

**CEER**

**Council of European  
Energy Regulators**



## **Implementation of TSO Unbundling Provisions**

Fostering energy markets,  
empowering **consumers**.

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## Background

- Update to the 2016 Status Review on the implementation of TSO Unbundling and Status Review on the implementation of DSO Unbundling; which:
  - Provided an overview of the status of implementation of the unbundling provisions set out in the 3<sup>rd</sup> Energy Package on the basis of information provided by NRAs
  - represents the status of the TSO and DSO unbundling in the respective country as for February 2016
- The present (and rebranded) status review provides updated information gathered from 25 NRAs through a questionnaire in March 2018 and refined up to February 2019;
- Additionally, the report covers the main changes and novelties introduced in CEP



## Main focus of the report

- TSOs
  - ▶ 3rd country certifications;
  - ▶ cross-border certifications;
  - ▶ requirements for state-owned TSOs;
  - ▶ financial independence;
  - ▶ compliance issues;
  - ▶ investments,
  - ▶ joint-venture TSOs and joint undertake

## New challenges in the certification procedures

- Since the last CEER report from 2015, **21 cases** reported where the certification procedure was reopened by NRAs or a new certification process took place:
  - Changes in the ownership structure
  - Changes in the shareholders' percentage-share
  - Changes in the unbundling model
- ACER can be requested through the EU Commission
- There is a wide discretion in this respect
- Until now, there has been no ACER opinion on certification



