

OPINION 02/2017 OF THE ENERGY COMMUNITY REGULATORY BOARD  
on the preliminary decision no. 312-3/2016-C-I of 26 January 2017 issued by the regulatory  
authority of the Republic of Serbia on certification of *Elektromreža Srbije*

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THE ENERGY COMMUNITY REGULATORY BOARD

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

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

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

CONSIDERING THAT:

**1. Procedure**

- (1) On 25 October 2016, *Elektromreža Srbije*<sup>3</sup> (hereinafter: *EMS* or 'the Transmission System Operator'; TSO) submitted to the national energy regulatory of Serbia (hereinafter: 'AERS' or 'the regulator')<sup>4</sup> an application for certification under the ownership rules stipulated by Article 39(1) and Article 49(3) in conjunction with Articles 101(1) and 102 of the Serbian Energy Law.<sup>5</sup>
- (2) The regulator has analysed whether and to which extent the TSO complies with the ownership unbundling requirements as laid down in Article 98 and 99 of the Energy Law transposing Article 9 of the Electricity Directive.
- (3) Following the change of the modification of the legal form of the Public Enterprise *Elektromreža Srbije* into a joint stock company<sup>6</sup> (hereinafter: '*EMS JSC*'), AERS requested additional information from the applicant by decision no 312-/2016-C-I of 18 November 2016.

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

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

<sup>3</sup> [www.ems.rs](http://www.ems.rs). The company was first established by the Executive Council of the People's Republic of Serbia on 28 June 1958 under the company name *Elektroistok*. *EMS* operates as joint stock company since 8.11.2016.

<sup>4</sup> [www.aers.rs](http://www.aers.rs).

<sup>5</sup> Official Gazette No. 145/14.

<sup>6</sup> Ref. Official Gazette No 88/16 and decision of the Serbian Business Registration Agency no BD-88869/2016 of 8.11.2016.

- (4) On 26 January 2017 AERS adopted a preliminary decision on the certification of EMS (hereinafter 'Preliminary Decision').<sup>7</sup> The Preliminary Decision is based on Article 39(1) and 49(3) in connection with Articles 101(1) and 102 of the Energy Law, as well as Article 24 of the Rulebook on Energy Licence and Certification.<sup>8</sup>
- (5) On 15 February 2017 AERS notified the Secretariat its Preliminary Decision.
- (6) On 1 March 2017 the Secretariat forwarded the Preliminary Decision to the ECRB President with the request for providing an ECRB Opinion pursuant to Article 3(1) Electricity Regulation.
- (7) The ECRB President on 9 March 2017 initiated ECRB consultation pursuant to Procedural Act no 01.1/2015/ECRB-EnC.
- (8) ECRB examined the Preliminary Decision in accordance with the procedures laid down in said Procedural Act by written procedure and including a discussion at the 36<sup>th</sup> ECRB meeting held on 19 April 2017. Final issuance of the present Opinion follows a hearing held at the premises of the Secretariat on 22 May 2017 at which ECRB was represented (hereinafter: 'the hearing').<sup>9</sup>
- (9) The present Opinion received the positive majority of votes required by Procedural Act no 01.1/2015/ECRB-EnC.

## 2. The Preliminary Certification Decision

### 2.1. The applicant

- (10) *EMS JSC* is a 100% State owned joint stock company that owns<sup>10</sup> and operates<sup>11</sup> the electricity transmission grid in the Republic of Serbia and is the exclusive holder of the license for electricity transmission and operation.<sup>12</sup> Ownership rights are executed by the Government of the Republic of Serbia.
- (11) Following the requirements of the Serbian Energy Law 2004, transmission activities performed by *EMS JSC* are unbundled from electricity supply, distribution and generation performed by the public enterprise *Elektroprivreda Srbije (EPS)*<sup>13</sup>.

### 2.2. Content

- (12) In December 2014, the Republic of Serbia adopted a new Energy Law. Articles 98 and 99 *leg cit* transpose the provisions of Article 9 of the Electricity Directive defining ownership unbundling as the only applicable unbundling model for *EMS JSC*.

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<sup>7</sup> AERS Decision, No. 312-3/2016-C-I.

<sup>8</sup> Official Gazette No 87/15.

<sup>9</sup> At said hearing ECRB received agreement of the Secretariat on an extended deadline for final issuance of the present ECRB Opinion with a view to reflect the information gained at the hearing.

<sup>10</sup> Cf Article 409 of the Energy Law.

