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**Status Review on the Implementation  
of Transmission System Operators'  
Unbundling Provisions of the 3<sup>rd</sup>  
Energy Package**

**CEER Status Review**

**Ref: C15-LTF-43-04**  
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## INFORMATION PAGE

### Abstract

This CEER document (C15-LTF-43-04) presents a Status Review on the Implementation of Transmission System Operators' Unbundling Provisions of the 3<sup>rd</sup> Energy Package.

This CEER Status Review provides an overview of the status of implementation of the unbundling provisions set out in the Directives of the 3<sup>rd</sup> Energy Package. Under this Package the energy networks are subject to unbundling requirements which oblige Member States to ensure the separation of vertically integrated energy companies, resulting in the separation of the various stages of energy supply (generation, distribution, transmission and supply).

This Status Review, together with the corresponding Status Review on the Implementation of Distribution System Operators' Unbundling Provisions of the 3<sup>rd</sup> Energy Package, aims to assess the status of DSO and TSO unbundling. Topics explored included related issues such as: Branding; Financial independence in terms of staff and resources; Compliance programme and officer; Investments, Joint-venture TSOs and Joint undertakings.

### Target Audience

European Commission, energy suppliers, traders, gas/electricity customers, gas/electricity industry, consumer representative groups, network operators, Member States, academics and other interested parties.

### Keywords

Unbundling; Cross-Sectoral; Networks; 3<sup>rd</sup> Package; Market Monitoring; National Regulatory Authorities (NRAs); Transmission System Operators (TSOs); Distribution System Operators (DSOs); Ownership Unbundling; Independent System Operator (ISO); Independent Transmission Operator (ITO)

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## Related Documents

### CEER documents

- [CEER Memo on the transposition of unbundling requirements for Transmission, Distribution and Closed Distribution Systems Operators](#), Ref: C14-IBM-61-03, 30 July 2014
- [CEER Status Review on the Transposition of Unbundling Requirements for DSOs and Closed Distribution System Operators](#), Ref: C12-UR-47-03, 16 April 2013
- [The Future Role of DSOs - A CEER Conclusions Paper](#), Ref: C15-DSO-16-03, 13 July 2015
- [CEER Status Review on the Implementation of Distribution System Operators' Unbundling Provisions of the 3rd Energy Package](#), Ref: C15-LTF-43-03, 1 April 2016

### External documents

- Commission Staff Working Paper; [Interpretative note on Directive 2009/72/EC Concerning common rules for the Internal Market in Electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas; The Unbundling Regime](#), 22 January 2010
- Commission Staff working document on Ownership Unbundling, [“The Commission practice assessing the presence of a conflict of interest including in case of financial investors”](#), SWD(2013)177final, 8 May 2013
- [Commission Staff Working Document Report on the ITO Model](#), SWD(2014) 312 final, 13 October 2014



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## Executive Summary

It is clear that Transmission System Operators (TSOs) and Distribution System Operators (DSOs) are important market actors, as they deliver electricity and natural gas to end-consumers, while guaranteeing the long-term ability of the system at the same time. As such, their independence, ensured through unbundling rules (among others), may strongly influence the level of retail competition available in the market.

As a background, the unbundling rules for TSOs were thoroughly revised under the 3<sup>rd</sup> Package, resulting in new, more far reaching unbundling requirements, whereas for the DSO the unbundling requirements have only been slightly reinforced. Another difference between DSO unbundling and TSO unbundling lies in the new requirement for TSOs, which now have to be certified by the competent NRAs as being compliant with the unbundling requirements and to be designated by the Member States. Such a certification and designation requirement does not exist for DSOs.

The rules on legal and functional unbundling as provided for in Directive 2003/54/EC did not, however, lead to an effective unbundling of the TSOs. Hence at its meeting on 8 and 9 March 2007, the European Council invited the European Commission to develop legislative proposals for the “effective separation of supply and generation activities from network operations”.

Without effective separation of networks from activities of generation and supply (i.e. effective unbundling), there is an inherent risk of discrimination not only in the operation of the network but also in the incentives for Vertically Integrated Undertakings (VIU) to invest adequately in their networks.

When it comes to **TSO Unbundling**, the 3<sup>rd</sup> Package requires these to be certified by National Regulatory Authorities (NRAs) under one of the unbundling models provided for in the Directives:

- as fully ownership unbundled (OU);
- Independent system operator (ISO);
- Independent transmission operator (ITO); or
- in special cases where the TSO satisfies the test for a derogation under Article 9(9) of the Directives - the so-called ITO+ model.

However, TSOs can be granted or continue to benefit from a - temporary and/or partial - exemption to unbundling. Cyprus, Luxembourg and Malta have been exempted to apply the unbundling provisions for their gas and electricity TSOs. Beside these countries, Estonia, Latvia, Finland and other Member State(s) qualified as an emergent market or having substantial problems in a geographically limited area, and can exempt their gas TSOs from applying the unbundling rules for a given period of time.



Overall, the most prevalent energy unbundling model implemented is OU followed by the ITO and ISO models, with an important difference for gas and electricity TSOs<sup>1</sup>. So far 70% of electricity TSOs have been certified under the OU model, while 40% of gas TSOs have been certified under this model. With 44%, the most used model under which gas TSOs have been certified is the ITO-model. Eight Member States have used two different models for the TSO certification in the gas sector, whereas in electricity only three Member States have chosen a combination of different unbundling models.

In cases where cross-border certification was required, such decisions have been taken as coordinated (separately published) NRA decisions on the basis of a prior agreement between the concerned NRAs<sup>2</sup>. For the Interconnector (UK) Limited, the competent NRAs (CREG and OFGEM) have coordinated the content of the decision and the certification procedure.

For the Member States in which the ISO model was applied, the NRAs monitor the relations and communications between the ISO and transmission system owner in order to ensure the compliance of the ISO with its obligations.

So far the European Commission has conducted 109<sup>3</sup> certification procedures and has not requested the Agency for the Cooperation of Energy Regulators (ACER) to provide its views on individual certification processes or on particular certification cases. This indicates that there has been a good level of cooperation between NRAs and the European Commission, including in relation to cross-border certifications.

In application of the ITO-model review clause provided for in the Directives, the European Commission found in its "Report on the ITO Model"<sup>4</sup> that most of the requirements related to the ITO model work in practice and are sufficient and adequate to ensure effective separation of the transmission business from generation and supply activities in the day-to-day business. Thus the European Commission did not see so far a need to propose changes to the ITO unbundling model, but mainly to reinforce its monitoring.

The ownership structures of TSOs in the Member States vary according to the models proposed in the 3rd Package but all the models proposed have been implemented throughout Europe as a whole. The implementation of unbundling models of the 3rd Package is a kind of evolving concept. While in the majority of the participating Member States the TSOs are owned/controlled by public entities (some up to 100%), in other Member States TSOs have a private ownership. This assertion can also vary between the electricity and gas sector.

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<sup>1</sup> According to the information received by the European Commission on certification notification, including later withdrawn certifications (as for 14 February 2016):  
(<https://ec.europa.eu/energy/sites/ener/files/documents/Received%20notifications%20corr.xlsx>)

<sup>2</sup> By Belgian, British and Dutch NRAs.

<sup>3</sup> <https://ec.europa.eu/energy/sites/ener/files/documents/Received%20notifications%20corr.xlsx>

<sup>4</sup> SWD(2014)312final



## 1 Background

With the adoption of Directive 2009/72/EC<sup>5</sup> (“Electricity Directive”) and Directive 2009/73/EC<sup>6</sup> (“Gas Directive”), together referred to as “the Directives”, new rules have been introduced on unbundling for TSOs and to a lesser extent for DSOs.

This report provides an overview of the status of implementation of the unbundling provisions set out in the Directives of the 3<sup>rd</sup> Energy Package (3<sup>rd</sup> Package). Under this Package the energy networks are subject to unbundling requirements which oblige Member States to ensure the separation of vertically integrated energy companies, resulting in the separation of the various stages of energy supply (generation, distribution, transmission and supply).

For TSOs the unbundling requirements have been considerably reinforced in comparison to the 2<sup>nd</sup> Energy Package; the independence of the network operators shall now be assessed through a certification process conducted by national regulatory authorities (NRAs).

The information on the current status of unbundling was collected by way of a survey among the NRAs of CEER member and observer countries, based on the information available to them until February 2016.

26 CEER members (out of 33 CEER members and observers) participated in the survey for this status review - Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Latvia, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden and the Netherlands. Input was provided until February 2016 to CEER and represents the status of the TSO and DSO unbundling in the respective country until then.

This review aims to assess the status of TSOs unbundling and topics explored included related issues such as: Branding; Financial independence in terms of staff and resources; Compliance programme and officer; Investments, Joint-venture TSOs and Joint undertakings.

## 2 Unbundling of Transmission System Operators

The Directives of the 3<sup>rd</sup> Package introduced new, further reaching rules for the effective separation of supply and generation activities from network operations. These provisions were introduced as a result of findings that the rules on (legal and functional) unbundling for TSOs, provided for in the previous directives, did not lead to effective unbundling of TSOs.

The 3<sup>rd</sup> Package TSO unbundling rules aim to remove the risk of conflicts of interest and discriminatory behaviour in network operation, to promote investments in network infrastructure in a non-discriminatory way and to ensure fair network access for new entrants as well as transparency in the market.

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<sup>5</sup> 2009/72/EC Directive 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

<sup>6</sup> 2009/73/EC Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in gas and repealing Directive 2003/55/EC





Considering the national particularities and the different market structures, several unbundling models for TSOs have been provided for in the Directives. Even though these unbundling models provide for different degrees of structural separation of network operation from production and supply activities, they are all expected to be effective in removing any conflict of interests between TSOs and producers/generators as well as suppliers. The rules on unbundling apply equally to private and public entities.

The 3<sup>rd</sup> Package unbundling rules have been transposed by (most) Member States into their national laws<sup>7</sup>, the relevant unbundling models have been (and are still being) implemented by NRAs and TSOs and are monitored by NRAs. Monitoring is also conducted by the European Commission with the purpose to review the application of the unbundling requirements (Article 52(1)(c) Gas Directive and 47(1)(b) Electricity Directive).

## 2.1 General legal framework

The Electricity and Gas Directives (Article 9) provide for a new unbundling regime for TSOs with the following unbundling models: primarily, as a point of departure, the Ownership Unbundling model (OU), or as alternatives the Independent System Operator model (ISO) and the Independent Transmission Operator (ITO) model. In addition, there is also a specific exception under Article 9(9) of the Directives (so-called “ITO+” model). These models are further explained below (see titles 4.3, 4.4, 4.5).

The Directives allow Member States to opt for one of these unbundling models, under the restriction that the ISO, ITO and “ITO+” models can only be chosen for a specific TSO if on entry into force of the Directives (3 September 2009), the transmission system concerned belonged to a VIU. The concept of VIU is defined in Article 2(21) Electricity Directive and Article 2(20) Gas Directive<sup>8</sup>.

New transmission systems which did not yet exist on 3 September 2009, or existing transmission systems which did not belong to a VIU on 3 September 2009, can only be certified under the OU model.

In addition to this a Member State has the right to opt exclusively for full OU in its territory even if the transmission system belongs to a VIU. Where a Member State has exercised that right, concerned undertakings do not have the right to set up an ISO or an ITO.

As mentioned above, if on the 3 September 2009 the transmission system was part of a VIU, Member States could choose for a specific TSO on their territory for the ISO and/or ITO model (Article 9(8) of the Directives). However, Member States were also required in this case to transpose the provisions on OU into their national law, in view of the fact that they cannot prevent a VIU owning a transmission system from complying with the requirements of OU. This also implies that it is not possible for a TSO to switch from OU to an ISO or an ITO.

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<sup>7</sup> There are currently some pending infringement procedures related to unbundling.

<sup>8</sup> ‘Vertically integrated undertaking’ means an electricity or a natural gas undertaking or a group of electricity or 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 or distribution, and/or LNG or storage, and at least one of the functions of generation or supply of electricity or of production or supply of natural gas.



In cases where the choice for a specific TSO to apply one of the above mentioned unbundling models exists, all the conditions of the chosen model have to be fulfilled. It is not allowed to combine elements of the different models in order to create a new unbundling model. As already indicated, Member States may in specific cases also apply for an exception from the specific rules concerning OU, ISOs and ITOs, and implement the so called “ITO+” model (Article 9(9) of the Directives). This can occur where on 3 September 2009, the transmission system belonged to a VIU and subject to proving that at that date, arrangements were in place which guarantee more effective independence of the TSO than the specific provisions concerning the ITO model (stipulated in Articles 17-23 of the Directives).<sup>9</sup> This is subject to a specific control/verification by the European Commission<sup>10</sup>.

Furthermore, an undertaking performing any of the functions of generation or supply in a Member State cannot directly or indirectly exercise control or any right over a TSO from a Member State that has opted for full OU. This means that the supplier in the first Member State cannot directly or indirectly exercise control or any right over a TSO certified under the OU model. Member States can however adopt measures in order to ensure a level playing field, provided that these measures are transparent, non-discriminatory, proportionate and compatible with the Treaty on the Functioning of the European Union and the European law, and provided they are notified to and approved by the European Commission in advance<sup>11</sup>. The call for a level playing field clause originally came from Member States that wanted to protect their unbundled production and supply companies from acquisitions by VIU undertakings of other Member States.

According to Article 44(2) Electricity Directive for the purposes of Article 9(1)(b), the notion of an “**undertaking performing any of the functions of generation or supply**” shall not include final customers who perform any of the functions of generation and/or supply of electricity, either directly or via undertakings over which they exercise control, either individually or jointly, provided that the final customers, including their shares of the electricity produced in controlled undertakings are, on annual average, net consumers of electricity and provided that the economic value of the electricity they sell to third parties is insignificant in proportion to their other business operations<sup>12</sup>.

The 3<sup>rd</sup> Package unbundling rules for TSOs also include the requirement of **certification of all TSOs by the relevant NRAs** (see also title 4.2.2). Undertakings which own a transmission system need to be certified by the relevant NRA(s) as having complied with the unbundling requirements and subsequently have to be approved and designated as a TSO by the Member State(s)<sup>13</sup>. Through such certifications, NRAs verify and control the effective application of unbundling rules by TSOs, which is a critical function of NRAs. As part of the certification procedure, which includes an opinion given by the European Commission, TSOs also have to demonstrate that they operate their network in line with Article 12 Electricity Directive resp. Article 13 Gas Directive, stipulating the tasks each TSO shall be responsible for.

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<sup>9</sup> Article 9(9) of the Directives

<sup>10</sup> Article 9(10) of the Directives

<sup>11</sup> Article 43 Electricity Directive; Article 47 Gas Directive

<sup>12</sup> Such provision is not foreseen for the gas sector.

<sup>13</sup> Article 10 of the Directives



Furthermore, the 3<sup>rd</sup> Package also contains some other provisions related to the unbundling of the transmission systems and TSOs, such as Article 1 of the Gas Regulation and Articles 6(4) and 7(4) of the Electricity resp. Gas Directives.

Article 1 Gas Regulation<sup>14</sup> states that Member States may establish an entity or body set up in compliance with the Gas Directive for the purpose of carrying out one or more functions typically attributed to a TSO, which shall be subject to the requirements of this Regulation. That entity or body shall be subject to certification in accordance with Article 3 of the Gas Regulation and shall be subject to designation in accordance with Article 10 of Gas Directive.

In other words, Member States are allowed to establish through their national legislation an entity to which a TSO task can be delegated. The entity seems not to be considered as a TSO, as it does not perform all TSO tasks and thus does not “act as a TSO”<sup>15</sup>. However, certification of such entities/bodies is required in order to avoid a situation where a producer and/or supplier would be able to directly or indirectly take control over or exercise any right regarding the delegated TSO task to that entity. As the Gas Regulation applies from 3 September 2009<sup>16</sup>, such entities/bodies can only be certified under OU<sup>17</sup>.

