constitutional Court and 44/2014.

⁴³ Secretariat Opinion 1/17 of 23 January 2017 OST.

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only formally the sole body exercising control over the State's activities in the transmission, generation and supply of electricity. Its involvement both as a sole shareholder and in exercising public functions gives also rise to concerns about concrete conflicts of interests.

Without any separation in control over *EMS* and *EPS* in place, one of the main objectives of the Electricity Directive's unbundling provisions, the elimination of an interest by the TSO in discriminating in favour of its related supply and generation companies, is likely to be frustrated. This risk is pertinent in particular as regards *EMS'* authority over the allocation of transmission capacity and congestion management on interconnectors as *EMS* is still not participating in a regionally coordinated mechanism for the allocation of cross-border capacities.⁴⁴

d. Relations between electricity and natural gas companies

Article 9(3) of the Electricity Directive requires that ownership unbundling is also implemented across the natural gas and electricity markets,⁴⁵ thereby prohibiting joint influence over an electricity generator or supplier and a 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.

In this respect, the Secretariat notes that the State fully owns and controls *Srbijagas*, a vertically integrated undertaking active in natural gas transmission,⁴⁶ distribution⁴⁷ and supply.⁴⁸ *Srbijagas* is one of two companies active on the wholesale market for natural gas and dominates the market for retail gas supply. Moreover *Srbijagas* through a subsidiary is one of two gas transmission system companies in the country and holds a 25% share in the other one, *Yugorosgaz Transport*.⁴⁹ In 2014, the Ministerial Council decided that Serbia violated the unbundling provisions of Directive 2003/55/EC.⁵⁰ The breach has not been rectified since. In this situation, the fact that the Government is the only public body (also) exercising control over both *Srbijagas* and *EMS* cannot be reconciled with the Electricity Directive's provisions on ownership unbundling.

⁴⁴ Subject to infringement case ECS-6/11 in which on 19 May 2017, the Secretariat submitted a Reasoned Request to the Ministerial Council seeking a decision that Serbia failed to comply with the Energy Community's rules requiring the state-owned electricity transmission system operator to participate in a common coordinated congestion management method and procedure for the allocation of capacity.

⁴⁵ Commission's Opinion on certification of *Elering AS*, C(2016) 8255, 02.12.2016.

⁴⁶ License No 0146/13-LG-TSU issued on 31.10.2006 for 10 years (transmission activities are further carried out by *Srbijagas* pursuant to Article 421 of the Energy Law of 29 December 2014). *Srbijagas* operates 95% of the gas transmission network in Serbia.

⁴⁷ AERS Decision No 311.01-40/2006-LI issued on 31.10.2006 for 10 years (*Srbijagas* continues carrying out distribution activities even if the license has formally expired). 19 licensed distribution system operators are active on the Serbian market.

⁴⁸ License No 0275/16-LG-SN issued on 29.09.2016 for 10 years.

⁴⁹ Subject to the Secretariat's Opinion 2/17 of 22 April 2017.

⁵⁰ Decision 2014/03/MC-EnC on failure by the Republic of Serbia to comply with EnC Treaty in Case ECS-9/13 of 23 September 2014.

3. Conclusion of AERS in the Preliminary Decision

Although AERS rightly finds that the requirement of independence of *EMS* is not met, the Preliminary Decision nevertheless certifies *EMS* as a TSO unbundled in compliance with the provisions of the Serbian Energy Law corresponding to Article 9 and 9(6) of the Electricity Directive in particular. Under point 1 of the Preliminary Decision, AERS issues a certification to *EMS* and under point 2, it obliges *EMS* to take specific actions within 12 months. In particular, AERS obliges *EMS* to:

- *“take all necessary actions with authorised bodies of the Republic of Serbia in order to harmonise ruling regulations of the Republic of Serbia so as to comply with conditions concerning the independence of the transmission system operator;*

....”

The Secretariat considers these requirements not suitable or appropriate to remedy the lack of compliance with the ownership unbundling model. It concurs with the ECRB in this respect, which *“fails to see the suitability of imposing condition on EMS JSC that are not in the company’s sphere of competence”*.

Indeed, the requirements are too broad, unclear and vague as to what *EMS* is concretely obliged to do and can do. It is unclear already whether *EMS* is merely under an obligation to act or is obliged to reach a specific result. It is also not clear how *EMS* can influence, let alone adopt amendments to Serbian legislation. In this respect, the Secretariat notes that AERS itself found that *“amendment of those regulations does not depend on the applicant and is not in its jurisdiction, but it depends on and is strictly in the jurisdiction of relevant state bodies”*.⁵¹ Moreover, the effect of the requirements is also highly questionable bearing in mind that *EMS* asserts to have already submitted – without any result – several initiatives to the Serbian Government and to the ministries responsible for economy, public administration as well as the Secretariat for Legislation asking for amendments to primary and secondary legislation necessary to separate control between two public bodies in line with the unbundling rules.⁵² As a matter of fact, both the Ministry of Energy and Mining,⁵³ and *EMS*⁵⁴ have called for amendments of primary legislation in order to ensure separation of the public bodies representing State ownership in the TSO and the generation/supply undertakings. However, such amendments have neither been drafted nor adopted.

