

Opinion 1/17

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

On 15 July 2016, the Energy Community Secretariat (hereinafter “the Secretariat”) received a notification from the Energy Regulatory Authority of the Republic of Albania (hereinafter “ERE”) of a Decision on “Opening the procedures to review the certification application in electricity transmission activity of Transmission System Operator company”.¹

On 18 October 2016, ERE notified the Secretariat of a preliminary decision on the certification of *Operatori i Sistemit të Transmetimit sh.a* (hereinafter “OST”), the transmission system operator (hereinafter “TSO”) for electricity (hereinafter “the Preliminary Decision”). The Preliminary Decision was adopted on 6 October 2016² based on Articles 3 (8), 16, 54 and 58 points 1,2, 3, 6 and 7 of the Power Sector Law,³ as well as Articles 6, 8, 9 (1), 10, 11 and 2 of ERE’s Regulation on the Certification of the Transmission System Operator for Electricity (hereinafter “ERE’s Regulation on Certification”).⁴

Pursuant to Article 10 of Directive 2009/72/EC⁵ (hereinafter “the Electricity Directive”) and Article 3 of Regulation (EC) No 714/2009⁶ (hereinafter “the Electricity Regulation”) the Secretariat is required to examine the notified Preliminary Decision and deliver its Opinion to ERE as to the compatibility of such a decision with Article 10(2) and Article 9 of the Electricity Directive.

On 5 December 2016, based on Article 10(7) of the Electricity Directive and Article 3(3) of the Electricity Regulation, the Secretariat addressed ERE with a request for submission of additional documents necessary for the assessment of the compliance by OST with the unbundling requirements. On 9 December 2016 ERE submitted the requested documents. On 14 December 2016 a hearing, at which all relevant stakeholders participated, took place at the premises of the Secretariat in Vienna.

¹ ERE Decision, No. 117, adopted on 15.07.2016.

² ERE Decision, No. 165, adopted on 6.10.2016.

³ Power Sector Law No.43/2015, adopted on 30.04.2015.

⁴ ERE, Regulation on the Certification of the Transmission System Operator for Electricity, No.154, adopted on 11.12.2015.

⁵ 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.

⁶ 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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On 19 December 2016, 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. Description of the notified Preliminary Decision

OST was established pursuant to the Decision of the Council of Ministers No. 797 of 14 December 2003, and was registered as a joint stock company in July 2004. OST was initially part of the state holding KESh (*Korporata Elektroenergjitike Shqiptare Sh.a*), which performed all the activities in the Albanian power sector. By Order of the Minister of Economy No. 586 of 1 August 2008⁷ and a Decision of the General Assembly of OST No. 6 of 14 August 2008,⁸ the exercise of state-ownership over the shares in OST (as in other public companies) was transferred to the Ministry of Economic Development.

In 2009, OST was licensed for performing the activity of electricity transmission by ERE.⁹ Today, OST is the only TSO for electricity in Albania and performs all relevant technical and commercial functions. OST's membership in ENTSO-E depends only on its certification as being compliant with the unbundling provisions subject to the present Opinion.

On 1 April 2015, the Albanian Parliament adopted the Power Sector Law to transpose the Electricity Directive and the Electricity Regulation in Albanian legislation. Article 54 of the Power Sector Law transposes the provisions on ownership unbundling in Article 9 of the Electricity Directive, including the rules pertaining to ownership unbundling of public companies in Article 9(6) of the Directive.

In 2016, the Law No. 8/2016 amended Law No. 7926 of 20 April 1995 "On transforming the state companies in entrepreneurs".¹⁰ This Law identifies the institutions responsible for exercising the ownership and control rights in public companies. The 2016 amendments stipulate that the exercise of the ownership and control rights in public companies in the electricity sector, including the right to appoint members of the supervisory boards, is performed in accordance with the Power Sector Law, and for public companies in the gas sector in accordance with the Gas Sector Law.¹¹

⁷ Order of the Minister of Economy No. 586 dated 1 August 2008 "On the transfer of the ownership title of the shares of the Transmission System Operator".

⁸ Decision of the General Assembly of OST sh.a. No. 6 dated 14 August 2008 "On the transfer of the ownership title of the shares of the Transmission System Operator".

