

Opinion 2/19

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

On 2 October 2018, the Energy Regulatory Office of Kosovo* (hereinafter, “ERO”) notified the Secretariat of a preliminary decision on the certification of the *Operator Sistemi i Transmisioni dhe Tregu – KOSTT sh.a.* (hereinafter “KOSTT”), the transmission system operator (hereinafter “TSO”) for electricity (hereinafter “the Preliminary Decision”). The Preliminary Decision was adopted on 24 September 2018² based on the Law 05/L-084 on Energy Regulator, Law No. 05/L-085 on Electricity (hereinafter “Law on Electricity”) and Law No. 05/L-081 on Energy, as well as Rule No. 14/2017 on Certification of Transmission System Operators approved by ERO, on 13.04.2017.

Pursuant to Article 10 of Directive 2009/72/EC³ (hereinafter “the Electricity Directive”) and Article 3 of Regulation (EC) No 714/2009⁴ (hereinafter “the Electricity Regulation”) the Secretariat is required to examine the notified Preliminary Decision and deliver its Opinion to ERO as to the compatibility of such a decision with Article 10(2) and Article 9 of the Electricity Directive.

On 24 January 2019, 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 Kosovo*

1. The applicant KOSTT

Based on Article 12 of the Law No. 2004/10 on Electricity from 29 April 2004, the Kosovo Trust Agency⁵ adopted a decision separating the vertically integrated undertaking *Korporata Energjetike e Kosovës* in two separate enterprises: “*Kosovo Energy Corporation JSC*” (hereinafter *KEK Holding*) and “*Transmission System Operator and Market Operator Holding JSC*” (hereinafter *KOSTT Holding*). The former performed the activities of lignite mining and electricity generation, distribution

¹ This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Advisory Opinion on the Kosovo declaration of independence.

² ERO, Preliminary Decision, No. V_1033_2018, adopted on 24.09.2018.

³ 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.

⁴ 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.

⁵ Established in 2002 by UNMIK Regulation 2002/12 for managing publicly owned enterprises. See: ERO, Preliminary Decision, para.8.

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and supply, and the latter performed electricity transmission system and market operator activities. On 22 December 2005, the General Assembly of *KOSTT Holding* established *KOSTT JSC* as a subsidiary, and transferred to *KOSTT JSC* 100% of the assets for carrying the functions of transmission and market operator in Kosovo.⁶ *KOSTT* was registered on 23 December 2005 as a Joint Stock Company⁷ and was licensed for the first time by ERO in 2006, for electricity transmission and market operation activities.⁸

KOSTT is in full public ownership. It has the following corporate bodies:

- The General Assembly with the competence to: change the statute and the sub-legal acts of the enterprise; decide on unification, consolidation, separation, distribution, liquidation, transformation; bankruptcy or insolvency; increase or decrease the share capital; decide on the issuance of shares, debt or insurances converted in shares as well as consolidation or separation of unpaid shares and converting insurance; appoints (upon proposal of an audit committee), removes or replaces external auditors etc.⁹ The shareholding rights in the General Assembly are exercised by the Assembly of Kosovo,* represented by a person represented by the President of the Assembly.¹⁰
- The Board of Directors, comprising of seven members, one of which is a Chairman. According to Article 14 of the Law on Electricity, five of the members and the Chairman are appointed and dismissed by the national Assembly of Kosovo*, whereas the Chief Executive Officer, as a member of the Board of Directors, is elected by the Board of Directors itself. Pursuant to Article 13(4) of the Law on Electricity, the competences of the Board are set in the Law on Public Enterprises and include: the adoption of business strategy plans, internal control, auditing, as well as risk management procedures, annual and extraordinary meetings of the Assembly, preparations of the agenda of the Assembly, approval of annual report, annual balance report and annual assessments of profits and losses for the General Assembly's approval and decision on all other issues set forth in the Statute of *KOSTT*.¹¹ According to Article 13(5) of the Law on Electricity, the Board of Directors is held accountable

⁶ Deed of transfer regarding the transfer of real property and electricity lines of Transmission System and Market Operator Holding J.S.C. to Transmission System and Market Operator J.S.C., of 22.12.2005.

