

## **Background Paper on the main new elements of the Third Package for implementation in the Contracting Parties**

In July 2009 the European Union adopted the so-called third legislative liberalisation package. This third package repealed and replaced the legal acts that were to be implemented by the Contracting Parties with two directives and two regulations, that is Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks. These legal acts entered into force on 3 March 2011.

Taking into consideration the institutional framework and the development of the energy sectors of the Contracting Parties, discussion on amending the Energy Community law and implementing the newly adopted pieces of EU legislation in order to align the Energy Community legislative framework with the developments at the European Union level has been initiated. This discussion resulted in firstly, adoption of a Recommendation No 2010/02/MC-EnC of 24 September 2010 by the Ministerial Council on the implementation of amendments to the *acquis communautaire* on energy, and then its transformation into a legally binding decision. The latter, Decision No 2011/02/MC-EnC (hereinafter: MC Decision 2011), was adopted by the Ministerial Council at its meeting in Chisinau on 6 October 2011. According to this decision the Contracting Parties are legally bound to bring into force the laws, regulations and administrative provisions necessary to comply with the third package by 1 January 2015. The Decision also adapted the relevant Third Package legislation to the institutional framework of the Energy Community.

Since the implementation of the third legislative package brings significant changes and has complex implications for the energy sectors and the institutional frameworks of the Contracting Parties, it is important to plan the phases of transposition as early as possible. In that respect, a detailed Implementation Plan, outlining the different preparatory activities to be taken by the Contracting Parties as well as the institutions was adopted by the PHLG on 14 December 2011. One year after, at its meeting in December 2012, the PHLG reviewed its Implementation Plan for the Third Energy Package and deplored the significant delay in preparatory works. It concluded that the Secretariat is expected to present an initial report on elements to be transposed in order to achieve compliance with the Third Package at the next meeting of the PHLG.

On this ground, the Secretariat submits this report to the PHLG, which is a work in progress and will be continuously adapted. It will serve as a basis for the discussions during the workshop to be held in June 2013, taking into account the specificities of the Contracting Parties.

## 1. Promotion of regional cooperation (Article 6 Directive 2009/72/EC) and Regional solidarity (Article 6-7 Directive 2009/73/EC)

Directives 2009/72/EC and 2009/73/EC introduce new articles in relation to promotion of regional cooperation that did not exist in the previous *acquis*. They establish first of all an obligation for cooperation between the regulatory authorities of the Contracting Parties (Article 6(1) Directive 2009/72/EC and Article 7(1) Directive 2009/73/EC). The regulatory authorities, or the Contracting Parties themselves, shall promote and facilitate the cooperation of TSOs at a regional level with the aim of “*creating a competitive internal market in electricity, foster the consistency of their legal, regulatory and technical framework and facilitate integration of the isolated systems forming electricity islands that persist in the Energy Community.*” The regional cooperation on electricity matters concerns the cooperation in the geographical area defined under Title III of the Energy Community Treaty.<sup>1</sup>

Article 6(2) Directive 2009/72/EC and 7(2) Directive 2009/73/EC establish an obligation for cooperation of the Energy Community Regulatory Board with national regulatory authorities and TSOs to ensure the compatibility of regulatory frameworks with other European regions. Furthermore, there is an obligations on the Contracting Parties to ensure that TSOs have one or more integrated system(s) at regional level covering two or more Contracting Parties for capacity allocation and for checking the security of the network (Article 6(3) Directive 2009/72/EC and 7(3) Directive 2009/73/EC). Finally, where vertically integrated TSOs participate in a joint undertaking established for implementing such cooperation, the joint undertaking shall establish and implement a compliance program. That program shall set out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded and shall be notified to the Energy Community Regulatory Board (Article 6(4) Directive 2009/72/EC and 7(4) Directive 2009/73/EC).

According to MC decision, Article 12 of Regulation (EC) 714/2009 and of Regulation (EC) 715/2009, concerning regional cooperation of TSOs within ENTSO-E and ENTSO-G shall not be applicable. Instead Article 25 of MC Decision 2011 shall apply. The later article requires that TSOs shall “*promote operational arrangements in order to ensure the optimum management of the Energy Community network*” and that they shall “*promote the development of energy exchanges, the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions.*” They shall furthermore pay due attention to the merits, i.e. they shall aim at introducing implicit auctions for short-term allocations, and the integration of balancing and reserve power mechanisms.

In this context it is important noting the necessity to implement the European network codes<sup>2</sup> also in the Contracting Parties. The 9<sup>th</sup> Energy Community Ministerial Council in its conclusions agreed that “*the network codes [...] should be adopted in the Energy Community as soon as possible after adoption at EU level*”. Accordingly, Article 39 Directive 2009/72/EC and Article 43 Directive 2009/73/EC require the Energy Community “*to endeavour to apply*” the Guidelines adopted by the European Commission under Directive 2009/72/EC and Regulation (EC) No 714/2009 respectively Directive 2009/73/EC, and Regulation (EC) No 715/2009. The quoted Articles further foresee that “*these Guidelines [...] shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty*”.

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<sup>1</sup> Article 7 MC Decision 2011

<sup>2</sup> Network codes developed by ENTSO-E/G based on ACER framework guidelines according to Articles 6 and 8 of Regulation (EC) 714/2009 and of Regulation (EC) 715/2009 and made legally binding following comitology procedure on EU level.

The PHLG and ECRB in 2012 laid down the procedures for network code adoption in the Energy Community.<sup>3</sup> Application of European standards will remain crucial for the technical operation of interconnected systems and full integration of the pan-European energy market.

In relation to gas, a new article on regional solidarity is introduced with Directive 2009/73/EC ([Article 6 Directive 2009/73/EC](#)). This article requires cooperation between Contracting Parties in order to promote regional and bilateral solidarity, covering situations “*resulting or likely to result in the short term in a severe disruption of supply affecting a Contracting Party.*” It furthermore lists issues that such coordination shall include, thereby referring to coordination of national emergency measures from Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, as adapted by Ministerial Council Decision No. 2007/06/MC-EnC of 18 December 2007. Finally, there is an obligation for the Contracting Parties to inform the Energy Community Secretariat and the other Contracting Parties of such cooperation ([Article 6\(3\) Directive 2009/73/EC](#)).

## **2. Unbundling of TSOs and certification (Article 9 et seq. Directive 2009/72/EC and Directive 2009/73/EC) (Article 3 ER)**

### **2.1. Need for unbundling**

Vertically integrated companies are active in the generation, network and retail activities and this may result in vertical foreclosure for potential competition. Vertical integration of supply and transmission activities within one company risks creating incentives within the group to favour the supply business of the affiliates. This can happen in many ways such as: raising rivals' cost, withholding essential information, and by providing the information only to affiliated companies. A company active in generation or supply which at the same time owns transmission network assets can use its control over the network in order to prevent or limit competition in other areas. That distorts the level playing field and renders market entry more difficult, which could lead to reinforcing the market power of the incumbent. The latter would not have an incentive to invest in network expansion. In particular, the problems of discrimination with regard to third party access to the grids, information leakage between the network and supply companies and distortion of investment incentives are quite important.<sup>4</sup> The rules on unbundling aim at preventing companies which are involved both in transmission of energy and in generation and/or supply of energy from using their privileged position as operators of a transmission network to prevent or obstruct access of network users – of other than their affiliated companies - to their network. Unbundling requires the effective separation of activities of energy transmission from production and supply interests. It aims at ensuring non-discriminatory access to networks as an essential condition to allow fair competition between suppliers and stimulating investment in infrastructure, also when new interconnectors may negatively impact on the market share of the vertically related supplier.

- An important issue concerning the transmission networks is the access to the grid and access to interconnectors, which link the electricity grids between different Contracting Parties. Network operators which also have interests in the competitive activities have incentives and possibility to offer preferential treatment to their affiliates, which leads to discrimination of the other competitors. For example, costs which have to be paid by the generators to the network operators for enforcing the network may be substantial and render the generation project unviable. Furthermore, TSOs may require substantial documentation to be provided when the first application for connection to the grid is made, which is time requiring and substantial costs are needed. In addition to all this, costs for building new network connections can be high, because they can be done only by the TSO which has no incentive to choose the shortest and the most economical way for connecting new plants that would compete with its affiliates

<sup>3</sup> Procedural Act 2012/02-ECRB-EnC; Procedural Act 2012/01-PHLG-EnC

<sup>4</sup> See: Cabau, E. *Unbundling of TSOs* in Jones, C. EU Energy Law: Volume I – the Internal Energy Market – the Third Liberalisation Package, Claeys & Casteels, 2010 at pp.87-88

latter. On the other hand, refusal to grant an access to the network shall be done in a non-discriminatory manner and in case when there is no sufficient capacity.

