

Opinion 3/21

pursuant to Article 3(1) of Regulation (EC) No. 715/2009 and Article 10(6) of Directive 2009/73/EC – Georgia – Certification of GGTC

On 13 September 2021, the Georgian National Energy and Water Supply Regulatory Commission (hereinafter “GNERC”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision (hereinafter “the Preliminary Decision”) on the certification of the transmission system operator (hereinafter “TSO”) *LLC Georgian Gas Transportation Company* (hereinafter “GGTC”) as an independent system operator (hereinafter “ISO”). The Preliminary Decision was adopted on 2 September 2021,¹ based on Article 50 of the Energy Law,² as well as the Certification Rules adopted by GNERC.³

Pursuant to Article 10 of Directive 2009/73/EC⁴ (hereinafter “the Gas Directive”) and Article 3 of Regulation (EC) No. 715/2009⁵ (hereinafter “the Gas Regulation”), the Secretariat is required to examine the notified Preliminary Decision and deliver its opinion to GNERC as to the compatibility of such a decision with Articles 9(8) and 14 of the Gas Directive (hereinafter “the Opinion”).

I. Background

1. The applicant GGTC

GGTC is a limited liability company established under Georgian law. It transports natural gas on the territory of Georgia on the basis of the only license issued in Georgia for that purpose.⁶ Transportation of natural gas through the network operated by GGTC takes place from imports to the distribution network and to so-called direct customers connected to the transmission network (including thermal power plants), as well as transit of Russian gas to Armenia. The total length of the main transmission gas pipelines of Georgia is about 2.000 km.

GGTC was established in December 1999 as the subsidiary of the predecessor of the *LLC Georgian Oil and Gas Corporation* (hereinafter “GOGC”). Today, GOGC is active in the production, supply and trade of natural gas as well as generation of electricity through its subsidiaries *LLC Gardabani Thermal Power Plant* and *LLC Gardabani Thermal Power Plant 2*. In terms of gas supply, GOGC supplies gas from the *Shah-Deniz Consortium* (under the agreements between the parties of the South Caucasus Pipeline project and the Government of Georgia) and SOCAR (in the framework of

¹ GNERC Decision No. 38/2, adopted on 2 September 2021.

² Law of Georgia on Energy and Water Supply of 27 December 2019, No. 5646-rs, as amended.

³ GNERC, Certification Rules, Resolution No. 9 of 27.03.2020.

⁴ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

⁵ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

⁶ License No. 004, series 22, issued by Decision N10/2 of GNERC dated 9 June 2004, the validity was extended for an unlimited duration by Decision N21/1 of GNERC dated 10 December 2009.

the memorandum of understanding between the Government of Georgia and SOCAR and under the relevant contracts) to the regulated segment of the market (household consumers and power generation facilities) via the intermediary *SOCAR Gas Export-Import*. In addition, GOGC supplies small volumes of gas received from Russia and locally produced gas to the unregulated segment of the market. Local gas production is rather low (less than 0.5% of total annual consumption).

The shares of GOGC are owned by the *JSC Partnership Fund*, established and controlled by the Government, while the rights and obligations associated with the shareholding are exercised by the Ministry of Economy and Sustainable Development of Georgia (hereinafter “the Ministry”).

In 2011, the shares in GGTC were transferred from GOGC to direct ownership of the State, exercised by the Ministry of Economy and Sustainable Development of Georgia. The latter transferred the management rights to the Ministry of Energy and Natural Resources of Georgia based on the agreement concluded on 21 September 2011. When the latter was incorporated in the Ministry of Economy and Sustainable Development in 2017, that Ministry has managed the State’s shares in both GOGC and GGTC. Based on an agreement concluded in 2019, the National Agency of State Property (as a successor of the Ministry) holding the state’s shares in GGTC transferred management rights to the Ministry (as a successor of the Ministry of Energy). The National Agency of State Property is subordinated to the Ministry.

