

## Opinion 1/18

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

On 28 October 2017, the Regulatory Energy Agency of Montenegro (hereinafter “RAE”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision on the certification of *Crnogorski Elektroprenosni Sistem AD Podgorica* (hereinafter “CGES”), the transmission system operator (hereinafter “TSO”) for electricity (hereinafter “the Preliminary Decision”). The Preliminary Decision was adopted on 20 October 2017<sup>1</sup> based on Article 68 (1) of the Energy Law<sup>2</sup>, Article 7 of RAE’s Rules on Certification of Transmission System Operators<sup>3</sup> (hereinafter “RAE’s Certification Rules”), as well as Article 12(1)(6) of the Statute of the Energy Regulatory Agency,<sup>4</sup> pursuant to a procedure governed by the Law on Cross-Border Exchange of Electricity and Natural Gas.<sup>5</sup>

Pursuant to Article 10 of Directive 2009/72/EC<sup>6</sup> (hereinafter “the Electricity Directive”) and Article 3 of Regulation (EC) No 714/2009<sup>7</sup> (hereinafter “the Electricity Regulation”) the Secretariat is required to examine the notified Preliminary Decision and deliver its Opinion to RAE as to the compatibility of such a decision with Article 10(2) and Article 9 of the Electricity Directive.

On 1 February 2018, 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.

### I. The role of the State in energy undertakings in Montenegro

#### 1. CGES

<sup>1</sup> ERA Preliminary Decision, No. 17/1967-17, adopted on 20.10.2017.

<sup>2</sup> Energy Law, Official Gazette of Montenegro No. 5/2016 and 51/2017, adopted on 29.12.2015.

<sup>3</sup> ERA, Rules on the Certification of the Transmission System Operators, Official Gazette of Montenegro No. 50/2016, adopted on 29.07.2016, entered into force on 11.08.2016.

<sup>4</sup> Statute of the Energy Regulatory Agency, Official Gazette of Montenegro No. 15/2016, adopted on 21.04.2017.

<sup>5</sup> Law on Cross-Border Exchange of Electricity and Natural Gas, Official Gazette of Montenegro No. 42/2016, adopted on 11.7.2016.

<sup>6</sup> 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.

<sup>7</sup> 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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The predecessor of the applicant, *CGES, Prenos Podgorica* was initially part of the state vertically integrated undertaking *Elektroprivreda Crne Gore AD Nikšić (EPCG)*, which performed all the activities in the energy sector of Montenegro. *Prenos Podgorica* was established as a separate company pursuant to the Decision on Restructuring through Spin-Off<sup>8</sup> adopted by *EPCG*'s shareholders assembly on 23 March 2009, and was registered as a joint stock company on 27 March 2009. Since 2 July 2010, when the changed name *Crnogorski Elektroprenosni Sistem (CGES)* was registered, the applicant for certification is operating as a joint stock company. Pursuant to the Preliminary Decision, the company's ownership structure is the following:

- **the State of Montenegro is the owner of 55.00% of the shares;**
- ***Terna Rete Elettrica Nazionale S.p.A.* is the owner of 22.0889% of the shares;**
- ***AD Elektromreže Srbije (EMS) – Beograd* is the owner of 10.0141% of the shares;**
- **custodial accounts,<sup>9</sup> funds and other legal persons own 5.3407% of the shares and**
- **natural persons own 7.5563% of the share capital.**

The company's corporate governance bodies are the shareholder assembly, the board of directors, a chief executive officer (CEO) and the company's secretary.<sup>10</sup> The assembly elects and discharges the members of the Board of Directors, as well as the auditor. It also, inter alia, decides on investments and loans in value exceeding 10% of the book value of the company's assets. The board of directors is a governing and managing body. Its decisions are executed by the company's secretary and the CEO. The board of directors of *CGES* has seven members, four of which are the representatives of the State, two are representatives of *Terna* and one is a representative of minority shareholders. The board takes decisions for investments and loans for a value lower than 10% of the book value of the company's assets. Based on the Articles of Association the board decides by simple majority of votes of the board members attending the session unless the decisions of the board are related to reserved matters, in which case minimum six members are required to vote in favour of a decision.<sup>11</sup> The reserved matters include decisions of the board that are, inter alia, related to the approval of the company's business plan, annual budget, development plan, construction plan, financial borrowings of any kind exceeding €250,000 and others. The CEO is appointed and discharged by the board of directors, and it manages the company and organises its day-to-day operations.

*CGES* is a holder of a licence for carrying out the business activity of electricity transmission valid until 29 July 2019.<sup>12</sup> *CGES* is the only TSO for electricity in Montenegro.

<sup>8</sup> No. 10-00-3204 from 23.03.2009.