⁵¹ AERS, Preliminary Decision, p.8

⁵² Three letters submitted by EMS to Government and several ministries, *supra*.

⁵³ Report submitted to the Government as a background for adoption of Government’s Conclusion of 23.12.2016.

⁵⁴ Three letters have been submitted by *EMS* requesting changes in the primary legislation in order to ensure compliance with the unbundling requirements pursuant to the ownership unbundling model, and separation of public bodies in particular. See: EMS Letter to the President of the Government of Republic of Serbia, No.5355, 20.04.2014; EMS Letter to the Ministry of Mining and Energy, Ministry of Public Administration and Local Self-governemnt, Ministry of Economy and Republic Secretariat for Legislation, No.2314, 23.02.2017; EMS Letter to the Ministry of Mining and Energy, Ministry of Economy, Ministry of Public Administration and Local Self-governemnt, Republic Secretariat for Legislation and AERS, No. 900-00-OPP-75/2017-001, 25.04.2017.

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Moreover, the requirements do not constitute actual conditions for *EMS*' certification. The Preliminary Decision envisages that a certification is issued immediately and not only after the compliance with the requirements added. The consequence in case of non-compliance with the requirement at the end of the 12-month deadline set is that AERS will launch a new certification procedure and re-evaluate the conditions for certification and potentially adopt a decision on the withdrawal of the certificate. At the hearing, AERS explained that in case of non-compliance with the Preliminary Decision within 12 months, the certificate of *EMS* may be withdrawn in accordance with Article 242 of the Energy.

The Secretariat notes that AERS followed the same approach already in its Preliminary Decision on the certification of the gas TSO *Yugorosgaz Transport*.⁵⁵ In its Opinion, the Secretariat found that launching a new certification procedure is possible already under Article 10(4) of the Electricity Directive and does not add value in the context of the present procedure. The same applies here.

In practice, this arrangement would mean that *EMS* is certified without meeting the requirements necessary for compliance with the provisions of the ownership unbundling model and thus in breach of Energy Community law. In this situation, the Secretariat agrees with the ECRB that “a certification should not be issued for *EMS JSC* as long as this requirement is not fulfilled”.

Finally, AERS explained that, should it deny the certification, *EMS* cannot be issued a license to operate as a TSO on account of Article 100 of the Energy Law, and that no other entity in Serbia has the capability to take over the transmission network operation. Therefore, AERS decided to issue a positive certification despite the conditions for unbundling are not fulfilled.

As in its Opinion in *Yugorosgaz Transport*, the Secretariat considers justification of a breach of Energy Community law by the intention to legalize the TSO's operation under national law as not appropriate. Issuing a license to *EMS* would de facto perpetuate a breach of one of the most fundamental requirements for TSO under European law, unbundling. It would also make the requirement of unbundling as a precondition for license in Serbian law redundant and reduce the certification procedure to a mere rubber-stamping exercise. This would be at odds with the rule of law as a fundamental principle of the Energy Community. That is even more so as the main reason why *EMS* is not unbundled is the failure of the competent state authorities, most notably the Government, to initiate and complete the necessary amendments to Serbian law.

Finally, the Secretariat notes that *EMS* is currently operating on the basis of a “conclusion” by the Government without any objection or intervention by AERS, nor any threats to security of supply. This seems to be in line with Article 407 of the Energy Law, according to which a TSO with a license pre-dating the entry into force of the Law shall continue performing its activities until the completion of the certification procedure.⁵⁶ In the Secretariat's view, certification cannot be granted

⁵⁵ Secretariat's Opinion 2/17 of 22 April 2017.

⁵⁶ The deadline for completion of the procedure, i.e. end of December 2016, has already passed.

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under the given conditions, and a new procedure should be initiated following rejection of the current one and proper unbundling of *EMS*. The Secretariat offers its assistance in that process.

IV. Conclusions

Based on the information displayed in the Preliminary Decision and all other information obtained in the course of the present proceeding, the Secretariat concludes that *EMS* is currently not unbundled in line with the ownership unbundling model as required by Article 9 of the Electricity Directive. Most notably, *EMS* is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity (the Government as representative of state ownership in both *EMS* and *EPS*, as well as in *Srbijagas*).

The Secretariat concurs with ECRB,⁵⁷ that *EMS* can currently not be certified as envisaged by the Preliminary Decision.

Pursuant to Article 3 of the Electricity Regulation, AERS shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *EMS*. AERS 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. AERS 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, 15 June 2017



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⁵⁷ ECRB opinion, para.32.