⁹ ERE Decision No.24, adopted on 26.03.2009.¹⁰ Adopted on 11.02.2016.

¹⁰ Adopted on 11.02.2016.

¹¹ Law No. 102/2015 "For the natural gas sector".

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Article 53(3) of the Power Sector Law provides that the “*Council of Ministers shall appoint the public authority representing the state as owner of its the shares of the Transmission System Operator, which needs to be independent of any production or supply activity according to the provisions of Article 54.*” Based on that provision, the Council of Ministers on 27 April 2016 adopted Decision No. 317 on defining the Public Authority representing the State as Owner of the Shares in Power Sector Companies (hereinafter “Decision No. 317”).¹² According to Article 1 of Decision No. 317, the public authority representing the Albanian state as shareholder of KESh and of the supply and distribution company *Operatori i sistemit të shpërndarjes Sh.a.* (hereinafter “OSHEE”) is the Ministry of Energy and Industry. Article 2 of Decision No. 317 stipulates that the public authority representing the Albanian state as the shareholder of OST is the Ministry of Economic Development, Tourism, Trade and Entrepreneurship (hereinafter “Ministry of Economy”).

On 13 July 2016, OST submitted to ERE an application for certification of its unbundling in accordance with Article 58 of the Power Sector Law. In the Preliminary Decision, ERE comes to the conclusion that OST complies with the requirements of the provisions on ownership unbundling.

The Preliminary Decision was adopted pursuant to the provisions of the Power Sector Law, the Regulation on Certification and the application submitted by OST together with supporting documentation. ERE has also reviewed and analysed the Council of Ministers’ Decision No. 317, as well as the Law on the Organisation and Operation of the State Administration.¹³

In its Preliminary Decision, ERE requested that, within twelve months from the entry into force of the Preliminary Decision, “*OST submits certificates providing guarantees regarding:*

- *the independence of the Financial Audit of the Transmission System Operator for Electricity which shall not be the same entity performing the audit of the vertically integrated generating or supply companies/undertakings;*
- *the TSO company shall require to the General Assembly the Ministry of Economic Development, Tourism, Trade and Entrepreneurship the assurance to prevent the appointments of the same Financial Audits with the vertically integrated undertakings;*
- *non-transferring the Transmission System Operator for Electricity staff to the generating/supply companies/undertakings;*
- *the TSO company shall draft the rules to fulfil the financial and legal unbundling obligation according to the provision of article 57/2 of Law No.43/2015 “On Power Sector”;*
- *the TSO company shall take the preliminary measures and collaborate within its authority to implement the legal obligation defined in the law.”¹⁴*

¹² Council of Ministers Decision No. 317, adopted on 27.04.2016.

¹³ Law No. 90/2012.

¹⁴ ERE Preliminary Decision, p.50.

At the hearing of 14 December 2016, ERE explained that non-compliance by OST with these requirements will result in an automatic re-opening of the certification process under Article 14 of the Regulation on Certification, without any further discretion of ERE in that respect.

II. Assessment of the Preliminary Decision

1. General

As the Secretariat has pointed out in a previous Opinion,¹⁵ 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. This objective is best fulfilled by implementation of the ownership unbundling model of Article 9 of the Electricity Directive, which Albania transposed by its Power Sector Law of 2015. In a market environment still prevailing in many Contracting Parties including Albania, 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,¹⁶ 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 (*in casu* Article 54(6) of the Power Sector 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 ERE's Preliminary Decision against that background.

2. Application of the ownership unbundling provisions to OST

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;

¹⁵ Secretariat Opinion1/16 of 3 February 2016 TAP AG.

