

OPINION 02/2016 OF THE ENERGY COMMUNITY REGULATORY BOARD

**on the Decision of the Albanian Regulatory Authority, ERE, no. 165 of 6 October 2016 on the preliminary certification of the Electricity Transmission System Operator**

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THE ENERGY COMMUNITY REGULATORY BOARD

Having regard to the Treaty Establishing the Energy Community and in particular Articles 5 and 11 thereof;

Having regard to Article 3(1) of Regulation (EC) 714/2009 ('Electricity Regulation') in conjunction with Articles 9(6) and 10(1) of Directive 72/2009/EC ('Electricity Directive')<sup>1</sup> according to which the Energy Community Regulatory Board (ECRB) is supposed to issue an Opinion on draft decisions of Contracting Parties' national regulatory authorities on certification of national transmission system operators upon consultation by the Energy Community Secretariat ('Secretariat');

Acting in accordance with Article 60 of the Energy Community Treaty and the procedures laid down in Procedural Act no 01.1/2015/ECRB-EnC<sup>2</sup>;

CONSIDERING THAT:

**1. Background**

- (1) *Operatori i Sistemit te Transmetimit* sh.a. (OST<sup>3</sup>; 'the Transmission System Operator'; TSO) is a 100% State owned company that owns and operates the electricity transmission grid in the Republic of Albania and is the exclusive holder of the electricity transmission license.
- (2) OST operates as joint stock company, registered as a legal entity by decision of the District Court of Tirana No. 31935 of 14 July 2004.
- (3) According to the decision of the Ministerial Council of the Republic of Albania<sup>4</sup> the State's shares in the Transmission System Operator are administrated by the Ministry of Economic Development, Tourism, Trade and Entrepreneurship (MZHETS).
- (4) The Albanian energy regulatory authority, ERE<sup>5</sup> ('the regulator'), is the competent national authority for certification of OST pursuant to the Albanian Power Sector Law (PSL)<sup>6</sup>.

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<sup>1</sup> Throughout the entire document reference to the Electricity Directive and Regulation shall mean the versions of the Energy Community *acquis communautaire* as applicable in the Energy Community pursuant to Ministerial Council Decision 2011/02/EnC-MC.

<sup>2</sup> PA/2015.01/ECRB-EnC on the procedures for issuing an opinion of the Energy Community Regulatory Board on the decision of a national regulatory authority for certification of a gas or electricity transmission operator.

<sup>3</sup> www.ost.al.

<sup>4</sup> Decision 317 of 27 April 2016, point 2.

<sup>5</sup> www.ere.gov.al.

<sup>6</sup> Law No 43/2015.

- (5) The regulator has analysed whether and to which extent the TSO complies with the ownership unbundling requirements as laid down in national legislation transposing the Electricity Directive 72/2009/EC and Electricity Regulation (EC) 714/2009.
- (6) According to Article 3(1) Electricity Regulation in combination with Article 10(1) Electricity Directive ECRB is supposed to issue an Opinion on preliminary certification decisions of Contracting Parties' national regulatory authorities on certification of national transmission system operators. Procedural Act no 01.1/2015/ECRB-EnC<sup>7</sup> defines related ECRB internal rules of procedure.

## 2. Procedure

- (7) On 13 July 2016 OST filed a request for certification with ERE based on Article 54 and 58 PSL. ERE considered the information material submitted together with the request compliant with the requirements of the certification rules issued by ERE<sup>8</sup>.
- (8) On 18 October 2016 ERE notified the Energy Community Secretariat ('Secretariat') its Decision no. 165 of 6 October 2016 "on the preliminary certification of "Transmission System Operator" Company' ('Preliminary Certification Decision`) in line with Article 10(5) Electricity Directive.
- (9) On 19 December 2016 the Secretariat forwarded the Preliminary Certification Decision to the ECRB President with the request for providing an ECRB Opinion pursuant to Article 3(1) Electricity Regulation.
- (10) The ECRB President on 24 October 2016 initiated ECRB consultation pursuant to Article 2 paragraphs (2) and (3) of Procedural Act no 01.1/2015/ECRB-EnC. ECRB examined the Preliminary Certification Decision in accordance with the procedures laid down in said Procedural Act and discussed the present Opinion at its 35<sup>th</sup> meeting on 6 December 2016.