- The decisions for *investment in the networks* which should be taken by the legally and functionally unbundled network operators are usually taken by the group as a whole, because of the close relationship between the network operator and the parent company. When taking decisions for investment, the parent company still takes into account the interests of the affiliate supplier, instead of taking into account only the needs for investment. This results in refraining from investment, because improved infrastructure would lead to increasing the competition, and the market power of the affiliate supplier would be endangered. Moreover, the network operators are reluctant to remove bottlenecks in the network if they favour the affiliated supply company and certain interconnector expansions do not even take place despite the requirements by third parties. This lowers the incentive for third parties to invest (for example, in new generation plant) if they are not sure that the network operator will treat them fairly, without discrimination and that their request for connection to the grid is not going to be met by costly and time consuming procedures. For example, in the period between 2001 and 2005, three German TSOs which were part of vertically integrated companies, generated congestion revenues of Euro 400-500 million, of which only Euro 20-30 million were invested in building new interconnectors.<sup>5</sup>
- *Information leakage* between the network and the competitive activities is still a practice in many vertically integrated companies, which means that the “Chinese walls” that are in place as information unbundling, are not well implemented. As a result, the affiliated supply and generation branches have access to confidential information from the network operators which gives them advantages with regard to their competitors. For example, the employees of different branches of the vertically integrated company still share many common facilities, go to the same company restaurant which allows informal exchange of information. They sometimes even share the same IT services, or even copying e-mails between the employees of formally unbundled branches continues. The personnel still perceives them as employees of the same group and moving from the management of one to the other branch is present and has effect on the decision making process in the network branch. The management of the supply company is represented at the parent level and has access to confidential and important information of the transport company. The network operator is informed when a customer would like to switch a supplier, because the new supplier needs access to the network. The network operator finds a way to inform its affiliate supplier, and as a result customers are prevented from switching and market entry for new competitors becomes difficult.<sup>6</sup>

## 2.2. General principles of unbundling

The Directives 2009/72/EC and 2009/73/EC give to the Contracting Parties choice between three different models of unbundling: ownership unbundling; Independent System Operator (ISO) and Independent TSO (ITO). Even though these three options provide for different degrees of separation, they should all be *“effective in removing any conflict of interests between producers, suppliers and TSOs, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities.”*<sup>7</sup>

The three unbundling options apply to both electricity and gas sector, and there are no stricter rules for each of them. Even though the three models are on an equal footing in the Directives and the Contracting Parties could opt for one of the three, from the text of the Directives it is obvious that the ownership unbundling is the rule, and **Article 9(8) of Directive**

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<sup>5</sup> European Commission, Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) and its Technical Annex SEC(2006) 1724, Brussels, 10.01.2007, COM(2006) 851 final, paras. 541-544.

<sup>6</sup> Lowe, P. (Director-General, DG Competition), Pucinskaite, I., Webster, W., Lindberg, P., *Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry*, No.1, Spring, Competition Policy Newsletter, 23-34, (2007), available at: [http://ec.europa.eu/comm/competition/publications/cpn/cpn2007\\_1.pdf](http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf).

<sup>7</sup> Recitals 12 of Directive 2009/72/EC and 9 of Directive 2009/73/EC

2009/72/EC and Directive 2009/73/EC stipulates that the ISO and/or ITO model are alternative options in case the country decides not to apply ownership unbundling.

ISO / ITO can be chosen only if vertically integrated company existed in the respective Contracting Party on 6 October 2011.<sup>8</sup> Moreover, once ownership unbundling has been chosen, it is not possible to go back to an ISO or an ITO model, if on the day of entry into force of the Directives the transmission system did not belong to a vertically integrated undertaking. Moreover, since the Contracting Parties cannot prevent a vertically integrated undertaking owning a transmission system from complying with the requirements of ownership unbundling (Article 9(11) Electricity and Gas Directives) – even if they designate ISO or ITO, they must also transpose the provisions on ownership unbundling into their national law.<sup>9</sup>

In order to ensure a level playing field, an undertaking performing any of the functions of generation or supply in a Contracting Party must comply with the rules on ownership unbundling as regards the acquisition of rights in a TSO in another Contracting Party having opted for ownership unbundling. According to Article 43 Directive 2009/72/EC and 47 Directive 2009/73/EC<sup>10</sup> Contracting Parties may take additional measure for ensuring level playing field. Those measures should nevertheless be compatible with Energy Community law, proportionate, non-discriminatory and transparent and shall be put into effect only following the notification to the Energy Community Secretariat. The Secretariat shall issue an opinion on the compliance of such measures.

The provisions on unbundling require structural separation between transmission activities and production/supply activities of vertically integrated companies. Those provisions have to be complied with the Contracting Parties not later than 1 June 2016.<sup>11</sup> In case a transmission system is controlled by an entity from a third country (Article 11 of Directive 2009/72/EC and Directive 2009/73/EC), the deadline for certification is 1 January 2017.<sup>12</sup> If the transmission system on 6 October 2011 was not part of a vertically integrated company, the deadline for implementation of the unbundling provisions is 1 June 2017.<sup>13</sup>

The provision on derogations from unbundling rules (Article 44(2) Directive 2009/72/EC, Article 49 Directive 2009/73/EC and subparagraph (a) of the first paragraph and the second subparagraph of Article 30 of Regulation (EC) 715/2009) are not applicable to the Contracting Parties pursuant to Article 24 MC Decision 2011.

### 2.3. Types of unbundling

#### a) Ownership unbundling (OU) – Article 9 of Directive 2009/72/EC and Directive 2009/73/EC

Ownership unbundling means separation of the ownership of the assets between the network and the production and supply activities of the previously vertically integrated company. It requires creation of a separate company which owns and operates the networks and significant shareholding by one type of a company in the other is not allowed. The TSO owns and manages the transmission network (Article 9(1)a) Directive 2009/72/EC and Directive 2009/73/EC). In case ownership unbundled TSOs create a joint venture that acts as a TSO in two or more Contracting Parties, they can keep ownership of the network (Article

<sup>8</sup> Article 9(8) Directive 2009/72/EC and Directive 2009/73/EC

<sup>9</sup> European Commission, Staff Working Paper, Interpretative Note on Directives 2009/72/EC and 2009/73/EC - the Unbundling Regime, 22.01.2010, p.5 (hereinafter: EC, *Unbundling Regime*, 2010)

<sup>10</sup> As adapted under Article 23 MC Decision 2011

<sup>11</sup> Article 8 MC Decision

<sup>12</sup> Article 3 MC Decision 2011

<sup>13</sup> Article 8(1) MC Decision 2011

9(55) Directive 2009/72/EC and Directive 2009/73/EC). Ownership unbundling means that the shareholders of the supply companies based in the same or in another Contracting Party, or a third country, cannot have significant shareholding of the network operator in the Member State where they provide their supply services and vice versa. However, it is possible that a person or company holds shares in both, a network operator and a supply undertaking as long as these shares represent a non-controlling minority interest.<sup>14</sup> Minority shareholding can only provide financial rights - the right to receive dividends - but cannot confer any right to take part in the decision-making process of the company or exercise any influence on the company (Article 9(2) Directive 2009/72/EC and Directive 2009/73/EC).<sup>15</sup>

The rules on unbundling apply both to public and private companies. Ownership unbundling does not require privatisation of the supply or network companies. In countries where the vertically integrated companies are still partially or completely state-owned, transmission assets could stay public but, in order to guarantee the independence of the TSO towards the generation and supply companies, different ministerial departments could be responsible for the newly separated activities.<sup>16</sup> Where the state is the owner of an integrated company a possible solution – in order to comply with the rules on ownership unbundling - would be to transfer the shares of one of the activities (the network operator or the supply company) to a separate legal person – another public body. This could be a foundation, independent agency, two different Ministries... (i.e. two public bodies pursuant to Article 9(6) Directive 2009/72/EC and Directive 2009/73/EC). If the Contracting Parties chose this option, they will need to be able to demonstrate that the requirements of ownership unbundling are enshrined in national law and are duly complied with, which will have to be assessed on a case-by-case basis. The result has to be that the decision making process of the network operators and supply companies are entirely separate.<sup>17</sup> On the other hand, if the vertically integrated company is privately owned, it could also not be required to sell its assets, but it could split the shares of the integrated companies into shares of the network company and of the remaining business. The shareholders may then keep shares of both companies, as long as it does not give them control over any one of them.<sup>18</sup> These arguments clearly show that ownership unbundling is not an expropriation of the network operators, requiring restriction of fundamental property rights. Taking into consideration that in virtually all Contracting Parties, both in electricity and gas, the transmission and generation and/or supply activities are controlled by public companies, the Secretariat has prepared an initial analysis of the ownership structure in the energy sectors in the Contracting Parties.

When ownership unbundling is implemented, the owner of a transmission system shall act as a TSO. The same person cannot exercise control over a generation or supply company and at the same time exercise control or any right over a transmission system, and vice versa.<sup>19</sup> The same person cannot appoint board members of a TSO and exercise control or any right over a generation or supply company (Article 9(1)c) Directive 2009/72/EC and Directive 2009/73/EC). Finally, the same person cannot be a member of the board of a TSO and of a generation or supply company (Article 9(1)d) Directive 2009/72/EC and Directive 2009/73/EC).

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<sup>14</sup> European Commission, Energising Europe: A real market with secure supply, Brussels, 19.09.2007, MEMO/07/361.

<sup>15</sup> For examples of ownership unbundling when there is a holding company or a direct capital link between supplier and a TSO, see: CABAU, E. *Unbundling of TSOs*, at pp.133-139

<sup>16</sup> European Commission, DG TREN, Commission Staff Working Document Accompanying the legislative package on the internal market for electricity and gas COM(2007) 528 final COM(2007) 529 final, COM(2007) 530 final, COM(2007) 531 final, COM(2007) 532 final, SEC(2007) 1180: Impact Assessment, SEC(2007) 1179, p.22

<sup>17</sup> European Commission, Questions and answers: Energy policy, Brussels, 19.09.2007, MEMO/07/362.

<sup>18</sup> ERGEG, 3rd Legislative Package Input, Paper 1: Unbundling, Ref: C07-SER-13-06-1-PD, 05.06.2007.