⁷ Registration number 70325350, registered on 23.12.2005. The shareholding companies, KEK Holding JSC and *KOSTT* Holding JSC were liquidated on 02.07.2010 and on 20.11.2009, respectively according to Article 39 of Law 03/L-087 on Publicly Owned Enterprises.

⁸ ERO, Register of licenses no. 13 (transmission) and 14 (market operator). The licenses for electricity transmission and electricity market operation have been first issued on 04.10.2006 and modified on 18.07.2012 and 13.04.2017 - latest version (ERO/Li_15/17) available at: http://www.kostt.com/website/images/stories/dokumente/tjera/licenca_me_pass/LICENCE_TRANSMISSION_SYSTEM_AND_MARKET_OPERATOR_J.S.C.pdf. The licenses are valid until 04.10.2036. ERO issues licenses based on Article 28(2) of the Regulator Law in conjunction with Article 4 of the Law on Electricity; see as well the regulator's licensing rules ERO/Rule no. 07/2017.

⁹ ERO, Preliminary Decision, para.31.

¹⁰ Article 13(2) and (3) Law on Electricity.

¹¹ ERO, Preliminary Decision, para.19.

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by reporting to the Assembly of Kosovo* at least on an annual basis.¹² The Chief Executive Officer represents and manages the company.

- The Audit Committee is appointed also by the Assembly of Kosovo* under the Law on Electricity, and it consists of three members of the Board of Directors.¹³ The qualifications of the members of the Audit Committee and its duties and responsibilities¹⁴ are set out in the Law No. 03/L-087 on Publicly Owned Enterprises (hereinafter “Law on Publicly Owned Enterprises”).¹⁵

2. Public activities in generation and supply

Two electricity generation companies, namely the *Kosovo Energy Corporation* J.S.C (hereinafter “*KEK*”), the company operating then two thermal power plants “Kosova A”¹⁶ and “Kosova B”¹⁷ as well as the company *Hidroekonomia “Iber Lepenc”* J.S.C. (hereinafter “*Ujmani HPP*”)¹⁸ are in 100% public ownership.

Pursuant to Article 5 of the Law on Publicly Owned Enterprises, the Government exercises the rights of the shareholder in public enterprises for electricity generation. The competences and duties are exercised by the Ministry of Economic Development on behalf of the Government.

After the privatisation of the Kosovo Energy Distribution and Supply Company (hereinafter “*KEDS*”) in 2013, Kosovo* has sold 100% of its shares in *KEDS* to the Turkish undertaking *Calik Limak Energy JSC*.¹⁹

The Government or the Assembly do not exercise control or have any other right in supply activities.

II. The Preliminary Decision

Article 11 of the Law on Electricity transposes the provisions on ownership unbundling of Article 9 of the Electricity Directive, including the rules pertaining to ownership unbundling of public companies in Article 9(6) of the Electricity Directive.

On 28 April 2017, *KOSTT* submitted an application for certification in accordance with the ownership unbundling model to ERO. Upon assessment, ERO found that the application was not complete and

¹² ERO, Preliminary Decision, paras. 17 et seq.

¹³ Article 15(1) Law on Electricity.

¹⁴ Article 15(2) and (3) Law on Electricity.

¹⁵ Law No. 03/L-087 on Publicly Owned Enterprises dated 13 June 2008, amended by the Law No. 04/L-111 dated 20 April 2012 and Law No. 05/L-009 dated 7 April 2015.

¹⁶ License No. ZRRE/Li_05/17_A.

¹⁷ License ZRRE/Li_05/17_B.

¹⁸ License No. ZRR/17/17.

¹⁹ ERO Preliminary Decision, paras. 35 et seq.

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requested additional information from *KOSTT* on two occasions.²⁰ It received the completed application on 5 July 2018. After that date, ERO assessed compliance of *KOSTT* with the ownership unbundling requirements laid down in Articles 11 of the Law on Electricity as well as with the Certification Rules.