<sup>11</sup> Ref. Official Gazette No 88/16 and decision of the Serbian Business Registration Agency no BD-88869/2016 of 08.11.2016.

<sup>12</sup> License no. 0106/13-ЈЕ-ПЦУ of 07.09.2006 issued by AERS consisting of license no 019/06-ЈЕ-4 of 05.09.2006 for electricity transmission operation and license no 020/06-ЈЕ-3 of 07.09.2006 for electricity transmission; available at: [www.aers.rs](http://www.aers.rs) – legislation – acts of the agency – license register.

<sup>13</sup> [www.eps.rs](http://www.eps.rs).

- (13) According to Article 407 of the Energy Law, the energy entity holding a license for performing the activity of electricity transmission and transmission system operation at the date of entry into force of the Energy Law shall continue performing the activity until the completion of the certification procedure pursuant to Article 100 *leg cit.* At the date of entry into force of the Energy Law<sup>14</sup> EMS held a license for electricity transmission and transmission system operation.<sup>15</sup> It follows, that Article 407 of the Energy Law applies to *EMS JSC*.
- (14) Article 100 of the Energy Law conditions issuance of a new license to *EMS JSC* for electricity transmission and electricity transmission system operation with certification of the company which was supposed to be finalised by 1 June 2016.<sup>16</sup> It follows, that in case the company's certification in line with the Serbian and Energy Community law is not positively confirmed by decision of AERS, AERS is not entitled to issue a new license to *EMS JSC*.
- (15) *In praxi*, license no. 0106/13-ПЕ-ПЦУ issued by AERS to *EMS* on 7 September 2006 for electricity transmission and electricity transmission system operation expired on 7 September 2016.<sup>17</sup> According to information provided at the hearing of 22 May 2017, *EMS JSC* since then performs and operates transmission system activities based on a decision of the government of the Republic of Serbia.<sup>18</sup>
- (16) In the Preliminary Decision, AERS issued a positive certification to *EMS JSC*. The regulator, thus, made its decision conditional to actions to be taken by *EMS JSC* within twelve months from the adoption of the final decision on certification, namely 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;*
  - *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.*

### 3. Assessment

#### 3.1. Compliance with the unbundling requirements

- (17) Article 9 of the Electricity Directive lays down the requirements for ownership unbundling. The provisions have been transposed by Articles 98 and 99 of the Energy Law.
- (18) In essence, compliance with the ownership requirements calls for effective implementation of the following elements:
- a. The transmission operator has to own the transmission system (cf Article 9(1) lit (a) Electricity Directive);
  - b. The transmission system operator has to operate the transmission system (cf Article 9(1) lit (a) Electricity Directive);

<sup>14</sup> According to its Article 434 the Energy Law entered into force on the day after its publication in the Official Gazette of the Republic of Serbia (No. 145/2014).

<sup>15</sup> Cf fn 12.

<sup>16</sup> Cf Article 434 the Energy Law.

<sup>17</sup> Cf [www.aers.rs](http://www.aers.rs) – legislation – acts of the agency – license register.

<sup>18</sup> Not available to ECRB.

- c. Control<sup>19</sup> over the transmission system operator's activities has to be effectively separated from supply and generation activities and vice versa (cf Article 9(1) lit (b-d) and Article 9(2) Electricity Directive).

#### Ownership of the electricity transmission system

- (19) Based on the arguments provided in the Preliminary Certification Decision, ECRB has no reason to doubt that *EMS JSC* owns the electricity transmission system in the Republic of Serbia. Namely, Article 409 of the Energy Law transferred ownership of the electricity transmission system to *EMS* (today: *EMS JSC*). Not all assets have been registered with national cadastre yet. However, according to the information provided at the hearing of 22 May 2017, *EMS JSC* already filed all requests for pending ownership registration with the competent Serbia authorities.

#### Operation of the electricity transmission system

- (20) Compliance with ownership unbundling means *“that the undertaking which is the owner of the transmission system also acts as the TSO, and is as a consequence responsible among other things for granting and managing third-party access on a non-discriminatory basis to system users, collecting access charges, congestion charges, and payments under the inter-TSO compensation mechanism, and maintaining and developing the network system. As regards investments, the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning”*.<sup>20</sup>
- (21) ECRB has no reason to doubt that *EMS JSC* operates the electricity transmission system in the Republic of Serbia. The TSO provides third party access to its system at conditions, access charges and congestion revenue rules regulated by AERS<sup>21</sup>, performs investment planning<sup>22</sup> and participates in inter-TSO compensation mechanisms<sup>23</sup>.