<sup>9</sup> According to Article 3(5) of the Montenegrin Law on Voluntary Pension Funds, "a custody company is a commercial company to which the pension fund management company, based on a contract, entrusted the performance of tasks related to the control over the management of the assets of the pension fund."

<sup>10</sup> Article 28 Articles of Association of *CGES*.

<sup>11</sup> Article 50 Articles of Association of *CGES*.

<sup>12</sup> License for electricity transmission, E-007, dated 30.07.2009 valid until 29.07.2019. At the same date 30.07.2009, *CGES* also obtained licenses for operation of the electricity transmission system, as well as for electricity market operator, but

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CGES is a member of ENTSO-E.<sup>13</sup>

## 2. EPCG

*EPCG* is the dominant electricity supply<sup>14</sup> and generation<sup>15</sup> undertaking in Montenegro. The ownership structure of *EPCG* is the following: the state of Montenegro is the owner of 57.02% of the shares, the Italian company A2A S.p.A. is the owner of 41.75% and other shareholders own 1.23% of the shares.

The governance bodies of *EPCG* include the shareholder assembly, the board of directors, a chief executive officer (CEO), the company's secretary and the auditor.<sup>16</sup> The shareholder assembly elects and discharges the members of the board of directors, as well as the auditor. It also decides on investments and loans in value exceeding 10% of the book value of the company's assets. The decisions of the board of directors the governing and managing body of the company, are implemented by the executive director, the company's secretary and the managers. The board of directors of *EPCG* has seven members, four of which are representatives of the State and three are representatives of the Italian company A2A S.p.A.

## 3. Montenegro Bonus DOO

The State of Montenegro holds 100% of the shares in another company, *Montenegro Bonus DOO*. According to information available on RAE's website, this undertaking has a license for supply of electricity.<sup>17</sup> The Preliminary Decision contains no information on the governance of this undertaking or the state representatives in its management.

## 3. Crnogorski Operator Tržišta DOO (COTEE)

The State of Montenegro holds also 100% of the shares in the undertaking *Crnogorski Operator Tržišta DOO (COTEE)*, (Montenegro Market Operator LLC). This undertaking is legally and functionally unbundled from CGES.

## II. Description of the notified Preliminary Decision

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those are not valid anymore. Since 26.12.2011, License for market operator was issued to Montenegrin operator of the electricity market DOO Podgorica, E-013 valid until 25.12.2026.

<sup>13</sup> See: <https://www.entsoe.eu/about-entso-e/inside-entso-e/member-companies/Pages/default.aspx> (15.12.2017).

<sup>14</sup> License No. E-021 from 17.03.2017 valid until 17.03.2027.

<sup>15</sup> License No. E-001 from 26.12.2005 valid until 26.12.2025.

<sup>16</sup> Article 35 Articles of Association of *EPCG*.

<sup>17</sup> License No. E-001 from 26.12.2005 valid until 27.09.2027.

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Article 136 of the Energy Law of 2015<sup>18</sup> transposes the provisions of the Electricity Directive on ownership unbundling. Article 135 and 136 of the Energy Law, as amended on 26 July 2017,<sup>19</sup> also include rules pertaining to ownership unbundling of public companies corresponding to Article 9(6) of the Electricity Directive. They identify the state authority competent for finance activities (i.e. the Ministry of Finance) as a public body responsible for exercising the state's ownership and control rights in the electricity TSO. The amendments stipulate that besides the right to propose members of the body for managing the TSO, this authority shall also have the right to appoint state's representative in the shareholders' assembly in the electricity TSO.<sup>20</sup>

On 20 June 2017, CGES submitted to RAE an application for certification in accordance with Article 68(1) of the Energy Law. In the Preliminary Decision, RAE concluded that CGES complies with the requirements of the provisions on ownership unbundling. RAE issued an unconditional certification of CGES as an electricity transmission system operator.

### III. Assessment of the Preliminary Decision

#### 1. General

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.<sup>21</sup> This objective is best fulfilled by implementation of the ownership unbundling model of Article 9 of the Electricity Directive, which Montenegro transposed by its Energy Law. In a market environment still prevailing in many Contracting Parties including Montenegro, where energy activities are predominantly performed by undertakings with whole or majority ownership by the State and/or characterized by dominant positions on their respective markets, the separation of control and the prevention of conflicts of interest is of particular importance. For cases, as in Montenegro, 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,<sup>22</sup> Article 9(6) of the Electricity Directive offers an ownership unbundling variant, 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

<sup>18</sup> Official Gazette of Montenegro No. 5/2016, adopted on 29.12.2015.

<sup>19</sup> Official Gazette of Montenegro No. 51/2017.

<sup>20</sup> Article 135(3) of the Energy law as amended reads: "*Members of the managing authority of the transmission system operator directly and independently are proposed by the state administration body competent for finance, without seeking opinions and instructions from the government and appoints the proxy for the General Assembly of Shareholders of the Transmission System Operator.*"

<sup>21</sup> Secretariat Opinion 1/16 of 3 February 2016 TAP AG; Secretariat Opinion 1/17 of 23 January 2017 OST; Secretariat Opinion 3/17 of 23 January 2017 EMS.