<sup>19</sup> The term “control” is defined in the Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings. For details on interpretation of the terms “control”, “person” and “rights” see: EC, *Unbundling Regime*, 2010, p.8-9

Compliance with ownership unbundling means that the undertaking which is the owner of the transmission system also acts as the TSO, and is as a consequence 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>20</sup>

*b) Independent System Operator (ISO) – Articles 13-14 Directive 2009/72/EC and 14-15 Directive 2009/73/EC; the regulatory oversight - 37(3) Directive 2009/72/EC and 41(3) Directive 2009/73/EC*

The Contracting Parties could designate an ISO on a proposal by the transmission system owner. The designation shall be subject to the opinion of the Energy Community Secretariat upon certification of the ISO by the national regulatory authority ([Article 13\(1\) Directive 2009/72/EC](#) and [14\(1\) Directive 2009/73/EC](#)). When ISO model is chosen, the ownership of the transmission grids remain with the vertically integrated company, but technical and commercial operation of transmission system is performed by the ISO, acting as a TSO. ISO can be viewed as a detailed form of behavioural regulation.<sup>21</sup> The ISO must be independent from supply or generation interests and must ensure the same effectiveness of the separation of activities as ownership unbundling. Specific rules ensuring its independence that should be complied with are defined in [Article 13\(2\) Directive 2009/72/EC](#) and [14\(2\) Directive 2009/73/EC](#).

The ISO shall act as a TSO, which means that it shall be granted all tasks and obligations applicable to a TSO ([Article 13\(4\) Directive 2009/72/EC](#) and [14\(4\) Directive 2009/73/EC](#)). The ISO shall be responsible for granting and managing third-party access, including the collection of access charges, congestion charges, and payments under the inter-TSO compensation mechanism. It shall moreover have a strong say in investment planning and takes investment decisions by being responsible for operating, maintaining and developing the transmission system, and for ensuring the long-term ability of the system to meet reasonable demand through investment planning (including construction and commissioning of the new infrastructure).<sup>22</sup>

The transmission system owner is legally and functionally unbundled from the vertically integrated company. It has specific tasks listed in [Article 13\(5\) Directive 2009/72/EC](#) and [14\(5\) Directive 2009/73/EC](#), which include an obligation for financing the investments decided by the ISO or at least giving its agreement on financing by an interested third party or the ISO itself. However, the directives underline that the transmission owner is not responsible for granting and managing third party access or for investment planning.

Significant regulatory involvement is needed through stricter regulation and permanent monitoring ([Article 37\(3\) Directive 2009/72/EC](#) and [41\(3\) Directive 2009/73/EC](#)). Those regulatory duties and powers are additional to the regular duties of the regulatory authorities regarding transmission system operators under Article 37(1) Directive 2009/72/EC and Article 41 Directive 2009/73/EC, which means that the duties specific to ISO monitoring apply in addition to duties regarding regulatory oversight over ownership unbundled TSO.<sup>23</sup> In particular, the regulatory authorities shall monitor the transmission owner's and ISO compliance with their obligations, as well as the relations and the communications between the

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<sup>20</sup> EC, *Unbundling Regime*, 2010, p.8

<sup>21</sup> Biggar, D. *When should regulated companies be vertically separated* article in Amato, G., Laudati, L., *The anticompetitive impact of regulation*, Edward Elgar, 171-197, 2001

<sup>22</sup> Article 13(4) Directive 2009/72/EC and 14(4) Directive 2009/73/EC

<sup>23</sup> Cabau, E. *Unbundling of TSOs*, at p.151

two entities. The regulatory authority also acts as a dispute settlement authority between them. It also has to approve the investment planning decided by the ISO in advance of its financing by the transmission owner, and to ensure that the access tariffs collected by the ISO include remuneration for the network owner. The regulatory authority shall also monitor the use of congestion charges collected by the ISO pursuant to [Article 16\(6\) Regulation \(EC\) 714/2009](#). Moreover, the national competition authorities are granted powers to effectively monitor compliance of the transmission system owner with its obligations ([Article 13\(6\) Directive 2009/72/EC](#) and [14\(6\) Directive 2009/73/EC](#)).

When ISO is appointed, the directives require legal and functional unbundling of the transmission system owner from the vertically integrated company ([Article 14 Directive 2009/72/EC](#) and [Article 15 Directive 2009/73/EC](#)). Moreover, [Article 31 of Directive 2009/72/EC](#) and [Directive 2009/73/EC](#) imposing an obligation for unbundling of accounts continue to apply, and until 1 January 2015, separate accounts for supply activities for eligible customers and supply activities for non-eligible customers shall be kept.<sup>24</sup>

*c) Independent TSO (ITO) – Articles 17-23 Directive 2009/72/EC and Directive 2009/73/EC; the regulatory oversight - 37(5) Directive 2009/72/EC and 41(5) Directive 2009/73/EC*

As with the ISO, if on 6 October 2011 the transmission system was part of a vertically integrated company, the Contracting Parties could decide not to implement ownership unbundling but to establish an ITO.

Under the ITO model, the supply company can own and operate the network. If it is part of the vertically integrated company, the management of the network must be done by a subsidiary of the parent company, which can make all financial, technical and other decisions independently from the parent company. The ITO must have a strong say in investment planning in order to raise money on the capital market.

Detailed rules on independence of ITO cover rules concerning assets, equipment, staff and identity; effective decision making rights; independence of management; supervisory body.

This is the model that requires the highest level of regulatory involvement through heavy regulation and permanent monitoring. A supervisory body (Independent management Compliance officer) is in charge of preserving the financial interest of the mother company without being involved in the day-to-day business.

*i. Rules on assets, equipment, staff and identity of the ITO*

The Directives require ITO to be autonomous. [Article 17\(1\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#) require that ITO is equipped with all financial, technical, physical and human resources necessary to fulfill its obligations and to carry out the activity of electricity or gas transmission.

The Electricity and Gas Directives provide for specific rules as regards the assets, the personnel and the financial resources that are necessary for fulfilling the tasks and obligations of the ITO relating to the activity of electricity or gas transmission. In particular, the ITO must own the assets - not only the network, but also any other assets necessary for the transmission activity ([Article 17\(1\)\(a\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)). It also must employ the personnel necessary for performing the core activities of the ITO, including management and network operation ([Article 17\(1\)\(b\) Directive 2009/72/EC](#) and

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<sup>24</sup> Article 15 MC Decision, 2011



**Directive 2009/73/EC**). In addition, corporate services (legal services, accountancy and IT services) which are considered to constitute part of the day-to-day core activities (**Article 17(1)(h) Directive 2009/72/EC and Directive 2009/73/EC**), as well as specific services relating to development and repair of the network must be provided by qualified staff members employed by the ITO. Only as an exception, the ITO could conclude contracts for services with third-party service providers. The ITO could outsource however, activities that do not directly concern the activity of electricity or gas transmission, such as office cleaning services or office security services. There is a specific provision prohibiting leasing of personnel and contracting of services of the ITO by the vertically integrated undertaking (**Article 17(1)(c) Directive 2009/72/EC and Directive 2009/73/EC**). On the other hand, provision of services by the ITO to other parts of the vertically integrated undertaking is permitted only in specific circumstances, in particular if there is no discrimination of other system users, if there is no restriction of competition in generation or supply and if the regulatory authority has approved the provision of the services concerned. Furthermore, the ITO is not allowed to share IT systems or equipment, physical premises and security access systems with any other part of the vertically integrated undertaking, as well as to use the same consultants and auditors (**Article 17(5) and (6) Directive 2009/72/EC and Directive 2009/73/EC**).

The activities of electricity or gas transmission are defined in **Article 17(2) Directive 2009/72/EC and Directive 2009/73/EC**, and are additional to the tasks of a TSO under Article 12 Electricity Directive and Article 13 Gas Directive. Those tasks include representation of the TSO, granting and managing third-party access, collection of access charges and investment planning. This list however is indicative and not exhaustive.

As regards financing, **Article 17(1)(d) Directive 2009/72/EC and Directive 2009/73/EC** provide for a general rule that “*appropriate financial resources for future investment projects and/or for the replacement of existing assets must be made available to the ITO by other parts of the vertically integrated undertaking in due time.*” These resources have to be approved by the Supervisory Body and the ITO must inform the regulatory authority of these financial resources.<sup>25</sup>

Under **Article 17(4) Directive 2009/72/EC and Directive 2009/73/EC**, the ITO must not, in its corporate identity, communication, branding and premises, create confusion in respect of the separate identity of other parts of the vertically integrated undertaking. **Article 17(3) Directive 2009/72/EC and Directive 2009/73/EC** require the ITO to be organised in the legal form of a limited liability company.

Finally, **Article 31 of Directive 2009/72/EC and Directive 2009/73/EC** imposing an obligation for unbundling of accounts apply as well.