¹⁶ 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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- 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. Only 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 provided to the TSO through a lease or concession agreement.¹⁷

The Secretariat has no reason to doubt that in the case at issue, OST is actually the owner of the transmission system. Article 54(2) of the Power Sector Law stipulates that “*the Transmission System Operator owns the transmission system for electricity, which includes 400 kV, 220 kV and 110 kV lines, electricity transformation substations with levels of transformation of 400 kV, 220 kV high voltage, and 110 kV bus bars in all 110/TM kV substations, to the point of measurement of power on the 110 kV side of 110/MV kV transformers, including switching equipment of 110 kV lines. The Transmission System Operator operates other similar infrastructure of this level of voltage which is not its property, serving for delivering power to the distribution operator and/or customers directly connected to the transmission system.*”

Moreover, the Preliminary Decision confirms that the transmission assets are accounted for on the balance sheet of OST. At the hearing of 14 December 2016, it was further clarified that OST’s ownership of the transmission assets is based either on general civil law (for movable property including electricity cables) or on a title issued by the Real Estate Registration Office (cadastre) for certifying OST’s management/administration rights over public property (for immovable property including 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.¹⁸ 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

¹⁷ 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.

¹⁸ Secretariat Opinion 1/16 of 3 February 2016 *TAP AG*.

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tasks of a transmission system operator, and whether it disposes of the necessary (human, technical, financial) resources for this.¹⁹ Based on the Preliminary Decision but also on its own long-standing experience and cooperation with OST, the Secretariat agrees with ERE's findings that OST satisfies these criteria.

c. Separation of control over transmission from generation/supply

The Preliminary Decision assesses OST's compliance with the ownership unbundling model against Article 54(6) of the Power Sector 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 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 Regulation²⁰ 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.²¹

The Secretariat agrees with ERE that the Ministry of Economy and the Ministry of Energy, representing the state's shares in OST and KESh/OSHEE respectively in accordance with Decision No. 317, in principle qualify as public bodies within the meaning of Article 9(6) of the Electricity Directive.²²

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.

¹⁹ Commission's Opinion on certification of *VÜN* C(2012) 2244 final of 29.3.2012.

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

²¹ Article 9(2) of Directive 2009/72/EC and Article 54(4) of the Power Sector Law.

²² 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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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.²³

Secondly, the regulatory authority tasked to certify the TSO needs to establish, *de iure* and *de facto* independence between the two public bodies tasked to exercise control over the state-owned undertakings in question, including the prevention of any common influence of a third public or private entity.²⁴ 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.²⁵

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

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*”.²⁶ ERE noted that OST also acts as Market Operator, a function which may develop into a power exchange in the future. According to Article 57 of the Power Sector Law, the Council of Ministers still has to decide on the legal and financial split/division of the Market Operator from the Transmission System Operator. Provided that legal and functional unbundling is ensured, the Secretariat does not consider it as a concern if OST owns the Market Operator or participates and owns shares in an electricity exchange as long as such a company only facilitates trade and is not engaged in buying or selling electricity.²⁷ In that respect, the Secretariat notes that ERE required OST in the Preliminary Decision to draft the rules

²³ 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).

²⁴ 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.

²⁵ 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.

²⁶ Commission’s Opinion on certification of *Thanet*, C(2013) 2566 final of 26.4.2013.

²⁷ Commission’s Opinion on certification of *Energinet (gas)* (C(2012) 88, 09.01.2013 p.3

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required for the unbundling. It also invites ERE to monitor the compliance with the rules on legal and functional unbundling of the Market Operator and OST's involvement in any future power exchange.

2. Competences and control are effectively separated between the public bodies involved

The Secretariat agrees with ERE's finding that in general, the Ministry of Economy and the Ministry of Energy have the necessary competences and tools to exercise control over OST and KESh/OSHEE respectively in a legally and factually independent manner.

Separation of competences between the Ministries of Economy and Energy

The Albanian Constitution, in its Article 102(4), provides that a Minister "*within the principal directions of general state policy, directs, under his responsibility, actions for which he has powers.*" The general state policy is determined by the Council of Ministers, the collegial body forming the government. Competences granted to the Minister, on the other hand, seem to fall under the Ministry's exclusive competence.²⁸

Moreover, Article 3(5) of Law No. 90/2012 "On the organisation and operation of state administration" stipulates that "*according to the principle of clarity in the defining and the distribution of the responsibilities, the allocation and assignation of the functions and administrative duties, between the organs, institutions and administrative units, shall be specific, to avoid overlaps, to be transparent and public in the appropriate way.*"²⁹ According to Article 5 of the same Law, the Council of Ministers based on a proposal of the Prime Minister, defines the activities under the responsibility of each Ministry, while the "*Minister is responsible in front of the Council of Ministers and the Parliament for the whole activity of the Ministry.*" According to Article 22 of that Law, "*every minister is responsible for overseeing of the activity of the ministry, the subordinate institutions and autonomous agencies within the relative field of state responsibility.*"