<sup>22</sup> 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 tr̃kls* C(2012) 9108 final of 3.12.2012, at p. 2.

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differentiate these situations from other cases of ownership unbundling and matter for the assessment. When relying on Article 9(6), as transposed into national law (*in casu* Articles 135 and 136 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 RAE's Preliminary Decision against that background.

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

When assessing the compliance of the Preliminary Decision with the unbundling model enshrined in the Electricity Directive, 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.

The Preliminary Decision lists the assets required for performing transmission system operation activities.<sup>23</sup> The ownership evidence submitted relates to the immovable property such as land and buildings, whereas for the transmission lines (cables) for which there is no cadastre RAE has accepted the fact that the cables are registered as fixed assets in the balance sheet as evidence that they are in CGES's ownership.

Ownership certificates have not been submitted for two substations, SS 110/35 kV Kotor and SS 110/10 kV Kličevo, the construction of which was completed in 2017. For these substations, the registration procedure with the real estate cadastre is still ongoing. Based on CGES' investment plan 2012-2014 approved by RAE and the report on the completion of the investment plan 2016, RAE considered that the construction of the substations in question was financed by CGES and will be in CGES' ownership after the completion of the cadastre registration.

<sup>23</sup> ERA Preliminary Decision, pp. 10-11.

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The Secretariat agrees with this assessment by RAE and has no reason to doubt that *CGES* is actually the owner of the transmission system. RAE is invited to monitor the situation concerning the two substations.

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

Article 9(1)(a) of the Electricity 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 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.<sup>24</sup> A regulatory authority’s assessment in this respect needs to establish in particular whether a given undertaking is by law and fact actually performing the core tasks of a transmission system operator, and whether it disposes of the necessary (human, technical, financial) resources for this.<sup>25</sup>

Based on the Preliminary Decision<sup>26</sup> but also on its own long-standing experience and cooperation with *CGES*, the Secretariat agrees with RAE’s findings that *CGES* satisfies these criteria.

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

The Preliminary Decision assesses *CGES*’s compliance with the ownership unbundling model against Article 135 and 136 of the Energy Law, the provision transposing Article 9(6) of the Electricity 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 Electricity Directive, and may control production and supply activities, on one hand, and transmission activities on the other hand. In particular, Article 9(1)(b)(i) and (ii) of the Electricity Directive prohibits the person or persons to exercise control or any right over a TSO and an undertaking performing any of the functions of production or supply. While the notion of control is defined by the Merger Regulation,<sup>27</sup> Article 9(2) of the Directive clarifies that the concept of ‘any other right’ includes the power to exercise voting rights, the holding of a majority share and the power to appoint members of the TSO’s corporate bodies and those legally representing the TSO.<sup>28</sup>

The Secretariat agrees that Article 9(6) of the Electricity Directive applies to the separation of control over *CGES* due to the majority of State ownership of 55%. This majority, which also vests the State

<sup>24</sup> Secretariat Opinion 1/16 of 3 February 2016, *TAP AG*.

<sup>25</sup> Commission’s Opinion on certification of *VÜN C(2012) 2244* final of 29.3.2012.

<sup>26</sup> RAE, Preliminary Decision, sections 3.3.; 3.4.; 3.5.

<sup>27</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the, Official Journal L 24, 29.01.2004, p. 1-22.

<sup>28</sup> Article 9(2) of Directive 2009/72/EC.

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with a number of rights of the nature listed by Article 9(2) of the Electricity Directive, confers the possibility of exercising decisive influence on *CGES*.

The Secretariat further agrees with RAE that the Ministry of Finance and the Government, representing the state's shares in *CGES* and *EPCG* respectively in accordance with the Energy Law, in principle qualify as public bodies within the meaning of Article 9(6) of the Electricity Directive.<sup>29</sup>

In the European Commission's case practice so far, two ministries,<sup>30</sup> a prime minister and deputy prime minister in a regional government,<sup>31</sup> a ministry and a prime minister,<sup>32</sup> have been accepted as two public bodies within the meaning of Article 9(6) of the Electricity Directive. Whether a ministry and a government qualify as two separate bodies under Article 9(6) of the Electricity Directive has not yet been subject to a decision, neither in the European Union nor in the Energy Community.

In the Contracting Parties of the Energy Community, including Montenegro, it has been – and still is – rather common that the Government is the public body in charge with representing the state ownership in state-owned undertakings in general, including those in the energy sector. If, as is the case in Montenegro, the control over the TSO is transferred to an individual ministry as part of the Government, the question arises as to whether the requirement of “separation” in Article 9(6) of the Electricity Directive is satisfied.