## *ii. Independence of the ITO, its management and staff*

**Article 18 Directive 2009/72/EC and Directive 2009/73/EC** lay down the general principle that the ITO must have effective decision-making rights, independent from any other part of the vertically integrated undertaking, with respect to assets necessary to operate, maintain and develop the transmission system. This implies a general requirement of independence as regards network ownership and operation. In particular, any other part of the vertically integrated undertaking is not allowed to intervene in the day to day activities and management of the network, and in relation to activities of the ITO for the preparation of the ten-year network development plan (**Article 18(4) Directive 2009/72/EC and Directive 2009/73/EC**). Moreover, the ITO must have the power to raise money on the capital market (**Article 18(1)(b) Directive 2009/72/EC and Directive 2009/73/EC**). Subsidiaries of the

<sup>25</sup> EC, *Unbundling Regime*, 2010, p.16

vertically integrated undertaking performing functions of generation or supply cannot have any direct or indirect shareholding in the ITO and vice versa (Article 18(3) Electricity and Gas Directives). In practice this means that the supply subsidiary and the ITO can be positioned under a common parent company, but cannot be a direct or indirect subsidiary of each other.<sup>26</sup> All commercial and financial relations between the ITO and other parts of the vertically integrated undertaking must comply with market conditions and must be revealed to the regulatory authority upon request (Article 18(6) Directive 2009/72/EC and Directive 2009/73/EC) whereas those giving rise to a formal agreement must be submitted for approval to the regulatory authority (Article 18(7) Directive 2009/72/EC and Directive 2009/73/EC).

Article 19 Directive 2009/72/EC and Directive 2009/73/EC set out rules on the independence of the management (persons responsible for the top management) of the ITO. Depending on the form of the company and its statutes, it covers the members of the executive management of the ITO — which typically will include the Chairman, the Managing Director, and/or Chief Executive Officer — and/or any member of a board having decision-making powers other than members of the Supervisory Body of the ITO.<sup>27</sup>

The Supervisory Body of the ITO is in charge of taking all decisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office of the management of the ITO and they must be notified to the regulatory authority. The regulatory authority must ensure that the management of the ITO is professionally independent from other parts of the vertically integrated company and that its working conditions can actually ensure such independence (Article 19(1) and (2) Directive 2009/72/EC and Directive 2009/73/EC). In addition to the control of the regulatory authority, Article 19 Electricity and Gas Directives lay down specific rules aimed at ensuring that any conflict of interest is avoided as regards the management, but also as regards the employees, of the ITO.<sup>28</sup>

### *iii. Supervisory Body, Compliance programme and compliance officer*

A key requirement as regards the ITO model is the setting-up of a Supervisory Body which shall be composed of members representing the vertically integrated company, third party stakeholders and members of other interested parties, such as employees of the TSO (Article 20(2) Directive 2009/72/EC and Directive 2009/73/EC). In addition to the decisions concerning the management of the ITO, the Supervisory Body is in charge of taking the decisions that may have a significant impact on the value of the assets of the shareholders within the ITO, including decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the ITO and the amount of dividends distributed to shareholders. However, the Supervisory Body cannot take decisions regarding day-to-day activities of the ITO and the management of the network, or with the preparation of the ten-year network development plan (Article 20(1) Directive 2009/72/EC and Directive 2009/73/EC). Article 20(3) Directive 2009/72/EC and Directive 2009/73/EC includes rules for avoiding any conflict of interest of the members of the Supervisory Body.

The ITO is under the obligation to establish and implement a compliance programme, which shall be approved by the regulatory authority, in order to ensure that discriminatory conduct is excluded. Moreover, a compliance officer is to be appointed by the Supervisory Body, subject to approval by the regulatory authority. The compliance officer is specifically in charge of ensuring observance of the compliance programme and has a general role as

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<sup>26</sup> European Commission, Commission Staff Working Paper, Directives 2009/72/EC and 2009/73/EC - on the Unbundling Regime, 22.01.2010, p.17

<sup>27</sup> Cabau, E. *Unbundling of TSOs*, at p.167

<sup>28</sup> Article 19(3) - (8) Electricity and Gas Directives

regards guaranteeing that the ITO is independent in practice and does not pursue discriminatory conducts ([Article 21 Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)).

The compliance officer is subject to the same independence rules as the management of the ITO. Its tasks are specified in [Article 21\(3\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#) and include monitoring the implementation of the compliance programme, reporting annually to the regulatory authority and issuing recommendations regarding its implementation to the Supervisory Body. It also reports to the regulatory authority on commercial and financial relations between the vertically integrated undertaking and the TSO. The compliance officer can attend all meetings of the management or administrative bodies of the TSO, as well as those of the Supervisory Body and the general assembly ([Article 20\(8\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)) and it shall have access to all relevant data ([Article 20\(10\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)).

#### *iv. Network development and powers to make investment decisions*

In order to ensure that the necessary investments are made in the network, the directives impose specific obligations on the ITO as regards network development and investment decisions. The ITO is under the obligation to submit annually a ten-year network development plan to the regulatory authority, which must indicate to market participants the main transmission infrastructure that needs to be built or upgraded over the next ten years, together with a time frame. It has to contain all the investments already decided and it must identify the new investments which need to be executed in the next three years ([Article 22\(1\) and \(2\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)). The regulatory authority is under the obligation to consult all actual or potential system users on the ten-year network development plan in an open and transparent manner and must publish the result of the consultation process, and it must examine whether the plan covers all investment needs identified during the consultation process. The regulatory authority may require the ITO to amend its ten-year network development plan ([Article 22\(5\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)).

If the ITO does not execute an investment, the Contracting Party must ensure that the regulatory authority is required to either oblige the ITO to execute the investments in question; to organise a tender procedure open to any investors for the investment in question; or to oblige the ITO to accept a capital increase to finance the necessary investments and allow independent investors to participate in the capital ([Article 22\(7\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)). Through the implementation of these measures the Contracting Parties have an obligation to ensure that the investment in question is made.<sup>29</sup>

[Article 23 Directive 2009/72/EC](#) and [Directive 2009/73/EC](#) additionally provide for specific rules concerning the connection to the transmission system of new power plants, storage facilities, LNG regasification facilities, and industrial customers, in order to ensure that the ITO does not discriminate competitors of the generators part of its vertically integrated company.<sup>30</sup> In fact, access cannot be refused due to possible future limitations to network capacity or additional costs related to capacity increase ([Article 23\(2\) and \(3\) Directive 2009/72/EC](#) and [Directive 2009/73/EC](#)).

#### *v. Specific duties of the regulatory authority*

Even more significant regulatory involvement than for the ISO is needed through stricter regulation and permanent monitoring when an ITO model is implemented ([Article 37\(5\)](#)

<sup>29</sup> EC, *Unbundling Regime*, 2010, p.21

<sup>30</sup> Cabau, E. *Unbundling of TSOs*, at p.179

Directive 2009/72/EC and 41(5) Directive 2009/73/EC). Similarly to the ISO, those regulatory duties and powers are additional to the regular duties of the regulatory authorities regarding transmission system operators under Article 37(1) Directive 2009/72/EC and Article 41 Directive 2009/73/EC.<sup>31</sup> Those powers increase the power to control the behavior of the ITO and to sanction any discriminatory behavior. In particular, the regulatory authority shall monitor communications between the ITO and other parts of the vertically integrated undertaking and shall monitor commercial and financial relations between them, as well as approve all commercial and financial agreements between them. It shall act as dispute settlement authority between the ITO and the vertically integrated company. The regulatory authority shall have a right to carry out inspections, but also to issue penalties for discriminatory behaviour favouring the vertically integrated undertaking. Such penalties should be calculated on the basis of the annual turnover either of the vertically integrated undertaking or of the ITO. Finally, and only in case of persistent breach by the ITO of its obligations, the regulatory authority assign all or specific tasks of the ITO to an ISO.

*d) Comparison of the three models of unbundling; view from the academia and empirical studies*

A number of large integrated companies in the EU have already chosen the ownership unbundling even before the third package entered into force. In 2007 already 13 Member States had unbundled in ownership terms the transmission operators in the electricity sector, and 6 out of the relevant 21 Member States had chosen ownership unbundling in the gas sector.<sup>32</sup>

Long before the ownership unbundling was implemented as a binding legislation in the EU *acquis*, according to the OECD, it was important that there is an option to require divestiture (ownership unbundling) if the ISO does not deliver the appropriate operational and investment outcome due to the fact that no ISO has operated long time in order to view its effects in practice.<sup>33</sup> Although the benefits felt in the Member States, which were in an advanced stage of the liberalization of the electricity markets depend on many interrelated factors, the three case studies presented by ERGEG<sup>34</sup> on UK, Portugal and Italy are helpful for comparing the advantages and disadvantages of the ownership unbundling and the ISO.

*The ISO model in Scotland was found to have a number of disadvantages compared to ownership unbundling in England and Wales. The interface between the operator and asset owner is complex and must be regulated closely. In Portugal, there were no visible improvements when legal ownership was in place, and it was only with full ownership unbundling that consumers of electricity benefited from higher levels of investment, improved quality and lower prices. Italy which originally had an ISO model, due to the difficulties in coordination between the asset owner and operator, in 2005 moved to ownership unbundling resulting in a 30% increase in investment, and a doubling in the number of authorisations.*

Furthermore, according to the conclusions of a case study on the Belgian electricity market, the ownership unbundling was proposed to be part of the new EU legislations if “a level playing field and a competitive electricity market is the objective”.<sup>35</sup> In fact, even though the

<sup>31</sup> Cabau, E. *Unbundling of TSOs*, at p.151

<sup>32</sup> EU member states with full ownership unbundling for their electricity TSOs are: Czech Republic, Denmark, Finland, Italy, Lithuania, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. In the gas sector, the TSOs of Denmark, the Netherlands, Portugal, Romania, Spain and the UK are fully ownership unbundled. See: European Commission, Impact Assessment, SEC(2007) 1179, p.22

<sup>33</sup> OECD, *Regulatory Reform in the Electricity Industry: The United States* (Paris: OECD, 1999) cited at p.194 in Amato, G., Laudati, L. “The anticompetitive impact of regulation” Edward Elgar, 2001.