On 24 September 2018, ERO adopted and on 2 October 2018 notified to the Secretariat, a preliminary decision on the certification of *KOSTT* subject to the present opinion of the Secretariat. In its operative part, the Preliminary Decision unconditionally certifies *KOSTT* under the ownership unbundling model.

III. Assessment of the Preliminary Decision

1. General

The unbundling provisions were designed to separate control over transmission system operation, on the one hand, and production and supply activities as competitive activities, on the other hand, with the aim to eliminate a potential conflict of interest between transmission and other activities performed by vertically integrated undertakings.²¹ This objective is best fulfilled by implementation of the ownership unbundling model of Article 9 of the Electricity Directive, which Kosovo* transposed by its Law on Electricity of 2016. In a market environment still prevailing in many Contracting Parties including Kosovo*, where energy activities are predominantly performed by public undertakings 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 these cases, i.e. 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,²² 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 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 (Article 11(4) of the Law on Electricity), 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 ERO's Preliminary Decision against that background.

²⁰ See ERO's Preliminary Decision, paras.2-5.

²¹ 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*.

²² 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.

2. Application of the ownership unbundling provisions to *KOSTT*

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. In exceptional cases the European Commission has accepted that where the TSO does not own the transmission system the rights to manage the system were established otherwise.²³

In the present case, Articles 26-27 of the Law No. 05/L – 081 on Energy stipulates the rights of *KOSTT* over new and existing electricity transmission facilities.²⁴ Article 27(4) of the Law on Energy stipulates that “[T]he property rights established by this article, as well as the property rights over assets granted during the process of incorporation of an energy enterprise that was licensed in 2006 to operate Kosovo’s electricity distribution or **transmission system**, shall, immediately upon the request of the concerned energy enterprise, be registered in such energy enterprise’s name in the concerned Immovable Property Rights Register by the concerned Municipal Cadastral Office. Article 27(2) of the Law on Energy grants a right of servitude of 99 years to *KOSTT* of the property upon which energy facilities are situated.

The transmission assets are accounted for on the balance sheet of *KOSTT*.²⁵

As already held in previous Opinions,²⁶ the Secretariat concludes that in a situation such as in the case at hand, where the legal framework of a Contracting Party gives a clear and unambiguous legal

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

²⁴ Article 26 Law on energy.

²⁵ *KOSTT* application for certification, para.27.

²⁶ Secretariat Opinion 3/17 of 23 January 2017 *EMS*.

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basis such as the one of Article 27 of the Law on Energy, the requirement under Article 9(1)(a) of Directive 2009/72/EC may be deemed to be satisfied.

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.²⁷ A regulatory authority’s assessment in this respect needs to establish in particular whether a given undertaking is by law and in fact actually performing these core tasks, and whether it disposes of the necessary (human, technical, financial) resources for this.²⁸

Article 16(3) of the Law on Electricity requires that “the transmission system operator shall have available all necessary human, technical, physical and financial resources for safe, reliable and long-term operation of the transmission system”. Article 16(1) of the Law on Electricity lists the tasks of the transmission system operator, including “allocating cross-border transmission capacities, in cooperation with transmission system operators from Contracted Parties of the Energy Community,²⁹ congestion management for all transactions in interconnection lines with neighbouring systems.”

The Secretariat also takes a note of ERO’s finding that “KOSTT has also shown that for reasons beyond its control is unable to carry out the allocation of its interconnection transmission capacities.”³⁰ As the ECRB noted in its Opinion,³¹ “KOSTT’s capacity as transmission system operator is not affected by the fact that it does not perform the activities and functions carried out by EMS, including [...] capacity allocation and congestion management on the interconnections with neighbouring countries”.³²

The Secretariat agrees with ERO’s findings that KOSTT satisfies the criteria of having available the necessary human, technical, physical and financial resources to effectively perform the tasks of a transmission system operator.

c. Separation of control over transmission from generation/supply

²⁷ Secretariat Opinion 1/16 of 3 February 2016 TAP AG.

²⁸ Commission’s Opinion on certification of VÜN C(2012) 2244 final of 29.3.2012.

²⁹ According to Article 16(1.41) this right can be transferred to another regional entity established for this purpose (such as, e.g., SEE CAO).

