

OPINION 01/2018 OF THE ENERGY COMMUNITY REGULATORY BOARD

on the Decision of the Montenegrin Regulatory Authority, RAE, no. 17/1967-17 of 20 October 2017 on the preliminary certification of the Electricity Transmission System Operator *Cronogorski Elektroprenosni Sistem AD* (CGES)

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 and 10(1) of Directive 72/2009/EC ('Electricity Directive')¹ 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 (hereinafter 'the 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;²

CONSIDERING THAT:

1. Procedure

- (1) On 20 June 2017 *Cronogorski Elektroprenosni Sistem AD*³ (hereinafter: *CGES* or 'the transmission system operator'; TSO) submitted to the national energy regulatory of Montenegro (hereinafter: '*RAE*' or 'the regulator')⁴ an application for certification based on Articles 68(3) of the Montenegrin Energy Law (hereinafter 'the Energy Law').⁵
- (2) *RAE* analysed whether and to which extent the TSO complies with the ownership unbundling requirements laid down in Articles 136 of the Energy Law transposing Article 9 of the Electricity Directive.

¹ 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.

² 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.

³ www.cges.me.

⁴ www.regagen.co.me.

⁵ Official Gazette no.5/16 of 20.01.2016 and no. 51/17 of 03.08.2017.

- (3) On 20 October 2017⁶ RAE adopted a preliminary decision on the certification of CGES (hereinafter 'the Preliminary Decision')⁷ based on Articles 68(1) of the Energy Law in conjunction with the Rules on Certification of the Transmission System Operators.⁸
- (4) On 28 October 2017 RAE notified the Secretariat its Preliminary Decision based on Article 70(3) of the Energy Law.
- (5) On 1 November 2017 the Secretariat forwarded the Preliminary Decision to the ECRB President with the request for providing an ECRB Opinion pursuant to Article 3(1) Electricity Regulation. On the same day the ECRB President initiated ECRB consultation pursuant to Procedural Act no 01.1/2015/ECRB-EnC.
- (6) ECRB examined the Preliminary Decision in accordance with the procedures laid down in said Procedural Act by written procedure.
- (7) The present Opinion received the positive majority of votes required by Procedural Act no 01.1/2015/ECRB-EnC.

2. The Preliminary Certification Decision

2.1. The applicant

- (8) CGES is the only electricity transmission system operator in Montenegro. The company owns⁹ and operates the electricity transmission grid in Montenegro and holds a license for electricity transmission activities issued by RAE.¹⁰
- (9) CGES is registered as Joint Stock Company.¹¹ As of 31 December 2016 the company's shareholder structure is as follows: 55% State of Montenegro; 22.0889% *Terna Rete Elettrica Nazionale SpA (Terna)*;¹² 10.0141% *Elektromreža Srbije AD (EMS)*;¹³ 5.3407% other custodial accounts, funds or legal persons; 7.5563% natural persons.

2.2. Content

- (10) In December 2015 Montenegro adopted a new Energy Law.¹⁴ Article 136 *leg cit* transposes the provisions of Article 9 of the Electricity Directive defining ownership unbundling as the only applicable unbundling model for CGES.

⁶ I.e. in line with the deadlines foreseen in Article 70(1) of the Energy Law

⁷ RAE Decision no. 17/1967-16.

⁸ Official Gazette no.50/16 adopted by RAE Decision 16/2418-3 of 29.07.2016 based on Articles 43(4) point 4 of the Energy Law in conjunction with Art 13(1) of the statutes of RAE; the Decision entered into force in August 2016.

⁹ Cf chapter 3.1.

¹⁰ RAE registers of licensees no L-E-007. The license is valid until 29.07.2019. RAE issues licenses based on the licensing rules adopted in 2016 (Official Gazette no. 50/2016 of 03.08.2016) based on Article 43(4) point 4 of the Energy Law.