In Montenegro, the Government consists of a so-called president of the Government (the prime minister), one or more vice-presidents and individual ministers.<sup>33</sup> The ministers are members of the government, and are responsible in front of the prime minister. At the same time, Article 111 of the Montenegrin Constitution stipulates that the tasks of state administration are allocated to the individual ministries and other administrative bodies. The ministries hence form part of the state administration together with other administrative bodies.<sup>34</sup> They derive their rights and competences from the Law on State Administration. The Secretariat considers this sufficient to formally separate them from the Government within the meaning of Article 9(6) of the Electricity Directive. That said, the fact that their highest representative, the minister, may depend on and be influenced by the Government remains critical against the objective of Article 9 of the Electricity Directive, i.e. to avoid conflicts of interest. In circumstances such as the present one, it must be ensured that any actual or potential interference by the Government (and any of its individual members) on the exclusive control by one ministry over the TSO is effectively excluded. This requires an even higher scrutiny than in

<sup>29</sup> See for example: Commission's Opinion on certification of *Energinet* (gas) (C(2012) 88, 9.01.2012; Commission's Opinion on certification of *VÜN* (electricity) of *VÜN* (C(2012) 2244 final of 29.3.2012; Commission's Opinion on certification of *Affärsverket svenska kraftnät* (C(2012) 3011, 30.04.2012;; Commission's Opinion on certification of *TenneT* of (C(2012) 6258, 06.09.2012;; Commission's Opinion on certification of *GTS* of (C(2013) 4205, 01.07.2013; Commission's Opinion on certification of *Litgrid* (C(2013) 4247, 04.07.2013.

<sup>30</sup> Commission's Opinion on certification decision of *Affärsverket svenska kraftnät* C(2012) 3011, p. 3.

<sup>31</sup> Commission's Opinion on certification of *VÜN*, supra.

<sup>32</sup> Commission's Opinion on certification of *Fingrid-Fingrid Oyj* C(2014) 329, 17.01.2014.

<sup>33</sup> Article 102 of the Constitution of Montenegro.

<sup>34</sup> Article 111 of the Constitution of Montenegro.

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cases where the separation between the two public bodies referred to by Article 9(6) of the Electricity Directive is less ambiguous, e.g. in case of two separate ministries.

The Secretariat reiterates in that context that in order to fully achieve the objective of Article 9 of the Electricity 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 Electricity 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 the transmission system operator of any other entity controlling generation and supply activities.<sup>35</sup>

*Firstly*, a transmission system operator and the public (or private) body controlling it may in principle not be engaged in electricity generation and supply activities.<sup>36</sup>

*Secondly*, the regulatory authority tasked to certify the TSO needs to establish, *de iure* and *de facto* independence between the two public bodies exercising control over the state-owned undertakings in question, including the prevention of any common influence of a third public or private entity.<sup>37</sup> For that purpose, the public body controlling the transmission system operator must have clearly defined and delineated competences, must carry out the tasks assigned to it by Energy Community and national law in full autonomy and may not be subordinate to public or private entities controlling energy generation or supply undertakings.<sup>38</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 transmission system operator 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 transmission system operator, full independence may also call for the introduction of additional organisational measures within the public body concerned.

## 1. The transmission system operator is not engaged in generation / supply activities

<sup>35</sup> See: Secretariat Opinion 1/17 of 23 January 2017 *OST*, p.6, 12; Secretariat Opinion 4/17 of 2 October 2017 *Albgaz*, p.8.

<sup>36</sup> 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).

<sup>37</sup> See Section 2.2, page 10 of the 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.

<sup>38</sup> See for comparison, Commission's Opinion on certification of *Slovenská elektrizačná prenosová sústava a.a.*, C(2013) 5376 final, 9.08.2013; Commission's Opinion on certification of *Polskie Sieci Elektroenergetyczne S.A.* C(2014) 2471 final, 09.04.2014; Commission Opinion on certification of *GAZ-SYSTEM S.A.*, C(2014) 5457 final, 25.07.2014; Commission Opinion on certification *Magyar Gáz Tranzit Zrt.*, C(2015) 1046 final, 17.02.2015.



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The ownership unbundling provisions require that a transmission system operator (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>39</sup> Article 9(2) does also not exclude the holding of purely passive financial rights related to a minority shareholding, *i.e.* the right to receive dividends, without any voting rights or appointment rights attached to them.

