

Opinion 3/19

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

On 27 March 2019, the Energy and Water Services Regulatory Commission of the Republic of North Macedonia (hereinafter, “ERC”) notified the Energy Community Secretariat (hereinafter, “the Secretariat”) of a preliminary decision (hereinafter, “the Preliminary Decision”) on the certification of the joint stock company *Electricity Transmission and Power System Management, JSC MEPSO* (hereinafter, “*MEPSO*”), the transmission system operator for electricity (hereinafter, “TSO”). The Preliminary Decision was adopted on 27 March 2019 based on Article 75(4) of the Energy Law¹ and Article 5(1) of the Rulebook on Certification of an Electricity Transmission System and Natural Gas Transmission System Operator.²

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

On 16 June 2019, the Secretariat received an Opinion on the Preliminary Decision by the Energy Community Regulatory Board, as requested pursuant to Article 3(1) of the Electricity Regulation.

I. The role of the State in energy undertakings in North Macedonia

1. The applicant *MEPSO*

The electricity TSO *MEPSO* was initially part of the State-owned vertically integrated company for production, transmission and distribution of electricity, *Elektrostopanstvo Makedonija* (hereinafter, “*ESM*”). In 2004, a Law on Transformation of *ESM*⁵ has been adopted, based on which the Government, representing the company’s sole shareholder in the assembly, adopted a decision

¹ Official Gazette of the Republic of Macedonia, No. 96/18.

² Official Gazette of the Republic of Macedonia, No. 146/18.

³ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

⁴ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

⁵ Official Gazette of the Republic of Macedonia, No. 19/04, as amended by No.84/05.

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separating *ESM* on 27 September 2004.⁶ The following State-owned joint stock companies have been established accordingly:

- *ESM*, active in production, distribution and supply of electricity and
- *MEPSO*, in charge of transmission of electricity and management of the electricity system of Macedonia.

Under the Law on Transformation the assets, the employees, the rights and obligations related to the activity of transmission and management of the electricity system have been transferred to *MEPSO*.

On 24 July 2018, the Government adopted a Decision⁷ for transfer of *MEPSO*'s shares from ownership of the Government to ownership of the Ministry for Transport and Communications. The shares of *MEPSO* have been registered on the Ministry of Transport and Communications as owner in the Macedonian Central Securities Depository on 1 August 2018.

As a joint stock company, *MEPSO* has the following corporate bodies:

- The shareholder assembly's competences include amendments of the statute, approval of annual account, financial reports and annual operations' report, decision-making on the distribution of the revenues or on covering of losses, appointment and dismissal of the supervisory board members, modification of the rights related to certain types of shares, appointment of a certified auditor, as well as transformation or liquidation of the company.

The rights and obligations of the shareholder assembly are exercised by the Ministry of Transport and Communications as a sole shareholder of *MEPSO*, pursuant to the Company Law⁸ and the Statute of the company. The Minister of Transport and Communications personally represents the Ministry in the shareholder assembly and signs the decisions adopted by it.

- The supervisory board controls and supervises the operation of the management board, and has a broad mandate wide to decide and manage the company. The supervisory board members are appointed for four years by the shareholder assembly, i.e. by the Ministry for Transport and Communications. The supervisory board is composed of seven members, two of which are independent. The supervisory board, with majority votes of its members appoints a president of supervisory board from among its members,

⁶ Based on Article 518 (4) and Article 417 paragraph (3) of the Company Law and Article 4 of the Law on Transformation of "*Elektrostopanstvo Makedonija*".

⁷ Government Decision, No.44-6841/1, 24.07.2018.

⁸ Official Gazette of the Republic of Macedonia, No.28/2004, as amended last time by No.120/18.

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The Ministry for Transport and Communications in its capacity as sole shareholder of *MEPSO*, adopted on 19 October 2018 a decision dismissing the previous and appointing new members of the supervisory board.⁹

- The management board is competent to adopt the annual programme and financial plan (without approval from the supervisory board up to 50.000 EUR, and above that sum subject to its approval), to appoint management persons for daily operations at the company, to adopt investment decisions, decisions to grant/revoke loans, and to decide on internal organisation. With prior approval by the supervisory board it can close or transfer the company, reduce or expand the scope of operation, or establish other companies. The members of the management board are appointed by the supervisory board for four years. The management board is composed of a President/General Manager, the Deputy General Manager and sectors and subsidiary managers within *MEPSO*.