¹¹ Registration number with the Central Registry of Business Entities 4-0008972, ID number 02751372. According to the information provided in the Draft Decision, the Law on Business Organisation of Montenegro foresees that there is no legal or statutory opinion for third legal entities, save the shareholders themselves, to perform *de facto* and *de iure* control over the operation and performance of CGES.

¹² www.terna.it.

¹³ www.ems.rs.

¹⁴ The Law entered into force on the eighth day following its publishing in the Official Gazette of Montenegro no.5/16 of 20.01.2016.

- (11) Article 68(1) of the Energy Law defines RAE as competent body for certification of national transmission system operators. The same provision requires the possession of a valid license as precondition for certification. At the date of filing the certification application with the regulator, namely 20 June 2017, as well as at the date of the adoption of the Preliminary Decision by RAE, namely 20 October 2017, CGES held (and still holds) a valid license for electricity transmission activities with a validity date until 29 July 2019. Thus, the certification procedure initiated by RAE following the application of CGES is in line with the requirements of the Energy Law.
- (12) The Law on Cross-Border Exchange of Electricity and Gas (hereinafter 'the Cross-Border Law')¹⁵ envisages that cross-border transmission of electricity can only be carried out by a certified transmission system operator. CGES is responsible for cross-border transmission¹⁶ and, thus, is subject to the requirements of the Cross-Border Law.
- (13) In its Preliminary Decision RAE concluded that CGES complies with the ownership unbundling requirements of both the Energy Community law and the Energy Law and issued a positive certification decision without imposing conditions.

3. Assessment

3.1. Compliance with the unbundling requirements

- (14) Article 9 of the Electricity Directive lays down the requirements for ownership unbundling. The provisions are transposed by Articles 136 of the Energy Law.
- (15) Compliance with the ownership requirements calls for effective implementation of the following elements:
- The transmission operator must own the transmission system (Article 9(1) lit (a) Electricity Directive);
 - The transmission system operator needs to operate the transmission system and perform the core functions of a transmission system operator (Article 9(1) lit (a) Electricity Directive);
 - Control¹⁷ over the transmission system operator's activities has to be effectively separated from supply and generation activities and vice versa (Article 9(1) lit (b-d) and Article 9(2) Electricity Directive).

Ownership of the electricity transmission system

- (16) Based on the arguments provided in the Preliminary Decision, ECRB has no reason to doubt that CGES owns the electricity transmission system in Montenegro.
- (17) Namely, CGES submitted and RAE verified the decision of the EPCG shareholder assembly no 10-00-3201 of 23 March 2009 that, based on the Law on Business Organisation, transferred property rights from the previous vertically integrated undertaking *Elektroprivreda Crne Gore AD (EPCG)* to a newly established transmission system operator *Prenos Podgorica AD*, renamed into CGES in 2010.¹⁸

¹⁵ Official Gazette no 42/16, adopted on 28.06.2016.

¹⁶ Cf allocation of cross-border capacities by the Coordinated Auction Office South East Europe: www.seecao.com.

¹⁷ Cf the definition in Article 2(34) Electricity Directive.

¹⁸ *Prenos Podgorica* acquired the capacity of a legal entity on 27.03.2009 (registration number 4-0008972/001). The company name was changed into *Cronogorski Elektroprenosni Sistem* by decision of the first regular session of the company's shareholder assembly of 25.06.2010.

- (18) Furthermore *CGES* submitted and *RAE* verified deeds of title for ownership evidence with the exception of two sub-stations for which registration with the real estate cadastre has been initiated but not yet finalised.¹⁹ ECRB has no reason to question the assessment of *RAE* according to which the fact that *CGES*' investment plan for the years 2012-2014, approved by the regulator, as well as *CGES*' Report on the Completion of the Investment Plan 2016 outlining financing of these two sub-stations by *CGES* provides proof for assuming positive completion of the already initiated registration process.²⁰ However, as elaborated in previous certification decisions,²¹ **ECRB recommends including a condition in the final certification decision according to which *CGES* shall within twelve months from the adoption of the final certification decision inform *RAE* about the completion of the pending ownership registration.**