GGTC does not legally own the physical assets used for the transmission of gas (in particular pipelines and (two currently inactive) compressor stations). They are owned by GOGC. On 29 April 2021, GOGC founded *LLC Georgian Natural Gas Transmission Owner* (hereinafter “TNO”) and transferred ownership over the transmission system assets to it. GGTC concluded an agreement on the rent of the main gas pipelines and related infrastructure with GOGC in 2011. The agreement expires on 1 January 2022.

2. State activities in generation and supply of electricity

In addition to GGTC and GOGC, the State also fully owns the shares in undertakings active in the electricity sector. Those undertakings are: the generation company *Enguri HPP* (which in turn owns the shares of *Vardini HPP Cascade*), the wholesale trading and supply company *Electricity System Commercial Operator*, the electricity TSO *JSC Georgian State Electrosystem* and the wholesale trading company *Karchal Energy* (registered in Turkey). Furthermore, it owns 50% of the shares in the electricity TNO *Sakrusenergo* (with the remaining 50% being owned by the *Federal Grid of the United Energy System JSC* registered in the Russian Federation), and the *JSC Georgian Energy Development Fund*, which is active in renewable energy project development. The shares in all these companies are formally held by the National Agency for State Property.

On 2 December 2020, the Ministry issued Order N1-1/521 establishing a Different Rule for Assigning and Reallocation of the Functions among the Divisions of the Ministry of Economy and Sustainable Development of Georgia.⁷ Order N1-1/521 stipulates that the Department of Energy Policy and Investment Projects of the Ministry shall manage the shareholding in the transmission system operator or owners GGTC, *Georgian State Electrosystem*, *Sakrusenergo*, as well as *Georgian Energy Development Fund*, whereas the Department of Energy Reforms and International Relations

⁷ Resolution N1-1/521 dated 2 December 2020.

of the Ministry exercises the rights stemming from the shareholding of *Electricity System Commercial Operator, GOGC* and *LLC Engurhesi HPP*.

II. Description of the notified Preliminary Decision

In December 2019, Georgia adopted an Energy Law transposing the Third Energy Package as incorporated in the Energy Community, and including provisions on unbundling and certification. It requires unbundling of TSOs according to one of the two models envisaged also by the Gas Directive: ownership unbundling or independent system operation.⁸ Under Article 13(3) of the Energy Law, certification is a prerequisite for obtaining a license. On 10 June 2021, GGTC applied for certification under the ISO model.

In the operative part of the Preliminary Decision, GNERC rejects the certification of GGTC because GGTC “does not meet the requirements of Article 6 of the Certification Rules [List of Documents, Data and Information Necessary for Certification]” and because GGTC and the transmission system owner “have not fulfilled the requirements of the Unbundling Plan”.

An unbundling plan is indeed envisaged by Article 44 of the Energy Law and had been adopted by the Government on 25 March 2021.⁹ In particular, GNERC finds that the Ministry failed to comply with its commitment under the unbundling plan to ensure the reallocation of management rights over energy enterprises to separate public bodies by 9 August 2021. Instead, the temporary allocation of management rights to different structural divisions within the Ministry still applies. Furthermore, GNERC considers itself not in a position to confirm whether GGTC has the necessary physical and technical resources to operate the transmission system, since no lease agreement between the transmission system owner (hereinafter “TNO”) and GGTC has been submitted. Without this lease agreement, GNERC did not find itself in a position to assess GGTC’s capability to carry out the functions of a TSO nor its ability to implement a ten-year network development plan as well as the TNO’s capability to provide the necessary support to GGTC. Moreover, GNERC notes that contrary to the unbundling plan, no compliance programme has been submitted nor any information about the development of such a plan. Finally, GNERC considers that the charter of the TNO does not ensure independence and unbundling since the consent of GOGC as shareholder is required for the conclusion of any agreement by the TNO with a value exceeding GEL 100.000 and for the conclusion of a rent or lease agreement with the TSO, including amendments to it.

III. Assessment of the Preliminary Decision

1. The ISO model of unbundling

The unbundling provisions were designed to separate, in vertically integrated undertakings,¹⁰ control over transmission system operation as a natural monopoly, on the one hand, and over production and supply activities as competitive activities, on the other hand. The purpose of unbundling is to eliminate actual and potential conflicts of interest between transmission and other activities

⁸ Articles 44 to 46 of the Energy Law.

