

TO THE ENERGY AGENCY OF THE REPUBLIC OF SERBIA

REASONED REQUEST

Submitted pursuant to Article 10 of the Directive 2009/72/EC as incorporated in the Energy Community *acquis* by Decision 2011/02/MC-EnC of the Ministerial Council,¹ by the

SECRETARIAT OF THE ENERGY COMMUNITY

**for opening of the certification procedure for reassessment of compliance by JSC
Elektromreža Srbije with criteria for unbundling**

I. Background information

On 25 October 2016, Joint Stock Company *Elektromreža Srbije* (hereinafter “*EMS*”) ² submitted an application for certification to the Energy Agency of the Republic of Serbia (hereinafter “*AERS*”) based on the ownership unbundling model stipulated in Article 9 of Directive 2009/72/EC. On 15 February 2017, *AERS* notified the Energy Community Secretariat of a preliminary decision on the certification of the *EMS* (hereinafter “*Preliminary Decision*”) adopted on 26 January 2016 ³ on the basis of Articles 39(1) and 49(3) in connection with Articles 101(1) and 102 of the Energy Law,⁴ as well as Article 24 of the Rulebook on Energy License and Certification⁵ and Article 12 of the Statute of the *AERS*.⁶

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

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

¹ Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty.

² *EMS* started operating as a public enterprise on 1 July 2005 based on Government’s Decision No.023-297/2005-1, 27.01.2005. By the Government’s Decision No.023-10172/2016, 27.10.2016, *EMS* was transformed into a joint stock company, *EMS JSC Belgrade* (Serbian Business Registry Agency, Decision No. BD-88869/2016 of 08.11.2016. The modification of the legal form of the undertaking *EMS* was done by act No. 312-3/2016-C-I of 18.11.2016).

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

⁴ Energy Law, adopted on 29.12.2014, Official Journal of the RS, No.145/2014.

⁵ Minister of Mining and Energy, Rulebook on Energy License and Certification No.10-00-00010/2015-04, 09.10.2015, Official Journal of the RS, No.87/15.

⁶ *AERS Statute*, Official Journal of the RS, No.52/05.

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

After holding a hearing with relevant stakeholders in Vienna on 22 May 2017 and receiving an Opinion on the Preliminary Decision by the Energy Community Regulatory Board (hereinafter "ECRB") on 8 June 2017, the Secretariat adopted its Opinion 3/17 on the Preliminary Decision of AERS pursuant to Article 3(1) of Regulation (EC) No 714/2009⁷ and Article 10(6) of Directive 2009/72/EC⁸ on 15 June 2017.⁹ In their Opinions, both the Secretariat and ECRB considered that *EMS* could, at the time of issuing the respective Opinions, not be considered unbundled and should not have been certified as proposed by the Preliminary Decision of AERS. In particular *EMS* did not comply with the rules on ownership unbundling Article 9 of the Electricity Directive as it was still controlled directly by the Government, the representative of state ownership also in the electricity generation and supply company *Elektroprivreda Srbije* (hereinafter "*EPS*"), as well as in *Srbijagas*, a vertically integrated undertaking active in natural gas transmission,¹⁰ distribution¹¹ and supply.¹²

As required under Articles 10 and 11 of Directive 2009/73/EC and Article 3 of Regulation (EC) 715/2009, AERS had to adopt a final certification decision, taking utmost account of the Opinion of the Secretariat. On 4 August 2017, AERS adopted its Final Decision¹³ on the certification of *EMS*, which was published in the Official Gazette of the Republic of Serbia No. 76/17 from 9 August 2017 (hereinafter 'the Final Decision'). Both the Final Decision and the Secretariat's Opinion 3/17 were published on AERS's website. The Secretariat has not been notified by AERS of the adoption of the Final Decision.

The operative part of the Final Decision does not contain any longer conditions as was still the case with the Preliminary Decision, and simply reads:

"The Joint Stock Company Elektromreža Srbije ... is certified as an operator of the electricity transmission system."

⁷ 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.

⁸ 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.

⁹ Secretariat's Opinion 3/17 *EMS*.

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

¹¹ AERS Decision No 311.01-40/2006-LI issued on 31.10.2006 for 10 years (*Srbijagas* continues carrying out distribution activities even if the license has formally expired). 19 licensed distribution system operators are active on the Serbian market.