<sup>34</sup> ERGEG, 3rd Legislative Package Input, Paper 1: Unbundling, Ref: C07-SER-13-06-1-PD, 05.06.2007.

<sup>35</sup> Pepermans, G., Willems, B., *Network unbundling, ownership structure and oligopolies: A case study for the Belgian electricity market* Vol.1, No. 2, Competition and Regulation in Network Industries, 231-262, (2006).

ownership unbundling reduces the welfare in the short term, it creates better incentives for new entrants in the generation markets.<sup>36</sup> The case studies in number of countries (UK and the Nordic countries among them), done by Michael Politt,<sup>37</sup> confirmed the benefits from the ownership unbundling as well. Firstly, it increases the competition in generation activities. Furthermore, it has a positive effect on investment in generation and in the network infrastructure. Finally, ownership unbundling improves the information flow and prevents information leakage between the network operator and the competitive activities.

In addition, there is also econometric evidence for the benefits of the ownership unbundling. According to a study done by Copenhagen Economics in 2005 for DG Internal market,<sup>38</sup> high level of unbundling leads to lower prices. Another econometric study of 2005<sup>39</sup> confirmed the argument that the ownership unbundling is beneficial with regard to the incentives for investment. Finally, in a study comparing the responsiveness of the electricity prices to cost changes in Germany and UK, the conclusion that the lack of ownership unbundling is one of the factors explaining the competitive problems in the German market was achieved.<sup>40</sup>

When it comes to the other models, besides ownership unbundling, under both ITO and ISO option the integrated company retains the ownership of gas and electricity networks. This is also stated in the preamble of Directive 2009/72/EC (para.16), which reads *"the setting up of a system operator or a transmission operator that is independent from supply and generation interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place."* Even though ownership solution might be the same, difference between the two models arises regarding the management of the grids.

Under the ISO model the TSO is to be split into a transmission owner and an ISO. The transmission owner owns the network and can remain within the integrated company, whereas the ISO shall be legally independent. In this model, the integrated company loses the control over the management of the network assets and all the operation, maintenance, commercial and investment decisions are left to the ISO. The ITO model is substantially different as it allows that the network operator remains part of the same group as the supplier and generators. Under this model the integrated company can also operate the network *via* its subsidiary. This subsidiary company manages the network independently from the parent company, but differently from the ISO model the commercial and investment decisions remain under the parent company control. However, strict rules are in place for safeguarding the autonomy and managerial independence of the transmission company.

The ISO model requires approvals by the regulatory authority of investment arrangements and of the investment planning and multi-annual network development plan between the ISO and the transmission owner. In the ITO model, this control by the regulatory authority goes

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<sup>36</sup> See also two studies on the Dutch electricity market: Mulder, M, Shestalova, V., *Costs and benefits of vertical separation of the energy distribution industry: the Dutch case*, Vol.1, No.2 Competition and Regulation in Network Industries, 197-230, (2006) and KÜNNEKE, R., FENS, T., *Ownership unbundling in electricity distribution: The case of the Netherlands*, Vol.35, Energy Policy 1920-1930, (2007).

<sup>37</sup> Politt, M., *The arguments for and against ownership unbundling of energy transmission networks*, CWPE 0737 and EPRG 0714, August 2007

<sup>38</sup> Copenhagen Economics, *Market Opening in Network Industries: Part II Sectoral Analysis (2005b)* cited at p.16 in: Politt, M., *The arguments for and against ownership unbundling of energy transmission networks*, CWPE 0737 and EPRG 0714, August 2007

<sup>39</sup> Alesina, A., Ardagna, S., Nicoletti, G., Schiantarelli, F., *Regulation and Investment* Vol.3, No.4 Journal of the European Economic Association, 791-825 (2005).

<sup>40</sup> Zachmann, G., A Markow, *Switching Model of the Merit Order to Compare British and German Price Formation*, mimeo (2006) cited at p.22 in POLITT, M., *The arguments for and against ownership unbundling of energy transmission networks*, CWPE 0737 and EPRG 0714, August 2007.

even further as it needs to be ensured that absence of structural separation and possible remaining conflict of interest do not distort investments.<sup>41</sup>

As from all this, the ISO and ITO are expected to improve the status quo, but they would require more detailed, prescriptive and costly regulation and would be less effective in addressing the disincentives to invest in networks. When an ISO model is implemented, its effects in tackling the vertical foreclosure are not clear because the incumbent would have to behave as if it was not vertically integrated.<sup>42</sup> Setting up an ISO, and even more an ITO, would be timely and costly process and it might be expected that the costs of regulation could be higher than in the case of full unbundling. Furthermore, the contracts defining the responsibilities and obligations in the relations between the owner of the network and the ISO, or the ITO and the rest of the vertically integrated company, would need close regulatory oversight. In particular, regulators will need to be involved in the investment decisions, approval of the contracts, as well as in settling the disputes between the two. Therefore, it is expected that many companies will see that it is in their interest to move from the ISO / ITO model to full ownership unbundling.<sup>43</sup>

#### e) Certification of TSOs

Unlike in the second package, under which the Contracting Parties were under an obligation to designate TSOs, the third package adds an obligation for a certification of the TSOs by the regulatory authorities before their designation by the Contracting Parties ([Article 10\(1\) Directive 2009/72/EC and Directive 2009/73/EC](#)). The aim of this procedure is ensuring that the unbundling provisions are complied with, and not for a selection of a TSO among the competing companies.<sup>44</sup> The designation of the TSOs shall be notified to the Energy Community Secretariat and published in a dedicated section of the Energy Community website ([Article 10\(2\) Directive 2009/72/EC and Directive 2009/73/EC](#)). Irrespective of the unbundling model chosen, the same certification procedure applies to the ownership unbundled TSOs, ISOs and ITOs ([Article 10 Directive 2009/72/EC and Directive 2009/73/EC and Article 3 Regulation \(EC\) No 714/2009 and Regulation \(EC\) No 715/2009](#)).

The regulatory authorities are under the obligation to open a certification procedure upon notification by a potential TSO, or upon a reasoned request from the Energy Community Secretariat. In addition, the regulatory authorities must monitor compliance of TSOs with the rules on unbundling on a continuous basis, and must open a new certification procedure on their own initiative where a planned change in rights or influence over transmission system owners or TSOs may lead to an infringement of unbundling rules, or where they have reason to believe that such an infringement may have occurred ([Article 10\(4\) Directive 2009/72/EC and Directive 2009/73/EC](#)). The requirement for reacting in relation to “planned” changes means that assessment by regulatory authority is expected *ex ante*.<sup>45</sup>

The regulatory authority shall take a decision in four months<sup>46</sup> from the date of the notification by the transmission system operator or from the date of the Energy Community Secretariat’s request and afterwards the certification is deemed to be granted. The decision shall be notified without delay to the Energy Community Secretariat by the regulatory authority

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<sup>41</sup> Cabau, E. *Unbundling of TSOs*, at p.99

<sup>42</sup> Joskow, P. *Regulatory Priorities for Reforming Infrastructure Sectors in Developing Countries* (unpublished mimeo 1998), cited in BIGGAR, D. *When should regulated companies be vertically separated* article in Amato, G., Laudati, L., *The anticompetitive impact of regulation*, Edward Elgar, 171-197, 2001.

<sup>43</sup> Kroes, N. (European Commissioner for Competition), *Improving competition in European energy markets through effective unbundling*, Fordham Corporate Law Institute's Annual Seminar 2007, New York, 27.09.2007 SPEECH/07/574.

<sup>44</sup> Cabau, E. *Unbundling of TSOs*, at p.109

<sup>45</sup> Cabau, E. *Unbundling of TSOs*, at p.115

<sup>46</sup> Article 9(1) MC Decision, 2011

(Article 10(5) and (6) Directive 2009/72/EC and Directive 2009/73/EC). The steps of the procedure for certification are defined in Article 3 Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009. The Energy Community Secretariat shall examine any notification of a decision and shall deliver its opinion to the relevant national regulatory authority within four months. When preparing the opinion, the Secretariat shall request the Energy Community Regulatory Board to provide its opinion on the national regulatory authority's decision. Within two months of receiving an opinion of the Energy Community Secretariat, the regulatory authority shall adopt its final decision regarding the certification of the transmission system operator, taking the utmost account of that opinion. Where the Secretariat has issued an opinion, upon notification for certification under Article 9(10) Directive 2009/72/EC and Directive 2009/73/EC, and the final decision diverges from the Secretariat's opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying such decision. Diverging decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion (Article 3(6) Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009).<sup>47</sup>

As regards certification of the ISO, the regulatory authority must ensure that additional conditions are met (Article 13(2) Directive 2009/72/EC and Article 14(2) Directive 2009/73/EC) and the burden of proof is on the candidate operator or on the system owner, not on the regulatory authority.<sup>48</sup> Similarly, only an ITO that complies with the provisions from the directives, ensuring independence can be certified and designated.