It is also important to refer to Article 6(4) Electricity Directive and 7(4) Gas Directive related to “**regional cooperation**” stipulating that where vertically integrated transmission system operators want to participate in a **joint undertaking**, the joint undertaking shall establish and implement a **compliance programme** setting out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded. This compliance programme shall set out the specific obligations of employees to meet the objective of excluding discriminatory and anticompetitive conduct. It shall be subject to the approval of the Agency. Compliance with the programme shall be independently monitored by the compliance officers of the VIU TSOs. In other words, those requirements are only applicable in case a VIU TSO is part of the joint undertaking.

Another relevant article is Article 9.5 of both Directives as it relates to the creation of a **joint venture between TSOs**. In this article the created **joint venture** acts as a TSO and performs all TSO tasks, which implies that it must be certified.

Finally, the 3<sup>rd</sup> Package also provides for the following **exemption and derogations**:

#### a) Derogations for certain Member States

First, according to Article 49 Gas Directive, the unbundling rules of Article 9 shall not apply to Estonia, Latvia and/or Finland on the one hand and to Cyprus, Luxembourg and/or Malta on the other.

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<sup>14</sup> Neither the Electricity Directive nor the Electricity Regulation contains such a provision.

<sup>15</sup> Acting as a TSO means that the entity is responsible among other things for granting and managing third-party access on a non-discriminatory basis to system users, collecting access charges, congestion charges, and payments under the inter-TSO compensation mechanism, and maintaining and developing the network system. As regards investments, the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning

<sup>16</sup> Article 32 of the Gas Regulation

<sup>17</sup> The Electricity Regulation or Directive does not contain a similar provision.



The derogations for Estonia, Latvia and/or Finland will not apply anymore once these Member States are directly connected to another Member State. These derogations are thus temporary.

As soon as Cyprus is not any longer qualified as an isolated market and/or an emergent market<sup>18</sup>, the derogation from Article 9 unbundling requirements for gas TSOs will expire. For Cyprus, the first list of Projects of Common Interest (PCIs) mentions that a pipeline from offshore Cyprus to Greece mainland via Crete will be constructed.

Regarding Malta, the PCI list mentions the PCI Connection of Malta to the European Gas network (gas pipeline with Italy at Gela and Floating LNG Storage and Regasification Unit (FSRU)) and makes Malta no longer an isolated gas market. Nevertheless, Article 49 Gas Directive does not mention that the exemption from Article 9 will expire once Malta is no longer an isolated gas market.

Secondly, Article 49 Gas Directive also provides that any other Member State which is not directly connected to an interconnected system and has only one main external supplier, may derogate from Article 9. Such derogation must be notified to the European Commission. The same applies to a Member State qualified as an emergent market.

When the implementation of the Gas Directive would cause substantial problems in a geographically limited area of a Member State, in particular concerning the development of transmission and major distribution infrastructure and with a view to encouraging such investments, the Member State may apply to the European Commission for a temporary derogation from Article 9. It is a decision for the European Commission to grant such derogation.

For electricity, according to Article 44 Electricity Directive, derogation from the unbundling rules, Chapter IV, can only be granted by the European Commission where the Member State concerned can demonstrate that there are substantial problems for the operation of their small isolated systems<sup>19</sup>.

Finally, as for gas, the derogation provisions in the Electricity Directive foresee that Article 9 shall not apply to following Member States: Cyprus, Luxembourg and/or Malta (where in the case of Cyprus the derogation from the unbundling requirements for the electricity TSO(s) is not temporary in contrast to the derogation for the gas TSO(s) which is temporary).

Thus, Cyprus, Luxembourg and Malta have been exempted to apply the unbundling provisions for their gas and electricity TSOs. Estonia, Latvia, Finland and other Member State(s) qualified as an emergent market or having substantial problems in a geographically limited area can exempt their gas TSOs from applying the unbundling rules for a given period of time.

Consequently, Luxembourg has not adopted any of the unbundling models under the 3<sup>rd</sup> Package Directives. However, as the Luxembourg Electricity and Gas TSOs operate as a

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<sup>18</sup> According to Article 2(31) Gas Directive “emergent market” means a Member State in which the first commercial supply of its first long-term natural gas supply contract was made not more than 10 years earlier

<sup>19</sup> Article 2.26 of the Electricity Directive: means any system with consumption of less than 3000 GWh in the year 1996, where less than 5% of annual consumption is obtained through interconnection with other systems.



combined transmission and distribution system operator, it has to fulfil the minimum unbundling requirements applicable to the DSOs serving more than 100,000 connected customers, i.e. the legal, functional and accounting requirements as well as the requirement related to its communication and branding in order to be clearly distinguished from the supplier of the VIU.

#### **b) Exemptions for new infrastructure:**

Under the 3<sup>rd</sup> Package new transmission systems can be exempted from the unbundling rules under certain conditions. In the case of major new gas infrastructure, i.e. interconnectors, Liquefied Natural Gas (LNG) and storage facilities, an exemption under the 3<sup>rd</sup> Package Directives can only be granted for a defined period of time and provided that the specific requirements of Article 36 Gas Directive are met. A similar possibility is provided by Article 17 Electricity Regulation in the case of new direct current interconnectors (see title 4.2.4.2 for further information).

Exemptions already granted pursuant to Article 22 of Directive 2003/55/EC and Article 7 of Regulation (EC) 2003/1228 continue to apply until the expiry date stipulated in the exemption decision<sup>20</sup> (see hereafter title 4.2.4.1).

## **2.2 Main findings**

### **2.2.1 Unbundling models and ownership structures of TSOs**

The ownership structures of TSOs in the Member States vary according to the models proposed in the 3<sup>rd</sup> Package and it can be already underlined that all the models proposed have been implemented throughout Europe. The implementation of unbundling models of the 3<sup>rd</sup> Package is a kind of evolving concept which can change over time.

So far 109 TSOs in Europe have been certified as compliant with one of the 3<sup>rd</sup> Package's unbundling models<sup>21</sup> (and most of them were consequently designated). In some Member States, only the OU model has been transposed into national law, in other Member States several models have been implemented.

Overall the most prevalent unbundling model implemented is OU<sup>22</sup> followed by the ITO and ISO models, with an important difference for gas and electricity. A large majority (70%) of electricity TSOs have been certified under the OU model, while (only) 40% of gas TSOs have been certified under this model (see figures 10 and 11 below) and 44% gas TSOs have been certified under the ITO-model.

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<sup>20</sup> Recital 35 Gas Directive and recital 23 Electricity Regulation.

<sup>21</sup> According to the information received by the European Commission on certification notification, including later withdrawn certifications (as for 14 February 2016):  
(<https://ec.europa.eu/energy/sites/ener/files/documents/Received%20notifications%20corr.xlsx>)

<sup>22</sup> Regarding the number of Member States applying only the OU model.



### Unbundling models in the European overview – electricity

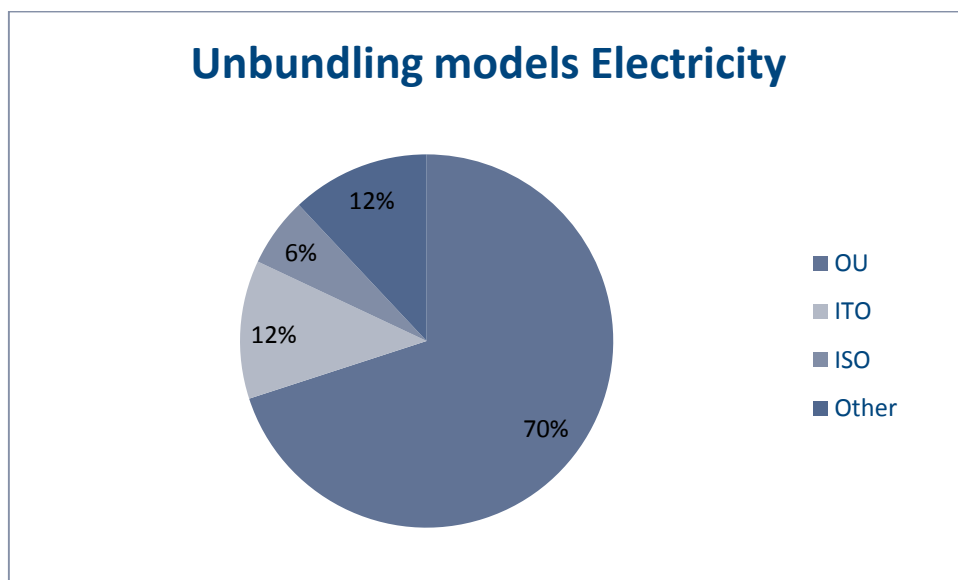
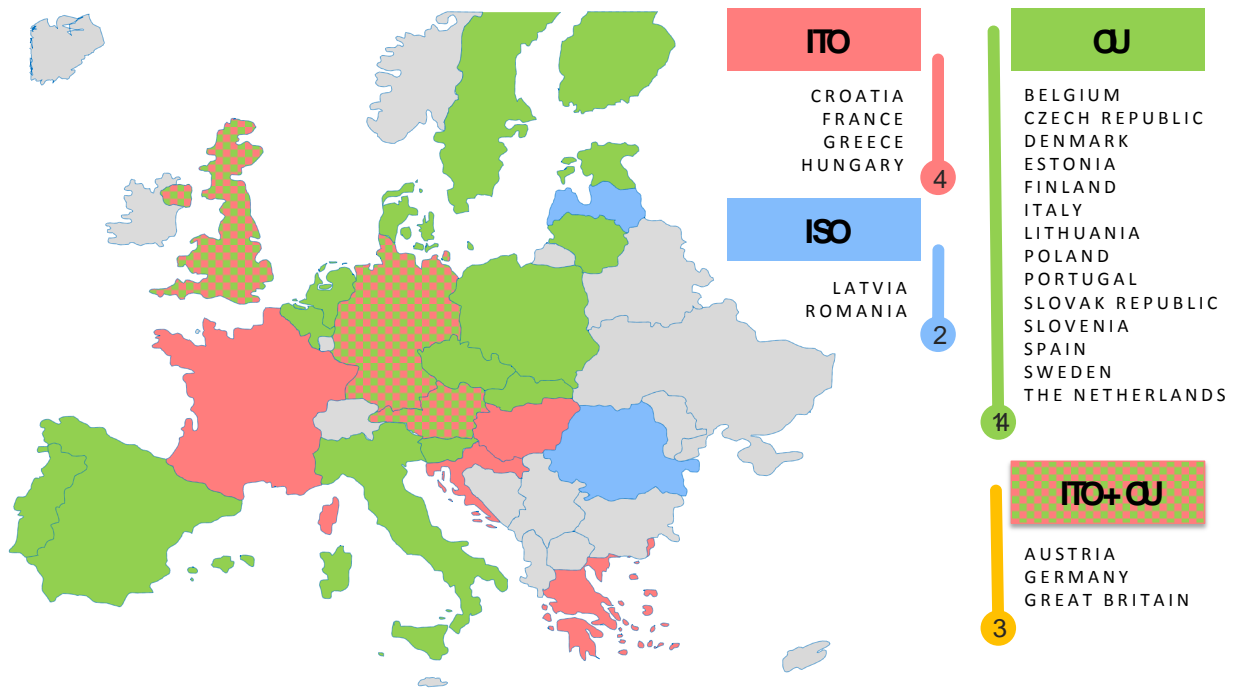


Figure 1: Unbundling models Electricity



### Unbundling models in the European overview – gas

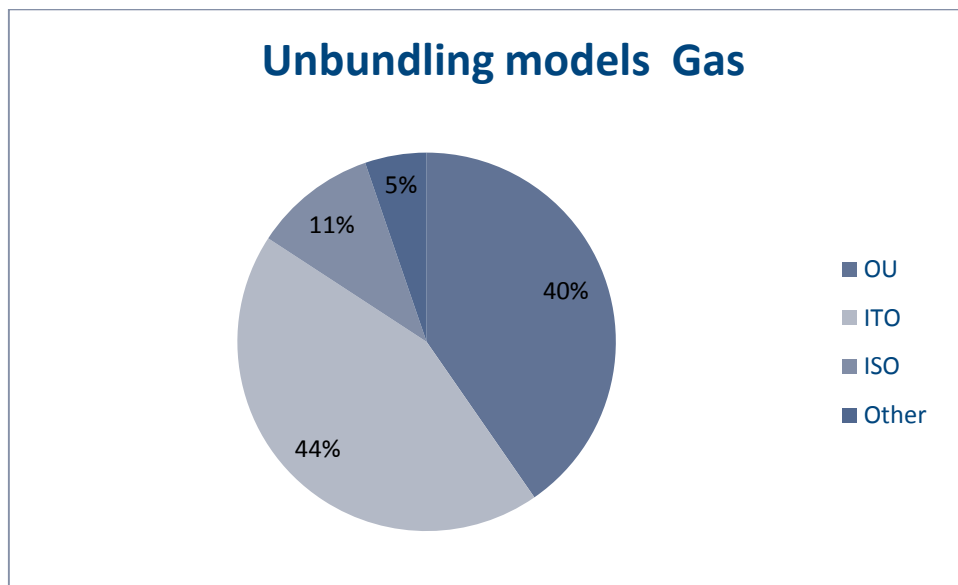
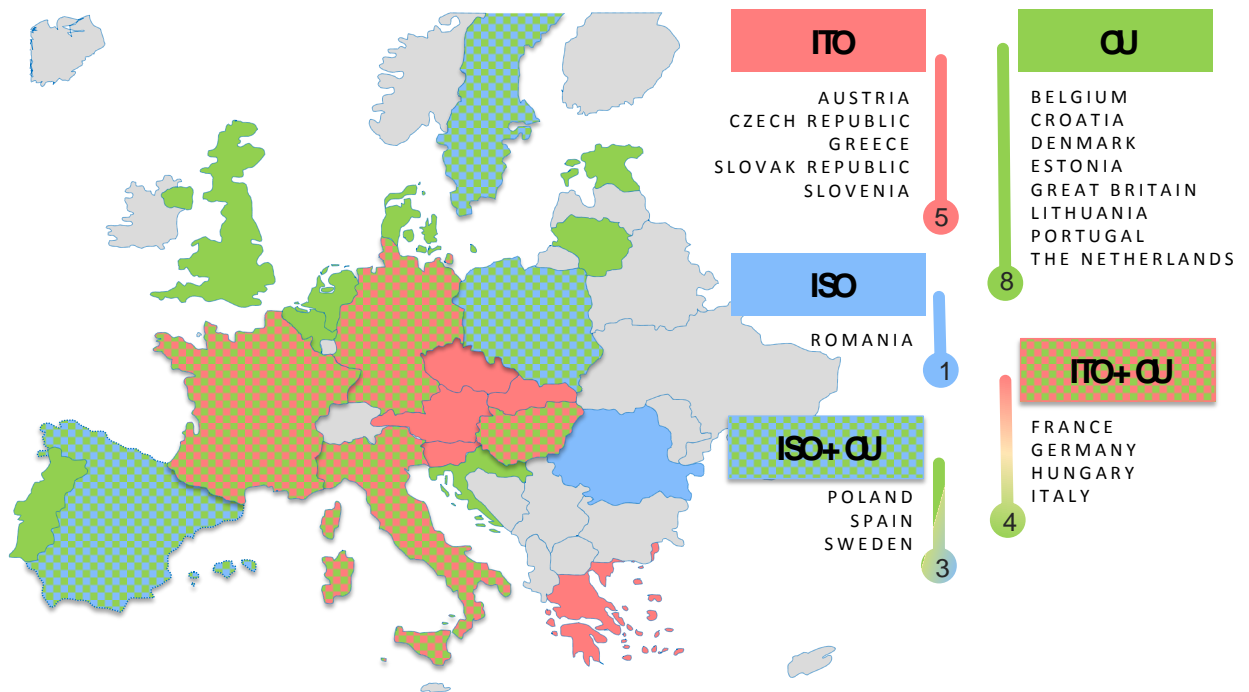


Figure 2: Unbundling models Gas

Seven Member States reported that in the gas sector two different models for the TSO certification were implemented<sup>23</sup>, whereas in the electricity sector only three Member States

<sup>23</sup> Austria, Germany, France and Italy used a combination of ITO and Ownership Unbundling models; Poland, Spain and Sweden used ISO and Ownership Unbundling combination.



have chosen a combination of different unbundling models for their TSOs<sup>24</sup>. In view of the vertical links between the electricity and gas sectors, the unbundling provisions should apply across the two sectors.