The new supervisory board on 13 December 2018 appointed the new members of the management board, including the General Manager and his Deputy.¹⁰

MEPSO is a member of the European Network of Electricity Transmission Operators (ENTSO-E).

2. State activities in generation and supply of electricity and natural gas

a) *ELEM* and *TEC Negotino*

Based on the Government Decision of 2005¹¹ and a decision of the management board of *ESM* of July 2005,¹² the two State-owned joint stock electricity production companies *ELEM* and *TEC Negotino* were established. *ELEM* owns several companies,¹³ among which *ELEM Trade* founded in 2009, which is licensed for supply with electricity.

After the separation of *ELEM* and *TEC Negotino*, *ESM* continued to perform the activities of electricity distribution and supply. In 2006, *ESM* was privatised. The majority of its shares (90%) is now owned by the Austrian company *EVN AG*.¹⁴ 10% of the shares remain in State ownership. The joint stock company *EVN Macedonia* performs activities of distribution and supply. *EVN Macedonia*

⁹ Appendix 33 to preliminary Decision submitted to the Secretariat by ERC.

¹⁰ Appendix 33 to preliminary Decision submitted to the Secretariat by ERC.

¹¹ Government Decision No.19-2626/1 from 30.06.2005.

¹² Decision for Confirmation of the Plan for Division of JSC *ESM* by Separation and Founding UO No. 02-3856/15/1 adopted by the Management Board of JSC *ESM* Skopje on 04.07.2005.

¹³ The other companies owned by *ELEM* are: Company for tourism, catering, recreation and sport *ELEM TURS SMLLC* Skopje, founded in 2012 to which joined *DUT Molika SMLLC* – Bitola and *DUT Popova Shapka SMLLC* - Tetovo from 1st of November 2012, Equipment and parts factory *FOD SMLLC*- Novaci, JSC *ELEM SKOPJE*, founded in 1997 and Maintenance, repair and transport factory *FORT SMLLC*- Oslomej, JSC *ELEM SKOPJE*, founded in 1996.

¹⁴ ERC, Preliminary Decision, pp.11-12.

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owns also a company *EVN Macedonia Electrani DOOEL*, licensed for generation of electricity. Majority ownership is in the hands of the Austrian company *EVN AG*.

Pursuant to Article 3(1) of the Law on Use and Disposal of the State-Owned Property and Municipal Property,¹⁵ the State-ownership shall be exercised by the Government unless decided differently by law. The Government thus owns 100% of the shares in *ELEM* and *TEC Negotino*. The Government also owns the minority shares of 10% in *EVN Macedonia*.

The corporate governance of *ELEM* and *TEC Negotino* comprises a shareholders assembly, a supervisory board and a management Board. The members of the supervisory board are appointed by decision of the sole shareholder, the Government (signed by the Prime Minister as President of the Government, or a Deputy Prime Minister presiding the respective session),¹⁶ while the members of the management board are appointed by the supervisory board.¹⁷

b) GAMA

The gas transmission operator *GA-MA* has been established in June 2006 and is at 50% of the shares by the Government, and at 50% by the private company *MAKPETROL*. Its management consist of six members, three of which are appointed by the Government and three are appointed by *MAKPETROL*. *GA-MA* does not perform any activity related to production or supply of gas or electricity.

II. Description of the notified Preliminary Decision

Article 71 of the Energy Law of 2018 transposes the provisions of the Electricity Directive on ownership unbundling. Article 72 of the Energy Law includes rules on ownership unbundling of public companies corresponding to Article 9(6) of the Electricity Directive. This article stipulates that the Ministry in charge of transport is the owner of the electricity transmission system operator. According to Article 71(2) of the Energy Law, the Ministry for Transport and Communication shall act independently when adopting decisions for appointment of the members of the supervisory board and may not accept directions and guidance from the Government or other state institution.

