

COMPLIANCE NOTE

by the Energy Community Secretariat

Georgia- competences in adoption of Ten Years Network Development Plan

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In this Compliance Note, the Secretariat reviewed Article 53, paragraph 5 of the Georgian Law on Energy and Water Supply.

1. Background

On 20 December 2019, the Parliament of Georgia adopted the Law on Energy and Water Supply. The discussion in the Parliament was long stalled because of a question about the independence and regulatory power of the national regulatory authority (NRA), the Georgian National Energy and Water Supply Regulatory Commission (hereinafter – GNERC), due to its role in relation to the adoption of the ten-year network development plans (TYNDP) for electricity and gas systems.

The Law on Energy and Water Supply confers the right to approve the ten-year network development plan (hereinafter – TYNDP) to the Ministry of Economy and Sustainable Development of Georgia.

1.1 Relevant Energy Community law

a. TYNDPs

The Electricity Directive 2009/72 (hereinafter ‘the Electricity Directive’) and Gas Directive 2009/73 (hereinafter ‘the Gas Directive’)¹ introduced obligatory TYNDPs to be drafted by transmission system operators (TSO): Articles 22(1) of the Electricity and Gas Directives require TSOs to annually **submit to** the NRA a TYNDP based on existing and forecast supply and demand and after having consulted all relevant stakeholders. According to Article 22(2) of the Electricity and Gas Directives, the purpose of TYNDPs is to ‘indicate to market participants the main transmission infrastructure that needs to be built or upgraded over the next ten years’; to list ‘all the investments already decided’; to ‘identify new investments which have to be executed in the next three years’; and to ‘provide for a timeframe for all investment projects’. In other words, the intention of TYNDPs is to establish a structured and forward-looking investment planning process that ensures adequate grid capacities to cover the demand of end-users and safeguards security of supply.

By way of a two-fold public consultation process, the process of developing the TYNDP also aims at ensuring extensive involvement of market participants: Article 22(1), in a first step, requires TSOs to consult stakeholders on existing and forecasted supply and demand before adopting the TYNDP. In a second step, pursuant to Article 22(4), the NRA has to publically consult the TYNDP with existing and potential system users once again.

¹ The Electricity and Gas Directives are applicable in the Contracting Parties in the version adopted and adapted for the Energy Community by Decision of the Energy Community Ministerial Council 2011/02/MC-EnC. See: <https://www.energy-community.org/legal/acquis.html>.

b. Competences of regulators

In relation to TYNDPs, Article 22 of the Gas and Electricity Directives tasks regulators to:

- **consult** the TYNDP with existing and potential users and publish the results of the consultation;²
- **examine** whether the TYNDP covers all investment needs identified during the consultation process;
- **monitor³ and evaluate** the implementation.

Article 22 of the two Directives does not envisage any approval of the TYNDP by regulators. According to Article 22(5) of the two Directives, they may, however, **require** the TSO **to amend** its TYNDP. Whether or not to make such a request is not in the discretion of the NRA. It depends on an assessment of 'whether the ten-year network development plan covers all investment needs identified during the consultation process', i.e. the public consultation performed by the regulator.⁴ Article 22 does not envisage that NRAs require TSOs to amend their TYNDPs for any other reasons.

As a comparison with the original version of the two Directives (i.e. the versions applicable in the EU) reveals, the yardstick for this assessment is more limited for Contracting Parties' regulators than for EU NRAs. Namely, EU regulators may request amendments to a TYNDP additionally (i.e. besides the consistency of the TYNDP with the results of the public consultation) requested in a situation where doubts have arisen as to the consistency with the Union-wide network development plan developed by ENTSO-E or ENTSOG. In such a case, EU NRAs may also consult the Agency for the Cooperation of Energy Regulators (ACER).⁵ An Energy Community wide TYNDP and an Agency comparable to ACER do not exist in the Energy Community.

c. Independence of regulators

Independence of regulators in exercising their competences is a central element of Energy Community law. Articles 39 paragraphs (4) and (5) and 41(4) item (a) of the Gas Directive and Articles 35 paragraphs (4) and (5) and 37(4) item (a) of the Electricity Directive require that regulators must be empowered to act independently in executing their task de-coupled from other public or private bodies and take binding decisions that are only subject to juridical review.⁶

Article 41(6) item (a) of the Gas Directive and Article 37(6) item (a) of the Electricity Directive empower regulators to set network tariffs or, at least, the methodologies for their calculation.

² Cf. E. Cabau in: Claeys&Castels, EU Energy Law – Volume I: The Internal Energy Market (Third Edition), margin note 4.237.

³ See also Article 41(1) item (g) of the Gas Directive and Article 37(1) item (g) of the Electricity Directive.

⁴ Cf. E. Cabau in: Claeys&Castels, EU Energy Law – Volume I: The Internal Energy Market (Third Edition), margin notes 4.238 and 4.239.

⁵ www.acer.europa.eu. On EU level a Union-wide TYNDP is prepared by ENTSO-E and ENTSOG on bi-annual basis on which ACER provides an opinion.