By Decision No. 317, the Council of Ministers established control of the Ministry of Economy as exclusive representative of the state's shares in OST, whereas the Ministry of Energy was appointed in the same capacity as the body exercising control over the state's electricity generation and supply assets managed by the public companies KESh and OSHEE. The Minister personally represents the respective Ministry in the shareholder assemblies. As was clarified during the hearing on 14 December 2016, control over publicly owned joint stock companies by the competent Ministries representing the state's shares is being exercised in accordance with the Law No. 9901 of 14.04.2008 "On Entrepreneurs and Companies", i.e. based on general corporate law rather than public law. Consequently, the rights stemming from the state's shares in OST, including voting rights,

²⁸ Frost&Fire Consulting, Memorandum prepared for OST, "Legal analysis of the degree of autonomy of the Minister from the Prime Minister", 12.12.2016, p.5.

²⁹ Article 3(5) Law No. 90/2012.

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are exercised by the Ministry of Economy autonomously and not under the influence of the Ministry of Energy and vice versa, thus complying with Article 9(1)(b) of the Electricity Directive.

Furthermore, the Secretariat agrees that both Ministries 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 2016 amendments to the Law No. 7926 "On transforming the state companies in entrepreneurs" provide that the "*exercise of the right of representatives of State property, including the right to appoint members of the supervisory boards in the power sector companies, shall be done in accordance with the provisions of the Power Sector Law.*" Decision No. 317 was subsequently adopted under the Power Sector Law, thus mandating the Minister of Energy and the Minister of Economy to appoint the members of the supervisory boards of their respective undertakings. Moreover, according to Article 135 of the Law No. 9901, one of the rights of the shareholder assembly (with the Minister of Economy being the only member for OST and the Minister of Energy for KESh/OSHEE) is the appointment and dismissal of the members of the supervisory board and the administrative board members. Finally, Article 13 of OST's articles of association³⁰ also envisages that the shareholder assembly appoints the members of the supervisory board. In this capacity, both Ministers in charge have adopted Decisions appointing the members of the supervisory board of OST and KESh/OSHEE respectively.³¹ According to Article 20(1) of OST's articles of association, the supervisory board is also in charge of appointing the chief executive officer (administrator) of the company. On 30 June 2016, the supervisory board of OST (re-)appointed the administrator and authorized its chairman to sign a contract with him.³² The same procedure was applied in KESh and OSHEE³³ without any reason to doubt that this happened in any way differently from what is envisaged by general corporate law.

Moreover, Article 9(1)(d) of the Electricity Directive prohibiting the same person from being a member of the board of both a supplier/generator and a TSO has been complied with as a review of the respective decisions appointing the supervisory boards and the administrators of OST and KESh/OSHEE confirms. Neither of the members acts also as a member of the supervisory or management bodies in other companies in the same sector.

Finally, the Secretariat was informed at the hearing of 14 December 2016 that the Ministry of Economy approved the budgets not only of OST but also of KESh and OSHEE for 2016. This happened before the adoption of the Council of Minister's Decision No. 317. According to the latter Decision as well as corporate law in Albania, the Secretariat has no reason to doubt that the future budgets of KESh and OSHEE will be approved by the Ministry of Energy, while the Ministry of Economy will remain competent for approving OST's budget in representing the state as shareholder

³⁰ Articles of Association of Transmission System Operator, No.1 of 29.01.2009.

³¹ The Ministry of Economic Development, Tourism, Trade and Entrepreneurship has adopted Decision No. 4911, of 14.06.2016 and the Ministry of Energy and Industry has adopted Order No.210 of 30.06.2016 and Order No.209 of 30.06.2016.

³² Decision No.17 of 30 June 2016 and Decision No.18 of the same date.

³³ Resolution No.10 adopted by the Supervisory Board of KESH on 28.09.2016 and Resolution No.9 adopted by the Supervisory Board of OSHEE on 01.12.2014.