Operation and performance of core functions of the electricity transmission system

- (19) As elaborated in previous ECRB Opinions on preliminary certification decisions,²² compliance with ownership unbundling means “*that the undertaking which is the owner of the transmission system also acts as the TSO, and is as a consequence responsible among other things for granting and managing third-party access on a non-discriminatory basis to system users, collecting access charges, congestion charges, and payments under the inter-TSO compensation mechanism, and maintaining and developing the network system. As regards investments, the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning*”.²³
- (20) Regulatory analysis in this context needs to assess whether a given undertaking is *de iure* entitled to and *de facto* actually performing these core tasks, and whether it disposes of the necessary (human, technical, financial) resources for this.²⁴
- (21) Legally Article 111 of the Energy Law defines the tasks of a transmission system operator to “*carry out transmission of electricity and manage the electricity transmission system in accordance with the license and certificate conditions, based on principles of impartiality, transparency and non-discrimination.*”
- (22) ECRB has no reason to doubt that *CGES* also practically operates the electricity transmission system in Montenegro. The company provides third party access to its system at conditions,

¹⁹ SS 110/35kV Kotor and SS 110/10 kV Kličevo.

²⁰ See Secretariat's Opinion 3/17 on certification of *EMS*, chapter 2.a, noting that where an applicant has taken all necessary steps to formally register the assets according to the rules, the ownership requirement of Article 9(1) lit (a) Electricity Directive can be considered satisfied.

²¹ AERS, certification of *EMS* Decision, No. 312-3/2016-C-I, adopted on 04.08.2017, available at: http://aers.rs/Files/Odluke/Sertifikati/2017-08-04_Odluka_AERS_SERT_EMS.pdf (25.08.2017).

²² ECRB Opinion 2/2017 on certification of *EMS*, paragraph 20.

²³ Cf Commission, Staff Working Document: Interpretative Note on Directive 2009/72/EC – The Unbundling Regime, 22.10.2010, chapter 2.2.

²⁴ Cf Commission's Opinion on certification of *Vorarlberger Übertragungsnetzbetreiber*, Secretariat's Opinion 3/17 on certification of *EMS*, chapter 2.b.

access charges and congestion revenue rules regulated by RAE,²⁵ performs investment planning²⁶ and participates in inter-TSO compensation mechanisms.²⁷

- (23) ECRB considers the information provided in the Preliminary Decision sufficient to explain that CGES also has the necessary human, technical, physical and financial resources to effectively perform the task of a transmission system operator. Amongst others, CGES is rewarded operational and investment costs via regulated network tariffs.

Separation of control

- (24) Following the ownership unbundling requirements of the Energy Community and the Energy Law, control over electricity transmission activities needs to be separated from electricity supply, distribution and generation activities. Evidence is, thus, to be given that the legal and/or natural persons holding shares in CGES are effectively separated from those performing activities of supply and/or generation and *vice versa*.

Shares held by the State of Montenegro

- (25) 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 ECRB, the Secretariat and the European Commission on draft certification decisions, 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.²⁸
- (26) In the present case it has to be proven that State administration responsible for the majority stake of 55% held by the State of Montenegro in CGES is effectively separated from State administration responsible for the majority stake of 57.02% held by the State of Montenegro in the undertaking performing generation, distribution²⁹ and supply, EPCG.³⁰
- (27) The Preliminary Decision demonstrates that State control over publically owned shares of CGES and EPCG is ensured by the following legal provisions in order to meet the requirements of Article 9(6) Electricity Directive:

²⁵ Respective rules and procedures are available on the websites of CGES and RAE.