On 27 November 2018, *MEPSO* submitted to ERC a request for certification¹⁸ based on Article 75(3) of the Energy Law and Article 3 of the Rulebook on Certification. On 27 March 2019, ERC adopted

¹⁵ Official Gazette of the Republic of Macedonia, No.78/2015, as amended.

¹⁶ Article 11(3) of the Law on Government, Official Gazette, No. 59/2000 as amended.

¹⁷ Both Supervisory Board and Management Board members have been appointed in 2017. See appendixes submitted by ERC to ECS.

¹⁸ No. 12-2259/1, 27.11.2018.

and notified to the Secretariat, of its Preliminary Decision on the certification of *MEPSO* subject to the Opinion of the Secretariat.

In the Preliminary Decision, ERC concluded that *MEPSO* complies with the requirements of the provisions on ownership unbundling. ERC issued an unconditional certification of *MEPSO* as an electricity transmission system operator. ERC imposed an obligation to *MEPSO* to be informed every half a year on the procedures initiated before the Cadastre Agency of North Macedonia regarding the right of ownership over the land on which it performs its activity.

III. Assessment of the Preliminary Decision

1. General

The unbundling provisions were designed to separate, in vertically integrated undertakings, control over transmission system operation, on the one hand, and production and supply activities, on the other hand, to eliminate a potential conflict of interest between transmission and other activities performed by vertically integrated undertakings.¹⁹ This objective is best fulfilled by implementation of the ownership unbundling model of Article 9 of the Electricity Directive, which North Macedonia transposed by its Energy Law. In a market environment still prevailing in many Contracting Parties including North Macedonia, where energy activities are predominantly performed by undertakings with whole or majority ownership by the State and/or characterized by dominant positions on their respective markets, the separation of control and the prevention of conflicts of interest is of particular importance. For cases, as in North Macedonia, 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,²⁰ 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 present assessment. When relying on Article 9(6), as transposed into national law (*in casu* Articles 71, 72, 75, 76, 77 and 78, as well as Article 237 paragraph (1) of the Energy Law), full achievement of the objective of Article 9(1) of the Electricity Directive needs to be ensured by the national regulatory authority proactively. The Secretariat reviewed ERC's Preliminary Decision against that background.

¹⁹ Secretariat Opinion1/16 of 3 February 2016 *TAP AG*; Secretariat Opinion 1/17 of 23 January 2017 *OST*; Secretariat Opinion 3/17 of 23 January 2017 *EMS*.

²⁰ 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 tr`kls* C(2012) 9108 final of 3.12.2012, at p. 2.

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

When assessing the compliance of the Preliminary Decision with the unbundling model enshrined in the Electricity Directive, the following aspects matter in particular:

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

a. *Ownership of the electricity transmission system*

Article 9(1)(a) of Directive 2009/72/EC requires that “*each undertaking which owns a transmission system acts as a transmission system operator*”. This means in principle that the undertaking applying for certification is the owner of the assets, i.e. the transmission system.

In the case of *MEPSO*, Article 71 of the Energy Law of 2018 establishes the ownership by *MEPSO* over the electricity network which was hitherto owned by the Republic of North Macedonia. This provision stipulates that the electricity transmission system operator is considered “*as a legal successor of Electric Power Company of Macedonia is the owner of the electricity transmission network which consists of transformer stations, line infrastructure objects - overhead power lines, plants, facilities and assets for performing energy activities - electricity transmission and electricity transmission management.*” Already in the Law on transformation of *EMS* of 2004, “*the ownership right over the immovable property and the land that have been used by EMS, and that in the Cadastre have been previously written on the name of the Republic of Macedonia, which with the restructuring of EMS belong to MEPSO, shall be written on the name of MEPSO as owner.*”²¹

The Secretariat agrees with ERC²² that *MEPSO* actually owns the electricity transmission assets. Out of 107 electricity lines, 50 have been registered in the Cadastre Agency of the Republic of North Macedonia as ownership of *MEPSO* (as immovable property) while the remaining 57 which are owned by *MEPSO* (only) on the basis of Article 71 of the Energy Law (and the Law on transformation

²¹ Article 1 of Law on amendments to Law on Transformation of “*Elektrostopanstvo Makedonija*”.