⁹ Government Resolution N129.

¹⁰ A VIU is defined in Article 2(20) of the Gas Directive as “a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas”.

performed by vertically integrated undertakings.¹¹ In particular, the rules on unbundling thus aim to prevent vertically integrated undertakings from using their privileged position as operators of a transmission network by obstructing access of network users other than their affiliated companies to their network or other conduct affecting fair and undistorted competition, market integration or infrastructure investment.

Against this background, the ISO model enshrined in Articles 14 and 15 of the Gas Directive envisages that the transmission network is not managed by the vertically integrated undertaking, including any of its subsidiaries, but by an operator which is fully independent from supply and production interests in the vertically integrated undertaking and at the same time effectively performs all TSO functions required by the Gas Directive and the Gas Regulation, most notably operation, development and maintenance of the system. As a precondition, it must be ensured that the ISO has the necessary powers and resources to operate the system independently from the vertically integrated undertaking.

In particular, an ISO may only be certified by a national regulatory authority if it fulfils all requirements listed in Article 14(2) of the Gas Directive namely:

- The candidate ISO has demonstrated that it complies with the requirements of Article 9(1)(b), (c), and (d) of the Gas Directive (Article 14(2)(a));
- The candidate ISO has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out the tasks of a TSO under Article 13 of the Gas Directive (Article 14(2)(b));
- The candidate ISO has undertaken to comply with a ten-year network development plan monitored by the regulatory authority (Article 14(2)(c));
- The candidate ISO has demonstrated its ability to comply with its obligations under the Gas Regulation (Article 14(2)(e));
- The TNO has demonstrated its ability to comply with its obligations under Article 14(5) of the Gas Directive (Article 14(2)(d)), namely to provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks, finance the investments decided by the ISO and approved by the regulatory authority or give its agreement to financing by any interested party including the ISO, provide for the coverage of liability relating to the network assets, and provide guarantees to facilitate financing any network expansions.

Only under these conditions may the VIU still retain the ownership of the network. As system owner, the vertically integrated undertaking's activities must be limited to enabling the ISO to carry out its tasks by fulfilling the obligations laid down in Article 14(5) of the Gas Directive.¹² Article 15 of the Gas Directive further requires legal and functional unbundling of the TNO from the other activities of the vertically integrated undertaking.

In the following, the Secretariat will verify whether the Preliminary Decision applies these criteria correctly. In the conditions of the present case, where the separation is to take place between different public bodies pertaining to the same administrative entity, the Government of Georgia, these criteria do not only apply to the relations between the ISO (GGTC) and the vertically integrated

¹¹ Secretariat Opinions 1/16 of 3 February 2016 *TAP AG*; 1/17 of 23 January 2017 *OST*.

¹² See Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

undertaking (GOGC) but also to and between different bodies within the Government as the framework within both the ISO and the system owner (continue to) operate.

a. Compliance with Article 14(2)(a) of the Gas Directive

Article 14(2)(a) of the Gas Directive determines that an ISO may be designated only where it complies with Articles 9(1)(b), (c) and (d). These provisions aim at establishing the independence of the system operator by separating the exercise of control over or any rights in production and supply activities, on the one hand, and transmission activities on the other hand. The term 'control' is defined in Article 2(36) of the Gas Directive as "*any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*"¹³ The rights include in particular the power to exercise voting rights, the holding of a majority share and the right to act as, as well as the power to appoint members of the TSO's corporate bodies and those legally representing the TSO (Article 9(2) of the Gas Directive). This applies across activities in the gas sector as well as in the electricity sector, 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 TSO¹⁴ (Article 9(3) of the Gas Directive).

To satisfy these independence requirements, Article 9(6) of the Gas Directive provides that two separate public bodies may be seen as two distinct persons within the meaning of Article 9(1) and (2) of the Gas Directive, and may control production and supply activities, on the one hand, and transmission activities on the other hand.