While in the majority of the participating Member States the TSOs are owned (some up to 100%) by public entities, in other Member States TSOs have a full or partial private ownership. This assertion can also vary between the electricity and gas sector within a Member State.

From the charts below it can be observed that public ownership is more prevalent in the electricity than in the gas sector. In the electricity sector, most of the TSO ownership structure is public, with a 100% public ownership for more than half of the responding Member States; only (Great Britain) GB and Portugal have a full private ownership structure for their TSOs. In ¼ of the participating Member States there is a mixture between private and public ownership for electricity TSOs (Austria, Belgium, Germany, Spain, Romania, Finland, France and Luxembourg).

The ownership structure in the gas sector is much more diverse than in the electricity sector, where there is a strong private ownership and/or a mixed ownership of TSOs. Great Britain, Czech Republic, Latvia and Portugal have chosen full private ownership for the gas TSOs in their market.

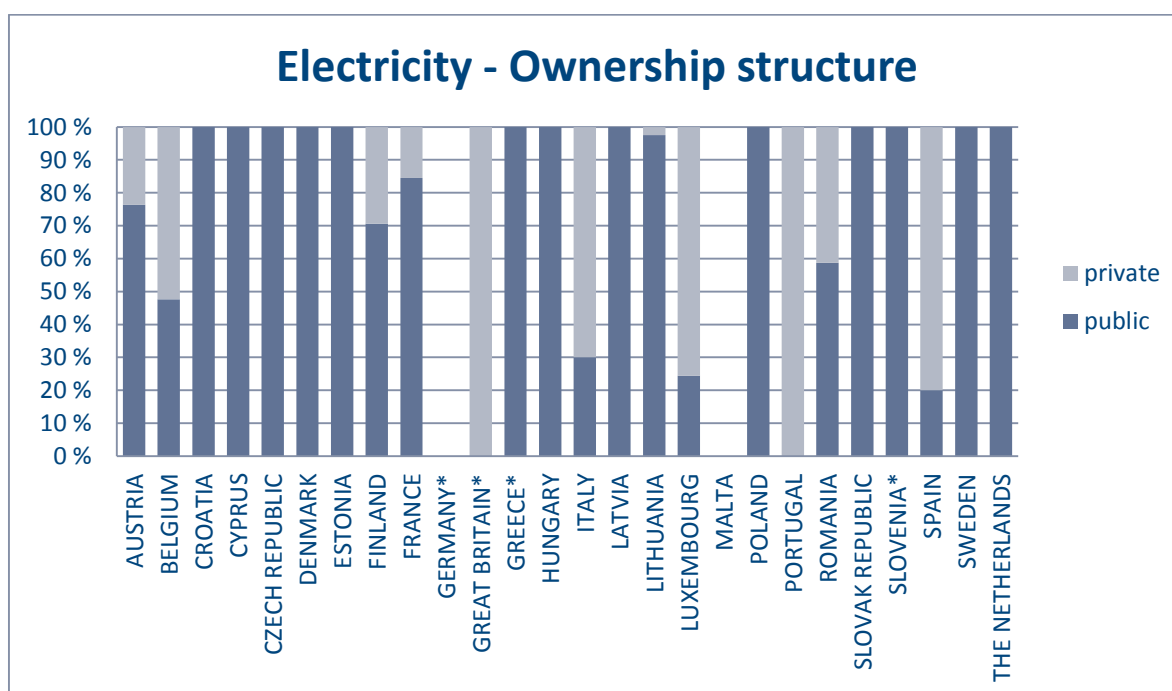


Figure 3: Electricity - Ownership structure

\*GB: 15 other privately owned TSOs including onshore, offshore and interconnector transmission assets.  
 GR: S.A. (where the 51.12 % is of public ownership)  
 SL: second TSO: 100% private

<sup>24</sup> Germany and Austria used Ownership Unbundling and ITO models, Great Britain used Ownership unbundling and ITO+ models.





LU: direct public ownership: 24.56 %, including indirect public ownership: 77.07%  
DE: Due to various ownership structures of the numerous German TSOs detailed information on the ownership structure of the individual electricity TSO can be viewed in the relevant certification decisions, available on the [BNetzA website](#)<sup>25</sup>

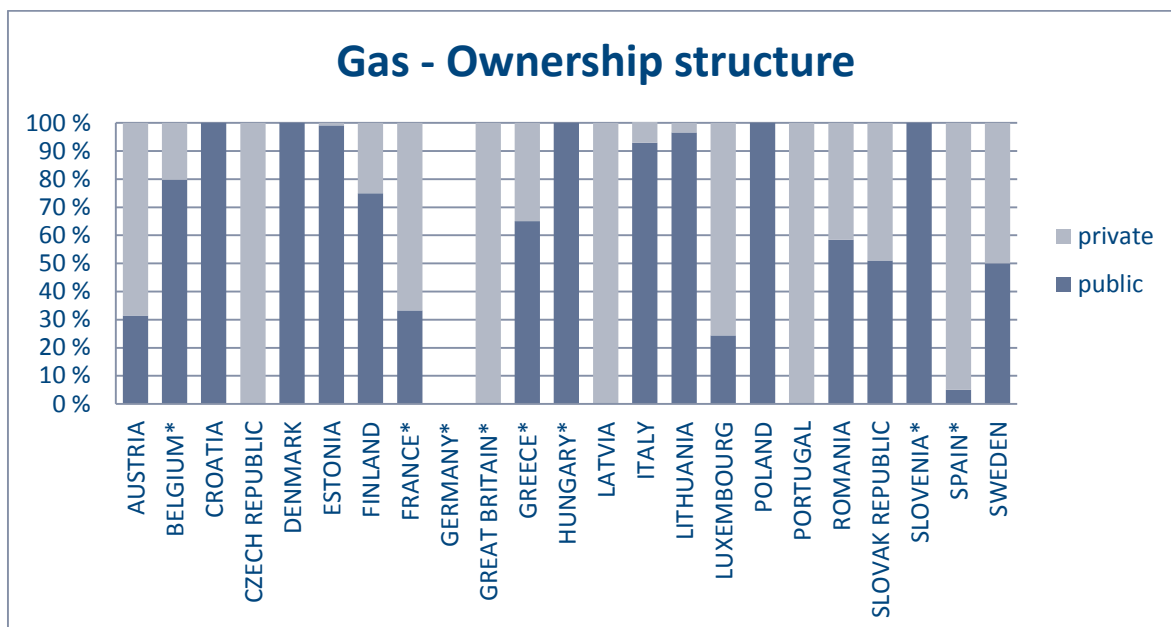


Figure 4: Gas - Ownership structure

\*BEL: first TSO 77.7% public and 22.3% private, second TSO 100% private  
FR: TIGF is owned by a consortium composed of 4 companies: SNAM (40.5%; gas operator), Pacific Mezz Luxembourg S.a.r.l. (31.5%; subsidiary of GIC, a Singaporean investment fund), C31 SAS (18%; 100% subsidiary of EDF) and Predica (10%; subsidiary of Crédit Agricole Group)  
GB: other 4 privately owned TSOs which are interconnector transmission assets  
HU: second TSO: 100% private  
SL: second TSO: 100% private  
ES: second TSO: 17.5 % of public ownership and 82.5 % of private ownership  
LU: direct public ownership: 24.56 %, including indirect public ownership: 77.07%  
DE: Due to various ownership structures of the numerous German TSOs detailed information on the ownership structure of the individual gas TSO can be viewed in the relevant certification decisions, available on the [BNetzA website](#)<sup>26</sup>

There were major changes in the private-public ownership structure after the implementation of the 3<sup>rd</sup> Package; approximately 2/3 of the Member States have reported relevant changes in the public-private ownership of the TSO since the entry into force of the 3<sup>rd</sup> Package. We observe the following:

<sup>25</sup> [http://www.bundesnetzagentur.de/cln\\_1432/DE/Service-Funktionen/Beschlusskammern/Beschlusskammer6/BK6\\_95\\_Zertifizierungsverfahren/zertifizierungsverfahren\\_node.html](http://www.bundesnetzagentur.de/cln_1432/DE/Service-Funktionen/Beschlusskammern/Beschlusskammer6/BK6_95_Zertifizierungsverfahren/zertifizierungsverfahren_node.html) (in German)

<sup>26</sup> [http://www.bundesnetzagentur.de/cln\\_1432/DE/Service-Funktionen/Beschlusskammern/Beschlusskammer7/BK7\\_95\\_Zertifizierungsverfahren/Verfahrenseinleitungen\\_Zertifizierung\\_node.html](http://www.bundesnetzagentur.de/cln_1432/DE/Service-Funktionen/Beschlusskammern/Beschlusskammer7/BK7_95_Zertifizierungsverfahren/Verfahrenseinleitungen_Zertifizierung_node.html) (in German)



1. The increase of the public ownership of the TSOs either for gas and electricity occurs through a continuous involvement of municipalities in the TSOs structures.
2. The increase of the private ownership occurs through a continuous involvement of private equity (e.g. Funds)

Some countries decided to radically change their market structure, for example in Portugal where after the entry into force of the 3<sup>rd</sup> Package a complete privatisation of the TSOs (REN - Rede Eléctrica Nacional, S.A. and REN Gasodutos, S.A.) has been implemented<sup>27</sup>.

## 2.2.2 Certification procedure of the TSOs

According to Article 10 of the Directives in combination with the provisions of Article 3 Electricity Regulation and Gas Regulation a TSO can only be **1) approved** and **2) designated** as a TSO following a certification procedure. The aim of the certification procedure is to verify whether the applicant TSO complies with the unbundling provisions of the 3<sup>rd</sup> Package. The certification procedure is initiated by:

- a TSO<sup>28</sup>;
- a NRA<sup>29</sup>; or
- upon a reasoned request of the European Commission to the competent NRA.<sup>30</sup>

The certification procedure is applicable to all unbundling models: OU, ISO, ITO and unbundling regime under Article 9(9). This procedure is applicable for the initial certification, and subsequently at any time when a reassessment of a TSO's compliance with the unbundling rules is required and also applies for exempted new infrastructure under the 2<sup>nd</sup> Package (see hereafter).

Once the TSO has been certified by the NRA, it must then be “approved and designated” by the Government (designation from the Member States<sup>31</sup>). The final decision designating the TSO is notified to the European Commission and published in the Official Journal of the European Union.

As regards certification of the ISO and ITO models some additional requirements are applicable which are linked to the particular role of NRAs in controlling the continuous application of the unbundling rules.

Formally, certification procedures were conducted as from 3 March 2011, as soon as the provisions of the Electricity and Gas Regulations were transposed into the national law of the

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<sup>27</sup> The TSO Companies are fully owned by REN – Redes Energéticas Nacionais, SGPS, S.A., a listed company, with seven shareholders, which each hold between 5% and 25% of its shares (the maximum permitted by law). In addition, 33,1% of the shares in REN SGPS are traded on the stock market ('free float')

<sup>28</sup> Article 10(4)(a) of the Directives.

<sup>29</sup> Article 10(4)(b) of the Directives, NRAs may initiate a certification procedure where they have knowledge that a planned change in rights or influence over TSO may lead to an infringement of the unbundling requirements or where the NRA has reason to believe that such an infringement has occurred.

<sup>30</sup> Article 10(4)(c) of the Directives which relate to the reassessment of certification decisions and not decisions made in respect of new applicants.

<sup>31</sup> Article 10 (2) of the Directives.



Member States. Where certification is requested by a TSO which is controlled by a person from a third country, the procedure of Article 10 is replaced by the procedure of Article 11 of the Directives. Through the certification of TSOs, it is verified as to whether the applicant TSO complies with the unbundling provisions of the 3<sup>rd</sup> Package<sup>32</sup>, especially regarding persons exercising control over the applicant TSO and whether the legal provisions on the assignment of tasks to a TSO, depending on the chosen unbundling model, have been respected.

Most of the NRAs have issued guidance to assist TSOs in the certification procedure; this guidance covers elements such as the documents to be submitted. The certification procedure is most commonly initiated by the TSOs themselves, who submit all relevant documents for review to their respective NRA.

The NRA shall adopt a preliminary certification within four months from the date of the notification by the TSO, or from the date of the European Commission request. After expiry of that period, the certification shall be deemed to be granted. However, the explicit or tacit decision of the NRA shall only become effective after an opinion of the European Commission.

The European Commission can request the Agency to provide an opinion on the NRA's preliminary decision. It is not clear whether the opinion of the Agency can only be asked in case of cross-border transmission systems, or in any case. From the investigation, it should be noted that the European Commission has in no case sought the opinion of the Agency.

It is also possible for an NRA to adopt a preliminary decision where an unbundling model is chosen (ITO) to be applied for a specific timeframe and is then changed to another model after a certain period of time (OU)<sup>33</sup>. In such a case it is for the Compliance officer of the relevant TSO to assist and monitor the implementation of the models.

There is no legal obligation to appoint a Compliance officer under other unbundling models (OU-ISO). Practice shows that Compliance officers are "put in place" under other unbundling models resulting from NRAs decisions and not from Article 21 of the Directives related to ITO.

After having received the opinion of the European Commission, the final certification decision is made by the NRA within two months. In adopting its final decision, the NRA is required to take "utmost account"<sup>34</sup> of the European Commission's opinion. In the case of a first certification decision, all permissions and agreements are deemed as issued if all facts were presented explicitly during the application procedure. The European Commission can ask ACER, the concerned Member States and all the interested parties for views.

It should be noted that the burden of proof as to whether the above requirements are met is put on the candidate operator or on the system owner, not on the regulatory authority.

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<sup>32</sup> i.e. Article 9, Article 13 and chapter V for ITO Electricity Directive (respectively Article 9, Article 14 and chapter IV Gas Directive)

<sup>33</sup> Commissions opinion on BGE, C(2013)3117 from 23.05.2013.

<sup>34</sup> Article 3(2) of the Electricity Regulation and of the Gas Regulation. Or where the NRA is required to follow the binding decision of the Commission in relation to Article 9(1) notifications.



In case of cross-border transmission infrastructures the certification process of the concerned TSOs is the same as the one applicable to other TSOs. In this case NRAs have to cooperate and agree on a common process often aligning their decisions which can be very challenging if the concerned TSOs are submitted to different unbundling regimes on both sides of the border. NRAs therefore applied the general cooperation rule foreseen in the 3<sup>rd</sup> Package when it comes to cross-border issues<sup>35</sup>.

The GB regulator (OFGEM) has, for example, been involved in considering applications for certification from a number of TSOs, involving other NRAs from the Netherlands, Ireland and Belgium, as well as the Northern Ireland regulator. In order to have coordinated decisions the following practical steps have been taken<sup>36</sup>:

- Regular meetings between relevant NRAs;
- Joint NRAs/TSO meetings;
- Cooperation on drafting and timing of information requests (as appropriate within the applicable legal framework);
- Sharing of information between NRAs; and
- Attempts (where appropriate) by relevant NRAs to notify preliminary certification decisions to the European Commission within close timescales

The certification procedure is completed through the publication of the NRA's decision together with the European Commission's opinion. In the case of an application under the ISO model, the designation is subject to obtaining the **prior agreement of the** European Commission<sup>37</sup>.

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<sup>35</sup> Article 38(1) Electricity Directive; Article 41(1) Gas Directive.

<sup>36</sup> See Annex 2 – case study for details under the certification of the interconnector IUK.

<sup>37</sup> See European Commission's decision on Egrid C(2013)2169 from 12.04.2013.