²² Based on documents submitted by *MEPSO*, appendixes 19, 20, 27, 28, 29 and 30.

of *EMS*), the procedure for registration of the ownership rights is still ongoing.²³ The same goes for three transformer stations.²⁴

As already held in previous Opinions,²⁵ the Secretariat concludes that in a situation such as in the case at hand, where the legal framework of a Contracting Party provides a clear and unambiguous basis for ownership of the transmission system operator over transmission assets as a matter of principle (*in casu* Article 71 of the Energy Law and Article 1 of the Law on amendments to the Law on transformation of *EMS*), the requirement under Article 9(1)(a) of the Electricity Directive may be deemed to be satisfied. In the present case, also half of the transmission assets have been registered in the relevant cadastre on the name of *MEPSO*, and ERC has imposed a reporting obligation on *MEPSO*.

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

Article 9(1)(a) of the Electricity Directive also requires 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.²⁶ A regulatory authority’s assessment in this respect needs to establish in particular whether a given undertaking is by law and fact actually performing the core tasks of a transmission system operator, and whether it disposes of the necessary (human, technical, financial) resources for this.²⁷

Based on the information provided in the Preliminary Decision on the organisation, tasks and resources of *MEPSO*,²⁸ its membership in ENTSO-E but also on its own long-standing experience and cooperation with the company, the Secretariat agrees with ERC’s findings that *MEPSO* satisfies the criteria of having available the necessary human, technical, physical and financial resources to effectively perform the tasks of a transmission system operator.

c. Separation of control over transmission from generation/supply

The Preliminary Decision assesses *MEPSO*’s compliance with the ownership unbundling model against Article 71 of the Law on Electricity, the provision transposing Article 9(6) of the Electricity Directive. Article 9(6) provides that two separate public bodies may be seen as two distinct persons within the meaning of Article 9(1) and (2) of Directive 2009/72/EC, and may control production and supply activities, on one hand, and transmission activities on the other hand. The notion of control

²³ ERC, Preliminary decision, p.35.

²⁴ ERC, Preliminary decision, p.38.

²⁵ Secretariat Opinion 3/17 of 23 January 2017 *EMS*; Secretariat Opinion 2/19 of 1 February 2019 *KOSTT*.

²⁶ Secretariat Opinion 1/16 of 3 February 2016 *TAP AG*.

²⁷ Commission’s Opinion on certification of *VÜN C(2012) 2244* final of 29.3.2012.

²⁸ ERC, Preliminary Decision, sections 1.1.2 – 1.1.6 and 2.

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is defined by the Merger Regulation²⁹ 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.³⁰

According to Article 2 of the Law on Ownership and other Real Rights³¹ the “*state can acquire the right to ownership under conditions and in a manner envisaged by law.*” According to Article 112(2) of the same Law, the “*right to ownership may also be acquired with a decision of a competent state body, in a manner and under conditions determined by law.*” Article 2(4) of the Law on Privatization of State Capital of Enterprises³² stipulates that the “*state capital covers the shares of the Republic of Macedonia and the state government bodies in the enterprises and banks, i.e. trade companies acquired on various bases in accordance with the law,*” where state bodies are “*the ministries and other bodies of the state administration.*”³³ According to Article 3 of the same Law, “*the trade companies issue regular shares or share confirmations to the Republic of Macedonia, i.e. the bodies of the state administration for the value of the state capital.*”

Based on the Energy Law, on 24 July 2018, the Government transferred the shares issued by *MEPSO*, hitherto in ownership of the Government, into ownership of the Ministry of Transport and Communications. The Law grants the Ministry competences to appoint and dismiss *MEPSO*'s supervisory board members, which in turn appoint the management board members, and those rights the Ministry has already exercised *de facto*.

The Secretariat agrees that the Ministry of Transport and Communication on the one hand, and the Government on the other hand, representing the state's shares in *MEPSO* and *ELEM and TEC Negotino* respectively in accordance with the Energy Law, may, under certain circumstances, qualify as public bodies within the meaning of Article 9(6) of the Electricity Directive.