As described above, *GGTC's* shares are owned by the State, represented by the National Agency of State Property, which in turn is controlled by the Ministry. Moreover, the Ministry directly exercises the rights and obligations of the shareholder within *GGTC's* governance structures. This amounts to full and unfettered control over the TSO within the meaning of Article 2(36) of the Gas Directive. At the same time, *GOGC's* shares are owned by the *Partnership Fund* which in turn is controlled by the Ministry, thereby conferring to the Ministry control over *GOGC* as well. *GOGC* is active in gas production and supply, as well as in electricity generation. The Ministry also controls other significant electricity generation facilities, namely the hydropower generators *Enguri HPP* and *Vardanili Cascade HPP*, as well as the wholesale and retail supplier *Electricity System Commercial Operator* and the trading company *Karchal Energy*.

It follows that the Ministry – and hence the same public body within the meaning of Article 9(6) of the Gas Directive – exercises control within the meaning of Article 9(1)(b) and (c) of the Gas Directive over the gas transmission system operator *GGTC* as well as a number of undertakings active in production/trade/supply of gas and electricity. Therefore, the status of *GGTC* does not comply with Article 14(2)(a) of the Gas Directive, and cannot be certified as an ISO.

GNERC is further right in rejecting any recourse to the Ministry's Order N1-1/521 as a measure to rectify non-compliance with Article 14(2)(a) of the Gas Directive. Internal restructuring measures do

¹³ This definition is taken from the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and should be interpreted accordingly (recital 10 of the Gas Directive).

¹⁴ Commission Opinion on certification of *Elering AS*, C(2016) 8255, 02.12.2016.

not change the fact that control is exercised by the same public body, and do not suffice to eliminate the inherent conflict of interest this creates. This is even more so, as GNERC rightfully notes, as Article 15(4) of the Law of Georgia on the Structure, Powers and Rules of Activities of the Government, establishes a “one-person rule”, whereby the Minister is the only authority to approve both the statutes of the different structural divisions of the Ministry (the departments), and to take decisions falling within the competences of the Ministry. This principle implies the sole responsibility of the Minister for decision-making, irrespective of which department is operationally charged with overseeing different categories of undertakings.

b. Compliance with Article 14(2)(b) of the Gas Directive

Article 14(2)(b) of the Gas Directive provides that an ISO may be designated only where it has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13 of the Gas Directive. Article 13 of the Gas Directive lists the core tasks of TSOs, namely to:

- Operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities to secure an open market with due regard to the environment, ensure adequate means to meet service obligations;
- Refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;
- Provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system; and
- Provide system users with the information they need for efficient access to the system.

Similarly, Article 14(4) of the Gas Directive requires that the ISO shall be responsible for “*granting and managing third-party access, including the collection of access charges and congestion charges, for operating, maintaining and developing the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure.*”

In the Preliminary Decision, GNERC concludes that GGTC has at its disposal the necessary staff and sufficient financial resources to perform the core tasks of a TSO. However, it notes that no rent or lease agreement between the TNO and GGTC has been submitted. It was not concluded due to the lack of consensus in particular regarding the rent to be paid. Such agreement would be necessary for GGTC to possess, use and operate the network and therefore discharge the TSO’s core tasks. GNERC therefore concludes that it is not in a position to confirm whether GGTC has the necessary physical and technical resources to operate the transmission system.

The Secretariat agrees that GGTC has at its disposal the necessary human and financial resources. It also concurs with GNERC’s conclusion with regard to the necessary technical and physical resources: Although GGTC is currently operating on the basis of a rent agreement with GOGC, this agreement expires on 1 January 2022. The relevant assets have been transferred to the TNO which therefore needs to conclude a lease agreement with GGTC. Without the conclusion of an agreement between the operator GGTC and the TNO regarding the use of the system, i.e. the mentioned lease

agreement, and its review by GNERC and the Secretariat, *GGTC* is not in a position to operate, maintain, and develop the network in line with the requirements of the Gas Directive.