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in the shareholder assembly. Nonetheless, the Secretariat invites ERE, prior to adopting its final decision to clarify whether this indeed is the case for the approval of the budgets for 2017.

Finally, the Preliminary Decision does not assess how dividends are paid out and to whom, a question which matters to determine which entity within the Albanian state has a financial interest in the public energy undertakings. At the hearing held on 14 December 2016, it was clarified that decisions concerning the distribution of profits of OST are approved by the sole shareholder, the Ministry of Economy, exclusively. Also dividends from both OST and KESh and OSHEE go to the general state budget without any earmarking.

Competences of the Ministry of Energy related to OST under the Power Sector Law

In its preliminary decision, ERE also did not elaborate on the competences the Ministry of Energy retains under the Power Sector Law, in particular competences specifically affecting the decision-making by OST related to network planning and construction. This includes the right of the Ministry of Energy to define the National Energy Strategy and prepare programs for, inter alia, “*the strengthening of grids*” (Article 4 of the Power Sector Law), the approval by the Council of Ministers of “*new interconnection lines constructed by TSO or private investors*” upon proposal of the Ministry of Energy (Article 31 of the Power Sector Law) and the right to give an opinion to ERE when the latter exercises its competences in relation to the TSO’s ten-year network development plan (Article 60 of the Power Sector Law). While the responsibility of the Ministry of Economy is defined in Council of Ministers’ Decision No. 835, of 18.09.2013 as “*exercising the rights arising from being owner of state property*”, neither this decision nor the Power Sector Law give this Ministry any right related to the activities of OST beyond the Ministry’s general rights as shareholder under commercial law. The Secretariat further notes that Decision No. 317 explicitly provides that “*the Ministry of Energy and Industry exercises its rights in OST pursuant to the provisions of the Law No.43/2015 “On Power Sector” and its state responsibility field*”. The Electricity Directive, on the other hand, requires that the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning,³⁴ and discharges this responsibility in full autonomy.

The Secretariat’s concerns were discussed at the hearing held on 14 December 2016.

As regards the competences of the Ministry of Energy under Article 4 of the Power Sector Law, the Secretariat deems them to be of a general policy nature rather than a specific involvement in the activities and tasks of the TSO. They will be discussed below.

With regard to the right of the Ministry of Energy to propose the approval (or rejection) to the Council of Ministers of any new interconnectors to be constructed by OST stipulated in Article 31 of the Power Sector Law, the Ministry of Energy explained that such approval is required politically as interconnection lines depend on an arrangement between two sovereign states. The Secretariat is

³⁴ EU Commission, Staff Working Paper – Interpretative Note on Unbundling Regime, 22.01.2010, p.8.

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not convinced by that line of argument. The construction of interconnectors is indispensable for establishing an integrated pan-European infrastructure network in order to enable trade between the Energy Community Parties. European energy law tasks the TSOs to develop secure, reliable and efficient transmission systems in Article 12(b) of the Electricity Directive. Article 2 of the same Directive defines a TSO as “a natural or legal person responsible for [...] developing the transmission system in a given area, and where applicable, its interconnections with other systems [...].” This does not preclude the Council of Ministers and/or Parliament from concluding intergovernmental agreements with the neighbouring state in question to govern certain aspects of the bilateral relations, which are created by the implementation of such a decision. However, the competence of the Ministry of Energy and the Council of Ministers to approve the construction of new interconnection lines encroaches upon the independence of the TSO and the body exercising control under corporate law over it, the Ministry of Economy. Moreover, the European Commission has rightly held in a similar case on a Ministry’s competence to approve network investments 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.”³⁵ The Secretariat therefore considers that the right of the Ministry of Energy to propose approval or rejection of new interconnectors to the Council of Ministers, amounts to a decisive right which fails to comply with the Directive’s prohibition for the Ministry of Energy to exercise “any right” over OST. The Secretariat, concurring with the ECRB, requests ERE to elaborate on the issue further in its Final Decision.