³⁰ ERO, Preliminary Decision, para.75.

³¹ See ECRB Opinion 01/19 KOSTT, para.36.

³² Secretariat, Reasoned Request in Case ECS-3/08 of 13.05.2016, para. 69; this assessment has been confirmed by Decision 2016/02/MC-EnC and Decision 2018/12/MC-EnC of the Energy Community Ministerial Council on Case ECS-3/08 as well as the related Opinions of the Advisory Committee.

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The Preliminary Decision assesses *KOSTT*'s compliance with the ownership unbundling model against Article 11 of the Law on Electricity, 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 Directive 2009/72/EC, and may control production and supply activities, on one hand, and transmission activities on the other hand. The notion of control is further defined by the Merger Regulation³³ and includes the rights enumerated in Article 9(1)(b), (c) and (d) and (2) of Directive 2009/72/EC, including the power to exercise voting rights, the holding of majority share and the power to appoint members of the TSO's corporate bodies and those legally representing the TSO.³⁴

The Law on Electricity of 2016 excludes *KOSTT* from the application of the provisions of the Law on Publicly Owned Enterprises, particularly those related to the competence of appointing the Board of Directors, exercising the rights of shareholders, compensating the Board of Directors and reporting and appointment of the Audit Committee. In particular the Law on Electricity transferred the role of the sole shareholder of *KOSTT* from the Ministry of Economic Development to the Assembly of Kosovo*. This Law determines *KOSTT*'s obligation to report on its work before the Assembly on annual basis, and grants the Assembly competences to appoint and dismiss *KOSTT*'s Board of Directors.

The Secretariat agrees with ERO that the Assembly of Kosovo* and the Government representing the state's shares in *KOSTT* on the one hand and *KEK/Ujmani HPP* on the other hand, respectively in accordance with the Law on Electricity, qualify as public bodies within the meaning of Article 9(6) of the Electricity Directive.³⁵

That said, 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.

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

The transmission system operator and the public or private body controlling it may in principle not be engaged in electricity generation and supply activities. In this respect, the Secretariat notes that

³³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the, Official Journal L 24, 29.01.2004, p. 1-22.

³⁴ Article 9(2) of Directive 2009/72/EC and Article 54(4) of the Power Sector Law.

³⁵ 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.

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KOSTT has two licenses – for transmission system operation and for market operation. There is only accounting unbundling between the transmission system operator and the market operator.³⁶ As market operator, *KOSTT* buys the energy from the power plants benefiting from support for the promotion of renewable energy sources, and buys and sells the energy necessary for balancing purposes. *KOSTT* has also expressed interest in participating as a shareholder to establishment of a power exchange together with the Albania TSO, *OST*. Two Memoranda of Understanding have been signed in this respect, one by the relevant ministries from Albania and Kosovo* on 28 November 2017, and another one between the national regulatory authorities and the TSOs from Albania and Kosovo* on 17 August 2018.

The Secretariat agrees with ERO and does not consider the functions of *KOSTT* related to purchasing electricity for balancing purposes or from renewable sources, or its participation in a future cross-border power exchange to raise any concern. The Secretariat considers that there is no risk of discrimination by *KOSTT* against other generators, as long as the Market Operator only acts as a centralised buyer of energy produced from renewables as long as they are under a regulated feed-in tariff framework and are small in size.³⁷ Similarly, based on the European Commission's practice, since power exchanges function as platforms facilitating trade of electricity and gas by matching supply and demand on the respective markets and they are not themselves engaged in the buying or selling of electricity, if *KOSTT* holds shares in any future power exchange would not represent an obstacle for certification under the ownership unbundling model.³⁸

Finally, *KOSTT* is also one of the founders of the South-Eastern Europe Coordination Auction Office (SEE CAO) in Podgorica and owns 12.5% of its shares. As the Secretariat already held in previous Opinions,³⁹ the company is not engaged in activities of generation and supply of electricity or gas and therefore *KOSTT*'s participation in it does not raise concerns related to conflict of interest.