In the absence of an agreement and a review of its provisions, the Secretariat considers that *GGTC* fails to comply with the requirements of Article 14(2)(b) of the Gas Directive as *GGTC* does not have at its disposal the necessary technical and physical resources to carry out its tasks under Article 13 of the Gas Directive.

c. Compliance with Article 14(2)(c) of the Gas Directive

According to Article 14(2)(c) of the Gas Directive, a candidate ISO can only be certified if it has undertaken to comply with a ten-year network development plan monitored by the regulatory authority. A TSO needs to submit such a ten-year network development plan based on existing and forecast supply and demand every year to the regulatory authority. It must contain efficient measures in order to guarantee the adequacy of the system and the security of supply (Article 22 of the Gas Directive).

As has been pointed out above with regard to Article 14(2)(b) of the Gas Directive, GNERC notes that no lease agreement between the TNO and *GGTC* has been submitted which would constitute the basis for *GGTC* to possess, maintain, operate and develop the network. The Preliminary Decision therefore concludes that compliance with this requirement cannot be assessed.

However, although the Secretariat agrees with GNERC's conclusion that due to the lack of any agreement between the owner and the operator of the network, *GGTC* is not in a position to perform the tasks of a TSO, Article 14(2)(c) of the Gas Directive requires the candidate ISO to commit to comply with a ten-year network development plan (which it will have to prepare and implement as a TSO). Such commitment is given in *GGTC*'s application for certification and its charter contains provisions on the development of a ten-year development plan.

As a consequence, the Secretariat considers that *GGTC* complies with the requirements of Article 14(2)(c) of the Gas Directive.

d. Compliance with Article 14(2)(e) of the Gas Directive

Article 14(2)(e) of the Gas Directive requires the candidate ISO to demonstrate its ability to comply with its obligations under the Gas Regulation. Under the Gas Regulation, TSOs shall:

- Third-party access services: ensure that they offer services on a non-discriminatory basis to all network users (Article 14(1)(a)), provide both firm and interruptible third-party access services (Article 14(1)(b)), offer to network users both long and short-term services (Article 14(1)(c)),
- Capacity-allocation and congestion-management: implement and publish non-discriminatory and transparent capacity-allocation mechanisms (Article 16(2)), implement and publish non-discriminatory and transparent congestions-management procedures which facilitate cross-border exchanges in natural gas (Article 16(3)), regularly assess market demand for new investment and when planning investments, assess market demand and take into account security of supply (Article 16(5)),

- Transparency requirements: make public detailed information regarding the services it offers and the relevant conditions applied, together with the technical information necessary for network users to gain effective network access (Article 18(1)), publish reasonably and sufficiently detailed information on tariff derivation, methodology and structure (Article 18(2)), make public information on technical, contracted and available capacities on a numerical basis for all relevant points including entry and exit points on a regular and rolling basis and in a user-friendly and standardised manner (Article 18(3)), disclose this information in a meaningful, quantifiably clear and easily accessible manner and on a non-discriminatory basis (Article 18(5)), make public ex-ante and ex-post supply and demand information, based on nominations, forecasts and realised flows in and out of the system (Article 18(6)), make public measures taken as well as costs incurred and revenue generated to balance the system (Article 18(6));
- Balancing: provide sufficient, well-timed and reliable on-line based information on the balancing status of network users (Article 21(2));
- Trading of capacity rights: take reasonable steps to allow capacity rights to be freely tradable and facilitate such trade in a transparent and non-discriminatory manner (Article 22).

In its Preliminary Decision, GNERC notes that the TNO and *GGTC* have not concluded a lease agreement which would constitute the basis for *GGTC* to possess, use and operate the network. As a consequence, GNERC did not find itself in a position to assess *GGTC*'s capability to effectively perform the functions of a TSO.