When a TSO is controlled by person from a third country, certification is performed under Article 11 Directive 2009/72/EC and Directive 2009/73/EC. The Energy Community Secretariat shall be notified by the regulatory authority whenever a request for certification of a TSO which is controlled by a person from a third country is required, as well as when of any circumstances that would result in a person from a third country acquiring control of a TSO (Article 11(1) Directive 2009/72/EC and Directive 2009/73/EC). The regulatory authority shall also notify the draft decision to the Secretariat (Article 11(4) Directive 2009/72/EC and Directive 2009/73/EC). The Secretariat shall examine the request of whether the entity concerned complies with the requirements of Article 9 and whether granting certification will not put at risk the security of energy supply to the Energy Community.<sup>49</sup> It shall give an opinion within four months, and shall ask the views of the Energy Community Regulatory Board before giving an opinion (Article 11(5) and (6) Directive 2009/72/EC and Directive 2009/73/EC). In adopting its final decision the national regulatory authority shall take utmost account of the opinion of the Energy Community Secretariat (Article 11(8) Directive 2009/72/EC and Directive 2009/73/EC).

### **3. Regulatory authorities (Article 36-38 Directive 2009/72/EC and 39-41 Directive 2009/73/EC)**

The third package strengthens the powers and independence of the national energy regulators (NRAs) and adds a number of requirements to their organizational set up.

#### ***i. Independence***

Regulatory independence is to be guaranteed by the Contracting Parties and entails a number of requirements that come on top of the already existing independence parameters of the 2<sup>nd</sup> package.

<sup>47</sup> As adapted by Article 9(2) MC Decision, 2011

<sup>48</sup> EC, *Unbundling Regime*, 2010, p.12

<sup>49</sup> See Article 10 MC Decision, 2011

NRAs must be legally distinct and **functionally independent** from any private or public entity (**Article 35 (4) lit a Directive 2009/72/EC, Article 39 (4) lit a Directive 2009/73/EC**). This requirement goes beyond the 2<sup>nd</sup> package which was limited to independence from electricity and gas *industry*. The 3<sup>rd</sup> package also requires NRAs to be legally distinct and separate from any *public* body - including national, local or regional government, ministries, municipalities and political organizations or structures. This provision is closely linked to the requirement that the NRA should be able to take autonomous decisions. Notwithstanding national administrative rules, it needs to be the sole responsibility of the NRA to determine how it operates and is managed, including staffing-related matters. By definition this rules out any hierarchical link between the NRA and any other body or institution or, in principle, even sharing personnel and offices.<sup>50</sup>

NRA staff and management shall **act independently** from any market interest and shall not seek or take direct instructions<sup>51</sup> from any government or other public or private entity (**Article 35 (4) lit b Directive 2009/72/EC, Article 39 (4) lit b Directive 2009/73/EC**)<sup>52</sup>. The independence criterion includes a two-fold prohibition: first, it forbids NRA's staff and management to *seek or take* direct instructions; secondly, it implies the prohibition for anyone to *give* such instructions. Contracting Parties will need to provide for dissuasive civil, administrative and/or criminal sanctions in case of violation of the provisions on independence or attempts by public and private entities to give an instruction or to improperly influence an NRA decision.<sup>53</sup>

The NRA must be empowered to **take autonomous decisions**, independently from any political body (**Article 35 (5) lit a Directive 2009/72/EC, Article 39 (5) lit a Directive 2009/73/EC**). From an *ex ante* perspective, this requirement excludes any interference from the government or any other public or private entity prior to an NRA decision. The NRA must also be guaranteed autonomous development of its work program for the coming year(s), without a need for approval or consent of public authorities or any other third parties. From an *ex post* perspective autonomous and independent decision making requires decisions of the NRA to be immediately binding and directly applicable without the need for any formal or other approval or consent of another public authority or any other third parties. Moreover, the decisions by the NRA cannot be subject to review, suspension or veto by the government or the Ministry. It has to be noted that this precludes neither judicial review nor parliamentary supervision nor appeal mechanisms before any independent bodies independent.<sup>54</sup> On the contrary, **Article 37 (16-17) Directive 2009/72/EC and Article 41 (16-17) Directive 2009/73/EC** requires "*decisions taken by regulatory authorities [to] be [...] justified to allow for judicial review*" and oblige "*Contracting Parties [to] ensure that suitable*<sup>55</sup> *mechanisms exist at*

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<sup>50</sup> cf. European Commission, Staff Working Paper: Interpretative Note on Directives 2009/72/EC and 2009/73/EC – The Regulatory Authorities, 22 January 2010, chapter 2.2 (hereinafter: EC, *Regulatory Authorities*, 2010).

<sup>51</sup> An "instruction" is any action calling for compliance and/or trying to improperly influence an NRA decision and thus includes the use of pressure of any kind on NRA's staff or management (EC, *Regulatory Authorities*, 2010, chapter 2.2).

<sup>52</sup> Independence from public and private / market interest is identified as key requirement also by KEMA Int. B.V., *Regulatory Independence*, Issue Paper prepared for ERRA (2008), chapter 3.4. KEMA refers to autonomy, authority accountability and ability as regulatory features that can also be translated in political, sociological and financial independence, transparency and accountability.

<sup>53</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2. To guarantee the independence standard Contracting Parties should, more in detail, develop rules preventing NRA staff and management from pursuing any activity or holding any position or office with an electricity or gas undertaking, and from holding shares or having any other interests in electricity or gas undertaking. The independence requirement applies to all staff and management, independently of whether holding full-time or part-time positions.

<sup>54</sup> Recital 34 Directive 2009/72/EC and Recital 30 Directive 2009/73/EC; EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>55</sup> According to EC, *Regulatory Authorities*, 2010, chapter 5 the word 'suitable' implies that for certain types of NRA decisions, Contracting Parties should establish specific procedures where the court (or equivalent bodies independent of the parties involved and of any government) will rule at short notice. Similarly, in urgent cases, the court can be given the power to suspend an NRA decision. However, given the NRA's autonomy in decision



national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government”<sup>56</sup>.

Contracting Parties must ensure that NRAs exercises their powers **impartially and transparently** (Article 35 (4) Directive 2009/72/EC, Article 39 (4) Directive 2009/73/EC).

- *Impartiality* is aimed at guaranteeing that the NRA acts and takes decisions in a neutral way, based on objective criteria and methodologies. This means that Contracting Parties must provide for dissuasive civil, administrative and/or criminal sanctions in case of violations of the provisions on impartiality.<sup>57</sup>
- *Transparency* at minimum requires regulatory authorities to adopt and publish their rules of procedure including at least the decision making procedures; establish clear contact points for all stakeholders; and publish information on their own organisation and structure; consult stakeholders before taking important decisions by at least publishing documents ahead of public consultations and organizing public hearings and, preferably, also publishing a document after public consultation giving an overview of the comments received, of those that were taken into account and the reasons why other comments were not taken into account. In this context Article 37 (16) Directive 2009/72/EC and Article 41 (16) Directive 2009/73/EC requires that “*Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.*” Transparency also requires the NRAs to report on the way they spend their budget<sup>58</sup>.

NRAs must have a separate **annual budget** with autonomy in its implementation (Article 35 (5) lit a Directive 2009/72/EC, Article 39 (5) lit a Directive 2009/73/EC). This does not exclude that the NRA budget is part of the total state budget<sup>59</sup> provided there is a clear separate annual budget allocation for the NRA<sup>60</sup>. Also, approval of the budget of the regulator by the national legislator (parliament) does not constitute an obstacle<sup>61</sup> but should be limited to granting a global financial allocation and shall not be used as a means of influencing the NRA’s priorities.<sup>62</sup> However, the power of Contracting Parties to appoint members of the board of the NRA, the power to approve the budget and any measure of accountability set up by a Member State shall not result in any instruction being given concerning the regulatory powers and duties of the NRA.<sup>63</sup>

NRAs must be equipped with adequate **human and financial resources**<sup>64</sup> (Article 35 (5) lit a Directive 2009/72/EC, Article 39 (5) lit a Directive 2009/73/EC). Adequacy of financial resources needs to allow the NRA to carry out its duties and exercise its powers in an efficient and effective manner. The budget of similar regulators or bodies (e.g. national banks) and / or NRAs in other Contracting Parties may be used as benchmark. The human and financial sources made available to the NRA also have to reflect the extended duties

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making and independence from any public entity (cf. chapter 3.1), the power to suspend NRA decisions belongs only to courts and judges or appeal mechanisms before any other bodies independent of the parties involved and of any government.

<sup>56</sup> EC, *Regulatory Authorities*, 2010, chapter 5.

<sup>57</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>58</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>59</sup> European regulators noted that NRA would be preferentially funded from levies (cf ERGEG, *3rd package Legislative Package – Paper 5: Powers and Independence of NRAs* (June 2007), chapter 3.1.c.)

<sup>60</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>61</sup> Recital 34 Directive 2009/72/EC and Recital 30 Directive 2009/73/EC

<sup>62</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>63</sup> Recital 34 Directive 2009/72/EC and Recital 30 Directive 2009/73/EC; EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>64</sup> Supported by ERGEG, *3rd package Legislative Package – Paper 5: Powers and Independence of NRAs* (June 2007), chapter 3.1.c.

assigned to the NRAs under the 3rd package and the need to financially attract sufficiently qualified staff.<sup>65</sup>

The members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management shall be appointed for a fixed term<sup>66</sup> of five up to seven years, renewable once (Article 35 (5) lit b Directive 2009/72/EC, Article 39 (5) lit b Directive 2009/73/EC). Board members that have been appointed before the transposition of the 3<sup>rd</sup> package can finish their term of office provided it does not last longer than seven years. Ideally, regulators appointed under the independence requirements of the 2<sup>nd</sup> package should be the first ones to participate in the rotation scheme provided for under the 3<sup>rd</sup> package. If those regulators meet the new independence requirements, there is however nothing that prevents them from being appointed under the 3rd package.<sup>67</sup> Contracting Parties shall ensure an appropriate **rotation scheme** for the board or the top management (Article 35 (5) lit b Directive 2009/72/EC, Article 39 (5) lit b Directive 2009/73/EC). This means that the end date of the term of office of the board members cannot be the same for all members.