Based on this, the Secretariat agrees with ERO that the applicant *KOSTT* is not engaged in generation or supply activities.

2. Separation and independence of public bodies

For the purpose of establishing that the two public bodies tasked to exercise control over the state-owned undertakings in question are *de iure* and *de facto* independent from each other and there is no common influence of a third public or private entity, the public body controlling the transmission system operator must have clearly defined and delineated competences, must carry out the tasks

³⁶ *KOSTT* application, para.19.

³⁷ Commission's Opinion, certification of *Societa Gasdotti Italia S.p.A.*, C(2013) 380 final, 23.01.2013.

³⁸ Commission's Opinion on certification of *Energinet* (gas) (C(2012) 88, 09.01.2013 p.3

³⁹ Secretariat Opinion 1/18 of 27 February 2018 CGES.

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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.⁴⁰

The Law on Electricity defines the Assembly of Kosovo* as the public body that exercises shareholders rights over *KOSTT*. In the General Assembly of *KOSTT*, the Assembly of Kosovo* is represented by a representative appointed by the President of the Assembly. On the other hand, the Government is represented by the Ministry of Economic Development in the General Assemblies of *KEK* and *Ujmani HPP*.

ERO notes in its Preliminary Decision that the Constitution is based on the principle of separation of powers between legislative non-executive body (the Assembly), the law enforcement – executive body (the Government) and the President of Kosovo*. ERO concludes that “*KOSTT stated in its application that the transfer of shareholder rights over KOSTT from the Ministry (Government) to the Assembly has provided sufficient safeguards to ensure that control over the TSO is exercised without influence by the public body controlling the State’s interests on generation (production), namely by the Ministry of Economic Development of the Government.*”

The Secretariat agrees with ERO’s finding that in general, the Assembly, i.e. the Parliament of Kosovo*, and the Government of Kosovo* have the necessary competences and tools to exercise control over *KOSTT* on the one hand and *KEK/Ujmani HPP* respectively in a legally and factually independent manner.

The Secretariat also agrees that the two relevant public bodies, the Assembly and the Government, are 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. The procedure for appointing the members of the Board of Directors of *KOSTT* is governed by Article 14 of the Law on Electricity, which stipulates that the procedure is led by the Ministry of Public Administration, which in case of a vacancy on the Board of Directors makes a public vacancy announcement. The Parliamentary committee on energy, upon receiving the applicants’ files, submits to the Assembly at least two candidates for each open position. The Assembly with a majority of votes appoints one of the recommended candidates.

As regards *de facto* appointment of the management bodies of *KOSTT*, ERO states that Article 62(9) of the Law on Electricity allows “*the current TSO Board Members, including the Chairman and Audit Commission [to] continue to carry out their functions until the completion of their mandate.*” In exchange of information with the Secretariat, ERO confirmed that the mandate of the members of

⁴⁰ 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 Board of Directors of *KOSTT*⁴¹ and the mandate of the Audit Committee⁴² expired, and that the appointment of the new members of both the Board of Directors and Audit Committee is in the process of selection by the Assembly of Kosovo*. The Secretariat invites ERO to monitor the process of appointment and to ensure that the same person is not a member of the board of both a generator and a TSO as required by Article 9(1)(d) of the Electricity Directive.

KOSTT explained that the shareholder has the right to ask for dividend, and that in the past, when the Government was the shareholder of *KOSTT*, it had availed itself of this right.⁴³ ERO on the other hand has not assess how and to whom dividends are paid out by *KOSTT* and the other public energy undertakings active in generation, *KEK/Ujmani HPP*. This question matters to determine which entity within Kosovo* has a financial interest in the public energy undertakings, and to verify if dividends from *KOSTT* but also *KEK/Ujmani HPP* go to the state budget, whether the different shareholders are independent in deciding on the use of those dividends.

Finally, ERO does not elaborate on the competences of the Government, the Ministry of Finance and the Ministry of Economic Development related to *KOSTT* even though all those public bodies retain competences in terms of information they receive from *KOSTT* even after the transfer of the shareholders rights to the Assembly.