In the European Commission's case practice so far, two ministries,³⁴ a prime minister and deputy prime minister in a regional government,³⁵ a ministry and a prime minister,³⁶ have been accepted as two public bodies within the meaning of Article 9(6) of the Electricity Directive. In the Energy Community, only in the case of *CGES* – the electricity TSO in Montenegro, a ministry and a government have been accepted and qualified by the Secretariat as two separate bodies under Article 9(6) of the Electricity Directive. In that Opinion however, the Secretariat scrutinized the effect of the transfer of the control over the transmission system operator to an individual ministry as part

²⁹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the, Official Journal L 24, 29.01.2004, p. 1-22.

³⁰ Article 9(2) of Directive 2009/72/EC and Article 54(4) of the Power Sector Law.

³¹ Official Gazette of the Republic of Macedonia, No.18/01, 92/08, 139/09 and 35/10.

³² Official Gazette of the Republic of Macedonia, No. 37/96, 25/99, 81/99, 49/2000, 6/02, 31/03, 38/04, 74/05 and 123/12.

³³ Article 2-a of the Law on Privatization.

³⁴ Commission's Opinion on certification decision of *Affärsverket svenska kraftnät* C(2012) 3011, p. 3.

³⁵ Commission's Opinion on certification of *VÜN*, *supra*.

³⁶ Commission's Opinion on certification of *Fingrid-Fingrid Oyj* C(2014) 329, 17.01.2014.

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of the Government against the requirement of “separation” in Article 9(6) of the Electricity Directive is satisfied.

In the case at hand, ERC explained that according to Article 88 of the Constitution, the Government performs its rights and obligations based on and within the limits of the Constitution and laws. Article 89 determines that the Government is composed of a President and ministers. According to Article 92 of the Constitution, the Government and its individual members are responsible towards the Parliament.

At the same time, Article 95 of the Constitution stipulates that the ministries form part of the state administration together with other administrative bodies. Ministries derive their rights and competences from the Law on Organization and Operation of the State Administration Bodies³⁷ adopted with two thirds of the votes of the total number of members of Parliament. This may be deemed sufficient to formally separate them from the Government. What is decisive for the purpose of applying Article 9(6) of the Electricity Directive, however, is whether the Government and the Ministry are materially separate from each other.

The Secretariat reiterates in that context that in order to fully achieve the objective of Article 9 of the Electricity Directive – the prevention of potential and actual conflicts of interest – and to ensure unbundling of undertakings controlled by public bodies on equal footing with private undertakings, Article 9(6) of the Electricity Directive cannot be interpreted in a formalistic manner. The separation of control between the two public bodies in question must be effective in the sense that it ensures the full independence of the public body controlling the transmission system operator of any other entity controlling generation and supply activities.³⁸

In particular, the fact that the minister representing the owner of the transmission system operator – the ministry as a body of state administration, is a member of another collegial public body, the Government as owner of electricity generation companies, remains critical against the objective of Article 9 of the Electricity Directive, i.e. to avoid conflicts of interest. In such circumstances, conflicts of interest be result from the dependence of one public body on the other of which it forms part. This requires safeguards, even more than in constellations where the two public bodies in question were established on the same hierarchical level, to effectively exclude any interference by the Government (and any of its individual members) with the exclusive control by one ministry over the transmission system owner. The Secretariat will address this aspect below.

- 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

³⁷ Official Gazette of the Republic of Macedonia, No. 58/2000.

³⁸ See: Secretariat Opinion 1/17 of 23 January 2017 OST, p.6, 12; Secretariat Opinion 4/17 of 2 October 2017 *Albgaz*, p.8.

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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*”.³⁹ Article 9(2) does also not exclude the holding of purely passive financial rights related to a minority shareholding, *i.e.* the right to receive dividends, without any voting rights or appointment rights attached to them.

ERC lists several undertakings which *MEPSO* owns or in which it holds a significant amount of shares, namely:

- Electricity market operator *MEMO*, where *MEPSO* is the founder and sole shareholder;
- Coordination Center for Electricity and Energy *EKC*, Belgrade, Serbia, where *MEPSO* holds 25% of the shares;
- Coordinated Auction Office in South East Europe *SEECAO*, Podgorica, Montenegro, where *MEPSO* holds 12,5 % of the shares.