¹² License No 0275/16-LG-SN issued on 29.09.2016 for 10 years.

¹³ 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 (25.08.2017).

II. Facts giving rise to necessity for reassessment of EMS's compliance with unbundling criteria

1. Changes of national legal framework

On 26 June 2017, in the period after the Secretariat issued its Opinion 3/17 (hereinafter 'the Opinion') on the AERS Preliminary Decision concerning the certification of EMS and before the adoption of the Final Decision of AERS, the Serbian Parliament adopted amendments to the Law on Ministries.¹⁴ Article 4 of the Law on Ministries, specifying the competences of the Ministry of Economy were amended in a way that the Ministry of Economy was granted an additional competence to "*perform state administration affairs related to...setting strategic goals, improving work and business, monitoring and preparing proposals for acts on appointing and dismissing management bodies in public companies **except for public companies that perform activities of production and supply of electricity or natural gas...***". Article 7 of the same Law amended the competences of the Ministry of Mining and Energy granting it an additional competence to "*perform state administration affairs related to...preparing proposals for acts on appointing and dismissing management bodies, as well as other acts related to the work and operation of **public enterprises and companies that perform the activity of production and supply of electricity or natural gas***".

2. Impact of the changes in national legal framework to the compliance by EMS with the unbundling criteria

The unbundling provisions are 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.¹⁵ In cases where both transmission and production/supply functions remain in state-ownership, unbundling can be implemented in accordance with Article 9(6) read in conjunction with Article 9(1) of the Electricity Directive.

When assessing the compliance of the Preliminary Decision with the unbundling model enshrined in the Electricity Directive, the Secretariat outlined in its previous Opinions¹⁶ that the following aspects matter in particular:

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

¹⁴ Official Gazette of the Republic of Serbia No. 44/2014, 14/2015, 54/2015, 96/2015 – other laws and 62/2017.

¹⁵ Secretariat Opinion 1/16 of 3 February 2016 TAP AG; Secretariat Opinion 1/17 of 23 January 2017 OST.

¹⁶ Secretariat Opinion 1/17 of 23 January 2017 OST.

For the first two aspects, under a) and b) above, the Secretariat agreed that *EMS* complies with the criteria established under Energy Community law. However, the Secretariat had concerns and concluded in its Opinion 3/17 that *EMS* does not fulfill the conditions and could not be certified as ownership unbundled TSO due to lack of compliance with the third criteria concerning separation of control within the State.

Similarly, AERS in its Preliminary Decision had already remarked that

“EMS” JSC Belgrade did not submit evidence on compliance with the condition implying the independence of the transmission system operator as prescribed in Article 98 of the Energy Law (in terms of independence from the management body of an entity performing electricity production or supply) since the Government exercises control both over the transmission system operator (in this case, “EMS” JSC Belgrade) and over an energy entity performing electricity production and supply (in this case, Public Enterprise “Elektroprivreda Srbije”, Belgrade)”¹⁷.

The ECRB agreed with that assessment in concluding *“that the conditions, as stipulated by Article 9 paragraph 1 lit (b) and (c) and paragraph 2 in conjunction with paragraph 6 [of the Electricity Directive] are not met”*.

In its Opinion 3/17, the Secretariat concluded that

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

As describe above, the national circumstances have changed in the period between the Secretariat issued its Opinion and the AERS adopted its Final Decision.

While the basic requirement of designating two separate public bodies has not been complied with at the time when AERS issued its Preliminary Decision and at the time when the Secretariat issued its Opinion on that Preliminary Decision, with the subsequent amendments to the Law on Ministries, such separation of public bodies with respect to the control over transmission, on the one hand, and energy production and supply, on the other hand, may have taken place.

It is not clear either from the Final Decision of AERS or from the amendments of the Law on Ministries alone whether the two ministries mentioned therein have actually taken over full and separate control of the respective state-owned companies. This is subject to doubt: even after the amendments of the Law on Ministries, the Government seems to remain the

¹⁷ AERS Preliminary Decision, p. 7-8.

only legal person which “represents the Republic of Serbia and it exercise the rights and obligations which the Republic of Serbia has as the founder of public enterprises”.¹⁸

However, even if two distinct public bodies now effectively exercised control over transmission and the other energy activities of the State, respectively, the notion of separation of control is more comprehensive than that. As further defined in the practice of both the Secretariat and the European Commission requires *de iure and de facto* independence between the two public bodies in charge of exercising control over the state-owned undertakings in question, including the prevention of any common influence of a third body or entity.