#### Separation of control

- (22) Within the ownership unbundling model, Article 9(6) Electricity Directive opens up the possibility for State control of transmission activities as well as generation, production and supply activities, provided that the respective activities are administrated by separate public entities. As elaborated in related opinions of the European Commission on draft certification decisions of EU regulators<sup>24</sup>, two separate public bodies can be seen as two distinct persons, provided that it can be proven that they are not under the common influence of another public entity and their true separation is enshrined in national legislation as well as *de facto* complied with.

<sup>19</sup> Cf the definition in Article 2(34) Electricity Directive.

<sup>20</sup> Cf Commission, Staff Working Document: Interpretative Note on Directive 2009/72/EC – The Unbundling Regime, 22.10.2010, chapter 2.2.

<sup>21</sup> Respective rules and procedures are available on the websites of AERS and *EMS JSC*.

<sup>22</sup> [www.ems.rs](http://www.ems.rs) – development.

<sup>23</sup> See e.g. the latest monitoring report of ACER of 15.11.2016 available at: [http://www.acer.europa.eu/official\\_documents/acts\\_of\\_the\\_agency/publication/itc%20monitoring%20report%202016.pdf](http://www.acer.europa.eu/official_documents/acts_of_the_agency/publication/itc%20monitoring%20report%202016.pdf). The Inter transmission system Operator Compensation for Transits (ITC) is governed by Article 13 of Regulation EC 714/2009. Regulation EC 838/2010/EC (incorporated in the Energy Community acquis by Decision 2013/01/PHLG-EnC of 23 October 2013) contains further specifications.

<sup>24</sup> Certification of the Danish transmission system operator for electricity and for gas, Energinet.dk; certification of the Czech transmission system operator for electricity, ČEPS; certification of the Austrian transmission system operator for electricity, Vorarlberger Übertragungsnetze; certification of the Slovak transmission system operator for electricity, SEPS. See also: Commission Staff Working Paper on the unbundling regime of 22.1.2010, chapter 2.2, p. 10.

- (23) ECRB agrees with the assessment of AERS that the conditions, as stipulated by Article 9 paragraph 1 lit (b) and (c) and paragraph 2 in conjunction with paragraph 6<sup>25</sup>, are not met. Namely: the Republic of Serbia holds 100% of shares, thus a majority share, of both the transmission system operator, *EMS JSC*, and the energy entity performing electricity production and supply, *EPS*. In both cases, the Government of Serbia executes the ownership rights, directly exercises voting rights as well as the power to appoint members of the bodies representing *EMS JSC*<sup>26</sup> and *EPS*<sup>27</sup>.
- (24) According to the information provided at the hearing of 22 May 2017 a conflict of interest as ruled out by Article 9 paragraph 1 lit (d) does not exist.

### 3.2. Conditions imposed on the applicant

- (25) Despite concluding that the independence criteria required by the Energy Community and Serbian law are not met, the Preliminary Decision of AERS certifies *EMS JSC* subject to the conditions defined in the Preliminary Decision (cf paragraph (16)).
- (26) According to information provided at the hearing of 22 May 2017, ECRB has no reason to doubt that registration of not yet registered ownership assets can be successfully completed within the 12 months period required by the Preliminary Decision (cf paragraph (22)).
- (27) ECRB however has **doubts about the adequacy of the second condition** imposed by the Preliminary Decision requiring *EMS JSC* 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*”.
- a. ECRB agrees with AERS that reform of Serbian legislation<sup>28</sup> is indeed needed to allow for *EMS JSC* compliance with the ownership unbundling requirements of the Energy Community and Serbian Energy law and, more specifically, separation of control over *EMS JSC* and *EPS*.
  - b. ECRB also agrees with AERS that related legislative adjustments and their practical implementation are unlikely to be completed in a period shorter than twelve months and, thus, considers the granted timeframe reasonable.
  - c. ECRB further agrees with the conclusion of the Preliminary Decision that the required action „*does not depend on the applicant [...] but it depends on and is strictly in the jurisdiction of relevant state bodies*”. In this context, ECRB takes note of the arguments brought forward by AERS at the hearing of 22 May 2017 according to which AERS is not entitled to impose duties on any other body but the applicant.
- (28) Still, ECRB fails to see the suitability of imposing condition on *EMS JSC* that are not in the company's sphere of competence.<sup>29</sup>

<sup>25</sup> As transposed by Articles 98 and 99 of the Energy Law.