Firstly, RAE lists several undertakings in which *CGES* holds shares, namely:

- **Invest Banka Montenegro AD Podgorica, in which CGES holds a share of 1.5%;**
- **Elektroenergetski Koordinacioni Centar DOO (EKC) in Belgrade, in which CGES holds a share of 25%;**
- **SEE CAO DOO Podgorica, in which CGES holds a share of 12.5% ;**
- **Centar za Koordinaciju Sigurnosti - SCC DOO (Security Coordination Centre) in Belgrade, in which CGES holds a share of a share of 33.33%; and**
- **Berza Električne Energije DOO (the Electricity Exchange), in Podgorica, in which CGES holds a share of 33.33% %.**

RAE concludes that *CGES*'s participation in the capital of those undertakings “*is meaningless compared to the core activity of CGES and the value of its assets, and therefore it has no impact on independence of the transmission system operator.*” While in some of those undertakings *CGES* might have controlling rights, the Secretariat is not aware of any of them performing activities of generation and supply of electricity or gas. Nevertheless, the Secretariat invites RAE to verify whether any of the abovementioned undertakings controls other undertakings engaged, directly or indirectly, in the production or supply of electricity or gas, and whether there are any exceptional circumstances suggesting that *CGES* could have an incentive for discrimination or a conflict of interest.<sup>40</sup>

## **2. Competences and control are effectively separated**

- **Separation within the State between the public bodies involved**

The Secretariat agrees with RAE's finding that in formal terms, the Ministry of Finance and the Government of Montenegro have the necessary competences and tools to exercise control over *CGES* and *EPCG* respectively in a legally and factually independent manner.

<sup>39</sup> Commission's Opinion on certification of *Thanet*, C(2013) 2566 final of 26.4.2013.

<sup>40</sup> European Commission SWD(2013)177 final, 08.05.2013. See also, Commission's Opinions on *Swedegas AB*, C(2012) 3009; *National Grid*, C(2012)2735.

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First, the Government exercises the State's rights in *EPCG*. Pursuant to Article 6 of the Law on State Property, the Government exercises ownership rights and has powers in respect of state property. Article 33(5) of the Law on Business Organisations states that if the State owns shares, the rights arising from such shares are to be exercised by an authorized officer or persons who are issued the power of attorney to exercise such rights. According to these acts, the State is represented by the Government. In reality, the Government appoints the representative of the State's shares i.e. the one representative in the shareholder assembly of *EPCG*, which then appoints the members of the board of directors.<sup>41</sup>

Second, the rights of the State as main shareholder of *CGES* are exercised by the Ministry of Finance. Article 135(3) of the Energy Law, as amended in July 2017, stipulates that the state authority competent for financial affairs is to propose members of the body for managing the transmission system operator, without seeking the opinion or instructions from the Government, and is to assign a representative in the shareholders' meeting of the transmission system operator. As RAE found, the Energy Law is *lex specialis* derogating Article 6 of the Law on State Property. Both the representatives of the state in the shareholders assembly and the board of directors of *CGES* are thus appointed by the Ministry of Finance. The nomination<sup>42</sup> of the candidates for members of the board of directors of *CGES* and designation of a representative for the shareholder assembly has been submitted by the Ministry of Finance on 29 June 2017. Four candidates were nominated as members of the board of directors, and one person as a representative in the shareholder assembly. The shareholder assembly appointed the members of the board of directors in accordance with the Ministry's nominations in June 2017.<sup>43</sup> Whether or not, and in which manner a CEO was appointed is not covered by the Preliminary Decision. The term of office of the CEO appointed in 2013 apparently expired in December 2017. The Secretariat invites RAE to verify in the Final Decision whether the newly appointed board of directors have appointed a new CEO without any instruction from the Government.<sup>44</sup> Furthermore, the Secretariat agrees that the Ministry of Finance and the Government are also formally independent in terms of appointing the members of the corporate bodies of their respective companies, as required by Article 9(1)(c) of the Electricity Directive. Article 135(3) of Energy Law<sup>45</sup> as amended in July 2017, expressly stipulates that the "[m]embers of the managing authority of the transmission system operator directly and independently are proposed by the state administration body competent for finance, **without seeking opinions and instructions from the government** and appoints the proxy for the General Assembly of Shareholders of the Transmission System Operator." In addition, according to Article 42(1) of the Statute of *CGES* the members of the board of directors are to act and decide autonomously and independently of the shareholder assembly.

<sup>41</sup> Conclusion of the Government No. 07-003-2032/2 from 30.06.2017

<sup>42</sup> No 01-10677 from 29.06.2017.

<sup>43</sup> Decision on the Appointment of Members of Board of Directors of *CGES* No. 10-00-7203/1 from 29.06.2017

<sup>44</sup> Commission's Opinion on certification of *Transelectrica* C(2015)7053.

<sup>45</sup> Official Gazette of Montenegro No. 51/2017.