## Result of certification decisions

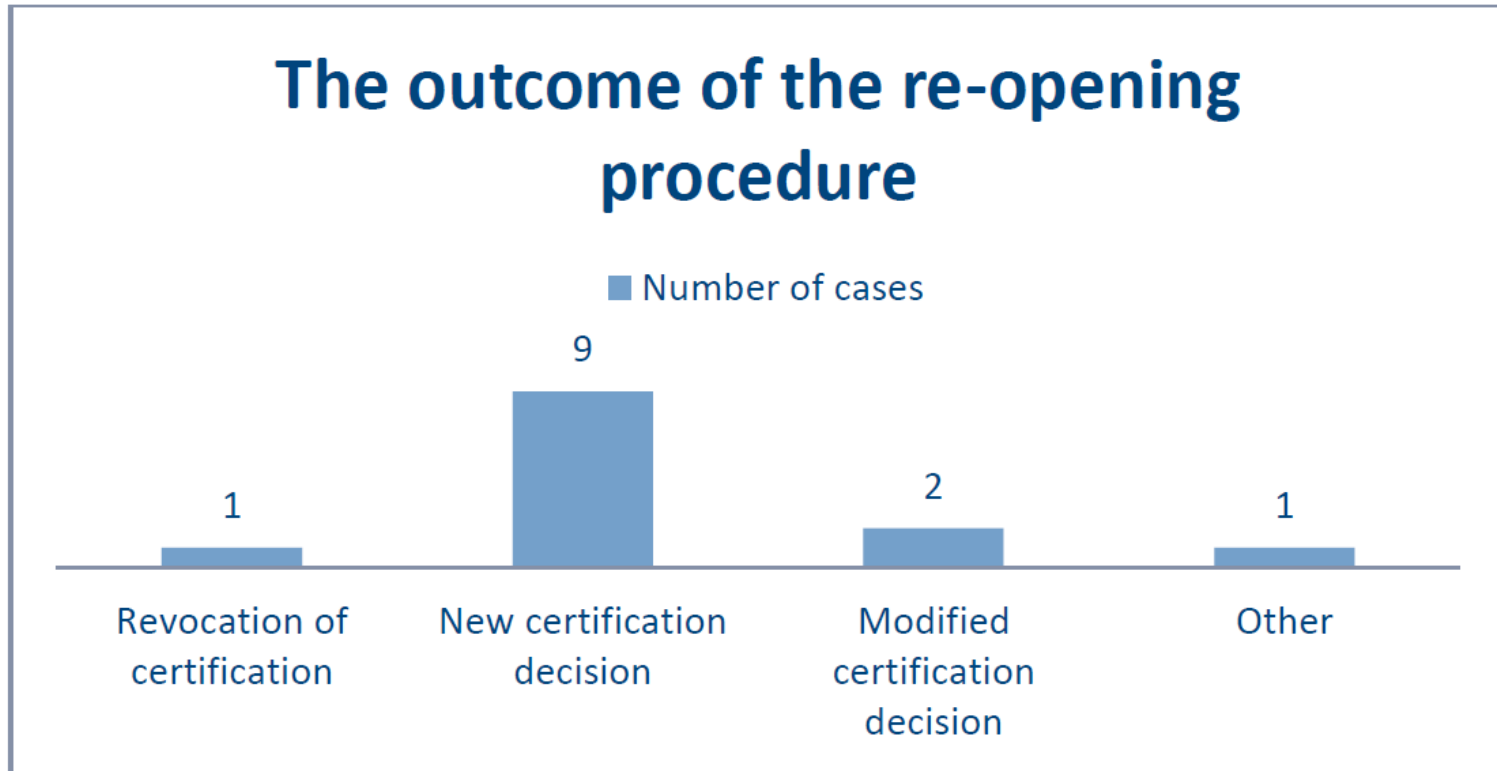


Figure 1: the outcome of the re-opening procedure

In approximately eight cases the review procedure is still ongoing

## Changing the unbundling model

- Three certification cases were related to changes regarding the **unbundling model of the TSO**:
  - Greece: TSO “ADMIE” changed from ITO model to OU model as a consequence of its changed ownership and shares structure
  - France: TSO “TIGF” (now called Teréga) also changed its unbundling regime from an ITO to OU in 2014
  - Ireland: the first certification of TSO “GNI” was issued as an ITO model following the divestment of the parent company Ervia, which resulted in the cessation of the supply and generation activities. In 2016 GNI applied for an OU certification that was granted the same year.
- In Great Britain, the certification decision for the Interconnector “IUK Ltd” was reviewed due to a change of the legal basis from a regime similar to an exempted interconnector to the OU regime.

## Changing in the ownership structure

- In various cases, the new certification decisions were triggered by changes in the **ownership structure** or in the shareholders' shares:
  - Great Britain: TSO "TCP OFTOS" has a new main shareholder
  - Great Britain: TSO "Greater Gabbard OFTO Limited" has now only one shareholder (from a third country) instead of 3
  - Spain: TSO "Reganosa" is not under control through Sojitz Cooperaton (Japanese company), as it has only 15 % and Sojitz Cooperaton may not appoint members of the supervisory board
  - Austria: The change of shares by the TSO "Gas Connect Austria GmbH" (GCA) has the consequences that it was certified under the ITO model.



## Changing in the ownership structure

- In various cases, the new certification decisions were triggered by **changes in the ownership structure or in the shareholders' shares:**
  - Greece: “SOCAR<sub>21</sub>” from Azerbaijan was the preferred bidder for 66% of the shares of the public TSO “DESFA”. The NRA issued one combined certification decision, for both “DEPA” on the basis of Article 10 of the Directive and “SOCAR” according to Article 11 (third country rule).
  - France: EDF reduced its share in RTE from 100% to 50.1%. Shares were sold to the public entity “Caisse des dépôts et consignation” and “CNP Assurances”.





## Changing in the ownership structure

- Several Member States have decided to not take ownership shares in their TSOs in the future
- They rather support the privatization of their TSOs
- We observe a trend of third-country participations in the EU TSOs so that the procedure of Article 11 of the Directives has to be properly applied

# Third-Countries Certification Regime

- A TSO shall be certified following the certification procedure laid down in Article 11 of the Directives
- Third countries shall be refused if:
  - the entity doesn't comply with the unbundling rules. This applies equally to OUs, ISOs and ITOs
  - the granting certification put at risk the security of energy supply of the Member State and the European Union
- The particularity of this procedure 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

## Third-Countries Certification Regime

- There were **three Electricity TSOs** and **two Gas TSOs** certification decisions in relation to 3rd countries with involvement of the European Commission and the concerned Member States.
- In two cases, the certification procedure has been carried out and a thorough assessment has been the priority of NRAs in cooperation with their Member States and the European Commission.
- Where certification is requested by a TSO controlled by a person of a 3rd country/ 3rd countries, **the NRA shall notify the case** to the European Commission.
- In addition, the NRA or another competent authority designated by the Member State, such as a ministry, shall examine independently the impacts of the certification on the national as well as the European security of supply.
- This assessment shall be part of the final certification decision by the NRA.