The members of the board or, in the absence of a board, members of the top management may be **relieved from office** during their term *only* if they no longer fulfill the independence criteria or have been guilty of misconduct under national law<sup>68</sup> (Article 35 (5) lit b Directive 2009/72/EC, Article 39 (5) lit b Directive 2009/73/EC). Although the Electricity and Gas Directives leave room for rules adopted at national or regional level as far as misconduct is concerned, it has to be stressed that the possibility to remove a member of the board during his or her term will apply in special cases only, such as fraud, bribery and breaches of the independence or impartiality of the NRA. Contracting Parties need to provide for appropriate rights of defense for the persons concerned.<sup>69</sup>

The independence requirements of the 3<sup>rd</sup> package do not deprive:

- the government of the possibility of establishing and issuing its national energy policy within which the NRA must operate, e.g. concerning security of supply, renewables or energy efficiency targets. Still, general energy policy guidelines issued by the government must not encroach on the NRA's independence and autonomy.<sup>70</sup>
- NRAs of close cooperation, as appropriate, with other relevant authorities or compliance with general policy guidelines issued by the government *not* related to the regulatory powers (Article 35 (4) lit b.ii Directive 2009/72/EC, Article 39 (4) lit b.ii Directive 2009/73/EC)<sup>71</sup>. In order to prevent one authority encroaching on the competences of the other authority, Member States should provide for clear arrangements governing cooperation between the different authorities.<sup>72</sup>

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<sup>65</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>66</sup> The introduction of a fixed term is also supported by ERGEG, *3rd package Legislative Package – Paper 5: Powers and Independence of NRAs* (June 2007), chapter 3.1.b.

<sup>67</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>68</sup> Supported by ERGEG, *3rd package Legislative Package – Paper 5: Powers and Independence of NRAs* (June 2007), chapter 3.1.b.

<sup>69</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>70</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2.

<sup>71</sup> Cooperation is required by Articles 37(2), second subparagraph and 38 (1-4) Directive 2009/72/EC and Article 41(1-4) second subparagraph and 42 (1) Directive 2009/73/EC; The text of the Directives gives guidance on the exchange of confidential information in this context: the receiving authority must ensure the same level of confidentiality as that required of the originating authority.

<sup>72</sup> EC, *Regulatory Authorities*, 2010, chapter 2.2. These arrangements should ideally cover the possibility, as appropriate, to exchange confidential information and provide for the duty to consult the other authority or to ask the other authority for advice.

## ii. Powers and Duties

As regards their responsibilities, the regulatory authorities compared to the 2<sup>nd</sup> package are granted more powers. **Article 37(1) Directive 2009/72/EC and Article 41(1) Directive 2009/73/EC** contain the core **duties** of the NRA:

- to fix or approve the transmission, distribution tariffs and balancing services or their methodology<sup>73</sup>. The core duties of the NRA as regards network tariffs do not deprive the Contracting Party of the possibility to issue general policy guidelines which ultimately will have to be translated by the NRA into the tariff structure and methodology. However, these guidelines should not encroach on the NRA's competences or infringe any of the requirements of the 3<sup>rd</sup> package;<sup>74</sup>
- to enforce the consumer protection provisions and
- monitoring.

**Articles 36 of the Electricity Directive and 40 of the Gas Directive** specify the **objectives** that need to be respected by the NRA when carrying out its duties. This has a clear normative value: in carrying out its regulatory duties and exercising its powers, the NRA has the *obligation* to take all reasonable measures to implement the list of objectives. It is also important to note that the 3<sup>rd</sup> package gives the NRA a clear regional mandate: the NRA must promote a competitive, secure and environmentally sustainable internal market for electricity and gas in the Energy Community.<sup>75</sup>

NRAs are not only given extensive duties but also the necessary **powers** to be able to carry out its duties. **Article 37(4) Directive 2009/72/EC and Article 41(4) Directive 2009/73/EC** provide a minimum but not exhaustive<sup>76</sup> list of powers that have to be assigned to NRAs:

- to issue binding decisions on electricity and gas undertakings;
- to carry out investigations into the functioning of the electricity and gas markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market.<sup>77</sup> Where appropriate, the regulatory authority shall also have the power to cooperate with the national competition authority and the financial market regulators or the Commission in conducting an investigation relating to competition law;

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<sup>73</sup> Four options as regards the way tariffs for network access and balancing services are established can be identified: the NRA fixes the tariffs; the NRA fixes the methodology; the NRA approves the tariffs or the NRA approves the methodology. Recital 36 Directive 2009/72/EC and Recital 32 Directive 2009/73/EC mention that the NRA will fix or approve the tariff or the methodology on the basis of a proposal by the TSO / DSO / LNG operator or on the basis of a proposal agreed between those operator(s) and the users of the network. This means that the NRA also has the power to reject and amend such proposal. If the NRA is given the power over the methodology (fixing or approving), it is up to the TSOs to calculate the tariffs (which have to be in line with the methodology approved by the NRA); EC, *Regulatory Authorities*, 2010, chapter 4.2.1.

<sup>74</sup> E.g. issuing a general policy guideline with regard to attracting investments in renewables by a Contracting Party should be allowed, while a rule setting the profit margin in the cost-plus tariff would rather be considered as a prohibited direct instruction to the NRA (EC, *Regulatory Authorities*, 2010, chapter 4.2.1.).

<sup>75</sup> Article 36 (a,b) Directive 2009/72/EC, Article 40(a,b) Directive 2009/73/EC

<sup>76</sup> Contracting Parties must generally grant the NRAs the powers enabling them to carry out their tasks in an efficient and expeditious manner. According to recital 37 of Directive 2009/72/EC and recital 33 of Directive 2009/73/EC, the NRA should also be granted the power to contribute to ensuring high standards of universal and public service in compliance with market opening, the protection of vulnerable customers, and the full effectiveness of consumer protection measures (EC, *Regulatory Authorities*, 2010, chapter 4.2.)

<sup>77</sup> Recital 37 of Directive 2009/72/EC and Recital 33 of Directive 2009/73/EC identify that the establishment of virtual power plants or gas release programs is one of the possible measures that can be imposed by the NRA to implement this power. According to EC, *Regulatory Authorities*, 2010, chapter 4.2. the quoted recitals are not exhaustive but also gas capacity release programs and storage capacity release programs could be considered as necessary and proportionate measures.

- to require any information from electricity and natural gas undertakings relevant for the fulfillment of its tasks.<sup>78</sup> It remains up to the NRA alone to judge whether the information it asks from the undertaking is relevant; any such assessment of the NRA remains subject to judicial review or appeal mechanisms (cf. chapter 3.1);
- to impose effective, proportionate and dissuasive penalties on electricity and gas undertakings not complying with their obligations.<sup>79</sup> Contracting Parties have the choice to assign the power to impose penalties to the regulatory authority or to give the NRA the power to propose to a competent court (but *not* to any other public or private body<sup>80</sup>) that it impose such penalties. It needs to be underlined that the NRAs' duties include follow up on non-compliance of electricity and gas undertakings with network codes, once made legally binding in the Energy Community (cf. chapter 1<sup>81</sup>).

The powers of the NRA are not limited to or dependent on any of the unbundling options<sup>82</sup>.

The execution of the regulatory powers and duties has to duly respect the independence principles listed in chapter 3.1 but in particular the requirements of:

- autonomous and directly binding decision making, independently from any political body, without need for any formal or other approval or consent of another public authority or any other third parties and not subject to review, suspension or veto by the government or the Ministry (Article 35 (5) lit a Directive 2009/72/EC, Article 39 (5) lit a Directive 2009/73/EC)<sup>83</sup> and
- transparency of the decision making process (Articles 35 (4) and 37 (16) Directive 2009/72/EC, Articles 39 (4) and 41 (16) Directive 2009/73/EC) including the application of stringent procedures respecting the rights of defense of the companies concerned and allowing for judicial review of decisions (cf. chapter 3.1).

### iii. Organisation

In terms of organization, each Contracting Party shall entrust a **single**<sup>84</sup> **regulatory authority** at national level with *all* the regulatory duties provided for Directives 2009/72/EC and 2009/73/EC (Article 35 (1) Directive 2009/72/EC, Article 39 (1) Directive 2009/73/EC). More in detail this entails means that:

- the core duties of the NRA can no longer be split between the regulator and the Ministry;
- the existence of several decision making bodies (e.g. director, board, secretariat or chamber) within a regulatory authority remains possible, provided (1) they are integrally part of one single national regulatory authority entrusted with all duties and powers listed in the Electricity and Gas Directives and Regulations and (2) each of these bodies meets all independence requirements of the Electricity and Gas Directives.<sup>85</sup>

<sup>78</sup> This might also require carrying out inspections on the premises of the entities concerned. According to EC, *Regulatory Authorities*, 2010, chapter 4.2 Article 37(4) Directive 2009/72/EC and Article 41(4) Directive 2009/73/EC in this context grant to NRA powers very similar to those of competition in relation to inspections. European regulators supported the right of regulators to require information (cf. ERGEG, *3rd package Legislative Package – Paper 5: Powers and Independence of NRAs* (June 2007), chapter 3.3.e).