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However, the Secretariat – as the ECRB<sup>46</sup> – is concerned about the Preliminary Decision's silence on independence in reality between the control exercised by the Ministry of Finance over *CGES* and the Government over *EPCG*. As stated above, such independence needs to be scrutinized and verified even more meticulously in cases, such as the present one, where the public body controlling the TSO is politically affiliated very closely with the public body controlling generation and supply. Even in cases where the two public bodies in question are less dependent on each other, Article 9(6) of the Electricity 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 public bodies designated to control the undertakings performing the functions of the TSO and generation/supply, respectively.<sup>47</sup> RAE's Preliminary Decision does not elaborate on any possible interferences, *de iure* or *de facto*, by of the Government, the Prime Minister or the President.

While the Secretariat notes that, the Law on State Administration stipulates that each ministry, including the Ministry of Finance, acts as an independent administrative body in the area of its respective competences. Nonetheless, since the Prime Minister represents the Government and manages its work, the Secretariat urges RAE to elaborate further on his/her rights vis-à-vis the Ministry of Finance. This analysis should take into account not only the law on the books but also constitutional reality.<sup>48</sup> Without such an in-depth assessment, certification of *CGES* is questionable.

Moreover, the Preliminary Decision does not assess how dividends are paid out and to whom, a question which matters to determine which entity within the State of Montenegro has a financial interest in the public energy undertakings.<sup>49</sup> Furthermore, the Preliminary Decision has not assessed the procedure of the auditors' appointment and whether the requirements that the financial auditor of the TSO may not be the same entity carrying out the audit of undertakings active in the areas of generation and supply have been fulfilled. Therefore, the Secretariat invites RAE, in its final decision to elaborate on these issues.

Finally, the Preliminary Decision includes a finding that the State of Montenegro holds 100% of the shares in two other energy companies, *Crnogorski Operator Tržišta DOO* (Montenegro Market Operator LLC) (*COTEE*) and *Montenegro Bonus DOO*. Provided that legal and functional unbundling between the TSO and the Market Operator is ensured, the Secretariat does not consider the state ownership of *COTEE* as a concern as long as such a company only facilitates trade and is not

<sup>46</sup> ECRB Opinion, at paragraph 28.

<sup>47</sup> See for comparison Commission's Opinion on certification of *Energinet.dk* (electricity); Commission's Opinion on certification of *Energinet.dk* (gas); Commission's Opinions on certification of *VÚN*, C(2012) 2244 final of 29.3.2012; Commission Opinion on certification of *ČEPS* (electricity) C(2012) 7059 final, 04.10.2012; Commission Opinion on certification of *TenneT TSO B.V.* C(2013) 4206 final, 01.07.2013; Commission Opinion on certification of *Gas Transport Services B.V.* C(2013) 4205 final, 01.07.2013; Commission Opinion on certification of *Slovenská elektrizačná prenosová sústava a.a.* C(2013) 5376 final, 09.08.2013; Commission Opinion on certification of *GAZ-SYSTEM S.A.* C(2014) 5457 final, 25.07.2014

<sup>48</sup> Secretariat Opinion 1/17 of 23 January 2017 *OST*, p. 11

<sup>49</sup> Secretariat Opinion 1/17 of 23 January 2017 *OST*, p. 10; Commission Opinion on certification of *Slovenská elektrizačná prenosová sústava a.a.* C(2013) 5376 final,

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engaged in buying or selling electricity.<sup>50</sup> However, the Secretariat invites RAE to assess the independence of CGES from *Montenegro Bonus DOO*, the holder of a license for supply of electricity.<sup>51</sup> While it may well be possible that based on *lex generalis*,<sup>52</sup> the Government represents the state ownership in *Montenegro Bonus DOO* as it does in *EPCG*, it requests RAE to investigate and elaborate on the separation of control over transmission from generation/supply within the state concerning CGES and *Montenegro Bonus DOO* in the same manner as elaborated for *EPCG*, and if necessary to impose conditions for ensuring effective separation of control.

- **Independence of the other shareholders of CGES**

Besides the State as a majority shareholder with 55%, minority shareholders with impact on decision-making in CGES are *Terna Rete Elettrica Nazionale S.p.A* ("*Terna*") with 22.0889% shares and *Elektromreža Srbije a.d. Beograd* ("*EMS*") with 10.0141% shares of CGES. *Terna* is an electricity transmission system operator in the Republic of Italy, and *EMS* is an electricity transmission system operator in the Republic of Serbia. Taking into account that the board of the CGES in case of decisions related to so-called reserved matters requires a minimum of six out of 7 members to vote in favour of a decision,<sup>53</sup> the influence of the two minority shareholders may be of relevance for control in CGES.

In its Preliminary Decision, RAE finds that *Terna Rete Elettrica Nazionale S.p.A.* and *EMS* are certified TSOs in Republic of Italy and Republic of Serbia respectively. While the Secretariat does not deem it appropriate for RAE to re-assess the unbundling of TSOs properly certified by regulatory authorities of other Parties to the Energy Community Treaty, it still invites RAE to take into account the specifics of the present case.