## 3. Assessment

### 3.1. Relevant legal provisions

- (11) Directive 72/2009/EC and Regulation (EC) 714/2009 have been included in the Energy Community *acquis communautaire* by Decision 2011/02/EnC-MC<sup>9</sup> of the Energy Community Ministerial Council.
- (12) Articles 9, 10, 13 and 14 of Directive 72/2009/EC in conjunction with Article 3 of Regulation (EC) 714/2009 stipulate the rules for unbundling and certification of national electricity transmission system operators.
- (13) The legal acts referred to in paragraph (11) have been transposed into national legislation of the Republic of Albania in 2015 by adoption the PSL.
- (14) OST carries out the function of an electricity transmission system operator as defined by Articles 3(84) and 53-57 PSL.

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<sup>7</sup> [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/3836269/211BC9325656784BE053C92FA8C02695.PDF](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3836269/211BC9325656784BE053C92FA8C02695.PDF).

<sup>8</sup> Regulation on the certification of transmission system operator for electricity (ERE Decision No 154 of 11 December 2015; 'ERE Decision No 154').

<sup>9</sup> [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/1146182/0633975AB3B67B9CE053C92FA8C06338.PDF](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/1146182/0633975AB3B67B9CE053C92FA8C06338.PDF)

- (15) According to Article 58(1) PSL the Transmission System Operator has to be certified by ERE according to the rules defined by said Article in conjunction with Section II leg cit before being granted a transmission license by the regulator according to Article 54(2) PSL. OST has applied for certification in accordance with the ownership unbundling model.
- (16) In line with Article 9(1) of the Electricity Directive, Article 54 paragraphs (4) and (5) of the PSL define the applicable ownership unbundling requirements, namely ruling that the same entity shall not be entitled at the same time to:
- a) *exercise control directly or indirectly over a licensee performing any of the functions of electricity and natural gas generation or supply, and to exercise control or exercise any right over the Transmission System Operator or over the transmission network;*
  - b) *exercise control directly or indirectly over the Transmission System Operator or over the transmission network, and exercise control or exercise any right over an licensee performing any of the functions of electricity and natural gas generation or supply;*
  - c) *to appoint members of the supervisory council, the managing board or other bodies legally representing the Transmission System Operator or the transmission network, and directly or indirectly exercise control or any right over a licensee performing any of the functions of electricity and natural gas generation or supply;*
  - ç) *be a member of the supervisory council, the management board or other bodies representing the licensees with the licensees performing any of the functions of electricity or natural gas generation or supply, and that of the transmission system operator or transmission network.*
- (17) In line with Article 9(6) of the Electricity Directive, Article 54(6) of the PSL stipulates that:
- Where the person referred to in the above paragraph is a state-controlled public body, the two separate public bodies that exercise control, one over a transmission system operator or over a transmission network on the one hand, and the other over the licensee that performs any of the functions of generation or supply on the other, shall be deemed not to be the same person.*
- (18) Article 53(3) of the PLS requires the Council of Ministers of the Republic of Albania to:
- [...] appoint the public authority representing the state as owner of its the shares of the Transmission System Operator, which needs to be independent of any production or supply activity according to the provisions of Article 54 [of the PSL].*
- (19) The in paragraph (18) referred to decision was issued by the Council of Ministers of the Republic of Albania no. 317 on 27 April 2016 ('Decision No 317') according to which the Ministry of Economic Development, Tourism, Trade and Entrepreneurship (MZHETS) is the public authority representing the State's shares in OST whereas related responsibilities as regards the, also, 100% State owned electricity generation and supply companies, KESh<sup>10</sup> and OshEE<sup>11</sup>, are with the Ministry of Energy and Industry (MEI).
- (20) Article 102(1) lit (b) and (d) of the Constitution of the Republic of Albania of 28 November 1998 ('Constitution') rules that the Prime Minister "*outlines [...] the principle directions of State policy*" and "*coordinates and supervises the work of the members of the Council of Ministers*", the later

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<sup>10</sup> [www.kesh.al](http://www.kesh.al).

<sup>11</sup> [www.oshee.al](http://www.oshee.al).

consisting of the Prime Minister, Deputy Prime Minister and Ministers according to Article 95 of the Constitution. Article 102(4) of the Constitution empowers Ministers to autonomously direct actions under her/his responsibility “*within the principle directions of State policy*”. Similar autonomy is provided by Article 5(3) of the Albanian Law no 90/2012 “On the organisation and operation of the state administration”.