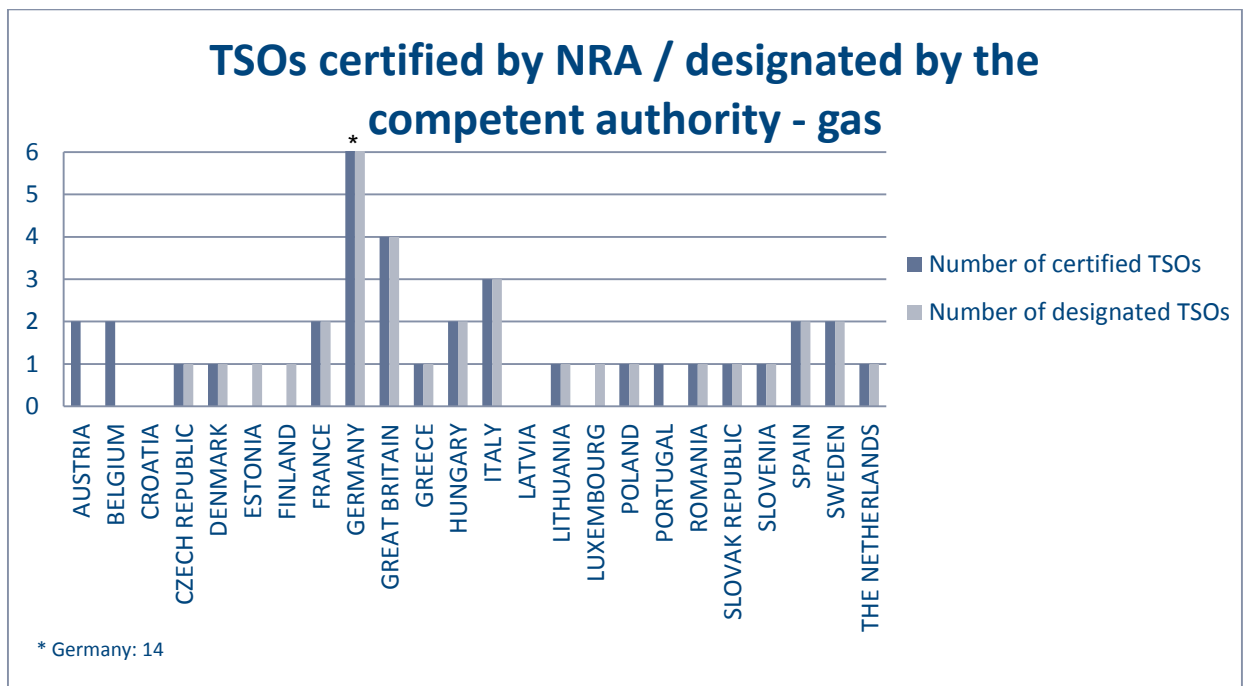


Figure 5: Gas TSOs certified/designated

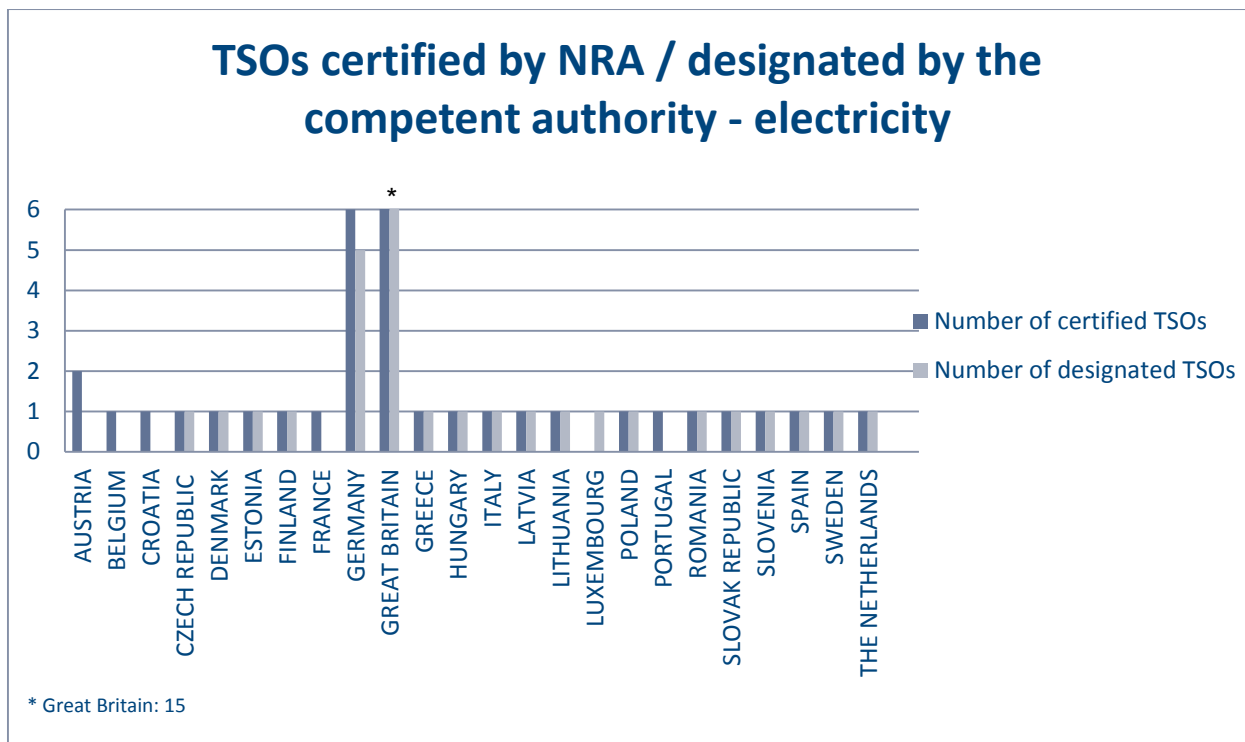


Figure 6: Electricity TSOs certified/designated



The charts show that most of the certified TSOs have also been designated and that the procedure has been properly followed. In five Member States<sup>38</sup>, certified TSOs are being designated by a competent ministry, whereas in the majority of other countries designation has been done by NRAs. In most Member States the final certification decisions entailing the “designation” have been issued by the NRAs. In Croatia, the certification process of the gas TSO is still pending.

There are clear reasons stated in the Directives describing a situation in which a certification may be refused. This is the case following Article 11(3) Electricity Directive, if it has not been demonstrated that:

- The entity concerned complies with the requirements of Article 9; and
- To the NRA or to another competent authority designated by the Member State that granting certification will not put at risk the security of energy supply of the Member State and the Community.

Two cases in which certifications have been initially refused by NRAs worth to be mentioned:

1. In Spain the initial negative certification of the TSO Reganosa was issued on 4 April 2013. One of the shareholders appealed against the negative certification decision. The latter positive certification of Reganosa, issued on 4 February 2014, was appealed by Enagás Transporte. However, both appeals have been dismissed in 2015.
2. In Germany, the NRA decided primarily to issue a negative certification of the TSO Tennet because of insufficient financial resources. The negative certification has been reversed as a result of an agreement between the concerned NRA and TSO.

### 2.2.3 Joint undertakings

According to Article 9(5) of the Directives the unbundling requirement of owning the transmission system and acting as a TSO<sup>39</sup> shall be deemed to be fulfilled, when two or more undertakings which own transmission systems have created a joint venture which acts as a TSO in two or more Member States for the transmission systems concerned. In other words, Article 9(5) of the Directives clarifies that TSOs creating a joint venture which acts as a TSO in two or more Member States can keep the ownership of their network without contravening the requirement set out in Article 9(1)(a) of the Directives.

In principle no other undertaking can be part of the joint undertaking unless it is a TSO that has been certified as OU, or ISO, or ITO.

The joint venture can only be certified under the OU model as it has been created after the 3 September 2009. For the purposes of Article 9(5) of the Directives, the same procedure applies as for the OU model. Such joint ventures exist in two Member States – Austria (in the electricity sector) and Finland (in the gas sector), whereas Finland has a derogation from the Gas Directive.

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<sup>38</sup> Belgium, France, Great Britain, Slovak Republic, Spain.

<sup>39</sup> Article 9(1)(a) of the Directives



Article 9(5) of the Directives differs from the situation foreseen in Article 6(4) Electricity Directive and Article 7(4) Gas Directive (see above). So far no application has been made of those articles<sup>40</sup>.

## 2.2.4 Exemptions and certification

### 2.2.4.1. Exemptions under 2<sup>nd</sup> Package

Exemptions for new infrastructure that have already been granted pursuant to Article 22 of Directive 2003/55/EC<sup>41</sup> and Article 7 of Regulation (EC) 2003/1228<sup>42</sup> **continue to apply** until the expiry date stipulated in the exemption decision, also after entry into force of the Gas Directive and the Electricity Regulation (Recital 35 Gas Directive and Recital 23 Electricity Regulation). These exemptions were limited to access to the infrastructure and the applicable tariffs.

The European Commission noted in several certification opinions<sup>43</sup> that this does not mean that exempted projects under Article 22 of Directive 2003/55/EC and Article 7 of Regulation (EC) 2003/1228 are not to be subject to any unbundling rules at all. Certain unbundling rules still have to be complied with, in particular the rules on legal and functional unbundling, as derived from Directive 2003/55/EC and Article 7 of Regulation (EC) 2003/1228 and any other relevant rules, as specified in the applicable exemption decisions.

Furthermore the European Commission considers that, where infrastructure has not received a full exemption under Article 22 of Directive 2003/55/EC and Article 7 of Regulation (EC) 2003/1228, the unbundling rules of the Directives are in principle to be complied with as regards the non-exempted part of the capacity, unless this is not possible without undermining the exemption obtained under Article 22 of Directive 2003/55/EC and Article 7 of Regulation (EC) 2003/1228. Whether this is the case is to be subject to a case-by-case analysis, which needs, in particular, to focus on whether it is ensured that the non-exempted capacity is marketed independently from any production or supply interests of the shareholders of the pipeline.

For Gas an exemption could only be requested for cross-border interconnectors, LNG and storage facilities, while for electricity the exemptions were only applicable for interconnectors<sup>44</sup>.

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<sup>40</sup> The Belgium Gas Act of 8 July 2015 has transposed Art 7(4) of the Gas Directive which allows the gas transmission system operator to have a participation in a joint undertaking acting as a balancing operator.

<sup>41</sup> Major new gas infrastructures, i.e. interconnectors **between** Member States, LNG and storage facilities, can, upon request, only be exempted from the provisions of Articles 18, 19, 20, and 25(2), (3) and (4) of the Gas Directive and not from the provisions of Article 9

<sup>42</sup> New direct current interconnectors can, upon request, be exempted from the provisions of Article 6(6) of this Regulation and Articles 20 and 23(2), (3) and (4) of Directive 2003/54/EC and not from the provisions of Article 10

<sup>43</sup> For example: European Commission's Opinion on E-Control's draft certification decision for NABUCCO C(2012)9575

045-2012-AT

<sup>44</sup> See Annex 2 for case studies on BBL and BritNed



#### 2.2.4.2. Exemptions of new infrastructures under the 3<sup>rd</sup> Package

**Exemptions from the unbundling rules** can be granted for a defined period of time in the case of major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, provided that the specific requirements of Article 36 Gas Directive are met<sup>45</sup>. A similar possibility is provided by Article 17 Electricity Regulation in the case of new direct current interconnectors.

The fact that these provisions are not limited to transmission systems and interconnectors, but also include LNG and storage facilities which can be exempted from the unbundling rules, means that these facilities built since the 3<sup>rd</sup> Package came into force and after the time of the exemption has been expired, need to be certified under the OU-model. New transmission systems, in particular systems which did not exist on 3 September 2009, will have to follow the OU regime, if they are not an extension of an existing transmission system of an already certified ITO.

It must be underlined that any exemption from unbundling should first be limited in time (temporary) and can be full or partial. A decision partially exempting new infrastructure from the OU model must specify those elements of Article 9 of the Directives, from which the undertaking is exempted, and those with which the undertaking shall comply. Consequently, in case of partial exemption from Article 9 of the Directives, the certification decision must ensure the compliance of the new infrastructure with the other OU unbundling requirements<sup>46</sup>.

Article 36(3) Gas Directive<sup>47</sup> states that the NRA decides on a case-by-case basis on the exemption from the provisions of Article 9. This implies that when the TSO requests, for example, a full exemption from the OU provisions, the NRA will have to decide whether it can or cannot accept the full exemption. The NRA is obliged to assess the TSO by taking into account the specific OU provisions and to submit its decision to the European Commission in accordance with Article 36(8) Gas Directive<sup>48</sup>. The European Commission can decide that the NRA should amend or withdraw its initial decision and the NRA shall comply with the Commission's decision<sup>49</sup>. In case of cross-border new infrastructure the Agency intervenes when all NRAs have not been able to reach an agreement within six months or upon a joint request from the NRAs (Article 36(4) Gas Directive<sup>50</sup>).

#### 2.2.5 Certification of third countries TSO

If a TSO is controlled by a person or persons from a third country, or third countries, the certification procedure according to Article 11 of the Directives (Certification in relation to third countries) shall apply. The procedure of Article 10 is replaced by the procedure of

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<sup>45</sup> The exemption can be granted upon request for a defined period of time from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) of the Gas Directive.

<sup>46</sup> NRAs should also consider the need to impose conditions (Article 36(6) Gas Directive and Article 17(4) Electricity Regulation).

<sup>47</sup> Article 17(4) of the Electricity Regulation

<sup>48</sup> Article 17(7) of the Electricity Regulation

<sup>49</sup> See Annex 2 for case study on ElecLink interconnector certification

<sup>50</sup> Article 17(5) of the Electricity Regulation





Article 11 of the Directives concerning certification in relation to third countries but the concept of control is the same as that used in the EC Merger Regulation and should be interpreted accordingly. In such cases, in addition to the regulatory authority, another competent authority designated by the Member State (e.g. a relevant ministry) needs to be involved in the process. Certification in relation to third countries shall be refused, if it has not been demonstrated that:

- (a) The entity concerned complies with the requirements of the unbundling rules according to Article 9 of the Directives. This applies equally to ownership unbundling, ISOs and ITOs; and
- (b) Granting certification will not put at risk the security of energy supply of the Member State and the European Union.

According to Article 49 Electricity Directive, Article 11 applied from 3 March 2013 and not from March 2011.

The national regulatory authority, when adopting its final decision on the certification, must take utmost account of **this prior Commission opinion** which must be provided in advance.

The person taking control of a European TSO from a third country has to be located **outside the EU and the EEA**. Where certification is requested by a TSO controlled by a person of third country/countries, the NRA shall notify the case to the European Commission. The NRA and another competent authority designated by the Member State, such as the ministry, examines independently the impacts of a certification on the national as well as European security of supply. This assessment shall be part of the final certification decision by the NRA. The draft decision made by the NRA shall be adopted within four months from the date of the notification of the TSO. The NRA shall notify the draft decision to the European Commission together with all relevant information with respect to the decision.

There have been to date four cases in the gas sector<sup>51</sup> and one case in the electricity sector<sup>52</sup> so far in which TSOs have been certified in relation to third countries under Article 11 of the Directives.

Regarding the assessment of the security of supply criteria, in case of certification in relation to third countries, the Greek experience should be mentioned. In the recent certification of DESFA, the security of supply criteria were met via the provision that RAE has the power to suspend voting rights of the Integrated Company within DESFA SA in the case that either the Integrated Company or its shareholders take any action, or decision that jeopardizes the security of supply of Greece or of the European Union.

The particularity of this procedure and the one applicable to TSO not controlled by third countries is that:

1. The European Commission provides a prior opinion to the NRA;
2. The Member State has a major role in assessing the security of supply aspect;
3. The directives enumerate under which reasons a certification can be refused.

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<sup>51</sup> France, Germany, Greece and Poland

<sup>52</sup> Great Britain



## 2.2.6 Assessment of the certification procedure

The certification process proved to be an efficient *ex-ante* instrument to check the proper implementation of the unbundling rules even if it can appear to be burdensome. The cooperation between NRAs, TSOs and the European Commission worked efficiently and most of the deadlines have been respected by all parties. Most of the TSOs have been certified in time and no major complaint on the process emerged. Finally the publication of the NRAs decision and the European Commission's opinions render the process very transparent which increased the accountability of all parties involved.

Fully effective separation of network activities from supply and generation activities should apply (throughout the Community) to both Community and non-Community undertakings. To ensure that network activities and supply and generation activities throughout the Community remain independent from each other, NRAs are **empowered to refuse certification** to TSOs that do not comply with the unbundling rules.