Namely, the Secretariat hereby recalls that according to its Opinion issued on 8 June 2017, the Secretariat stated that "*EMS can currently not be certified as envisaged by the AERS Preliminary Decision of the Serbian regulatory authority (AERS). This is because EMS is currently not unbundled in line with the ownership unbundling model as required by Article 9 of the Electricity Directive and it is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity (the Government is a representative of state ownership in both EMS and EPS, as well as in Srbijagas).*" Since the Energy Agency of the Republic of Serbia (hereinafter "*AERS*") adopted its Final Decision certifying *EMS*,<sup>54</sup> the Secretariat submitted a request to *AERS* for reopening the certification procedure on 28 August 2017 which is still pending.

The Secretariat invites RAE to further investigate on whether *EMS*, despite being a minority shareholder, is vested with any other rights, contracts or other means that either separately or in

<sup>50</sup> Commission's Opinion on certification of *Energinet* (gas) (C(2012) 88, 09.01.2013 p.3)

<sup>51</sup> License No. E-001 from 26.12.2005 valid until 27.09.2027

<sup>52</sup> Law on State property and Law on Business Organisations.

<sup>53</sup> Article 50 Articles of Association of CGES.

<sup>54</sup> AERS Final Decision, No. 312-3/2016-C-I, adopted on 04.08.2017, available at: [http://aers.rs/Files/Odluka/Sertifikati/2017-08-04\\_Odluka\\_AERS\\_SERT\\_EMS.pdf](http://aers.rs/Files/Odluka/Sertifikati/2017-08-04_Odluka_AERS_SERT_EMS.pdf) (25.08.2017).

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combination, based on considerations of fact or law, confer to it the possibility of exercising decisive influence amounting to control on *CGES*.<sup>55</sup> The Secretariat also invites RAE to investigate any potential conflict of interests that might arise from the ownership of generation and supply activities of the Republic of Serbia, in particular participation of *EPS* to the Montenegrin electricity market<sup>56</sup> and the influence that *EMS* could have as a shareholder in *CGES* for treating *EPS* more favourably than other generation/supply undertakings. If indeed a conflict of interest is found to exist, the voting rights of *EMS* in the general assembly of *CGES*, might, by way of example, require that *EMS*'s voting rights and appointing rights in *CGES* be made passive; and that it only keeps financial rights (i.e. right to receive the dividends attached to those shares).<sup>57</sup> If relevant, RAE should also request that the *EMS* manage its *CGES* shares in a manner that the same persons are not entitled to make decisions both in *CGES* and regarding the operation of undertakings performing generation or supply of electricity i.e. *EPS*.<sup>58</sup>

Finally, the Secretariat invites RAE before adopting a final certification decision, to investigate in all potential participations of *CGES*'s other private shareholders, namely *Robotti Global Fund United States of America* and *Langston Shipholding LTD - Liberia*, in generation and/or supply companies and determine whether or not they give rise to a conflict of interest incompatible with the unbundling rules.<sup>59</sup> Such assessment should take into account the geographic scope and location of transmission and generation/supply; the significance of participation (value and nature; size and market share) or access to confidential information by the investor etc.<sup>60</sup> The ECRB also recommended to elaborate in the final decision on minority shareholders more in detail, as they may have influence on the appointment of board members by way of exercising their voting rights in the shareholders assembly, and that minority shareholding of a supply company may link to sharing of sensitive information such as, e.g. capacity booking.<sup>61</sup>

### 3. 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 Electricity 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 a state-owned TSO, full independence of network operation from supply and generation interests may also require additional measures including, inter alia, the elimination of exchanges of any confidential information

<sup>55</sup> ECRB Opinion, at paragraph 32.

<sup>56</sup> See Commission's Opinion on certification of *TenneT Offshore 9 Beteiligungsgesellschaft C*(2016)213, in relation to the fact that integration of markets leads to greater potential for conflict of interest.

<sup>57</sup> See Commission's Opinion on certification of *Regasificadora del Noroeste, S.A. Spain, C*(2013) 9689; *Societatea Nationala de Transport Gaze Naturale Transgaz SA ('Transgaz')*, C(2013) 8485

<sup>58</sup> Commission's Opinion on certification of *Fingrid-Fingrid Oyj C*(2014) 329, 17.01.2014.

<sup>59</sup> See, for comparison, Commission's Opinion on certification of *Fingrid-Fingrid Oyj C*(2014) 329, 17.01.2014.

<sup>60</sup> European Commission SWD(2013)177 final, 08.05.2013

<sup>61</sup> ECRB Opinion, at paragraph 33

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on a daily basis.<sup>62</sup> Given that under Article 9(6) of the Electricity Directive, the TSO continues to operate within the State as if it were a vertically integrated undertaking, this is of particular importance. The ownership unbundling model is meant to ensure a situation in which discrimination can be excluded based on ownership structure of the TSO.<sup>63</sup> In cases under Article 9(6) of the Electricity 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.