As regards the obligation of ERE to request the Ministry of Energy’s opinions on OST’s draft ten-year network development plans before approval as well as on any measures taken by ERE in the context of monitoring and ensuring compliance with the plan once adopted (Article 60 of the Power Sector Law), the Ministry of Energy explained that this provision has not been used so far. Moreover, any such opinion will be prepared by the energy sector department inside the Ministry of Energy, and not the newly established department exercising the rights and competences over KESh and OSHEE given to the Ministry of Energy by Decision No 317. However, the Secretariat remains concerned that the Ministry of Energy could be biased by its control over KESh and OSHEE when giving such an opinion, and that such a bias can result in negative effects on the development of the network.³⁶ While a separation of departments may be considered appropriate and sufficient to prevent conflicts of interest³⁷ between the Ministry of Energy’s general policy-making role in the energy sector (including transmission) and its control over the generation and supply activities in Albania (see below), Article 60 of the Power Sector Law establishes competences specifically affecting the TSO’s autonomy related to the exercise of one of the core functions attributed to it by

³⁵ 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.

³⁶ Commission’s Opinion on certification of *Gas Transport Services B.V.* C(2013) 4205 final, 01.07.2013.

³⁷ Similarly, the Commission considered that non-discrimination rules and compliance rules are not sufficient to remove concerns with respect to the compatibility of the influence of a Ministry controlling generation and supply over investment decisions related to TSO. See: Commission’s Opinion on certification of *TenneT TSO.B.V.*, C(2016) 3987, 22.06.2016

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Energy Community law, network planning. A mere separation of tasks within the Ministry of Energy does not rule out a potential or actual conflict of interest within the Ministry of Energy. The Secretariat notes that also the European Commission has considered incompatible with the exercised competences over TSOs, in particular related to decisions on investments.³⁸

To ensure the independence of OST in transmission planning, the Secretariat proposed to empower the Ministry of Economy to issue opinions concerning the network development plan to ERE. As an alternative to amendments to the Power Sector Law,³⁹ the Secretariat suggested to ERE to include respective clarifications in the draft Regulation on the Procedures to Submit and Approve the Investment Plan from Electricity Transmission and Distribution Operators and the Licensees who have Public Service Obligations. Namely, the Regulation could clarify that the Ministry responsible for energy means the Ministry of Economy as a “*successor Ministry responsible for the energy sector*” pursuant to the definition in the Power Sector Law. Besides, it would be necessary that ERE makes certification dependent also on an amendment to the Council of Ministers Decisions No.833 and 835, so that the tasks granted to the Ministry of Energy in relation to OST can be transferred to the Ministry of Economy. In this way, the Ministry of Economy, in its capacity of a shareholder of OST would be empowered to exercise its competences to take decisions on investments in line with Article 9(2)(d) of OST’s articles of association. By the date of adoption of this Opinion, no amendment to the Regulation or Decisions No. 833 and 835 have been adopted.

The Secretariat requests ERE to make the certification of OST conditional upon the full transfer of tasks related to OST to its sole shareholder, the Ministry of Economy. Where such a process would require amendments of primary and secondary legislation, a reasonable transitional time may be granted.

The role of the Prime Minister

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.⁴⁰ ERE’s Preliminary Decision does not elaborate on the role of the

³⁸ 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.

³⁹ Commission’s Opinion on certification of *TenneT TSO.B.V.*, C(2016) 3987, 22.06.2016.

⁴⁰ 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

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Council of Ministers, the Prime Minister or the President. This silence raised also the concern of the ECRB.⁴¹