In relation to the Government, Article 13(7) of the Law on Electricity requires the Board of Directors of *KOSTT* to provide information to the Government “*in order to monitor the implementation of policies in the energy sector*”. Furthermore, the Government enters in international financial loan agreements for infrastructure development of *KOSTT*, as a principle borrower.⁴⁴ The Secretariat deems Article 13(7) of the Law on Electricity, based on which the Government has to be kept informed for the purpose of implementing its policy, of a general policy nature rather than a specific involvement in the activities and tasks of the transmission system operator. Nonetheless, since this article is of general nature, and does not define what kind of information is required by *KOSTT*, the Secretariat invites ERO to elaborate on this aspect in its Final Decision in order to dispel any potential conflict of interest related to confidential information being shared by *KOSTT* with any public body other than its shareholder. In relation to the Government as a principle borrower, or a guarantor, participating to loan agreements concluded by *KOSTT* for infrastructure projects would only raise concerns if the Government has a decisive word on whether such infrastructure project will be developed or not, i.e. if the Government could selectively decide to support only loans that would be beneficial for developing transmission infrastructure only in areas that would benefit *KEK*.

In relation to the Ministry of Finance, according to *KOSTT*'s application for certification,⁴⁵ the Law on Public Financial Management and Accountability obliges the TSO to notify the Minister of Finance

⁴¹ Government Decision on appointment of members of Board of Directors of *KOSTT*, No.07/47, 02.09.2015 appointed members of the Board for three years.

⁴² Ministry of Economic Development Decision on appointing the Audit Committee of *KOSTT*, No. 2402, 09.10.2015.

⁴³ *KOSTT* application, para.151.

⁴⁴ *KOSTT* application para. 161.

⁴⁵ *KOSTT* application para. 74.

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in writing of „significant events“ related to “a) forming or participating in the formation of a legal entity, company, partnership, trust, unincorporated joint venture or any similar arrangement, or any other business or non-business organization or association; b) acquiring, disposing or significantly modifying the nature or extent of any interest held in any organization or association referred to in point (a) above; c) acquiring or disposing of any operating asset or other significant asset; d) ceasing, expanding or modifying its operations; e) exercising its ownership interest in any organization or association referred to in point f) above to cause such organization or association to take any action specified in points (a) – (d) above; and g) engaging in any borrowing or lending activity.”⁴⁶

The report based on Article 56 of the Law on Public Financial Management and Accountability is obligatory for all public enterprises (*KOSTT* but also *KEK/Ujmani HPP*) and is to be drafted in line with rules developed by the Central Harmonization Unit on Financial Control of the Ministry of Finance.⁴⁷ After receiving a proposal from the public undertaking (on for ex. establishing a public-private partnership under Article 56(a)), the Minister of Finance has 15 days “to deny or approve” the request in writing, or impose conditions to that approval.⁴⁸ Finally, the Government has to ratify the decision in order for it to be effective.

The fact that a decision on significant events, as listed in Article 56 of the Law on Public Financial Management and Accountability, depend on an approval by the Ministry of Finance and confirmation by the Government may encroach upon the right of the Assembly as a public body controlling the TSO to carry out its tasks in full autonomy. Even more, such reports are submitted to and approval for similar actions by *KEK/Ujmani HPP* is also needed by the Ministry of Finance. Since the Ministry of Finance, being part of a collective body (the Government) that controls generation activities, will have a right to approve or deny *KOSTT*'s decisions related to significant events, this could lead to selective decision making in favour of the publicly owned generation. Having in mind these concerns, the Secretariat invites ERO to investigate concrete examples of such reporting and to evaluate the influence of the Ministry of Finance upon the independent decision making of *KOSTT* and its shareholder, the Assembly of Kosovo*, and if need be – to condition the certification of *KOSTT* with changes to legislative framework.

In relation to the Ministry of Economic Development, ERO notes that a dedicated unit was established within the Ministry of Economic Development with the purpose of monitoring the performance of all public enterprises and that the competences and functions of that unit have been determined by Law on Publicly Owned Enterprises. The Ministry, and its Unit for Monitoring Publicly Owned Enterprises, based on Article 30 of the Law on Publicly Owned Enterprises, is still empowered to receive the annual business plan prepared by *KOSTT* which includes, inter alia:

- A description of the business and financial targets to be achieved by the publicly owned enterprises and the timetable for implementation;
- A choice of means for achieving those targets;

⁴⁶ Article 56 Law on Public Financial Management and Accountability.