ERC concludes that none of those legal entities in which *MEPSO* participates or has controlling rights, performs or holds the license for the activity of electricity production, trade or supply.

As the Secretariat already held in previous Opinions,⁴⁰ *SEE CAO* and *EKC* are not engaged in activities of generation and supply of electricity or gas and therefore *MEPSO*'s participation in them does not raise concerns related to potential conflicts of interest.

As regards market operation, ERC clarified that *MEPSO*, based on the 2018 Energy Law, may not hold a license for the performance of the activity of organization and management of the electricity market. On 21 March 2019,⁴¹ its subsidiary *MEMO* submitted a request for issuing a licence for organizing and managing the electricity market to ERC. The procedure for issuing the licence to *MEMO* for performing the energy activity organising and managing the electricity market is still ongoing. The activities of the market operator are defined by Article 88 of the Energy Law. According to this provision, the market operator performs the activities related to the organisation, efficient functioning and development of markets with bilateral agreements and balance energy. These functions do not include genuine supply activities.

Based on the same provision in the Energy Law, the market operator may also perform the activities related to the organised electricity market in the country (*i.e.* national power exchange or participation in a cross-border power exchange). Article 90 of the Energy Law governs the tasks and competences of the operator of the organised electricity market which include establishing and operating that market through concluding contracts with the participants of the organised electricity market, cooperating with the transmission system operator for implicit auctions of transmission capacities, creating curves of electricity supply and demand and performing financial settlement with the market

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

⁴⁰ Secretariat Opinion 1/18 of 27 February 2018 *CGES*; Secretariat's Opinion 2/19 of 1 February 2019 *KOSTT*.

⁴¹ UP1 no. 12-15/19.

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participants. The Secretariat concludes that *MEPSO*'s future shareholding in a power exchange will not represent an obstacle for ownership unbundling as long as such a company only facilitates trade and is not engaged in buying or selling electricity.⁴² The Secretariat requests ERC to ensure and monitor that the activities of *MEMO* in its capacity as future as operator of the organised market, do not raise any issues resulting in a potential conflict of interest in relation to supply of electricity or gas.

– Separation and independence of public bodies

As stated above, the Secretariat agrees that in formal terms, the Ministry of Transport and Communications and the Government of North Macedonia may be considered two separate public bodies. To be considered also materially independent, the Ministry needs to have exclusive competences, instruments and resources to exercise control over *MEPSO* in a legally and factually independent manner from the Government.

While the Government, based on the Law on Government⁴³ and the Law on Use and Disposal of the State-Owned Property and Municipal Property⁴⁴ holds all shares in *ELEM* and *TEC Negotino*, the Ministry of Transport and Communications holds all shares in *MEPSO* based on Article 72(1) of the Energy Law, after they were transferred to it from the Government based on Article 237(1) of the Energy Law on 24 July 2018.⁴⁵ As owner of *MEPSO*, the Ministry is the only representative in the shareholders assembly.

The Secretariat considers the legally protected ownership position of the Ministry for Transport and Communications under corporate law, and the exclusive control rights resulting from that position, as an important element supporting the assumption of effective separation between the Ministry and the Government, and the absence of conflicts of interest.

From the perspective of public law, the Constitution of the Republic of North Macedonia stipulates that the Government consist of a president (the prime minister) and individual ministers,⁴⁶ each of which are appointed and dismissed by the Parliament.⁴⁷ Article 91 of the Constitution lists the competences of the Government, which as executive power, consist in deciding on the policy for implementation of legislation, proposals for legislation, adoption of secondary legislation etc. The Government is bound by the legislation adopted by the Parliament, including the Energy Law conferring ownership over *MEPSO* to the Ministry of Transport and Communications, and the competence to independently adopt decisions related to exercising the ownership rights.

⁴² Commission's Opinion on certification of *Energinet* (gas) (C(2012) 88, 09.01.2013 p.3.

⁴³ Official Gazette of the Republic of Macedonia, No. 59/2000 last amended with 140/18.