- (21) According to Decision No 317 as well as Article 1 of Law no 8/2016 “On transforming the state companies in entrepreneurs”, MZHETS is in charge of appointing the supervisory board of OST whereas MEI is for KESh and OshEE.
- (22) Article 8 of ERE Decision No 154 defines the requirements to be met by applicants for certification, namely, among others, as regards confidentiality of commercially sensitive information; necessary financial, technical, physical and human resources; development of a ten-year network development plan; ability to comply with the obligations of Regulation (EC) 714/2009 and the PSL; investment approval and/or financing subject to regulatory approval; and asset liability.
- (23) Law No 9901 “on traders and trading companies” defines the decision making competences of the Transmission System Operator’s General Assembly, i.e. MZHETS representing the owner, namely to approve:
- annual financial statements and the reports for the performance of the activity;
  - distribution of annual earnings;
  - increase or reduction of the registered capital;
  - division of the shares and their cancellation.

### 3.2. Assessment by ERE

- (24) In its Preliminary Certification Decision ERE considered the unbundling and certification requirements of the PSL as well as of ERE Decision No 154 in principle met but conditional to OST proving within twelve month following the entry into force of the final certification decision that:
- a. The company performing financial auditing of the Transmission System Operator is not the same company that is performing financial auditing of KESh and / or OshEE to be proven by confirmation of OST’s General Assembly, i.e. MZHETS.
  - b. Transfer of OST staff to KESh and / or OshEE is prohibited.
  - c. Draft rules to fulfill the financial and legal unbundling obligation according to the provision of article 57/2 of the PSL are provided by OST.
  - d. Preliminary measures are taken within OST to implement its legal obligations.

### 3.3. ECRB assessment

- (25) Based on the grounds provided in the Preliminary Certification Decision, **ECRB considers met** the requirements of:
- Article 9(1) lit (a) Electricity Directive;
  - Article 9(1) lit (c) in conjunction with Article 9(6) Electricity Directive;

- Article 9(1) lit (d) in conjunction with Article 9(6) Electricity Directive as regards the prohibition of the administrator of OST to enter into any activities related to generation, distribution or electricity supply; a member of the supervisory board of the Transmission System Operator to be at the same time appointed member of supervisory board of the generation and/or electricity supply company; as well as the safeguarded separation of the General Assembly of OST from those of the generation and electricity supply companies.
- (26) Within the ownership unbundling model, Article 9(6) Electricity Directive opens up the possibility for State control of transmission activities as well as generation, production and supply activities, provided that the respective activities are administrated by separate public entities. As elaborated in related opinions of the European Commission on draft certification decisions of EU regulators<sup>12</sup>, two separate public bodies can be seen as two distinct persons, provided that it can be proven that they are not under the common influence of another public entity and their true separation is enshrined in national legislation as well as *de facto* complied with.
- (27) The Preliminary Certification Decision *prima facie* provides evidence of a degree of separation of the activities of MZHETS and MEI: every Ministry has its own responsibilities in its own area of competence and has an independent power of decision in the areas for which it is responsible. In particular, one Ministry cannot give instructions to another Ministry, Ministers are both legally and politically responsible for their own Ministry and have an independent power of decision in their areas of competence.
- (28) However, **the Preliminary Certification Decision fails to demonstrate** that the autonomy of MZHETS and MEI is indeed meeting the requirements of Article 9(6) in conjunction with Article 9(1) lit (b) Electricity Directive. More specifically, it remains unclear from the Preliminary Certification Decision:
- a. to which extent the Prime Minister can influence or even repeal Ministerial decisions; and
  - b. to which extent MZHET, in performing the role of the General Assembly of OST, is independent in taking decisions on financial resources (budget) of the Transmission System Operator without being influenced or controlled by the Ministry of Finance or by any overarching public authority, taking into account the interests of the Republic of Albania as 100% shareholder of OST; or
  - c. to which extent the concerns raised in items (a) and (b) of this paragraph are alternatively addressed by a prohibition for MZHET to interfere in day-to-day operation of OST that would be able to, in return, mitigate the impact of potential influence making as referred to in items (a) and (b) of this paragraph; and
  - d. to which extent MZHET's independence in taking investment decisions as required by Article 8(2) lit (h) of ERE Decision No 154 is to be considered fully met, having in mind that Article 31(1) PSL attributes the competence of approving new interconnection lines to the Council of Ministers of the Republic of Albania.

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<sup>12</sup> Certification of the Danish transmission system operator for electricity and for gas, Energinet.dk; certification of the Czech transmission system operator for electricity, ČEPS; certification of the Austrian transmission system operator for electricity, Vorarlberger Übertragungsnetze; certification of the Slovak transmission system operator for electricity, SEPS. See also: Commission Staff Working Paper on the unbundling regime of 22.1.2010, chapter 2.2, p. 10.