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>64</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*

RAE's Preliminary Decision specifies that certain measures are currently in place, namely the Rulebook on Trade Secrets of CGES preventing disclosure of confidential or other commercially sensitive information of energy undertakings engaged in electricity and/or natural gas generation and/or supply<sup>65</sup> as well as a Statement submitted by CGES on the independence of the TSO's IT system independence from the IT systems of energy undertakings performing electricity generation and supply activities<sup>66</sup>.

While the Secretariat agrees that they are supportive in the avoidance of conflicts of interest and the sharing of confidential information, it considers it beneficial beyond these measures to request CGES to implement a compliance programme and appoint a compliance officer. The Secretariat has already addressed such request in previous Opinions.<sup>67</sup> The compliance officer and the compliance programme should be developed following the requirements of Article 21 of the Electricity Directive and should include extensive rights related to investment decisions, and in particular should report to RAE and publish on the website a report about the relations between the two public bodies controlling CGES and EPCG.

#### *Safeguards within the Government*

As follows from the above, the ministers are part of the Government and participate in collective decision-making, the Ministry of Finance as a public body exercising control over CGES, might be biased when exercising its policy-making functions. The Secretariat considers necessary that

<sup>62</sup> Recital 15 of the Electricity Directive.

<sup>63</sup> Commission's Opinion on certification of *Snam Rete Gas S.p.A.*, C(2013) 5961 final, 13.09.2013.

<sup>64</sup> See, for comparison, Commission's Opinion on certification of *Energinet* (gas) (C(2012) 88, 9.01.2012; Commission's Opinions on certification of *Vorarlberger Übertragungsnetze (VÜN)* C(2012) 2244 final of 29.3.2012.

<sup>65</sup> Evidenced by Qualification structure of employees by the degree and type of professional qualifications issues by CGES signed by Executive Director.

<sup>66</sup> Evidence S-IV-17.

<sup>67</sup> Secretariat Opinion1/17 of 23 January 2017 *OST*, p. 15.

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additional safeguards are taken within the Government of Montenegro in addition to the condition that the compliance programme to be implemented by *CGES* and it shall be required to also cover monitoring of the separation of competences between the Ministry of Finance and the Government, as already required by the Secretariat in its earlier opinions.<sup>68</sup> Those additional safeguards, which could be implemented at least on the level of secondary legislation, should delineate the competences of the Ministry of Finance and the Government in the exercise of their respective rights as representatives of state ownership in *CGES* and *EPCG* (as well as *Montenegro Bonus DOO*). As a way of example, the Minister of Finance as a member of the Government of Montenegro could be exempted from participation in decision-making related to the Government's rights in *EPCG* (and *Montenegro Bonus DOO*).

#### IV. Conclusions

Against this background, the Secretariat supports certification of *CGES* in line with RAE's Preliminary Decision, subject to the following remarks. Namely, the Secretariat requests that RAE

- monitors whether the two substations SS 110/35 kV Kotor and SS 110/10 kV Kličevo, are entered in the cadastre;
- investigates how dividends are paid out and to whom, and how the auditors of *CGES* and *EPCG* as well as *Montenegro Bonus* are appointed;
- investigates the role of and possible or potential interference by, *de iure* or *de facto*, the Government, the Prime Minister and the President in relation to the Ministry of Finance;
- requires that independence and avoidance of conflicts of interest between the Ministry of Finance and the Government and/or the Prime Minister is ensured by adequate measures, e.g. by way of secondary legislation and the appointment of a compliance officer and implementation of a compliance programme;
- investigates the independence of *CGES* in relation to undertaking in which *CGES* has financial and other interests;
- investigates the independence in the control over *CGES* in relation to other related undertakings founded by the State, most notably *Montenegro Bonus DOO*, and if necessary to require appropriate measures ensuring independence and avoiding conflicts of interest;
- investigates the independence of the shareholders of *CGES* other than the State, in particular *EMS* as well as other minority shareholders (*Roboti Global Fund United States of America* and *Langston Shipholding LTD – Liberia*) from generation and/or supply companies, and if necessary to require appropriate measures ensuring independence and avoiding conflicts of interest.

Pursuant to Article 3 of the Electricity Regulation, RAE shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *CGES*. RAE

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<sup>68</sup> Secretariat Opinion/17 of 23 January 2017 OST, p. 15.

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shall also communicate its final decision to the Secretariat and publish its decision together with the Secretariat's Opinion.

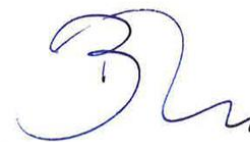
The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. RAE is invited to inform the Secretariat within five working days following receipt whether and why it considers that this document contains confidential information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

Vienna, 27 February 2018



Janez Kopač

Director



Dirk Buschle

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