<sup>26</sup> The company's bodies include an Assembly and a Board of Directors headed by a General Manager. Members of these bodies are appointed by the Government of Serbia (ref statutes of *EMS JSC* and Amendments to the Memorandum of Association of the Public Enterprise *EMS*; both: Official Gazette No 88/16).

<sup>27</sup> As regards the appointment of *EPS* Supervisory Board and General Manager by the Government of the Republic of Serbia see: [http://www.eps.rs/Eng/Documents/CompanyProfileEPS\\_EN\\_20170210\\_fin%20e.pdf](http://www.eps.rs/Eng/Documents/CompanyProfileEPS_EN_20170210_fin%20e.pdf).

<sup>28</sup> According to the information provided by the Ministry of Economy and Mining of the Republic of Serbia at the hearing of 22.05.2017 this should involve adjustment of (at least): the Law on Government, Law on Ministries, Law on Public Enterprises and Law on Commercial Companies

- (29) Further to this, the condition is vague, lacks concrete steps to be taken and, in particular, actions that have to be performed by the applicant.
- (30) ECRB also has **doubts about the effectiveness of the consequences** in case *EMS JSC* should fail to comply with the imposed condition within the twelve months deadline. According to the Preliminary Decision the only consequence would be a re-evaluation of the application leading to a new certification procedure. In practice this would mean that *EMS JSC* is certified for a year without meeting the requirements for independence necessary for compliance with the provisions of the Energy Community and Serbian law. At the hearing of 22 May 2017 AERS informed that lack of compliance of *EMS JSC* with the conditions of the Preliminary Decision will lead to withdrawal of the company's license for electricity transmission and transmission system operation. ECRB fails to see such consequence clearly outlined in the Preliminary Decision and further questions the effectiveness of (if so) withdrawal of a license that *de iure* already expired on 7 September 2016 (cf paragraphs (14) and (15)).
- (31) Furthermore, ECRB stresses that the concept of conditional approval of certifications should target the imposition of improvements in context with a, in principle, positive assessment of the applicant's compliance with the relevant unbundling requirements. Contrary to this, the Preliminary Decision explicitly outlines lack of compliance of *EMS JSC* with the independence requirements of the Energy Community and Serbian law and, nevertheless, issues a certification under a condition that can be hardly complied with by the applicant (alone). ECRB is of the opinion that independence of the applicant in line with the relevant unbundling requirements of the Energy Community law must be a pre-condition for certification.<sup>30</sup>
- (32) **It follows that a certification should not be issued for *EMS JSC* as long as this requirement is not fulfilled. In any case the certification decision should clearly identify the concrete actions expected from the applicant.**<sup>31</sup>
- (33) In this context ECRB acknowledges the link made in Article 100 of the Energy law between successful certification and licensing of a TSO. ECRB understands this link as intention of the legislator to promote the applicant's compliance with the unbundling requirements of the Serbian and Energy Community law which has not been proven in the case of *EMS JSC*. Translating the link between licensing and certification into a duty of the regulator to deliver a positive certification decision must be considered contradictory to the scope of the very legal provision.

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<sup>29</sup> Different from that, conditions imposed in comparable certification Opinions only entail measures that can be reasonably expected to be met by the relevant company and building on confirmation of the applicant's compliance with the central unbundling requirements (see e.g. Commission, Opinion on certification of *HOPS C(2015)9559*).


<sup>30</sup> See as well: ECRB, Opinion 1/17 on certification of *Yugorosgaz Transport*; Secretariat, Opinion 1/17 on certification of *Yugorosgaz Transport*.

<sup>31</sup> ECRB considers its related position confirmed by result of the hearing of 22 May 2017.

HAS ISSUED THE FOLLOWING OPINION

1. This Opinion is provided to the Energy Community Secretariat according to Article 3(1) of Regulation (EC) 714/2009 in conjunction with Articles 9 and 10 of Directive 72/2009/EC for reflection in the Secretariat's Opinion on the Preliminary Decision of the regulatory authority of the Republic of Serbia on certification of *EMS JSC*.
2. This Opinion will be published on the Energy Community website and submitted to the Energy Community Secretariat in line with Article 5 of Procedural Act 01.1/2015/ECRB-EnC. ECRB does not consider the information contained herein confidential. According to Article 4 paragraph (2) of Procedural Act 01.1/2015/ECRB-EnC, AERS is invited to inform the ECRB President within five (5) days following receipt whether it considers that, in accordance with rules on applicable rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to its publication, including reasons for such a request.

For the Energy Community Regulatory Board

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

Branislav Prelević  
ECRB President

2 June 2017