As has been pointed out above, while *GGTC*'s charter and the Gas Network Rules would provide for *GGTC* to fulfill these tasks, a rent or lease agreement with the TNO to which the assets have been transferred is the necessary basis for managing, operating, maintaining and planning of the transmission system. Due to the lack of conclusion of such agreement, *GGTC* does not have at its disposal the necessary resources to perform the main activities of a TSO as listed in Article 13 of the Gas Directive as well as to comply with the requirements of the Gas Regulation. Therefore, the Secretariat agrees that *GGTC* fails to comply with the requirements of Article 14(2)(e) of the Gas Directive.

e. Compliance with Article 14(2)(d) of the Gas Directive

Article 14(2)(d) of the Gas Directive requires that the TNO has demonstrated its ability to comply with its obligations under Article 14(5) of the Gas Directive, namely to

- provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks (Article 14(5)(a));
- finance the investments decided by the ISO and approved by the regulatory authority or give its agreement to financing by any interested party including the ISO (Article 14(5)(b));
- provide for the coverage of liability relating to the network assets (Article 14(5)(c)); and
- provide guarantees to facilitate financing any network expansions (Article 14(5)(d)).

GNERC in its Preliminary Decision states that due to the lack of submission of draft contracts to fulfil these obligations, it cannot assess whether the TNO meets these requirements, in particular with regard to the financing of the investments, insurance of responsibilities and development of the network.

The Secretariat takes note of the fact that no evidence for the fulfilment of the obligations listed under Article 14(5) of the Gas Directive was provided. In these circumstances, it has not been demonstrated by the TNO that it will finance the investments decided by the ISO or agree to financing, not that it will provide the coverage of liability relating to the network assets and provide guarantees to facility financing of network expansion. Therefore, the Secretariat considers that Article 14(2)(d) of the Gas Directive is not fulfilled.

f. Unbundling of the TNO

Article 15 of the Gas Directive requires legal and functional unbundling of the TNO (“*shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission*”). Legal unbundling requires that the network is owned by a company separate from the other activities not related to transmission, distribution and storage and must be responsible for all the decisions assigned to the TNO under the Directive. Functional unbundling requires that this company is independent in terms of its organisation and decision making from other activities not related to transmission. In particular, Article 15(2) of the Gas Directive sets the following minimum criteria:

- Persons responsible for the management of the TNO shall not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;
- Appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the TNO are taken into account in a manner that ensures that they are capable of acting independently;
- The TNO shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored.

Apart from the lack of a compliance programme as required by the unbundling plan until 10 June 2021, GNERC concludes in the Preliminary Decision that the charter of the TNO fails to establish the latter’s independence. According to para. 3.8 (i) of the charter, the conclusion of any agreement by the TNO with a value above GEL 100.000 must be approved by the general meeting of shareholders, i.e. the sole shareholder GOGC. According to para. 3.8 (j) of the charter, the general meeting of shareholders shall adopt the lease agreement with the ISO. Since GOGC as the sole shareholder of the TNO is active in gas production and supply, as well as in electricity generation, GNERC deems that the charter does not comply with the unbundling requirements. However, the TNO’s charter was amended on 1 September 2021, a day before the Preliminary Decision was adopted by GNERC. By the amendments, the above mentioned subparagraphs “i” and “j” were deleted.

The Secretariat agrees that due to the lack of establishment of a compliance programme, the TNO fails to comply with the requirements of Article 15 of the Gas Directive.

IV. Conclusion

Based on the information displayed in the Preliminary Decision and all other information obtained in the course of the present procedure, the Secretariat concludes that GGTC does not comply with the unbundling provisions due to the State as sole shareholder also controlling companies active in

production/supply activities in the gas/electricity sectors. Moreover, the lack of a lease agreement with the TNO precludes GGTC from having at its disposal the necessary technical and physical resources to perform the tasks of a TSO enshrined in Article 13 of the Gas Directive, and to comply with its obligations under the Gas Regulation. Furthermore, the TNO did not provide evidence for its ability to comply with its obligations under Article 14(5) of the Gas Directive. Finally, independence of the TNO from GOGC is not fully ensured because no compliance programme has been established as required under Article 15(2) of the Gas Directive.

Therefore, the Secretariat agrees with GNERC's conclusion in the Preliminary Decision that GGTC can currently not be certified.

Pursuant to Article 3 of the Gas Regulation, GNERC shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of GGTC. GNERC 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. GNERC is invited to inform the Secretariat within five working days following receipt of this opinion whether and why it considers that this document contains confidential information which it wishes to have deleted prior to such publication.

Vienna, 10 November 2021



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