⁴⁷ Article 6(3) Law on Public Financial Management and Accountability.

⁴⁸ Article 54 Law on Public Financial Management and Accountability.

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- A definition of total cost of operations and the manner in which this cost will be financed;
- Specific actions to be undertaken in order to achieve the targets set; and
- The obligations of the publicly owned enterprises vis-à-vis consumers and the public.

Based on this Article, the Ministry of Economic Development receives the business plans with planned investments of all public enterprises, *KOSTT* as well as *KEK/Ujmani HPP*, as such activity is based on the past shareholding rights of the Government in all energy public enterprises. Depending on the sensitivity of the information, the competences of the Ministry of Economic Development, which on behalf of the Government exercises the shareholders rights in energy undertakings active in generation of electricity, related to receiving information on network planning by *KOSTT* may be in conflict with *KOSTT*'s autonomy in financial and investment planning.

Upon entry into force of the Law on Electricity, *KOSTT* informed the Minister of Economic Development about the change in shareholders rights from the Ministry to the Assembly, which would affect also the reporting obligations towards the Policy and Monitoring Unit, and requested appointment to discuss future cooperation arrangements.⁴⁹ While the letter that *KOSTT* sent to the Ministry of Economic Development in relation to the reporting to it as to a shareholder is to be welcomed, Article 30 of the Law on Publicly Owned Enterprises requiring submission of the business plan establishes competences which may affect the TSO's autonomy related to the exercise of one of the core functions attributed to it by Energy Community law, network planning.⁵⁰ The Secretariat is thus concerned that the Ministry of Economic Development could be biased by its control over *KEK* and *Ujmani HPP* and could use the information received from *KOSTT* resulting in negative effects on the development of the network and for the benefit of its own generation.⁵¹ A direct approval or a *de facto* veto right on *KOSTT*'s planned investments by the Ministry of Economic Development is not in line with Article 9(1) and (2) of the Directive.⁵² The Secretariat invites ERO to assess the competence of the Ministry of Economic Development pursuant to Article 30 of the Law on Publicly Owned Enterprises, and if necessary to condition the certification of *KOSTT* with removal of such rights. ERO's assessment in relation to the information that the Government and the two Ministries receive and their approval or *de facto* veto rights, should be done against the requirements that "*whereby a person holding interests in [gas] production and supply at the same time has a decisive say in whether or not important investments in [gas] transmission infrastructure can go ahead or not, the incentive arises to abuse the control over the investments in the TSO with a view to favour the generation or supply interests, in casu by keeping potential competitors out of the market through preventing investments from taking place.*"⁵³

⁴⁹ *KOSTT* application, para.76.

⁵⁰ See: Commission's Opinion on certification of *Gas Transport Services B.V.* C(2013) 4205 final, 01.07.2013; Commission's Opinion on certification of *Amber Grid*, C(2015) 2135 final, 23.03.2015; Commission's Opinion on certification of *TenneT TSO.B.V.*, C(2016) 3987, 22.06.2016.

⁵¹ Commission's Opinion on certification of *Gas Transport Services B.V.* C(2013) 4205 final, 01.07.2013.

⁵² Commission's Opinion on certification of *TenneT TSO.B.V.*, C(2016) 3987, 22.06.2016.

⁵³ Commission's Opinions on certification of *Gas Transport Services B.V.* C(2013) 4205 final of 1.7.2013 on certification of *TenneT*. C(2013) 4206 final of 1.7.2013.

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For the relations between the three public bodies (the Government, the Ministry of Economic Development and Ministry of Finance) in the areas addressed above, ERO is requested to assess compliance issues in its Final Decision and, if need be, make the certification of *KOSTT* conditional upon the full transfer of tasks related to the TSO to its sole shareholder, the Assembly of Kosovo*. Where such a process would require amendments of primary and secondary legislation, a reasonable transitional time may be granted.