The NRAs issue the certification decision but the subsequent designation as a TSO remains in the competence of the Member State. It is the responsibility of the Member States to notify the European Commission of the designated TSOs in their countries. If this "formal" step is not ensured there is a potential risk that the TSO is not recognised as such and its status might be contested.

The certification of the TSO is also an important step for the TSO's involvement in the ENTSOs work; for example, a non-designated TSO cannot participate in the voting within ENTSO-E. Following ENTSO-E Articles of Association, their Assembly can decide to suspend the participation and/or voting rights of a TSO or to exclude it if it is not certified<sup>53</sup>.

## 2.2.7 Assessment of the certification by the European Commission

The Directives entrust the European Commission with the task of examining the certification decisions to be submitted by the NRAs to the European Commission, and provide to the NRA an Opinion on the preliminary decision within two months after receiving the notification<sup>54</sup>. The European Commission can request an opinion on the preliminary decision from ACER, in which case the deadline is extended by two months. If the European Commission does not issue an opinion, the preliminary NRAs decision is deemed to be approved tacitly by the European Commission. The European Commission shall provide an opinion assessing the NRAs decision. The NRAs, when adopting their final decisions on the certification, must take utmost account of the European Commission's opinion.

In order to properly assess the NRAs certification decisions, the European Commission issued a Questionnaire describing the information which is necessary for the European Commission for its assessment of the preliminary decisions in the certification procedure. The questions are based on the existing provisions of the Directives as well as the Merger Regulation to which both Directives refer and summarize views of the European Commission with regards to the unbundling provisions. To ensure the full transparency of the certification

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<sup>53</sup> Article 12 (2) Articles of Association of ENTSO-E from 30.09.2014.

<sup>54</sup> Article 11(6) of the Directives



process, the European Commission publishes the non-confidential version of its opinions/decisions in the original language as well as in English. Prior to publication, the European Commission requests the NRA, to which the opinion/decision is addressed, to indicate whether or not the opinion/decision contains confidential information.

At this stage the European Commission has published more than 100 opinions on draft decisions of NRAs. The major hurdles and obstacles identified in the TSO certification process by the European Commission mostly concerned the ownership structure(s), **even in the OU model**. For all unbundling models, some of the main issues faced by the European Commission during the process are related to:

- The unclear exercise of control and rights in an OU;
- The low level of resources available to manage the financing, maintenance and development of the TSO;
- The unclear definition of the ITO Task;
- The lack of independence of the management, the board members and the Supervisory Body and the issue of conflict of interest after the end of term of office;
- The lack of separation between the competent ministers within the State (powers of the Department for Energy over the TSO; powers of the Department for Energy conferred by law over dispatching) for state owned companies;
- The lack of clarity when it comes to services provided to ITO by VIU contracts for services between the VIU and the ITO - IT consultants and contractors are not clear enough and should often be revised;
- The exercise of control and rights with the VIU often does not ensure proper unbundling and issues such as generation interests of an Investment fund (Mitsubishi); Interests of minority shareholders; shareholding in subsidiary of VIU.

The European Commission addressed in its opinions other issues and concerns e.g. definition of VIU, commercial and financial contracts between the ITO and VIU<sup>55</sup>, separation of IT systems and equipment, branding<sup>56</sup> and independence of audit, sufficient resources and power to raise money on the capital market, repartition of the tasks between the management and the supervisory bodies. Most of these concerns have been considered in the final decisions of NRAs and implemented by TSOs.

### 2.3 Ownership Unbundling

The principles and rules of OU are prescribed in Article 9 of the Directives. According to Article 9(1)(b)(i) of the Directives, the same person cannot exercise control on generation, production and/or supply activities, and at the same time directly or indirectly exercise control over any right over a transmission system operator or over a transmission system. Furthermore, the same person is not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking of a TSO or a transmission system, and directly or indirectly to exercise control or any right over generation, production and/or supply activities (Article 9(1)(c) of the Directives).

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<sup>55</sup> e.g. France, Greece, Slovenia (*regarding the rental of a part of business premises of VIU by ITO*)

<sup>56</sup> See Annex 2 for case study Austria – ITO Model - OMV



The same person is not allowed to be a member of the board of both a TSO and a generator, producer or supplier at the same time (Article 9(1)(d) of the Directives). The term “exercise of control or any right” is defined in Article 9(2) of the Directives and means:

- 1) the exercise of voting rights,
- 2) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, or
- 3) the holding of a majority share.

However, Article 9(2) does not prohibit 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<sup>57</sup>.

A Member State cannot prevent a VIU from complying with the requirements of ownership unbundling. At the same time, where a Member State has opted for ownership unbundling, either in general or as regards a specific TSO, the VIU does not have the right to set up an ISO or ITO. As a consequence some Gas<sup>58</sup> and Electricity<sup>59</sup> TSOs decided to divest their shares in order to be certified under the ownership unbundling model. In case of the Czech Republic the TSO shares were sold by the VIU. The Czech gas TSO Net4Gas was sold off after it has been certified. It was originally certified as an ITO and still keeps its ITO certification even though it's no longer owned by the incumbent gas VIU.

In other cases they remain as a shareholder but lost their rights as foreseen in Article 9(2) of the Directives.

In the majority of the participating Member States with "state-owned" TSOs production, supply and transmission activities are being controlled by different state authorities, in order to ensure an effective structural separation. For instance, in the Czech Republic the national TSO (ČEPS) is owned by the State and the Ministry of Industry and Trade is charged with exercising shareholder and control rights. However, it does not exercise, directly or indirectly, control or any other right over an electricity producer, electricity trader, gas producer or gas trader. A similar situation can be found in Estonia where production and supply activities were transferred under control of Ministry of Finance and the transmission to the Ministry of Economic Affairs and Communications.

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<sup>57</sup> Commission Staff Working Document, Ownership Unbundling: The Commission's Practice In Assessing The Presence Of A Conflict Of Interest Including In Case Of Financial Investors, SWD(2013) 177 final, 8 May 2013

<sup>58</sup> Belgium, Czech Republic, Estonia, France, Hungary, Lithuania.

<sup>59</sup> Austria, Belgium.



The ownership steering of the Finish electricity TSO, Fingrid, is under the Ministry of Finance. The sphere of the ownership steering of the Prime Minister's Office covers undertakings performing production and supply of electricity and natural gas. The autonomy of decision-making of the ministries over matters related to their respective administrative sectors ensures that the ownership steering of the Prime Minister's Office and the Ministry of Finance remain separate. A strict separation between the responsible ministries in such cases is necessary. This is the reason why an amendment of the Polish Energy Law that implemented the 3<sup>rd</sup> Package foresaw a transfer of the TSO management<sup>60</sup> from the Ministry of Treasury, executing control over most of state owned shares in electricity and gas production and trading entities<sup>61</sup>, to the Ministry of Economy. The current division of the powers and competences amongst the Prime Minister, the minister in charge of economy and the minister in charge of State Treasury has the following nature:

- The ministers have independent decision-making powers within the areas that they are in charge of and are in this respect independent from other minister as well as from the Prime Minister;
- Both ministers have no authority to give any instructions to each other;
- The ministers are legally and politically accountable for their ministries and consequently have independent decision-making powers within the areas of their respective competence;
- The Prime Minister does not have the power to issue orders and instructions to the ministers in reference to transmission of electricity and gaseous fuels.

In order to avoid a potential conflict of interest, several NRAs imposed additional requirements for issuing certifications, alongside with general conditions concerning the control powers over a TSO or conflict of interests of persons involved in production or supply (which in some cases even referred to (very small<sup>62</sup>) minority<sup>63</sup> shareholders of the TSO)<sup>64</sup>.

The ownership unbundling regime is certainly less regulatory and burdensome than the other models where, for example, contracts between the VIU and the TSO are to be checked. Nevertheless, in practice, the monitoring of OU is also very burdensome, if one considers the many changes occurring within the TSO.

Once the TSO is certified as OU there is a continuous control foreseen, which is less burdensome compared to the ITO/ISO models, as there is no obligation to either nominate a compliance officer or set up a compliance programme. There is also a less strict reporting obligation for the TSOs and only a general monitoring obligation for NRAs to review the certification, if the TSOs submit new elements, which require the NRA to reconsider the decision or in the case of any new element.

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<sup>60</sup> Both Gas and Electricity TSOs

<sup>61</sup> The Polish State Treasury holds 100% of the shares of TSOs, and it is the Ministry of Economy that is authorised to manage the State's participation in TSOs.

<sup>62</sup> For instance, one small owner of Finnish TSO (small electricity utility with share of 0,05 %) shall make arrangements in order to give up its decision making powers and rights towards TSO by the end of 2016

<sup>63</sup> E.g. a condition issued by CREG in regard to a minority shareholder of the TSO having a right to appoint a member in the board of the TSO and at the same time having a very small participation (0,00087%) in a producer/supplier: a formal commitment of this (non-controlling) shareholder not to exercise its voting rights relating to its shareholding in a company active in production/supply of electricity and gas was required.

<sup>64</sup> See Annex 2 for case study Portugal on EDP Voting rights



## 2.4 Independent Transmission Operator

A Member State can decide not to apply the rules of ownership unbundling, but to apply for an ITO model, if the transmission system belonged to a VIU when the 3<sup>rd</sup> Package entered into force (September 2009). The ITO model allows for TSOs to remain part of a VIU under a set of detailed behavioural and structural criteria, laid down in Chapter IV of the Gas Directive and Chapter V of the Electricity Directive.

A certification under the ITO-model is only foreseen in cases where on the date of 3 September 2009, the transmission system concerned belonged to a VIU and the Member State decided to not apply Article 9 (1) and to comply with either ISO or ITO model. In order to determine the status of a VIU, it has to be examined whether the relevant gas or electricity undertaking is controlled by, or controls, another company active in the gas or electricity field (control criteria). If it is the case, then at least one of the two undertakings has to be a transmission system operator, and the second undertaking needs to be integrated and exercise any of generation/production and/or supply activity (activity criteria). In addition, both companies should be active in the European Union (geographical criteria).

Article 37(5) Electricity Directive and Article 41(5) Gas Directive lay down a list of specific duties and powers to be assigned to regulatory authorities where an ITO is designated. These duties and powers are additional to the duties and powers generally conferred on regulatory authorities as regards TSOs. The list of specific duties and powers is not exhaustive. The NRAs have to assess compliance of the TSOs with the additional requirements of the ITO model:

- VIUs have to assure the independence of the TSO in view of the autonomous organisation, decision-making and exercise of the business of the TSO. A TSO has to also ensure its independence in its decision making and its activities through its organisational structure which needs to be autonomous from the VIU.
- Independent TSOs as well as other parts of the VIU cannot operate in the same offices, including offices that have common security gates. Nevertheless, the TSO can rent the offices on the basis of current market conditions from the VIU. A third party, providing services to both the TSO and the VIU, has to ensure an operative and informational separation in its provision of services.
- The independent TSO has to possess the means necessary for the construction, operation and the maintenance of a secure and efficient transmission network at any point of time. The financial situation of the TSO also has to allow for new investment, which result from legal obligations or the network development plan.
- Independence of the personnel and the management. A TSO has to ensure that all personnel working for it do not exercise any functions within the VIU.
- Creation of a Supervisory Body being responsible for decisions of the ITO which may have significant impact on the value of the assets of the shareholders in the TSO.
- Creation of a Compliance programme with nomination of a compliance officer which is subject to approval by the NRA. In this context, the NRA may foresee provisions in its certification decision allowing for an effective review of the compliance programme.



Among Member States in which the ITO model was used only three NRAs mentioned concerns related to this unbundling model. In Germany there were concerns related to the compliance officer nomination, commercial and financial contracts between the ITO and VIU and disposal of sufficient funds to ensure autonomous investment. These concerns were laid down as conditions in the respective certification decisions and have been generally fulfilled so far. Also, in other countries (Slovenia<sup>65</sup> and Slovakia<sup>66</sup>) some concerns were expressed by NRAs related mainly to commercial and financial contracts between the ITO and VIU.

In all Member States with ITO unbundled TSOs (except Slovenia) a supervisory body had been established in the governance structure of the ITOs and so far NRAs could not identify any attempt by the supervisory body to interfere in the day-to-day business of the ITO. No major obstacles have been identified that could affect the independence of the ITO.

This might also be the consequence of the fact that many NRAs<sup>67</sup> have imposed additional requirements before issuing the final certification decision. In Austria there were various conditions regarding the core duties of the TSO; in France these conditions are related to separation of services (R&D and training services) and IT systems between TSOs and VIUs. In Greece, additional conditions have been included inter alia such as the change of the TSOs' article of association and hiring personnel in the Internal Control Department. In its provisional certification decision the Hungarian NRA required contractual changes (e.g. auditing, IT, SLA contracts) and reviewed compliance with these requirements within the certification procedure.

According to the review clause and particularly to the reporting obligation of Article 47(3) Electricity Directive and Article 52(3) Gas Directive the European Commission had by 3 March 2013, to submit a detailed specific report on this topic to the European Parliament and the Council on whether and to what extent the unbundling requirements particularly for the ITO model are successful in practice in ensuring full and effective independence of the ITO.

In its "Report on the ITO Model" as part of its Communication on "Progress towards completing the Internal Energy Market", published on 13 October 2014, the European Commission concluded that at the time of report, most requirements related to the ITO model seemed to work in practice and were usually sufficient and adequate to ensure effective separation of the transmission business from generation and supply activities in the day-to-day business. As a conclusion the European Commission did not see, so far, a need to propose changes into ITO unbundling model but mainly to reinforce its monitoring.

## 2.5 Independent System Operator

Under the provisions of the ISO model set out in Article 13 to 15 of the Directives, a network operator cannot own the transmission network, but may own other parts of the VIU which owns the transmission network.

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<sup>65</sup> ITO has to terminate the leasing contract for hiring smart part business premises of VIU by 31 December 2015.

<sup>66</sup> The necessity to ensure a consistent monitoring of commercial and financial contracts between the ITO and VIU.

<sup>67</sup> Austria, France, Germany, Greece, Cyprus (only for Gas-TSO) and Hungary (only for Gas-TSO)



Thus, there is not such a strict separation as foreseen by the ITO model. However, the ISO is not allowed to stay within the structure of the VIU which owns the transmission network but has to be separated according to the requirements of ownership unbundling.

According to Article 13(2) of the Directives a TSO may be approved and designated as ISO only if:

- (a) The TSO has demonstrated that its compliance with the requirements of Article 9(1)(b),(c) and (d) of the Directives;
- (b) The TSO has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 12 of the Directives;
- (c) The TSO has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
- (d) The transmission system owner has demonstrated its ability to comply with its obligations under para. 5, providing all the draft contractual arrangements with the TSO and any other relevant entity; and
- (e) The TSO has demonstrated its ability to comply with its obligations under Regulations (EC) No 714/2009 and 715/2009 including the cooperation of transmission system operators at European and regional level.

The ISO model was implemented in five of the participating Member States (Latvia, Poland, Romania, Spain and Sweden<sup>68</sup>).

Additional requirements to the 3<sup>rd</sup> Package were introduced by some countries; in Latvia the TSO has to perform, within 24 months, the maintenance of fixed assets of the transmission system or had to conclude an agreement for performance of specific works with such a company which is neither directly nor indirectly associated with activities of electricity generation, trade and distribution. The fact that the TSO owner performed the maintenance of fixed assets was seen by the Latvian NRA as the main obstacle that still needed to be overcome by the TSO to correctly implement the ISO model. In Romania, the NRA saw such an obstacle in the ownership structure of the grid - part of which is public property and the other part is owned by TSO. This was one of the reasons to begin a new certification under OU model.

In most Member States, the NRAs monitor the relations and communications between the ISO and transmission system owner in order to ensure compliance of the ISO with its obligations<sup>69</sup>. Except in Spain, NRAs did not approve the contracts concerning management of the network, allocation of responsibilities, etc. between the ISO and the transmission system owner. In Romania and Spain, the NRA has to act as a dispute settlement authority between the ISO and TSO in respect to any complaint submitted by either party or a third party. Whereas in Latvia, Poland and Romania the NRAs approved the ISO's annual investment planning and multi-annual network development plan.