In its Final Decision, AERS simply referred to these amendments but failed to analyse in the level of detail required the degree of separation of control over the different activities by the different public bodies in charge.

More specifically, AERS has not verified whether the requirement for a true separation of control between the two public bodies has been complied with. It still remains to be verified whether, under the changed circumstances of the amended Law on Ministries, the public body controlling the transmission system operator (potentially the Ministry of Economy) has clearly defined and delineated competences, performs those tasks in full autonomy and is not subordinate to another collegial or single body (such as the Government or the Prime Minister) controlling (also) energy generation or supply undertakings¹⁹. Furthermore, where one of the two ministries in question also exercises policy functions which may actually or potentially affect the control over and the decision-making of the transmission system operator, full independence may also be compromised.

The Final Decision also refers to the Law on Administration²⁰ without specifying the relevant articles or the relevance of that Law for the present case. It stipulates that “*the ministry is headed by the minister, who represents the ministry, adopts regulations and solutions in administrative and other matters and decides on other issue from the scope of the ministry, and for its work and state from scope of the ministry's competences is responsible to the Government and the National Assembly*”²¹. AERS concludes that it follows from this Law that there is no interaction in the work of the ministry competent for economy and ministry competent for the energy, and no shared control over the TSO and energy companies operating in the field of electricity production and supply. Based on this, AERS, in its Final Decision, based its finding that EMS is fulfilling the requirements for the TSO certification pursuant the Law on Energy on this provision.

¹⁸ Article 4 of Law on the Government “Official Journal of the Republic of Serbia” No. 55/2005, 71/2005, 101/2007, 65/2008, 16/2011, 68/2012 - decision of the Constitutional Court, 72/2012, 7/2014 - decision of the Constitutional Court and 44/2014.

¹⁹ 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.

²⁰ “Official Gazette of the Republic of Serbia”, No. 79/05, 101/07, 95/10 and 99/14.

²¹ AERS Final Decision, p 12.

As described above, the Secretariat was involved in the certification procedure as required by Article 10(1) of the Electricity Directive at a stage where the factual basis was different from the present one. As a consequence, the Secretariat's Opinion is not made on the same set of facts and laws as AERS' Final Decision. At the same time, the Final Decision on the basis of new legislation raises a number of issues on which the Secretariat had no opportunity to give its Opinion for AERS to be taken into account, and which seem to require a more in-depth against the Electricity Directives provisions on ownership unbundling.

Considering the above, the Secretariat concludes that it is necessary for AERS to (re-)open the certification procedure so that the Secretariat can give its Opinion on compliance of *EMS* with the criteria for unbundling based on the changed circumstances.

III. ECS Request for reassessment of compliance with the unbundling criteria

Article 10(4)c) of Directive 2009/72/EC, transposed by Article 103(2)3) of the Serbian Energy Law, obliges the regulatory authorities to open a certification procedure

“...
“

(c) upon a reasoned request from the Energy Community Secretariat.”

This provision does not envisage any discretion by the national regulatory authority in responding to the Secretariat's request.

Based on the reasons given above, the Secretariat thus requests that AERS in accordance with Article 10(4)c) of Directive 2009/72/EC

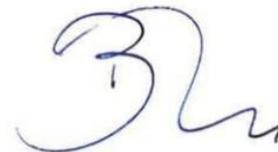
Opens a certification procedure for the assessment of compliance by the electricity transmission system operator *EMS* with the unbundling criteria stipulated in Article 9 of Directive 2009/72/EC, as transposed by Article 98-99 of the Serbian Energy Law, based on changed circumstances after the issuance of the Secretariat's Opinion 3/17.

On behalf of the Secretariat of the Energy Community

Vienna, 15 September 2017

Handwritten signature of Janez Kopač in blue ink.

Janez Kopač
Director

Handwritten signature of Dirk Buschle in blue ink.

Dirk Buschle
Deputy Director / Legal Counsel