²⁶ www.cges.me – projects as well as – about/electrical transmission system. According to Article 112 of the Energy Law CGES is required to develop a ten-year transmission system development plan that for approval by RAE upon annual update. As integral part of this report, CGES has to provide for consent of the regulator a three-year investment plan listing investment decisions that have been already made and investments to be realised on annual basis for the upcoming three years. Related plans are available on the website of RAE at www.regagen.co.me - javne nabavke.

²⁷ See e.g. the latest monitoring report of ACER available at: https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ITC%20Monitoring%20Report%202016.pdf. The Inter transmission system Operator Compensation for Transits (ITC) is governed by Article 13 of Regulation EC 714/2009. Regulation EC 838/2010/EC (incorporated in the Energy Community acquis by Decision 2013/01/PHLG-EnC of 23 October 2013) contains further specifications.

²⁸ See e.g. ECRB Opinion 2/2016 on certification of OST; ECRB Opinion 2/2017 on certification of EMS; Secretariat Opinion 1/2017 on certification of OST; Secretariat Opinion 3/2017 on certification of EMS; Commission's Opinions on certification of ČEPS; *Vorarlberger Übertragungsnetze*; SEPS. Cf also: Commission Staff Working Paper on the unbundling regime of 22.01.2010, chapter 2.2, p. 10.

²⁹ Via its subsidiary *Crnogorski Elektrodistributivni Sistem (CEDIS)*.

³⁰ The other shareholders of EPCG are: 41.75% Italian utility company A2A SpA (www.a2a.eu/en); 1.23% minority shareholders (see www.epcg.com/en/node/1567).

- According to Articles 2, 4 and 6 of the Law on State Property of Montenegro the Government of Montenegro exercises property rights over State property “unless otherwise defined by a special law”.
 - Article 135(3) of the Energy Law allocates the right to exercises property rights over State property in *CGES* to the Ministry of Finance (MoF), including the right to “independently and directly [...] without obtaining opinion or instruction from the State government” propose and appoint the management board of *CGES*. *RAE* concludes in accordance with the rule *lex specialis derogate legi generalis* that Article 135(3) of the Energy Law prevails over the State competences laid down in the Law on State Property. The same legal provision also forbids instructions of the government to members of the managing board of *CGES* as well as parallel occupation of members of the managing board of *CGES* in an undertaking performing generation/supply. The MoF also appoints the State representative to the General Assembly of *CGES*.
 - Article 135(3) of the Law on Energy safeguards the independence of the MoF as part of the government, in particular also having in mind that the constitution of Montenegro obliges the government to execute and enforce the Energy Law.³¹
 - The competences of the government and Ministry of Energy defined in the Energy Law are of general nature, thus do not interfere into the competences of the MoF. Namely, the government issues long-term energy development goals and strategies while the Ministry of Energy is in charge of monitoring these plans and strategies and analyse the realisation of energy balance and investment in energy.³² In addition, the Energy Law explicitly rules out that public bodies exercise control over the transmission network sector and supply/production.
- (28) ECRB agrees with the conclusion of *RAE* that these arguments demonstrate separation of State control over publically owned shares in *CGES* and *EPCG*. However, the Preliminary Decision runs short in putting the argument *lex specialis derogate legi generalis* into context with the constitution of Montenegro: it only explains that Ministers are members of the government according to the constitutions but lacks details on the potential powers of the Prime Minister over Ministers; if an how Ministers can take decisions independently; the decision making rules of the government and to which extent collegial decisions may limit independent decision making rights.³³ **These aspects should be further elaborated in the Final Decision.**
- (29) While the Preliminary Decision provides evidence of separate appointment of the Board of Directors and State representative to the General Assembly of *CGES* and *EPCG* by the MoF and the government, respectively, the Preliminary Decision does not provide information whether the appointed State representatives are indeed different persons. Also, it is advisable to require *CGES* to include the prohibition of double functions also in its statutes. **The Final Decision should be amended accordingly.**

³¹ Article 102 of the Constitution of Montenegro.

³² Articles 7-11 of the Energy Law.