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<sup>68</sup> In Poland, Spain and Sweden – only for Gas-TSOs; in Latvia only for Electricity-TSO; in Romania for both Gas and Electricity TSOs.

<sup>69</sup> In Poland the certification procedure of TSO under ISO model includes an examination of the fulfilment of the statutory obligations of TSO by the President of ERO. Moreover, pursuant to Article 23 para. 2, point 6b) of the Polish Energy Law Act the scope of competencies of the ERO President includes monitoring of the relations and the communication between the transmission network owner and TSO.





## 2.6 The unbundling regime according to the Article 9(9) Gas/Electricity Directives

Article 9(9) of the Directives provides that a Member State may choose not to apply **any of the three** models described above, only where on September 3<sup>rd</sup>, 2009, the transmission system belonged to a VIU and at that date, arrangements were in place which guarantee more effective independence of the transmission system operator than ensured by the specific provisions of the ITO model<sup>70</sup>.

Member States might seek to make available such arrangements where these existing arrangements would not meet the prescriptive requirements of the ITO model (as set out in Chapter V of the Electricity Directive and Chapter IV of the Gas Directive) but the existing arrangements in place achieved a better outcome in terms of independence of the TSO. In such cases, the European Commission is asked to take a Decision on certification (and not only an Opinion), and the NRA is obliged to implement that Decision.

However, three important limitations are to be taken into account: First, the structure of the TSO and the regulatory framework must guarantee more effective independence of the TSO than the ITO model. Secondly, this structure and regulatory framework must have already been in place before 3 September 2009. Finally, the transmission system must belong to a VIU on 3 September 2009. These important limitations have resulted in this model being seldom applied.

It is also important to underline that, contrary to the other models, the European Commission has a binding role in verifying that the arrangements in place guarantee more effective independence of the TSO than for the ITO model<sup>71</sup>. NRAs have to **comply with** the European Commission's Decision (Article 9(10) of the Directives).

Also, in Great Britain, prior to 3 September 2009 three companies – separate, corporate groups - were involved in the ownership of the GB National Transmission System: National Grid owns the transmission network in England and Wales; while SHETL and SPTL, which are each part of a VIU, own transmission networks based in Scotland. National Grid is responsible for operation of the entire GB System, including SHETL and SPTL's networks in Scotland.

These arrangements are different to the ITO and ISO model but given the role of National Grid, as an ownership unbundled entity operating the entire system, can be considered to guarantee more effective independence than the ITO model. SHETL and SPTL have therefore been certified under the Article 9(9) derogation.

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<sup>70</sup> So called "ITO+" model

<sup>71</sup> See Annex 2 for case study on the ITO+ Model - Irish Case



## 2.7 Monitoring of the unbundling requirements

According to Article 10(4) of the Directives, the continuing compliance of TSOs with the unbundling requirements is being monitored by NRAs. In order to ensure this monitoring task remains effective, there is a reporting obligation on TSOs according to Article 10 to notify the NRAs about any planned transaction which may require a reassessment of TSO's compliance with the unbundling requirements.

NRAs shall monitor the continuing compliance of TSOs with these requirements, and as a consequence shall open a new certification procedure upon a TSO's notification or on their own initiative; likewise, the European Commission may make a reasonable request for the opening of the procedure.

In order to carry out their assessment under the certification procedure, NRAs and the European Commission are entitled to request from TSOs and/or production/supply companies any information necessary to fulfil the tasks that NRAs and the European Commission have been assigned within the context of the certification. NRAs and the European Commission are bound by confidentiality obligations pursuant to Article 10(8) of the Directives.

In addition the general NRA duties prescribed in Article 37 (4) (c) and (d) Electricity Directive and to Article 41 (4) (c) and (d) Gas Directive, NRAs may require any information from undertakings relevant for the fulfilment of its tasks related to unbundling requirements, and impose effective, proportionate and dissuasive penalties on undertakings not complying with their obligations (among others, those that are related to the unbundling regime).

The European Commission encourages NRAs to monitor and keep under review how the OU, ITO, ISO and other models are implemented and check, for example:

1. Whether a financial incentive could exist that could influence TSOs decision-making powers and, if that is the case, to ensure that remedies are put in place that effectively remove this conflict of interest<sup>72</sup> and
2. Whether the adoption of a proposed legislation will ensure that a controversial task (e.g. ministry approval for the appointment of a member of the supervisory body) is eliminated and to include the possibility in the final decision to reconsider the certification should the amendment not be adopted.

In cases where no conflict of interest between TSO and VIU is found, it is still important to monitor the unbundling requirements considering that new facts or circumstances might emerge and change the initial assessment. Referring to the ITO model, the European Commission underlined in its Report on the ITO Model<sup>73</sup> that careful monitoring of the ITOs is essential with regards to the requirements for the Supervisory Board and its independence from the VIU, provisions concerning Cooling On/Off period, effectiveness of the Compliance Programme and ITOs ability to ensure that the necessary investments are made in the network.

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<sup>72</sup> Commission' opinion of 8 July 2013 on the certification of Moyle Interconnector Limited, C(2013)4398/F1

<sup>73</sup> SWD(2014) 312 final



The charts below give an insight in the NRAs monitoring of the certification decisions. The monitoring activities by NRAs to ensure compliance of TSOs with unbundling requirements are achieved through:

- Assessment of the Compliance officer's reports;
- Asking TSOs to provide information;
- Assessing the TSOs planned transactions;
- Assessing Commercial and financial agreements; and
- General oversight

From this chart, the monitoring of the TSOs occurs primarily through the general oversight of the NRAs (e.g. request from NRAs) as a consequence to their obligation to monitor and report on the implementation of the unbundling provisions. Equally important is the information provided by and requested from TSOs on the implementation of the unbundling provisions. The reports submitted by the Compliance officers are as external sources of information for NRAs a very important tool that provides a complete insight into the company's activity, structure and functioning. Another source of information relevant to the NRA's monitoring, are the various commercial and financial agreements, however, these are only relevant for the ITO and ISO models and not for the OU, where no compliance officer is in place.

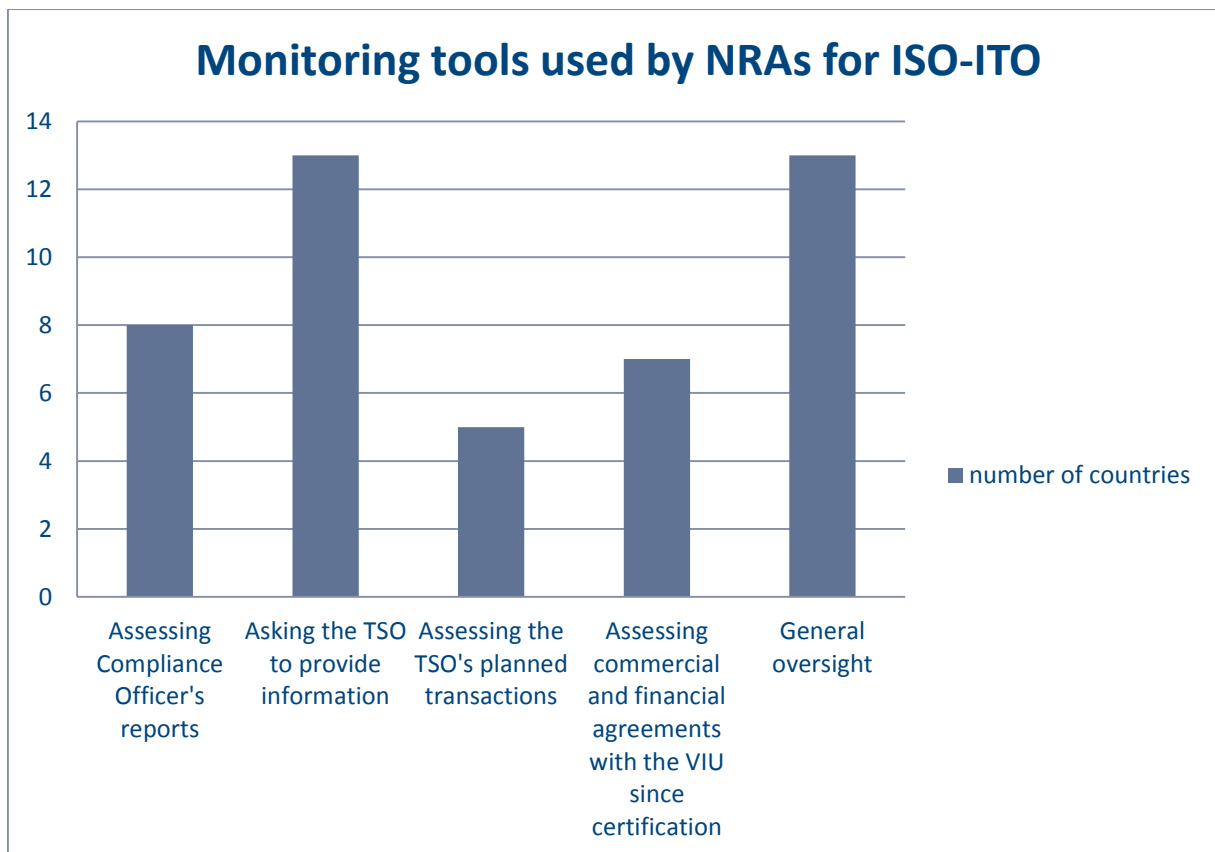


Figure 7: Monitoring tools used by NRAs for ISO-ITO

There are particular cases where the TSO is not certified, due to an exemption according to Article 9 Electricity Directive (e.g. Cyprus) but nevertheless submitted a compliance programme to the NRA.



In Spain the monitoring activity of the NRA has been extended to the control of the agreements that have been changed following the NRAs intervention. In fact the Spanish NRA required several changes of the contract between the TSO certified as ISO (Enagas Transporte) and each transmission system owner (Saggas and ETN) and the implementation of the amendments was monitored.

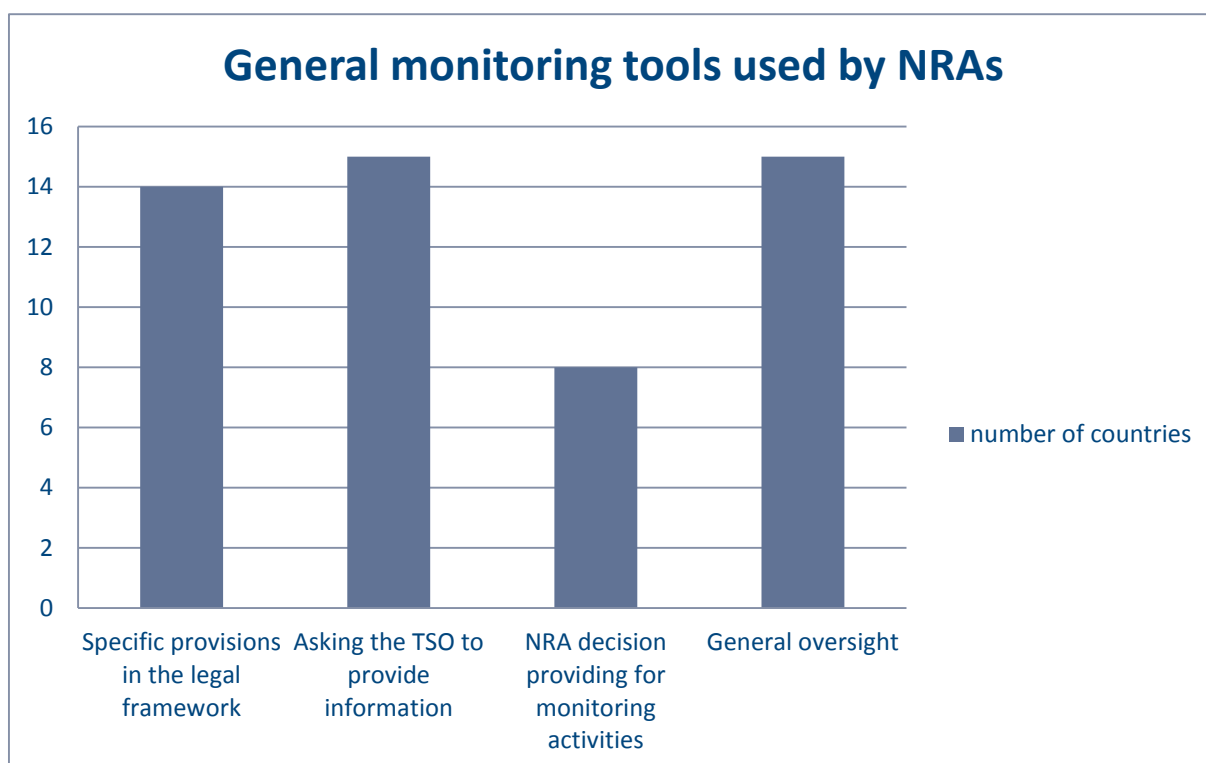


Figure 8: General monitoring tools used by NRAs

In France the national Energy Code provides for a general monitoring obligation; the NRA (Commission de Régulation de l'Énergie - CRE) must ensure that the TSOs comply with their certification obligation and for that the NRA can request, at any moment, any information needed. More specifically, in the case of the certification of the gas TSO (TIGF) CRE requested TIGF to:

- Regularly provide agendas of boards and GA of TIGF;
- Provide a yearly report describing how confidentiality obligation have been implemented and are respected;
- Notify to CRE any acquisition by GIC of stake above 5%, in a supply of production entity.

In GB, the monitoring of the correct implementation of the unbundling requirements is defined in the respective licences on the one hand and in the certification decision on the other hand. The applicants are required to submit an annual declaration and inform Ofgem of any changes in circumstances that may affect their certification status as these arise.



The Spanish provisions compel TSOs to notify transactions or other changes that involve unbundling requirements. Likewise, the Spanish NRA (Comisión Nacional de los Mercados y la Competencia - CNMC) requires the TSO to give information about transactions known by this NRA due to its monitoring activities. Several decisions on certification foresee specific information duties on the undertakings.

The fulfilment of the requirements imposed to Enagás by the Spanish NRA (decision issued 26 July 2012) was monitored asking information and using data published by CNMV (Stock Exchange Spanish Agency). That monitoring activity resulted in another NRA's decision issued 18 April 2013, notified to the European Commission.