## New developments in the OU model

- Since the last report, several TSOs have decided to divest their shares in order to be certified under the OU model. Most of these TSO were previously certified as ITO
- According to new business models several major European TSOs that were certified as ITO divested their shares and decided to be certified under the OU model. The possibilities foreseen in the Directives to implement various unbundling models are efficiently used by the TSOs and allow them enough flexibility to organize and/or adapt their business smoothly to the unbundling requirements.
- State-owned TSOs reinforced measures to guarantee an effective separation of control and exercise of rights in most of the Member States. In most of the Member States the monitoring and control of the state-owned TSO are properly divided by law between different ministries

## Participation of financial investors

- Situations where on one hand a shareholder in a TSO also has participations in generation, production and/or supply activities, but on the other hand it can be demonstrated that in the specific circumstances of the case there is no incentive for this shareholder to influence the decision making in the TSO with the intention to favor its generation, production and/or supply activities to the detriment of other network users.
- To assist NRAs EU Commission has already issued in 2013 a paper to illustrate how to interpret and apply the ownership unbundling rules in such cases.
- The EU Commission underlines that it is for the TSO to be certified to bring to the attention of the NRA that even though one or more of the circumstances set out to in Article 9(1)(b),(c) and/or (d) of the Directives may arguably be present, no conflict of interest exists in the case.
- The burden of proof as to the absence of a conflict of interest or an incentive to exploit it lies with the TSO and its shareholders, and includes an obligation to submit all the relevant information.
- The regulatory authority has to take the presented information into account and include it in its assessment whether the unbundling rules of Article 9 of the Directives are complied with.
- **There were two cases where certified TSOs were owned by financial funds having shares in generation and/or supply.**

## New developments in the OU model

- Since the last report, several TSOs have decided to divest their shares in order to be certified under the OU model.  
Most of these TSO were previously certified as ITO.
- Some NRAs have recently issued additional requirements when certifying OU TSOs. Even if the provisions of the Directives are quite detailed, Member States can always add provisions if these are necessary to efficiently implement the EU provisions.
- The additional unbundling requirements put on the TSOs are so far compliant with the EU legislation even if it is somehow a burdensome process to maintain. In the majority of Member States no main obstacles were observed where additional conditions have been put on TSO unbundling requirements.
- The state-owned TSOs reinforced measures to guarantee an effective separation of control and exercise of rights in most of the Member States where they are established.
- In most of the concerned Member States the monitoring and control of the state-owned TSO are properly divided mainly by law between different ministries to avoid any influence in the decision making on TSO, production and supply activities.

## New developments in the ITO model

- Since 2015 some NRAs have imposed additional requirements for issuing ITO certification decisions
- E.g. in France, CRE asked EDF to change one of its representatives in RTE's supervisory board who was previously a member subject to independence rules in violation of Article 19(7) of the Electricity Directive.
- The Directives further require the ITOs to set up a TYNDP on an annual basis. This is also an instrument for NRAs to judge whether the establishment of TYNDPs is a guarantee for a sufficient degree of investment in the networks.