Nevertheless, the Secretariat became convinced that independence from superordinate third bodies is sufficiently ensured as a matter of principle (i.e. without prejudice to the shortcomings resulting from Article 31 and 60 of the Power Sector Law, see above). Firstly, the Ministry of Economy explained during the hearing of 14 December 2016 that the competences of the Ministers in managing public bodies in exercising the rights of the State as shareholder stem from private law, which does not envisage any role for the Council of Ministers, President or Prime Minister. Secondly, under public law, a Minister directs under his responsibility the activity under his competence; he takes orders or guidelines implementing his competences (Article 102(4) of the Albanian Constitution). The competency granted to a Minister is an exclusive one and cannot be exercised by another body such as the Council of Ministers, the President or the Prime Minister. According to Article 92 of the Constitution, the President does not control or have any competences concerning the work of the ministries. According to Article 102 of the Constitution, the Prime Minister *coordinates and controls the work* of the members of the Council of Ministers and the other institutions of the central administration of the State. According to Article 2 of the Law 9000/2003, "Concerning the Organization and Functioning of the Council of Ministers", the *Prime Minister asks the relevant Ministers explanations, reports and administrative verifications for cases of the field that they cover*. According to Article 2(c) of the same Law, he/she *can suspend the implementation of the acts of the Ministers, Directors of the central institutions, depending on him or the Ministers, by his initiative or of the interested subjects, when he finds that the Constitution, the law or acts of the Council of Ministers are violated*. This latter qualification means that the Prime Minister, under normal circumstances, cannot involve him/herself in the management of public companies by the line ministries in charge. He/she cannot give orders or instructions as regards the individual Minister's responsibilities unless there is evidence for a breach of the Constitution or Albanian law. At the hearing held on 14 December 2016, OST further explained that even in such cases, the Prime Minister may only temporarily suspend the legal effects of a given act adopted by a line ministry, which will continue to produce effects after the suspension is lifted. The Prime Minister has thus no right to revoke acts of Ministers.

Having said that, the Secretariat agrees with the ECRB that these considerations should be further elaborated in the Final Decision of ERE. This analysis should take into account not only the law on the books but also constitutional reality.

⁴¹ ECRB Opinion, at paragraph 28.

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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 also requires measures related to, inter alia, the elimination of exchanges of any confidential information on a daily basis.⁴² 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.⁴³ 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

The Preliminary Decision is based largely on ERE's Regulation on Certification which makes obligatory certain measures meant to increase the operational independence of the TSO. This includes Article 8(2)(c) of the Regulation on Certification requiring confidentiality of the commercial information owned by the TSO and prohibiting transfers of the TSO's staff to undertakings active in generation or supply, which was made an explicit condition on OST in the Preliminary Decision. Furthermore, OST's Ethic Code of 1 July 2016 further details how conflicts of interest will be handled, including the duty of staff members to protect confidential information (Article 14 of the Ethic Code). Besides being applicable to the management of OST, the Ethic Code applies also to all OST employees, thereby binding them to respect the provisions on preventing conflict of interest and protecting confidential information.

Article 8(2)(k) of ERE's Regulation on Certification further requires that IT systems and buildings occupied by the TSO may not be used together with undertakings active in generation and supply. It also prohibits that same provider is contracted for IT, access and security services.

Finally, the Preliminary Decision implements Article 8(2)(m) of ERE's Regulation on Certification which requires 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. According to Law No. 9901 of 14.04.2008 "On Entrepreneurs and Companies", the financial auditors of the undertakings are to be appointed by the General Assembly, i.e. the Ministries for Economy and Energy respectively. In order to ensure compliance with these requirements, ERE insists in the Preliminary Decision that

⁴² Recital 15 of the Electricity Directive.

⁴³ 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.

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the TSO's audit company may not be the same as KESh's and OSHEE's, and that the Ministry of Economy may not appoint the audit company for the latter two undertakings.

The ownership unbundling model is meant to ensure a situation in which discrimination can be excluded based on ownership structure of the TSO.⁴⁴ 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. While the Secretariat agrees with ERE's Preliminary Decision that the abovementioned measures are supportive in the avoidance of conflicts of interest and the sharing of confidential information, it considers it beneficial beyond these measures to request OST to implement a compliance programme and appoint a compliance officer. In this respect, the Secretariat concurs with the ECRB, which demanded that "*the concept [of ownership unbundling in line with Article 9(6) of the Electricity Directive] must at least be accompanied by strict compliance reporting and continuous regulatory monitoring*".⁴⁵ 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 ERE and publish on the website a report about the relations between the two public bodies controlling OST and KESh/OSHEE. This would also be in line with Article 8(2)(r) of ERE's Regulation on Certification.