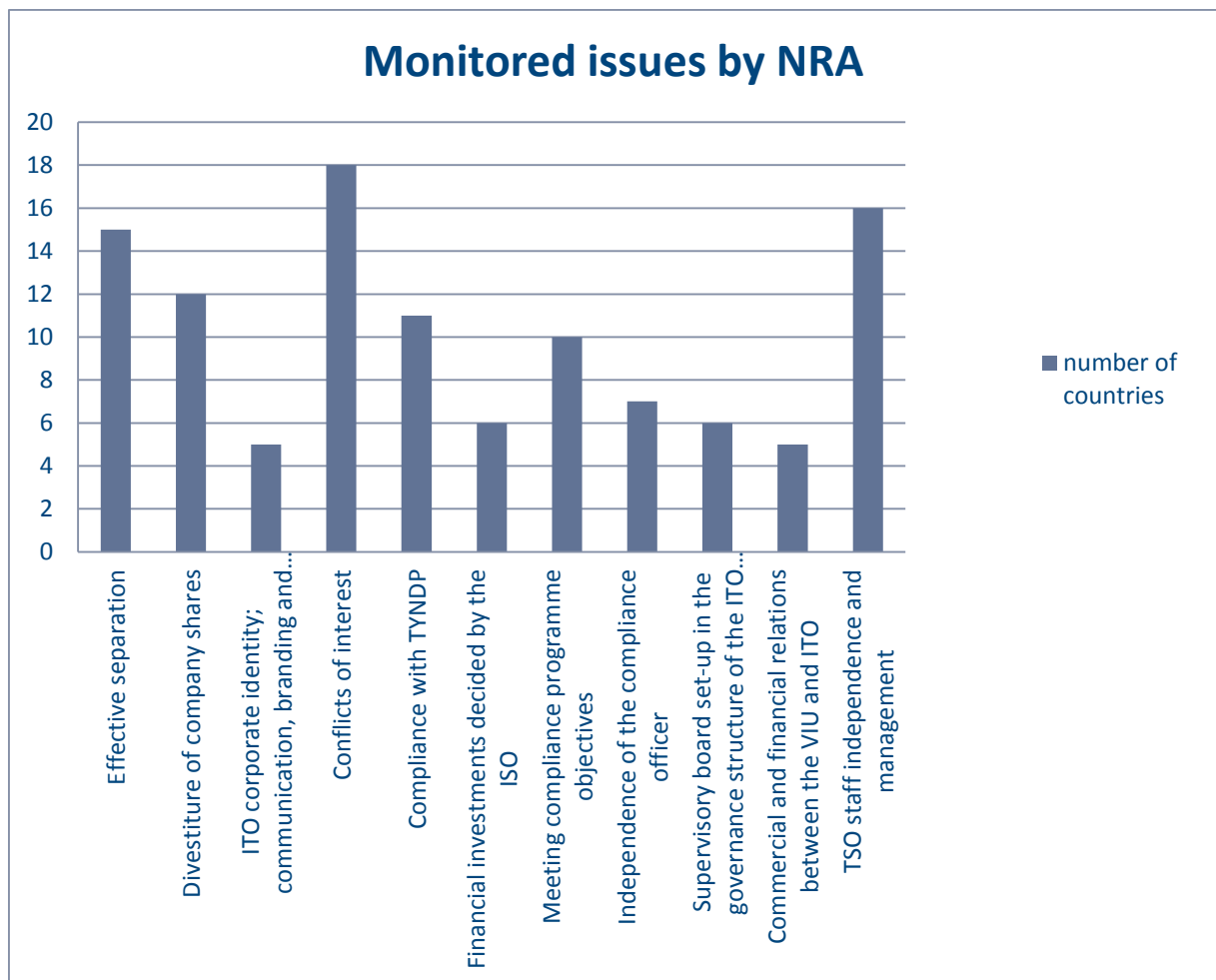


Figure 9: Monitored issues by NRAs



In the majority of the participating Member States<sup>74</sup> the TSOs informed the NRAs on their own initiative about every planned transaction that may have required a reassessment of their compliance. In other Member States<sup>75</sup> it happened following an NRA's request. In Finland the certification decision and legislation provide rules for the TSO and its owners to inform NRA of any planned arrangements, which might influence on the certification.

In GB, the requirement of TSOs to submit an annual declaration and inform Ofgem of any changes in circumstances that may affect their certification status is set out in the respective licences. Whereas in Portugal the TSO has to submit an annually report to the NRA, containing complete and detailed information on the state of compliance about the independence in the legal and financial level, the transmission system operator referred to in certifying legal regime, as well as information about the general meetings of the group to which it belongs. The TSO must also send to the NRA the announcements regarding qualifying holdings and annual and semi-annual information.

Most of the countries except Belgium, Cyprus, Czech Republic, Estonia, France, Luxembourg and Spain have published **monitoring guidance/rules**. In some Member States such rules are set out in the national law (e.g. Germany, Poland and the Netherlands). In Member States where cases of non-compliance with unbundling rules took place, the following measures were taken by the respective NRAs:

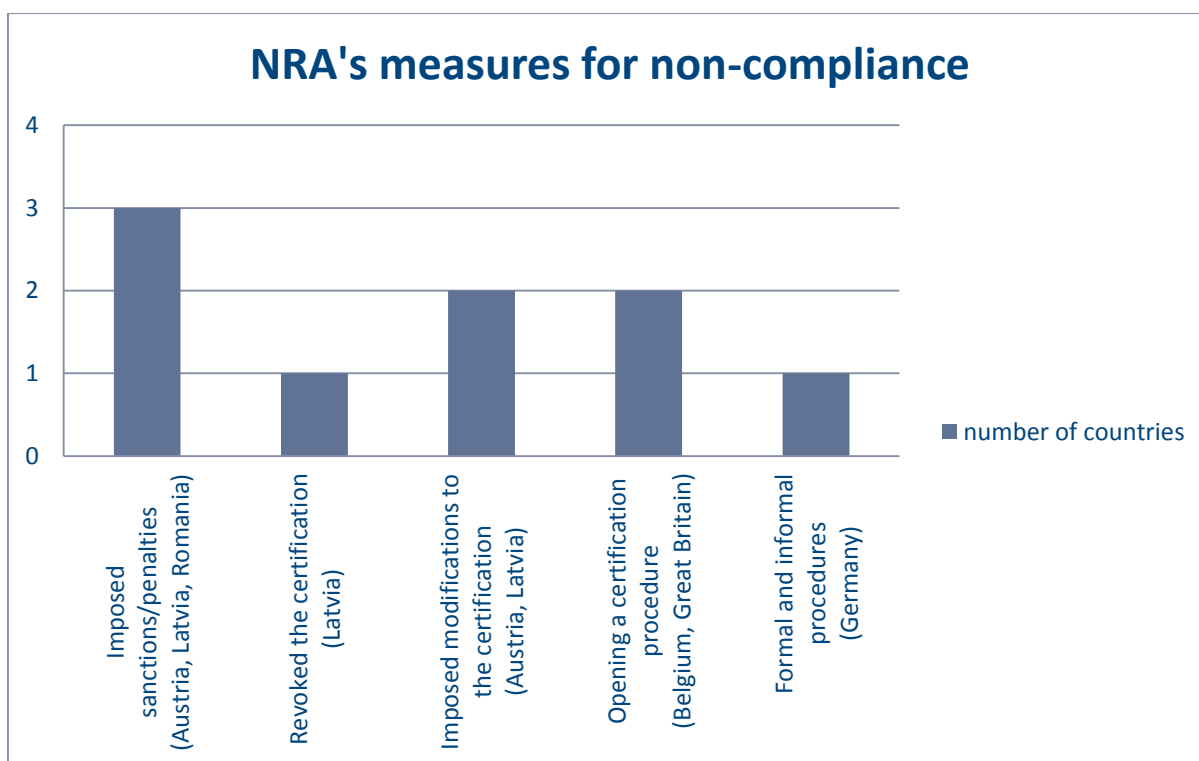


Figure 10: NRA's measures for non-compliance

<sup>74</sup> Austria, Czech Republic, Estonia, Finland, France, Great Britain, Hungary, Lithuania, Romania, Slovenia and Sweden.

<sup>75</sup> Belgium, France, Latvia and the Netherlands.



Firstly, TSOs that are not certified or not following the certification requirements are in breach of the unbundling requirements of the 3<sup>rd</sup> Package. Whereas the 3<sup>rd</sup> Package does not foresee explicit sanctions in these cases, most of the national rules have implemented rules to sanction these breaches. Most of the TSOs, which are not certified, are mainly subject to administrative sanctions<sup>76</sup>.

There were some few cases where certification procedures have been reopened either to comply with the European Commission's opinions or to take new elements into account, e.g.:

- Change in the shareholding;
- New contracts with the VIU;
- Change of the branding/communication policy, etc.

TSOs are obliged to inform NRAs when changes occur in the company structure and its organisation that have consequences for the unbundling regime agreed in the certification.

In Italy the gas TSO, Snam Rete Gas, was originally certified in 2012 as ITO. Following a change in ownership, it was re-certified in 2013 as OU. In January 2015, the Italian regulator (Italian Regulatory Authority for Electricity Gas and Water - AEEGSI) reopened again the certification of both TSOs (Terna and Snam) following changes in their ownership structures<sup>77</sup>.

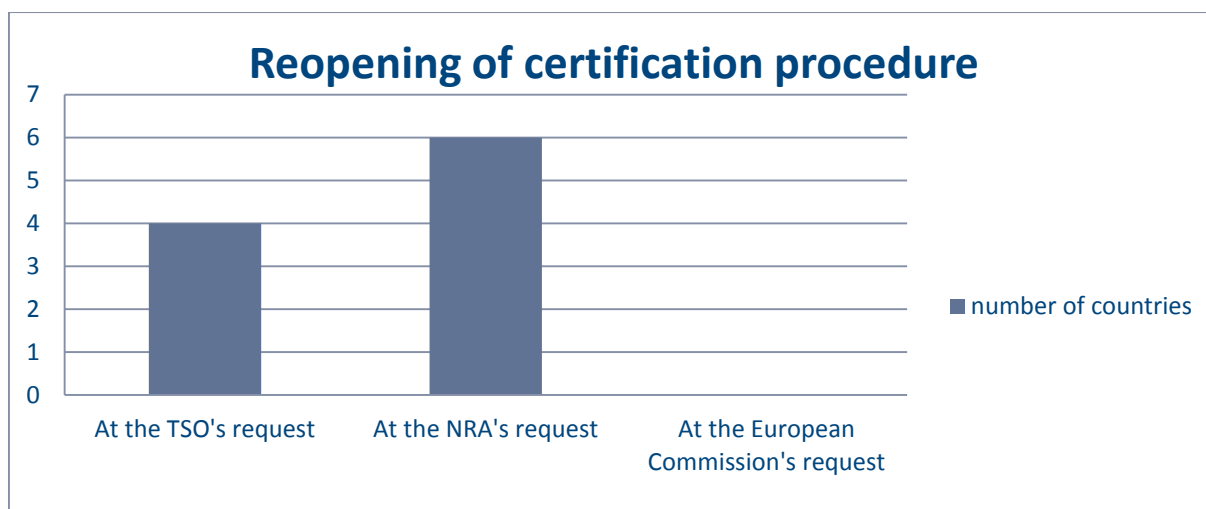


Figure 11: Reopening of certification procedure

<sup>76</sup> E.g. in France where a TSO failing to respect the certification process obligations may be subject to administrative sanctions by the standing committee for disputes and sanctions (CoRDIS), which can impose, according to the seriousness of the breach: (i) a temporary ban on access to the energy network, structures and installations for a period not exceeding one year; or (ii) a financial penalty, the amount of which is proportionate to the seriousness of the breach, to the situation of the concerned party, to the extent of the damage and to the benefit that was derived from the breach (Art. L.134-27 of the French energy code).

<sup>77</sup> The assessment is still pending.



## 2.8 Conclusions

The 3<sup>rd</sup> Package requires TSOs to be certified by NRAs under one of the unbundling models provided for in the Directives: as fully ownership unbundled TSOs, Independent system operator or Independent transmission operator or in special cases where the TSO satisfies the test for a derogation under Article 9(9) of the Directives (the so-called ITO+ model).

However, TSOs can be granted or continue to benefit from a (temporary and partial) exemption where the TSO concerned:

- is entitled to continue to rely on an exemption granted under Article 7 of Regulation (EC) No. 1228/2003 (for electricity TSOs) or under Article 22 of Directive 2003/55/EC (for gas TSOs);
- is in a substantially similar position to a person who has been granted an exemption under Article 22 of Directive 2003/55/EC (for gas TSOs); or
- is granted an exemption under the 3<sup>rd</sup> Package from applying the unbundling rules (temporary and possibly partial) under Article 17 of the Electricity Regulation (for electricity TSOs) or Article 36 Gas Directive (for gas TSOs), when fulfilling the conditions provided for in these articles.

Overall, the most prevalent unbundling model implemented is OU followed by the ITO and ISO models, with an important difference for gas and electricity TSOs. So far 70% of Electricity TSOs have been certified under the ownership unbundling model, while only 40% of gas TSOs have been certified under this model. With 44%, the majority of gas TSOs have been certified under the ITO-model. Seven Member States have used two different models for the TSO certification in the gas sector, whereas in electricity only three Member States have chosen a combination of different unbundling models.

The ownership structures of TSOs in the Member States vary according to the models proposed in the 3<sup>rd</sup> Package, but all the models proposed have been implemented throughout Europe as a whole. The implementation of unbundling models of the 3<sup>rd</sup> Package is a kind of evolving concept which can change over time. While in the majority of the participating Member States the TSOs are owned/controlled by public entities (some up to 100%), in other Member States TSOs have a private ownership. This assertion can also vary between the electricity and gas sector.

The public ownership is stronger in the electricity than in the gas sector. In the electricity sector most of the TSO ownership structure is public; only GB and Portugal have a full private ownership structure for their TSOs. In ¼ of the countries there is a mixture between private and public ownership (Austria, Belgium, Germany, Spain, Romania, Finland, France, and Luxembourg). The ownership structure in the gas sector is more diverse and more importance is given to the private ownership or a mixed ownership structure. Gas TSOs in Great Britain, Czech Republic, Latvia and Portugal have full private ownership. Most of the certifications decisions were positive ones.

In cases where cross-border certification was required, such decisions have been taken as coordinated (separately published) NRA decisions on the basis of a prior agreement between the concerned NRAs<sup>78</sup>. For the Interconnector (UK) Limited, the competent NRAs (CREG and Ofgem) have coordinated the content of the decision and the certification procedure.

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<sup>78</sup> By Belgian, British and Dutch NRAs.





For the Member States in which the ISO model was applied, the NRAs monitor the relations and communications between the ISO and transmission system owner in order to ensure the compliance of the ISO with its obligations except in Spain, where NRAs did not approve the contracts concerning the management of the network and the allocation of responsibilities between the ISO and the transmission system owner. In Romania the NRA has to act as a dispute settlement authority between the ISO and TSO in case of complaint. Whereas in Latvia, Poland and Romania the NRAs approved the ISO's annual investment planning and multi-annual network development plan.

In none of the certification procedures conducted so far by the European Commission (109 certifications to date<sup>79</sup>) ACER has been asked by the European Commission to provide views neither on the certifications process nor on particular certification cases. This witnesses a good cooperation of the NRAs also with the European Commission but in particular between NRAs in cases of cross-border certifications.

In application of the ITO-model review clause, provided for in the Directives, the European Commission found in its "Report on the ITO Model"<sup>80</sup> that most of the requirements related to the ITO model work in practice and are sufficient and adequate to ensure effective separation of the transmission business from generation and supply activities in the day-to-day business. Thus, the European Commission did not see, so far, a need to propose changes to the ITO unbundling model, but mainly to reinforce its monitoring.

On the issue related to Ownership unbundling and financial investors the European Commission issued a working paper in which it was noted that in the context of the certification procedure for TSOs the EC found that in certain situations referred to in Article 9(1) of the Directives, it was evident from the facts of some concrete cases that the simultaneous participation in transmission activities on the one hand, and in generation, production and/or supply activities on the other hand, **did not give rise to any potential conflict of interest or incentive to exploit it per se**, and as a consequence did not in any way risk impacting negatively on the independent management of the TSO.

These situations were considered carefully by both NRAs and the European Commission during the certification process so that a proper assessment has been carried out on a case by case basis<sup>81</sup> with the result that no major problems have been identified so far.

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<sup>79</sup> <https://ec.europa.eu/energy/sites/ener/files/documents/Received%20notifications%20corr.xlsx>

<sup>80</sup> SWD(2014)312final  
[https://ec.europa.eu/energy/sites/ener/files/documents/2014\\_iem\\_communication\\_annex3.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2014_iem_communication_annex3.pdf)

<sup>81</sup> SWD(2013)177final



## Annex 1 – List of Abbreviations

Term	Definition
2 <sup>nd</sup> Package	Second Energy Package
3 <sup>rd</sup> Package	Third Energy Package
ACER	Agency for the Cooperation of Energy Regulators
AEEGSI	Autorità per l'energia elettrica il gas ed il sistema idrico (Italian NRA)
BNetzA	Die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (German NRA)
CEER	Council of European Energy Regulators
CER	Commission for Energy Regulation (Irish NRA)
ČEPS	Česká energetická přenosová soustava (Czech TSO)
CNMC	La Comisión Nacional de los Mercados y la Competencia (Spanish NRA)
CNMV	Comisión Nacional del Mercados de Valores (Stock Exchange Spanish Agency)
CRE	Commission de régulation de l'énergie (French NRA)
CREG	Commission de Régulation de l'Électricité et du Gaz (Belgian NRA)
DERA	Danish Energy Regulatory Authority
DSO	Distribution System Operator
e.g.	Exepmli gratia (for example)
E-Control	Energie-Control Austria (Austrian NRA)
ERSE	Entidade Reguladora dos Serviços Energéticos (Portuguese NRA)
EU	European Union
GCA	Gas Connect Austria GmbH
ISO	Independent System Operator
ITO	Independent Transmission Operator
LNG	Liquefied Natural Gas
MS	Member State



Term	Definition
NMa	Nederlandse Mededingingsautoriteit (The Netherlands Competition Authority)
NRA	National Regulatory Authority
OFGEM	Office of Gas and Electricity Markets (British NRA)
OU	Ownership Unbundling
PCI	Project of Common Interest
TSO	Transmission System Operator
VIU	Vertically Integrated Undertaking



## Annex 2 – Case studies

### Case Study: Interconnector (UK) Limited (IUK)

The certification of the IUK interconnector had to be done by two different regulators: the GB (Ofgem) and the Belgian regulator (CREG).