⁶ See as well: recital (35) and (37) of the Electricity Directive; recitals (30) and (33) of the Gas Directive.

2. EU practice

The role of regulators related to TYNDPs is not unified in the European Union. The Electricity and Gas Directive leave the choice as to how to implement the acquis to the national legislator. A number of examples are elaborated hereinafter:

- In Austria, the national (TY)NDP is subject to regulatory approval.⁷ Yet when assessing the TYNDP the regulator is strictly limited to analyse whether it covers the demand identified during the public consultation process, its consistency with the EU-wide TYNDP and whether it complies with the criteria of technical necessity, adequacy and economic efficiency. Consultation obligations of the TYNDP are foreseen as required by the [EU] acquis.
- Regulatory approval of the national TYNDP is also required in France, UK and Croatia.⁸ The French regulator, for instance, has to verify whether the TYNDP covers the demand identified during the public consultation process and is consistent with the EU-wide TYNDP, other evaluation criteria are not provided by law.⁹ Consultation obligations of the TYNDP are foreseen as required by the [EU] acquis.
- Germany has opted for a so-called 'confirmation' of the TYNDP by the regulator. This concept differs from formal approval. While the German legislation tasks the NRA to approve the scenarios that have to be used as basis for the national TYNDP,¹⁰ the TYNDP is only 'confirmed' by the NRA after review. For its assessment the regulator is limited to verify whether the TYNDP complies with the requirements explicitly defined by law.¹¹ Consultation obligations of the TYNDP are foreseen as required by the [EU] acquis. The NRA finally submits the confirmed TYNDP to the government for the development of a federal demand plan.
- In Portugal, the TYNDPs are approved by the Ministry based on a non-binding opinion that the NRA provides to the Ministry after public consultation of the TYNDP.
- In Belgium, TYNDPs have to be submitted by both the gas and electricity TSOs to the NRA and Ministry. Legislation, however, only requires approval of the electricity TYNDP which is to be issued by the Ministry after consultation with the regulator. The right to request amendments to the TYNDP in case of doubt that it sufficiently covers demand is given to the Ministry, upon advice of the NRA.¹²

As it can be seen from the above examples, the legal systems of the EU Member States foresee different approaches for the treatment of TYNDPs. They reach from regulatory to ministerial approval, from consultation of the NRA to no involvement of the regulator at all. It is, however, important to underline that where approval of the TYNDP is foreseen, the right of the competent

⁷ Articles 37-39 Electricity Law; Articles 63-65 Gas Law.

⁸ Articles 28, 31, 34 and 48 of the Gas Market Law.

⁹ Articles L321-3, L431-6 and L421-7-1 of the Energy Code.

¹⁰ Article 12a of the German Energy Law. At least three scenarios have to be presented every second year to the NRA for approval following public consultation.

¹¹ German legislation in Articles 12b and 12c of the Energy Law requires the TYNDP to include: necessary network upgrades within the upcoming three years; timeline for network development and upgrades; the implementation status of the previous TYNDP; possible alternative network development option; other information for specific technologies such off-shore connections, pilot projects etc. The regulator also has to verify the consistency of the TYNDP with the EU-wide TYNDP.

¹² Article 13 Electricity Law. The gas TYNDP does not require any approval (cf Article 15/1(5) Gas Law.

body to request amendments to the TYNDP is limited to the analysis whether it covers the demand identified during the public consultation process [and is consistent with the EU-wide TYNDP].

3. Legal assessment

Articles 22 of the Gas and Electricity Directives do not stipulate any ‘approval’ competence in context of regulatory tasks related to TYNDPs. This stands in contrast to other provisions in the acquis, which do vest the regulators with explicit competences of approval.

Firstly, an explicit exemption applies to the case of Independent System Operators (ISO) for which the acquis requires regulatory approval of the first TYNDP, the investments planning and the multi-annual network development plan presented by the ISO on an annual basis which is a means to ensure independent investment making decision of the ISO from the vertically integrated undertaking.¹³ [...] The rationale behind is to protect independent investment decision making of the ISO having in mind that the ISO is not the owner of the transmission network but manages it on behalf of the owner. To guarantee financing, the ISO in the course of the certification process pursuant to Article 13(2) item (c) Electricity Directive and Article 14(2) item (c) Gas Directive therefore has to undertake to comply with a TYNDP under the monitoring of the NRA. In addition to this first TYNDP, Article 37(3) item (c) Electricity Directive and Article 41(3) item (c) Gas Directive grant the NRA the power to approve the investment planning and multi-annual network development plan presented annually by the ISO.¹⁴

Secondly, the Gas and Electricity Directives in other cases very clearly use the term ‘approval’ in context with regulatory powers. This is, for example, the case in Article 41(6) of the Gas Directive and Article 37(6) of the Electricity Directive reading:

‘The regulatory authorities shall be responsible for fixing or approving [...]

(a) connection and access to national networks, including transmission and distribution tariffs or their methodologies [...];

(b) the provision of balancing services [...];

(c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.’