Safeguards within the Ministry of Energy

The area under the responsibility of the Ministry of Energy is defined in Council of Ministers Decision No. 833, dated 18.09.2013, as including "*the drafting of the policies that aim to guarantee the electricity supply, the utilisation of the energy and mineral resources for a stable economic development and public use.*" Under the Power Sector Law, the Ministry of Energy shall develop the national energy strategy, prepare midterm programmes for the development of the power sector, "*ascertain the necessity ... of strengthening of grids*" and supervise the implementation of the energy policy (Article 4). The Ministry of Energy also proposes technical regulations and safety standards under Article 34 of the Power Sector Law. Article 97 of the Power Sector Law tasks the Ministry of Energy with the development of an Electricity Market Model which defines "*the ways the participants of the electricity markets cooperate, the relevant contractual relationships and main required information and data exchanges between market participants*", affecting directly (also) the TSO. As the public body exercising control over the main generation and supply activities performed by KESh and OSHEE, there is a risk that the Ministry of Energy may be biased when exercising its policy-making functions.

At the hearing held on 14 December 2016, the Ministry of Energy informed that it had recently been restructured to the effect that policy decisions inside the Ministry are being prepared by the energy sector department whereas a newly established department exercises the rights and competences over KESh and OSHEE given to the Ministry by Decision No. 317. The Secretariat considers the

⁴⁴ Commission's Opinion on certification of Snam Rete Gas S.p.A., C(2013) 5961 final, 13.09.2013.

⁴⁵ ECRB Opinion, at paragraph 29.

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establishment of different departments sufficient under the condition that the compliance programme to be implemented by OST (see above) also covers monitoring of the separation of competences within the Ministry of Energy.

d. Vertical relations between natural gas and electricity markets

Article 9(3) of the Electricity Directive requires that ownership unbundling applies also across the natural gas and electricity markets,⁴⁶ thereby prohibiting joint influence over an electricity generator or supplier and a natural gas TSO, or a natural gas producer or supplier and an electricity TSO. Compliance with this provision has not been assessed in the Preliminary Decision. It matters for OST's certification as the state fully owns the oil and gas company Albpetrol, a vertically integrated undertaking including transmission operation as well as natural gas production and supply activities, and currently being unbundled.

At the hearing held on 14 December 2016, the Secretariat was informed that on 7 December 2016, the Council of Ministers adopted Decision No. 848 and separated Albpetrol by transferring the control over the vertically integrated undertaking's oil and gas production and supply activities remaining within the company to the Ministry of Energy and establishing a new state-owned transmission system operator Albgaz, control of which is exercised by the Ministry of Economy. The solution chosen thus mirrors the unbundling model implemented in the electricity sector. While Albgaz has not yet been certified by ERE, the Secretariat considers that separation sufficient within the context of the present certification procedure. It nonetheless, invites ERE to elaborate in its final decision on the application of the unbundling rules across the electricity and the gas sectors and their implementation in Albania.⁴⁷

III. Conclusions

Against this background, the Secretariat supports certification of OST in line with ERE's Preliminary Decision, subject to the following remarks. The Secretariat requests that ERE

a) elaborates on and monitors:

- the compliance with the rules on legal and functional unbundling of the Market Operator and the modalities of OST's involvement in any future power exchange;
- whether the Ministries of Economy and Energy, respectively, approved budget of OST and KESh/OSHEE;

⁴⁶ Commission's Opinion on certification of *Elering AS*, C(2016) 8255, 02.12.2016.

⁴⁷ Similarly, the Commission – even though aware that separation between ministries has been ensured in Romania - it nonetheless invited ANRE to provide such assessment in its final decision. See: Commission's Opinion on certification of *Transelectrica D.A.*, C(2015) 7053 final, 12.10.2015.

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- the role of the Council of Ministers and the Prime Minister in relation to the Ministries of Economy and Energy;
- the application of the unbundling rules across the electricity and the gas sectors and their implementation in Albania.

b) imposes additional requirements on OST (within a timeframe not longer than 12 months) related to:

- the implementation of a compliance programme and appointment of a compliance officer;
- provide evidence that the Ministry of Energy may not propose the approval (or rejection) to the Council of Ministers of any new interconnectors to be constructed by OST, by virtue of adequate primary or secondary legislation;
- provide evidence that the Ministry of Economy is exclusively empowered to issue opinions concerning the network development plan to ERE, by virtue of adequate primary or secondary legislation.

Pursuant to Article 3 of the Electricity Regulation, ERE shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of OST. ERE 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. ERE 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, 23 January 2017



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