Differences in the transposition of the unbundling rules between the Belgian and the GB implementing legislation have had the consequence that the framework to assess IUK's compliance with the unbundling rules differs for both regulators. Besides the three unbundling models, the GB legislation also provides the possibility of certification of a TSO which benefits from an exemption under Article 22 of Directive 2003/55/EC and of certification of a TSO which is in a "substantially similar" position to a person who benefits from such an exemption. In Belgium, only the OU-model has been transposed in national law.

At the GB side, IUK submitted its request for certification based on the certification ground set out in the GB Gas Act on the basis that IUK is in a "substantially similar" position to a person who benefits from an exemption under Article 22 of Directive 2003/55/EC until 3 March 2015, by which date it will have to change its corporate governance arrangements, and from that date, will have to comply with the requirements of full OU. On this basis, Ofgem submitted its preliminary decision to the European Commission requesting an Opinion.

At the Belgian side, IUK has submitted its request for certification based on the full OU model. Full OU will only be implemented after a transitional period that runs until 3 March 2015, needed to carry out the necessary structural changes to the IUK corporate structure.

**Ofgem and CREG have matched their respective draft decisions in order to come to one common result.**

In its Opinion, the European Commission, relating to the preliminary decision of CREG, limited itself to the additional elements that have come forward from CREG's analysis of IUK's compliance with the unbundling rules. However, the European Commission underlined that the comments made in its Opinion of 26 March 2013 to the preliminary decision of Ofgem are also valid for, and to be taken into utmost account by, CREG.

In May 2013 and July 2013 respectively, Ofgem and CREG adopted final certification decisions regarding IUK. In both decisions, the certification was granted to IUK provided that it would fulfil a number of conditions by 3 March 2015. During this transitional period IUK would implement a number of structural changes to ensure full compliance with the OU model. As part of the ongoing monitoring and reporting on the progress of implementing the conditions, IUK informed CREG and Ofgem in 2015 that not all the conditions set in the certification decisions would be met by 3 March 2015. On that basis, CREG and Ofgem reopened their certification procedures *ex officio* in February and March 2015 respectively.



After assessing the situation of IUK to what extent their situation is in line with the OU model, Ofgem and CREG have notified the European Commission of their draft decision. Both regulators came to the conclusion that IUK has taken sufficient measures in the meantime to ensure that Gazprom, being a person that is active in the production and supply of gas, can no longer exercise rights, in the sense of Article 9(2) of Directive 2009/73/EC, vis-à-vis the TSO IUK. In addition, both regulators agreed that IUK also complies with other conditions that had been imposed by the initial certification decisions not related to the position of conflicted shareholders.

In October 2015 both NRAs have issued a final decision and certified IUK as full OU.

### **Case Study: BBL<sup>82</sup>**

BBL operates the Balgzand Bacton Line gas interconnector connecting the Dutch and British gas markets. For part of the BBL's capacity, BBL has been granted a partial exemption (80% of the current forward capacity of the pipeline) for major new infrastructure under Article 22 of Directive 2003/55/EC, by Ofgem and NMa (The Netherlands Competition Authority). The partial exemption does not cover the full capacity (20%) or the reverse flow capacity. The duration of the exemption is limited to the expiration dates of the initial contracts, which expire one after the other between 2016 and 2022.

In their preliminary decisions, NMa and Ofgem have adopted a similar approach. In both the Netherlands and the United Kingdom, national legislation transposing the Gas Directive has provided the NRAs with the possibility to assess certification applications by TSOs holding an exemption under a specific framework of analysis.

In the Netherlands, the NRA is obliged to assess whether the TSO complies with the unbundling rules in its exemption rather than with the transposed OU-rules of the Gas Directive. NMa has hence proceeded to analyse the exemption decision and has come to the conclusion that BBL complies with the requirements under that decision, subject to the fulfilment of certain conditions related to the non-exempted part of the capacity in BBL.

In the United Kingdom, Ofgem's assessment consists of a compliance test, a criterion which concerns the question whether or not the applicant holds an exemption under Article 22 of Directive 2003/55/EC and remains entitled to that. In its preliminary decision, Ofgem concludes that BBL satisfies this test and that it can be granted certification subject to the fulfilment of certain conditions related to the non-exempted part of the capacity in BBL.

Both of the assessments lead to the common conclusion that the non-exempted part of the capacity in BBL should be treated and marketed independently from the supply interests of (one of) its shareholders, taking into account the objectives of the 3<sup>rd</sup> Package, unless this is not possible without undermining the exemption. The European Commission has supported this approach, but noted that it may only be applied as long as the partial exemption is in place. After that BBL will have to comply with the regular unbundling requirements as laid down in the 3<sup>rd</sup> Package.

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<sup>82</sup> Commission's Opinion on Ofgem's and Nma's draft certification decisions for BBL C(2013)1526 055-2013-UK; 056-2013-NL



### Case study: BritNed<sup>83</sup>

BritNed is the owner and operator of the high voltage direct current electricity interconnector between the Isle of Grain in the United Kingdom and Maasvlakte in the Netherlands. BritNed is a joint venture company by National Grid Holdings One plc (50%) and Tennet Holding B.V. (50%). Both owners are operators of transmission grids in Great Britain and the Netherlands respectively. BritNed is operated independently of the transmission systems in GB and the Netherlands.

BritNed has been granted an exemption for new interconnectors under Article 7 of Regulation (EC) No 1228/2003, which applies to all of the 1000MW capacity, in both directions, of the interconnector. The exemption was granted by the NRAs in both countries for a period of 25 years from the start of the operations, meaning that it will continue until 31 March 2036 unless it is revoked earlier pursuant to criteria included in the exemption. The exemption does not concern third party access.

BritNed has applied for certification in the United Kingdom and in the Netherlands, in either case on the basis of the specific framework for exempted infrastructures that is laid down in the respective national implementing laws.

In its opinion the European Commission noted that in the present case the owners of BritNed are two unbundled TSOs. The European Commission considered this to be relevant in its assessment of the exemption decisions of the NRAs. BritNed offers 100% of its capacity to the market via a combination of non-discriminatory and transparent explicit and implicit auctions. The exemption can hence be seen as a means to ensure the risk-reward balance of the investment and is not an exemption from third party access conditions. In addition, the European Commission considers that a granted exemption does not mean that as a rule unbundling rules do not apply at all. In the present case the European Commission notes that the ownership and governance structure of BritNed *prima facie* appears such that no conflict with the full OU model as laid down in Article 9 Electricity Directive would have been encountered, should BritNed have applied for certification under that regime. The European Commission considers that on this basis, BritNed can be certified as a TSO compliant with the unbundling rules.

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<sup>83</sup> Commission's Opinion on Ofgem's draft certification decision for BritNed C(2013)2914 062-2013-UK; Commission's Opinion on ACM's draft certification decision for BritNed C(2014)3295 096-2014-NL



### **Case Study: ElecLink interconnector certification**

In September 2013, ElecLink submitted to CRE and to OFGEM a request for exemption of an electricity interconnector between France and Great Britain within the Channel tunnel, in accordance with Article 17 of the Electricity Regulation. ElecLink is owned 51% by STAR Capital and 49% by Groupe Eurotunnel.

Based on their assessment of the exemption application, OFGEM and CRE drafted a joint opinion on ElecLink's exemption request setting out the exemption decisions applying to their respective jurisdictions. In such opinion, OFGEM and CRE decided to: (i) grant a partial exemption from the ownership unbundling provisions for a period of 25 years; (ii) require ElecLink to implement an "amended ownership unbundling (OU) model". As part of such "amended OU model", the NRAs ordered ElecLink to comply with the ITO model with the exception of Article 22 (network development and powers to make investment decisions). The NRAs also specified that ElecLink would need to be certified in both countries before the start of the operation of the interconnector.

In its review decision C(2014) 5475 final of July 28, 2014, the European Commission considered that it was not clear that ElecLink could not meet the OU model. Therefore, the European Commission was of the view that ElecLink should first apply for certification under the OU model. If, based on the assessment conducted by the NRAs in the context of certification for OU, it was concluded that ElecLink did not meet the requirements of Article 9 Electricity Directive, ElecLink should then apply for certification under the "amended OU model" so as to comply "*with the provisions of Articles 13 and 14 of Directive 2009/72/EC or of Chapter V of Directive 2009/72/EC as a condition for the exemption from ownership unbundling*".

Consequently, OFGEM and CRE modified their initial decisions on August 28, 2014, providing that if one or both NRAs conclude that ElecLink does not meet the OU requirements, then ElecLink shall re-apply for certification under the "amended OU model" as defined above.

ElecLink's certification process shall start in the upcoming months.

### **Case Study – ITO Model - OMV**

The Austrian TSO "OMV Gas GmbH" was rebranded into "Gas Connect Austria GmbH" (GCA). A new logo, new signs and new font has been agreed in order to distinguish GCA from the VIU (e.g. OMV Gas & Power GmbH, EconGas GmbH). It has separate e-mail addresses and a different phone number; Business cards and letterheads follow the separate corporate identities. GCA has chosen the "group approach", which means that the brand includes the words "Ein OMV Unternehmen" ("A Member of the OMV Group") in small print wherever it appears.

In its opinion on the certification of the company the European Commission found that the words "A Member of the OMV Group" in the official communication and public appearance of GCA should be deleted as they created confusion as to the undertaking's independence from the VIU and that this practice was not in line with the Gas Directive.

E-Control considered that there was no danger of confusing GCA and the VIU or any part of it. The corporate identity is the sum of all features and signs that distinguishes one undertaking from another. The question that needs to be answered is whether the use of



signs, logos, images, names, characters, numbers, shapes, representations and presentations could lead to a misunderstanding as to which undertaking is concerned, i.e. whether the public could believe that the goods or services in question come from the same undertaking. In this, it is not relevant whether any misunderstandings have actually happened; what matter is whether they could. "The public" is to be understood as the average customer in terms of knowledge, attention and comprehension. A company's public appearance or corporate identity hinge on its name, logo, registered trademarks, advertising style and slogans, website, e-mail, customer newsletter, invoice and letterhead, and business cards. This means that any assessment of distinctiveness must particularly scrutinise the degree of similarity of the respective signs and logos used, and goods and services provided, the similarity of the sectors in which the respective companies operate, the distinctiveness of the respective brands, and any barriers to entry arising from the level of brand awareness.

This means that an umbrella model, whereby the group undertakings come together under a uniform family brand, is permitted. Instead, consumers perceive the brand as a single undertaking. On the other end of the scale, full separation of all trademark signs etc. is, of course, compatible with the law. There is no chance of confusing transmission system operator and VIU in this model because they carry completely different brands and CIs. The "group approach" is close to this complete separation. It applies the same principles but allows for including words that identify the undertaking as part of a company group. GCA has chosen to follow this approach.

The explanatory notes explicitly allow for including small print in the transmission system operator's brand that identifies the undertaking as part of a group undertaking. The rebranding described above (logo, communication activities) is sufficient to ensure that such confusion is avoided. The inclusion of the words "A Member of the OMV Group", printed in the new undertaking's CI font, is not suitable to create confusion as to the independence from the VIU.

### **Case Study Portugal: EDP Voting rights**

In accordance with the full ownership unbundling model provided for in Article 9 of the Directives, the TSOs "REN Rede Eléctrica Nacional" and "REN Gasodutos" (concessionaires for the continental Portuguese electricity and gas transmission grid, both fully owned by REN SGPS), have applied for certification for electricity and gas respectively.

REN Rede Eléctrica Nacional was initially a subsidiary of EDP group, which has a dominant position in the Portuguese electricity sector and has kept its position as main operator, in number of customers and consumption, generating, producing and selling electricity as well as natural gas through various fully-owned daughter companies. Despite the separation of the EDP Group company REN – Rede Eléctrica Nacional which took place on 2000, EDP group holds 5% of REN SGPS' capital.





In order to prevent EDP or other parties with interests in the supply and/or production of electricity and/or natural gas to exercise influence over TSOs and aiming to Article 9 of the Directives, the Portuguese NRA (ERSE) made this certification process conditional (among other measures) **(i)** until REN SGPS amended its articles of association in order to provide that the shareholders that directly or indirectly exercise control or any right over an undertaking performing any of the functions of production or supply are not entitled to exercise voting rights **(ii)** until the voting rights connected to the participation of EDP in REN SGPS were limited so that only its passive financial rights in relation to its shareholding, in particular the right to receive dividends, would remain and **(iii)** to an annual report of TSOs to ERSE highlighting the compliance with the full ownership unbundling model, including the minutes of all general meetings.

Pursuant to these conditions EDP declared its intention of non-voting rights at REN SGPS and, in actual fact, EDP group was not represented at the last REN SGPS General Meeting of April 17, 2015. Furthermore, REN SGPS amended its articles of association in order to comply with the mentioned conditional measure. According to these terms, ERSE considered the above mentioned condition related to its certification decision as fulfilled.

#### **Example of the ITO+ Model - Irish Case**

In Ireland, the functions of the TSO are shared between the Electricity Supply Board (hereafter "ESB"), the owner of the VIU, and Eirgrid plc (Eirgrid), an independent company. The Irish regulator's (CER) assessment is that the system of legislation, licence obligations, enforcement powers and the involvement of Eirgrid in transmission system operation arrangements applying in Ireland **brings benefits** when compared to the ITO model, and therefore qualifies for certification of ESB (onshore network owner) under Article 9(9) Electricity Directive.

The result of the decision is that EirGrid plc is designated as TSO as it operates the Single Electricity Market (SEM) together with its subsidiary SONI. The Irish regulator, CER, proposes that this ownership arrangement be clarified and enhanced in certain respects to further improve the independence of system operation in Ireland. Following Article 10(6) Electricity Directive, the European Commission must verify in this case that the arrangements being certified clearly guarantee more effective independence than the ITO model.

The European Commission considers that, if effectively implemented, the Irish arrangements which share the tasks of transmission system operation between Eirgrid and ESB can deliver more effective independence than the ITO model. The changes necessary to ensure that the Irish arrangements are effectively implemented in the future can and should be made within a reasonable period of time. CER should monitor and assess whether the necessary steps are being taken to ensure these changes are implemented in a reasonable period of time.



## About CEER

The Council of European Energy Regulators (CEER) is the voice of Europe's national regulators of electricity and gas at EU and international level. CEER's members and observers (from 33 European countries) are the statutory bodies responsible for energy regulation at national level.

One of CEER's key objectives is to facilitate the creation of a single, competitive, efficient and sustainable EU internal energy market that works in the public interest. CEER actively promotes an investment-friendly and harmonised regulatory environment, and consistent application of existing EU legislation. Moreover, CEER champions consumer issues in our belief that a competitive and secure EU single energy market is not a goal in itself, but should deliver benefits for energy consumers.

CEER, based in Brussels, deals with a broad range of energy issues including retail markets and consumers; distribution networks; smart grids; flexibility; sustainability; and international cooperation. European energy regulators are committed to a holistic approach to energy regulation in Europe. Through CEER, NRAs cooperate and develop common position papers, advice and forward-thinking recommendations to improve the electricity and gas markets for the benefit of consumers and businesses.

The work of CEER is structured according to a number of working groups and task forces, composed of staff members of the national energy regulatory authorities, and supported by the CEER Secretariat. This report was prepared by the Legal Task Force of CEER's Implementation, Benchmarking and Monitoring Working Group.

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