## New developments in the ISO model

- Although the ISO model is not a broadly used model, it has also been adapted through NRAs by imposing further requirements in issuing or through constant monitoring of the ISO certification





## New on joint ventures

- According to Article 7(4) of the Gas Directive and 6(4) of the Electricity Directive, where vertically integrated transmission system operators participate in a joint undertaking established for implementing such cooperation, the joint undertaking shall establish and implement a compliance programme:
  - sets out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded.
  - set out the specific obligations of employees to meet the objective of excluding discriminatory and anticompetitive conduct.
  - shall be subject to the approval of ACER



## European Commission's assessment in the certification decisions

- According to Article 10 of the Directives the explicit or tacit decision on the certification of a TSO is to be notified to the European Commission by the NRA, together with all the relevant information with respect to that decision.
- Staff working document of the European Commission provides practical guidance on how the Commission treat and assess NRAs' notifications of preliminary certification decisions
- NRAs discuss their intended notifications with the Commission prior to officially requesting it to examine the notification
- For transparency purposes the Commission publishes the non-confidential version of its opinions/decisions on its website
- The Commission closely assess whether and to what extent the unbundling requirements particularly for the ITO model are successful

## European Commission's assessment in the certification decisions

Seven cases where the Commission issued opinions during the certification process or after the adoption of the certification decisions requesting a revision of an NRA's decisions. In its opinions the European Commission addressed the following issues:

- Restriction of requirements concerning the management of the TSO;
- Restriction of requirements concerning members representing employees in the supervisory body of the TSO;
- Scope of the VIU and competences of the supervisory board;
- Generation and supply interests held by a TSOs' controllers/financial investors outside the EEA should be considered (this has since been amended in transposing into UK legislation);
- Generation and supply interests held by any of the TSOs' controllers/financial investors should be considered cumulatively, in terms of the total capacity held by a controller;
- Minimum capacity in terms of generation and supply interests, small or micro generation interests held by a TSO's controllers/financial investors to be considered;
- Passive financial rights related to a minority shareholding;
- The scope for a conflict of interest in relation to the generation interests held by a TSO's shareholders.

## Monitoring the application of the unbundling provisions

- The monitoring of the proper application of the unbundling provisions through the certifications decisions is divided between diverse entities:
  - A compliance officer is designated by the TSO and checks the application of the unbundling rules in the company. The compliance officer monitors the compliance of the TSO with all the unbundling provisions, meaning also assessing the implementation of informational and accounting unbundling within the company.
  - The NRAs are responsible for ensuring a continuous monitoring of the unbundling implementation.
  - The European Commission evaluates whether gaps are identified in the implementation of the unbundling provisions

## Monitoring the application of the unbundling provisions

All these entities ensure a continuous monitoring of the certification requirements in compliance with the legal provisions within and outside the TSOs.

- The monitoring of the compliance officer is done within the TSO with its result yearly published in a compliance report submitted for check to the NRAs.
- Compliance programs, which are available to all employees and are made public in some cases, are generally seen as an effective tool in helping to monitor TSOs' compliance with the unbundling requirements.
- NRAs have to monitor the compliance of TSOs particularly with the requirements of Article 9 of the Directives. They shall open a certification procedure to ensure such compliance.
- The monitoring activity of the NRAs is twofold: an active role in asking TSOs for information where unlawful behaviors have been detected and a passive role through the obligations put on TSOs to inform NRAs on all changes occurring in their structure.

# Monitoring

The instruments foreseen for NRAs to assess the implementation of unbundling (and sanction breaches) are listed in Article 37(5) of the Electricity Directive and Article 41(5) of the Gas Directive. NRAs' duties and powers can be summarized as follows:

- issue penalties for discriminatory behaviour favouring the VIU of up to 10% of the annual turnover either of the VIU or of the TSO, as the case may be;
- monitor communications between the TSO and other parts of the VIU in order to ensure compliance of the TSO with its obligations;
- monitor commercial and financial relations including loans between the ITO and other parts of the VIU;
- carry out inspections, including unannounced ones, on the premises of the ITO and other parts of the VIU; and
- assign all or specific tasks of the ITO to an independent system operator where the ITO persistently breaches its obligations under the Directives, in particular where it engages in repeated discriminatory behavior to the benefit of the VIU. The following measures have been taken by NRAs in cases of non-compliance with unbundling rules:
  - (i) impose sanctions/penalties;
  - (ii) revoke the certification; and/or
  - (iii) impose a modification of the certification.