- (29) Beyond that and as a principle observation, ECRB questions whether the **concept of separating administration of State owned assets** in transmission vs. generation and supply companies can *realiter* effectively comply with ownership unbundling requirements, even if appropriately ruled in national legislation and conceded by Article 9(6) of the Electricity Directive. In the view of ECRB such concept must be at least accompanied by strict compliance reporting and continuous regulatory monitoring.
- (30) Finally, ECRB further fails to comprehensively understand from the Preliminary Certification Decision the reasoning and justification for the conditions imposed by ERE to be met within a **period of one year as well as the consequences** of OST failing to meet the conditions in time and / or entirely. Without further explanation on the reasons for granting a one year implementation period, ECRB considers such duration *prima facie* too long.

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#### HAS ISSUED THE FOLLOWING OPINION

on the Decision of the Albanian Regulatory Authority, ERE, no. 165 of 6 October 2016 on the preliminary certification of the Electricity Transmission System Operator

- A. The certification Decision should be **amended** by an assessment of:
- which safeguards are in place to avoid that the two Ministries in charge of the transmission company on the one side (namely, the Ministry of Economic Development, Tourism, Trade and Entrepreneurship, MZHET) and the supply and generation companies on the other side (namely, the Ministry for Energy and Industry, MEI) can be made subject to influence or alteration of decisions by the Prime Minister of the Republic of Albania; and
  - which safeguards are in place to ensure that MZHET, in performing the role of the General Assembly of OST, is independent in taking decisions on financial resources (budget) of the Transmission System Operator without being influenced or controlled by the Ministry of Finance or by any overarching public authority; or
  - to which extent the concerns addressed in points (a) and (b) are addressed by a prohibition for MZHET to interfere in day-to-day operation of OST that would be able to, in return, mitigate the impact of potential influence making as referred to in points (a) and (b); and
  - to which extent MZHET's independence in taking investment decisions as required by Article 8(2) lit (h) of ERE Decision No 154 is to be considered fully met, having in mind that Article 31(1) PSL attributes the competence of approving new interconnection lines to the Council of Ministers of the Republic of Albania.
- B. The certification Decision should be **amended** by an assessment as regards why the twelve month period for OST to meet the conditions stipulated by the ERE certification Decision is valid and whether any shorter period can be met.
- C. The certification Decision should be **amended** by rules defining sanctions in case of incompliance of OST with the certification conditions.



- D. The certification Decision should be **amended** by requirements for OST to report to ERE as regards compliance with the certification conditions on annual basis and ERE to report accordingly to the Energy Community Secretariat.
- E. Reference to legal provisions applicable under the EU *acquis communautaire* should be **replaced** by reference to the relevant legal provisions applicable under the Energy Community *acquis communautaire* pursuant to Ministerial Council Decision 2011/02/MC-EnC by, e.g., inserting a clarifying footnote with the first quote of the Electricity Directive / Regulation<sup>13</sup>.
- F. It seems advisable to **verify** the legal references of point 2 under heading "For all the above mentioned ERE Board decided". Namely, Article 8 point 2 should presumably read Article 8 point 3, considering that grounds of the Decision only make references to Article 8 point 2 but do not discuss its point 3. Further to this, reference to letters (c) and (f) of said Article should deserve review, having in mind that in the grounds of the decision ERE considers the requirements of Article 8 point 2 litera (c) met and the safeguards required to be provided by the Transmission System Operator would also not be able to address shortcomings in relation to Article 8 point 2 letters (c) and (f). At the same time, the requirement to proof prohibition of transfer of OST staff to KESh and / or OshEE rather relates to 8 point 2 litera (o).

This Opinion will be published on the Energy Community website and submitted to the Energy Community Secretariat in line with Article 5 of Procedural Act 01.1/2015/ECRB-EnC. ECRB does not consider the information contained herein confidential. According to Article 4 paragraph (2) of Procedural Act 01.1/2015/ECRB-EnC, ERE is invited to inform the ECRB President within five (5) days following receipt whether it considers that, in accordance with rules on applicable rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to its publication, including reasons for such a request.

For the Energy Community Regulatory Board

A handwritten signature in black ink, appearing to read 'B. Prelević', is written over a horizontal line.

Branislav Prelević  
ECRB President

16 December 2016

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<sup>13</sup> Such as for example: "throughout the entire document reference to the Electricity Directive and Regulation shall mean the versions of the Energy Community *acquis communautaire* as applicable in the Energy Community pursuant to Ministerial Council Decision 2011/02/EnC-MC."