3. The governance of the TSO to allow for full independence in day-to-day decision-making

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.

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 also requires measures related to, inter alia, the elimination of exchanges of any confidential information on a daily basis.⁵⁴ 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. 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.⁵⁵ 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.

In the case of Kosovo* the two public bodies controlling the TSO and generation activities are the Assembly and the Government, and the separation between the two and their independence from each other as well as from third public bodies is ensured in the Constitution. However, the Secretariat considers that safeguard measures for ensuring managerial independence over the day-to-day operations, as well as for the financial and operational independence of the TSO might still be improved within the TSO itself. *KOSTT* reported on some of those measures already in place such as: code of ethics, a statement signed by all Directors of the Board, as well as a separate code of ethics mandatory for all company personnel.⁵⁶ Other measures relate to the prohibition of sharing

⁵⁴ Recital 15 of the Electricity Directive.

⁵⁵ 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.

⁵⁶ *KOSTT* applications, paras. 112-113.

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confidential information.⁵⁷ ERO is invited to further assess the independence of the TSO concerning day-to-day operation in the Final Decision. In particular, it should focus on elaborating on the *de facto* implementation of the legal provisions referred to by *KOSTT*. Since some of those rules have been set before the ownership unbundling of *KOSTT*, ERO should verify whether the rules in place as implemented are satisfactory under the requirements for ownership unbundling.

The ownership unbundling model is meant to ensure a situation in which discrimination can be excluded based on ownership structure of the TSO.⁵⁸ 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. In previous Opinions,⁵⁹ the Secretariat has requested implementation of a compliance programme and appointment of a compliance officer. *KOSTT* in its application for certification referred to the Law on Electricity of 2004, which already at that time, in order to ensure independence, required the TSO to establish a compliance program. However, since the Electricity Law of 2016 does not contain such requirement, no compliance officer has been appointed and no compliance program is in place in *KOSTT*. The Secretariat therefore considers it beneficial beyond the measures in place to request *KOSTT* to implement a compliance programme and appoint a compliance officer. 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. In particular, it should report to ERO and publish on the website a report about the relations between *KOSTT* and the public bodies controlling and *KEK/Ujmani HPP* related to information sharing and the reporting requirements as elaborated in the preceding section.

IV. Conclusions

Against this background, the Secretariat supports certification of *KOSTT* in line with ERO's Preliminary Decision, subject to the following remarks. The Secretariat requests that ERO further assesses and elaborates on

- a) the process of appointment of members to the Board of Directors of *KOSTT* by the Assembly and to ensure that the same person is not a member of the board of both a generator and a TSO as required by Article 9(1)(d) of the Electricity Directive;
- b) the relations between *KOSTT* and the Government, the Ministry of Economic Development and the Ministry of Finance (such as information sharing, reporting, and decision-making concerning transmission assets).

To the extent the assessment under b) leads to concerns in the manner outlined above, ERO is requested to demand, in its Final Decision, the full transfer of tasks from the Government, the Ministry of Economic Development and the Ministry of Finance related to *KOSTT* to an independent body or institution, such as ERO itself or the Assembly of Kosovo*.

⁵⁷ *KOSTT* applications, paras. 116-127.

⁵⁸ Commission's Opinion on certification of Snam Rete Gas S.p.A., C(2013) 5961 final, 13.09.2013.

⁵⁹ Secretariat Opinion 1/17 of 23 January 2017 *OST*, p. 15; Secretariat Opinion 1/18 of 27 February 2018 *CGES*, p.15.

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ERO is also invited to request the implementation of a compliance programme and appointment of a compliance officer, and to ensure that it reports about the relations between the two public bodies controlling *KOSTT* and *KEK/Ujmani HPP*.

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

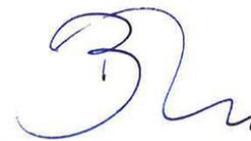
The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. ERO is invited to inform the Secretariat within five working days following receipt whether and why it considers that this document contains confidential information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

Vienna, 1 February 2019



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