³³ Cf similar concerns put forward by the Commission in context with the certification of the Austrian transmission system operator for electricity, *VUN*, and the safeguards provided in the final certification decision of the Austrian regulatory authority (<https://www.e-control.at/documents/20903/-/-/dccb6ad2-41c9-4b87-84b3-052d5d90c80f>).

Shares held by Terna

(30) As regards separation of (control over) *CGES*' shareholder *Terna* from supply and generation activities, ECRB agrees with the assessment of *RAE* that such must be positively assumed having in mind the valid certification of *Terna*.³⁴

Shares held by EMS

(31) As regards separation of (control over) *CGES*' shareholder *EMS*, ECRB recommends the final certification of *RAE* to elaborate more in detail as regards the following:³⁵ while, indeed *EMS* activities do not involve supply or generation activities, separation of control over the 100% State owned electricity transmission system operator *EMS* and the, likewise, 100% State owned enterprise performing electricity supply, distribution and generation, *Elektroprivreda Srbije (EPS)*,³⁶ was neither confirmed in the Preliminary Certification decision of the Serbian regulatory authority, *AERS*, nor in the related Opinions of ECRB no 2/2017 and the Secretariat no 3/2017. The mere fact that *AERS*, still, issued a final certification for *EMS* is not able to automatically overcome the concerns raised in ECRB Opinion no 02/2017.³⁷

(32) In praxis, ECRB concedes that potential or actual negative impact on the independence of *CGES* can hardly be construed from the lack of State control separation between *EMS* and *EPS*. In fact, *EMS* is not controlled by private investors but is 100% owned by the Serbian State. An interest of the Serbian State to interfere with the Montenegrin supply/generation market indeed cannot be substantiated at the given moment. Even if, related manipulative options are also limited having in mind that *EMS* only holds 10.0141% of shares. Still, the **final certification decision should at least touch upon these aspects and elaborate on related arguments.**

Other shareholders

(33) The Preliminary Decision remains short on the other (minority) shareholders of *CGES*, mainly concluding that their added up shares of 13% cannot influence decision making of *CGES*. **ECRB recommends elaborating in the final certification decision on minority shareholders more in detail. This should, in particular, address minority shareholding of supply companies,** having in mind that also minority shareholders have influence on the appointment of Board members by way of exercising their voting rights in the General Assembly and minority shareholding of a supply company may link to sharing of sensitive information such as, e.g. capacity booking.

³⁴ Commission's Opinion on AEEG's draft certification decision for Terna C(2013)810 052-2012-IT.

³⁵ Different from the Preliminary Decision, page 16, paragraph 1.

³⁶ www.eps.rs.

³⁷ The Secretariat submitted a Reasoned Request for opening of a certification procedure by *AERS* for reassessment of *EMS* with the unbundling requirements on 28.08.2017.

3.2. Other comments

- (34) The Preliminary Decision notes that *CGES* is “related to” the electricity distribution system operator, *CEDIS*, and Montenegro Bonus d.o.o. but runs short in explaining the “relationship” to the former and describing the latter’s scope of activities at all. **ECRB recommends amending the final certification decision accordingly.**
- (35) Finally, the Final Decision would benefit from adding clear reference to precise **articles of the quoted legal acts**, instead of (previously) only general reference to laws.

HAS ISSUED THE FOLLOWING OPINION

1. This Opinion is provided to the Energy Community Secretariat according to Article 3(1) of Regulation (EC) 714/2009 in conjunction with Articles 9 and 10 of Directive 72/2009/EC for reflection in the Secretariat’s Opinion on the Preliminary Decision of the regulatory authority of Montenegro on certification of *CGES AD*.
2. 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, *RAE* has been 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. Upon consultation *RAE* did not raise related concerns.

For the Energy Community Regulatory Board

A handwritten signature in blue ink, appearing to read "Giorgi Pangani", is written over a blue horizontal line.

Giorgi Pangani
ECRB President

1 February 2018