It may thus be concluded that the European legislator deliberately did not use the term ‘approval’ in context with the regulatory powers related to TYNDPs in Articles 22 of the Gas and Electricity Directives but, on the contrary, only established a supervisory and reviewing responsibility of regulators.

¹³ Cf. Articles 18(4) and 37(3) litera (c) Electricity Directive 2009/72 and Articles 18(4) and 41(3) litera (c) Gas Directive 2009/73.

¹⁴ E.Cabau in: Claeys&Castels, EU Energy Law – Volume I: The Internal Energy Market (Third Edition), margin notes 4.192 and 4.176. An ISO can be appointed by a Contracting Party upon proposal of the network owner where the transmission system belonged to a vertically integrated undertaking on 06.10.2011 (Article 13 Electricity Directive; Article 14 Gas Directive). To also compensate potential shortcomings of structural independence of Independent Transmission Operators (ITO), compared to ownership unbundled TSO the acquis provides further instruments to ensure that investments are realised despite the remaining link to the supply branch, cf. E.Cabau in: Claeys&Castels, EU Energy Law – Volume I: The Internal Energy Market (Third Edition), margin notes 4.234, 4.240 and 421. In addition to the obligation for TSOs to submit TYNDPs to the NRA, Article 22(7) of the Electricity and Gas Directives empowers the regulator to enforce investments that were included in the TYNDP but are not realised.

By consequence, **Energy Community law does not require approval of TYNDPs by the regulator**. At the same time, it does not exclude such approval powers, nor approval powers by another institution, e.g. on governmental or ministerial level.

At the same time approval of the TYNDP by another public or private body must not encroach on the NRA's independence and autonomy.¹⁵ In particular, such competences vested by national law may **not deprive regulators from their right to** independently evaluate the cost-reflectivity of the investments made when fixing or approving of transmission and distribution tariffs.

In this context, three considerations are of relevance:

1. First, the right of the NRA to evaluate the efficiency of incurred investment costs for the purpose of their recognition in network charges does not entitle the regulator to entirely reject an investment that has been recognized in the TYNDP, approved by another institution. The regulator's powers are limited to assess the level of efficiently incurred costs for the very project for approval of the network fees, not the adequacy of infrastructure projects included in the TYNDP.
2. Secondly, as the case for any other decision, the decision of a regulator to not recognise certain costs of an investment included in the TYNDP by another institution must be duly justified to allow for judicial review.¹⁶
3. Thirdly, the right of NRAs to require a TSO to amend its TYNDP pursuant to Articles 22(5) of the Gas and Electricity Directives must follow clear and transparent criteria and be strictly limited to the assessment '*whether the ten-year network development plan covers all investment needs identified during the consultation process*' [executed by the NRA according to Articles 22(4) leg cit]. As discussed above, the duty to analyse the consistency of the TSO's national TYNDP with regional or Energy Community wide planning does not exist for Contracting Parties' regulators, different from EU NRAs.

4. Assessment of Georgian legislation

Article 7 of the Energy Law of Georgia (hereinafter 'the Energy Law') stipulates that the Ministry shall develop in cooperation with the government and the regulator, GNERC, a State policy for a TYNDP (hereinafter 'the State policy') which shall be adopted by the Parliament.

Article 53(4) of the Energy Law requires the TSO to reflect the State policy in its TYNDP. Pursuant to the same provision, the TSO has to submit a TYNDP for review to GNERC after having it publically consulted. GNERC is entitled to request changes to the TYNDP but cannot entirely refuse a project included in the State policy in the course of approving network fees for such project. However, Article 53(5) leg cit empowers GNERC to exclude not efficiently incurred investment costs from the regulatory asset base in which case the remaining investment costs may be covered via the State budget.

¹⁵ See as well: Secretariat Policy Guideline PG 02/2015 on the independence of regulators, 28.01.2015, p.3. Commission, Staff Working Document: Interpretative Note on the Gas and Electricity Directives – the regulatory authorities (hereinafter the 'Interpretative Note'), 22.01.2010, p. 7.

¹⁶ Ref. Article 37(16) Electricity Directive and Article 41(16) Gas Directive.

Based on the above legal analysis, the Secretariat concludes that the provisions of the Energy Law comply with the Energy Community acquis.

First, the approval of the TYNDP in the form of the State policy by another public body does not conflict with the Energy Community law per se.

Secondly, the Energy Law requires consultation of GNERC in the process of developing the State policy.

Thirdly, the Energy Law foresees submission of a TYNDP to GNERC, and entitles GNERC to request changes to the TYNDP. In this context, the Secretariat recalls that such change requests must be limited to the analysis whether the TYNDP covers the demand identified during the public consultation process.

Fourthly, the Energy Law empowers GNERC to deny not efficiently incurred costs of a project included in the State policy in which case the investment costs not recognized by the regulator may be covered via the State budget.

Fifthly, the quoted provisions ensure independent decision making of GNERC in context of recognizing investment costs of a project included in the State policy in context of network tariff setting.