⁴⁴ Article 3(1)

⁴⁵ Government Decision, No.44-6841/1, 28.07.2018.

⁴⁶ Article 89 of the Constitution.

⁴⁷ Article 90 of the Constitution.

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Article 95 of the Constitution stipulates that the state administration consists of ministries and other state bodies. The scope of their activities is determined by the Law on Organization and Operation of the State Administration Bodies,⁴⁸ adopted by two-thirds majority in Parliament, and not subjects to changes or interference by the Government. Moreover, Article 13 of the Law on Government stipulates that the *“minister shall independently manage the ministry they have been appointed for, shall monitor and shall be responsible for the implementation of the laws and other prescriptions.”* Based on Article 55 of the Law on Organisation and Operation of the State Administration Bodies, the minister is empowered to adopt secondary legal acts, including decisions when empowered to do so by law. The Government has no competence to make proposals or to approve measures to be adopted by a minister. That according to Article 72(2) of the Energy Law, the Ministry of Transport and Communications is independent in the adoption of decisions for selection of a supervision body, is just a specific manifestation of this principle.

The Secretariat thus agrees that, in the first place, the ministries are responsible for the areas for which they are established, and independent of the Government.

At the same time Article 96 of the Constitution requires that ministries perform the assignments *“within their competence independently and on the basis of the Constitution and laws and are responsible in front of the Government”* (emphasis added). The Preliminary Decision does not elaborate on the nature, scope and notion of that responsibility. Moreover, individual ministries are obliged to inform the Government about acts adopted which relate either to constitutional rights of the citizens, the directions of the Government for implementation of the policy or the use of financial resources.⁴⁹ The Preliminary Decision also does not elaborate enough on the relation between the Government and ministries to sustain a finding of true independence of the Ministry controlling MEPSO. The Secretariat requests that ERC, in its Final Decision, assesses what kind of directions the Government may give to the ministers, related to their area of competence and how this may affect their decision-making.

Finally, the Law on Organization and Operation of the State Administration Bodies differentiates between supervision of the legality and supervision of the efficiency of the ministries' work.⁵⁰ In its preliminary decision, ERC is silent on the notion of supervision of efficiency of the activities and actions of the Ministry in charge of MEPSO, including the criteria applied by the Government, as well as the consequences of the Government considering a particular ministry's actions inefficient. The Government's supervision right is complemented by a right to prevent enforcement of measures,⁵¹ and to revoke or annul⁵² an act adopted by a minister. The latter, however, is limited to measures which are *“not compliant with the Constitution or law.”* In its Final Decision, ERC is requested to assess and explain whether and in which cases could the Government annul, revoke or prevent

⁴⁸ Official Gazette of the Republic of Macedonia, No. 58/2000.

⁴⁹ Article 31(1) of the Law on Government.

⁵⁰ Articles 38(1) and 41 of the Law on Organization and Operation of the State Administration Bodies. Article 30 of the Law on Government.

⁵¹ Article 29(2) of the Law on Government.

⁵² Article 30(2) of the Law on Government.

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enforcement of measures taken by the Ministry in charge of *MEPSO* deemed illegal or inefficient by the Government.

Subject to ERC's in-depth assessment and explanations in the Final Decision, it could be established that the Government's supervision right does not affect independent decision-making by the ministry controlling the transmission system operator, and that the Government's supervision right do not raise conflict of interests with the Ministry of Transport and Communications. In the event ERC's assessment comes to the opposite conclusion, it is requested to consult with the Secretariat for appropriate measures to be taken.

Lastly, even in cases where the two public bodies in question are less dependent on each other, Article 9(6) of the Electricity Directive precludes a third public body such as the Prime Minister or, as the case may be, the President, from giving instructions as regards the responsibilities of the two public bodies designated to control the undertakings performing the functions of transmission system operation and generation/supply, respectively.⁵³ ERC's Preliminary Decision does not elaborate on any possible interferences, *de iure* or *de facto*, by the Prime Minister or the President.

Based on Article 11(1) of the Law on Government, the President of the Government (the Prime Minister) represents the Government and manages its work. The President of the Government also signs the acts adopted by the Government.⁵⁴ However, the President has no competence to give directions or guidance to the members of the Government for issues that are in their portfolio, including for matters that relate to exercising rights of shareholder assembly and owner of the transmission system operator, which are adopted pursuant to Law on Company and do not relate to implementing governmental policy. In line with what was said above, ERC is requested to assess and explain, in its Final Decision, whether there could be conflicts of interests, e.g. between the Government's energy or infrastructure policy, and the exclusive control over *MEPSO* by the ministry in charge

- 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

⁵³ 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

⁵⁴ Article 11(3) of the Law on Government.

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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 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.⁵⁵ 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 behavior and undue dissemination of confidential information, including at the level of supporting staff and administration.⁵⁶ 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.

ERC assessed in its Preliminary Decision the measures currently in place to the independence operation of *MEPSO* on a daily basis. This includes a business secrets rulebook, rules on destruction of documents, rules for reporting and reacting to incidents related to secrecy, data protection rules, rules on safety copy creation and storage, records of authorised persons for processing personal data and record keeping rules, guidelines for visitors and clients as well as for security of company's premises. A Personal Data Protection Officer and Information System Administrator have been appointed and rules for their obligations and responsibilities have been adopted.⁵⁷

In addition, and following the Energy Community practice and past Opinions of the Secretariat,⁵⁸ Article 74(2) of the Energy Law provides a legal basis for the appointment of a compliance officers and adoption of a compliance program. Indeed, *MEPSO* has adopted such a program and has appointed a compliance officer prior to its certification. On 17 December 2018, ERC approved appointment of Compliance Officer.⁵⁹ The appointment was done based on conditions regulating the term and conditions for employment of the Compliance Officer approved by ERC in August 2018.⁶⁰ In January 2019, *MEPSO* adopted a compliance program.⁶¹ Some of the tasks of the Compliance Officer, besides monitoring the independence of the management bodies of *MEPSO*, relates also to providing consultations regarding the prevention or elimination of the conflict of interests as well as proposal of preventive and/ or corrective measures.

⁵⁵ Recital 15 of the Electricity Directive.

⁵⁶ 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.

⁵⁷ Annex 15 submitted by *MEPSO* to ERC.

⁵⁸ Secretariat Opinion 1/17 of 23 January 2017 *OST*, p. 15; Secretariat Opinion 1/18 of 27 February 2018 *CGES*, p.15; Secretariat's Opinion 2/19 of 1 February 2019 *KOSTT*, p.14.

⁵⁹ *MEPSO*'s Supervisory Board, Decision No. 02-9300/4, 13.12.2018 appointing Aleksandar Chebotarev, with effect after ERC's approval. This decision has been adopted after conducting an advertisement for the position of Compliance Officer No.02-8935 from 28.11.2018. The appointment was approved by ERC with Decision, No. 03-2386/2, 17.12.2018.

⁶⁰ ERC, Decision No. 02-1709/1, 31.08.2018.

⁶¹ JSC *MEPSO* Skopje, Compliance Programme, No. 02-357, 18.01.2019.

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In its Preliminary Decision, ERC rightly considers the adoption of compliance program and appointment of compliance officer as measures taken for and appropriate to avoid conflicts of interest and the sharing of confidential information. Moreover, ERC is mandated to “*continuously monitor the operation of JSC MEPSO Skopje through activities related to the collection, processing and analysis of data and information regarding the performance of the energy activity, submitted monthly to the ERC.*”⁶²

Consequently, the Secretariat considers that sufficiently effective measures have been taken within MEPSO to ensure that no conflict of interest exists in relation to the independence of the TSO in its day-to-day activities.

IV. Conclusions

Against this background, the Secretariat supports certification of MEPSO in line with ERC’s Preliminary Decision, subject to the requests made in the context of the assessment above. To the extent ERC, in implementing this Opinion, has concerns related to potential conflicts of interest, it is requested to impose the appropriate conditions in its Final Decision upon consultation with the Secretariat.

Pursuant to Article 3 of the Electricity Regulation, ERC shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of MEPSO. ERC 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. ERC 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, 17 June 2019

⁶² ERC, Preliminary Decision, section 3.

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