<sup>79</sup> Supported by ERGEG, *3rd package Legislative Package – Paper 5: Powers and Independence of NRAs* (June 2007), chapter 3.2.a,b.

<sup>80</sup> EC, *Regulatory Authorities*, 2010, chapter 4.2.

<sup>81</sup> EC, *Regulatory Authorities*, 2010, chapter 4.2.

<sup>82</sup> EC, *Regulatory Authorities*, 2010, chapter 4.2.

<sup>83</sup> EC, *Regulatory Authorities*, 2010, chapter 4.2.1.

<sup>84</sup> CABAU, E., *National Regulatory Authorities*, in JONES, C. *EU Energy Law: Volume I – the Internal Energy Market – the Third Liberalisation Package*, Claeys & Casteels (2010), ref. 6.8-6.10.

<sup>85</sup> EC, *Regulatory Authorities*, 2010, chapter 2.1.

The designation of other regulatory authorities **at regional level** within Contracting Party remains possible, provided that there is one senior representative for representation and contact purposes at Energy Community level (**Article 35 (2) Directive 2009/72/EC, Article 39 (2) Directive 2009/73/EC**)<sup>86</sup>. “Regional level” in this context understands a specific region at infra-national level within a federal Contracting Party or an autonomous region within a Contracting Party.<sup>87</sup>

A Contracting Party may also designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Contracting Party of which it is part. This derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at Energy Community level (**Article 35 (3) Directive 2009/72/EC, Article 39 (3) Directive 2009/73/EC**). Important in this provision is that the “small system” must be part of a geographically separate region. The fact that a region has little interconnection with the rest of the country is not itself sufficient to qualify for the derogation. In practice, the requirement of having a small system on a geographically separate region is likely to be met only by islands.<sup>88</sup>

#### **4. Retail markets (Article 41 Directive 2009/72/EC and 45 Directive 2009/73/EC) and consumer protection (Article 3 and Annex 1 Directive 2009/72/EC and Directive 2009/73/EC)**

##### **4.1. Retail markets**

In order to improve the operation of the retail market, the new provisions not only relate to measures for consumer protection, but they also promote retail competition. They also extend the role of the regulatory authorities. The development of well-functioning retail markets, to the benefit of all energy consumers, requires that the opening of markets goes hand in hand with measures to protect consumers and to assist them in making the right choices.

The third package introduced a new provision related to retail markets which requires that the Contracting Parties must ensure that the roles and responsibilities of energy undertakings, for example distribution system operators and suppliers, are defined with respect to contractual arrangements, commitment to customers, data exchange and settlement rules, data ownership and meter responsibility (**Article 41 of the Electricity Directive, Article 45 of the Gas Directive**). The rules must be subject to review by national regulatory authorities and other relevant national authorities.

##### **4.2. Role of the national regulatory authorities**

Moreover, the role of the national regulators was broadened to include additional monitoring and regulation of the operation of the internal energy market. They have been given an enhanced role of ensuring that customers benefit from the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection (**Article 36(g) of the Electricity Directive, Article 40(g) of the Gas Directive**). This provision requires working closely with other national organisations responsible for the protection of consumers, such as consumer bodies and competition authorities, to ensure that consumer

<sup>86</sup> CABAU, E., *National Regulatory Authorities*, in JONES, C. EU Energy Law: Volume I – the Internal Energy Market – the Third Liberalisation Package, Claeys & Casteels (2010), ref. 6.15.

<sup>87</sup> EC, *Regulatory Authorities*, 2010, chapter 2.1.; CABAU, E., *National Regulatory Authorities*, in JONES, C. EU Energy Law: Volume I – the Internal Energy Market – the Third Liberalisation Package, Claeys & Casteels (2010), ref. 6.11, 6.14.

<sup>88</sup> EC, *Regulatory Authorities*, 2010, chapter 2.1., CABAU, E., *National Regulatory Authorities*, in JONES, C. EU Energy Law: Volume I – the Internal Energy Market – the Third Liberalisation Package, Claeys & Casteels (2010), ref. 6.12, 6.13.

protection measures, including those outlined in Annex I, are effective. According to the Commission, this should take the form of open and transparent public consultation between the relevant bodies and provide for the capacity to share information. The Commission also proposes that this interaction should be reinforced by legislation in order to facilitate the sharing of confidential information and market investigations.<sup>89</sup> Article 37(1)(j) of the Electricity Directive, Article 41(1)(j) of the Gas Directive require explicitly a close cooperation with the relevant competition authorities. This provision also imposes a duty to monitor the effectiveness of market opening and competition at the retail level through a number of listed indicators.

The national regulatory authority shall also examine the supply prices to determine whether or not they are consistent with Article 3 of the Electricity and Gas Directives, i.e. whether they are the minimum necessary to protect consumers, vulnerable or otherwise, while not inhibiting effective competition in the market (Article 37(1)(o) of the Electricity Directive, Article 41(1)(o) of the Gas Directive), and where needed information shall be provided to the national competition authorities. As part of this examination, it will be for the regulator to determine whether prices are reasonable, easily and clearly comparable, transparent and non-discriminatory. In this context, such prices should be consistent with a competitive market outcome.<sup>90</sup>

#### 4.3. Customers' protection

Several new provisions, requiring high standard of public service obligations and customer protection, were introduced as well. In particular:

- provisions enabling customers to switch suppliers within three weeks;
- obligations on suppliers to provide information to consumers;
- obligation on suppliers to foresee efficient complaint handling procedures;
- specific protection of vulnerable customers.

The new directives provide that in case consumers want to switch supplier, the process should be as easy as possible. New deadlines have been introduced so that consumers can actually switch supplier within three weeks (Article 3(5)a and Article 3(6)a). For that purpose, customers are entitled to receive all consumption data in an easily understandable harmonised format (Article 3(5)(b) of the Electricity Directive, Article 3(6)(b) of the Gas Directive). This should include all information that a consumer would need either to assess his or her own consumption pattern or compare the consumption costs with offers provided by other suppliers. This provision does not impose an obligation that the customers must receive the data, but that they are entitled to receive the data in a non-discriminatory manner as regards costs, effort or time if they choose to request it.<sup>91</sup> Annex I(1)(i) imposes however an obligation that consumers must be properly informed of actual electricity/gas consumption and costs frequently enough to enable them to regulate their own electricity/gas consumption. The consumers are also permitted to allow any registered supply undertaking to have access to their consumption data, free of charge (Annex I(h) of the Electricity Directive, Annex I(h) of the Gas Directive). It is however a task of the national regulatory authority to provide an easily understandable harmonised format for the consumption data (Article 37(p) of the Electricity Directive, Article 41(q) of the Gas Directive). The new provisions related to availability of information shall make it easier for consumers to understand their own consumption, to use the information either to compare it with offers

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<sup>89</sup> European Commission, Commission Staff Working Paper, Interpretative Note on Directives 2009/72/EC and 2009/73/EC - Retail Markets, 22.01.2010, p.4 (EC, *Retail Markets*, 2010)

<sup>90</sup> EC, *Retail Markets*, 2010, p.4

<sup>91</sup> EC, *Retail Markets*, 2010, p.5. Annex I to the directives further elaborates on this provision of information to consumers.

from other energy suppliers, or to allow other suppliers to have access to their consumption data so as to provide them with a new offer of supply.<sup>92</sup>

The energy bill is one of the most important means of information to the consumer and therefore deserves special attention. Energy consumers should be able to compare prices, for example through price comparison sites.<sup>93</sup> Annex I also points out that consumers must be offered a wide choice of payment methods, which do not unduly discriminate between customers and that prepayment systems must be fair and adequately reflect likely consumption. These provisions are intended to ensure that consumers do not pay an excessive amount as part of a regular payment system and that consumers should have access to systems that are paid in arrears or in advance and are accessible to all consumers, including those without bank accounts or access to the internet.<sup>94</sup> Finally, when switching supplier, consumers must receive a final closure account following any change of electricity or gas supplier no later than six weeks after the change of supplier has taken place (**Annex I(1)(j) of the Electricity Directive, Annex I(1)(j) of the Gas Directive**).

New provisions related to customer protection deal with treatment of customers' complaints, which should be dealt with in a transparent, effective and non-discriminatory manner. To this end, the Contracting Parties must ensure that there is an independent mechanism, such as an energy ombudsman or consumer body, to deal efficiently with complaints and facilitate out-of-court dispute settlements (**Article 3(13) of the Electricity Directive, Article 3(9) of the Gas Directive**). Under Annex I(1)(f), consumers must benefit from transparent, simple and inexpensive procedures for dealing with their complaints, which should include a good standard of complaint handling by their energy service providers.<sup>95</sup> Moreover, single points of contact should be established to provide consumers with all necessary information on their rights and how they can have access to the relevant dispute settlement procedure (**Article 3(12) of the Electricity Directive, Article 3(9) of the Gas Directive**).

Finally, as a means of providing consumers with practical information relating to energy consumer rights, the Contracting Parties shall ensure that electricity suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklists established by the European Commission. The checklists shall be adopted by the Permanent High Level Group, following the procedure laid down in Article 79 of the Treaty.<sup>96</sup>

Protecting consumers remains necessary in the internal market. It is therefore important that the group of vulnerable consumers that need protection is clearly defined, and any mechanism adopted to protect these vulnerable consumers must not interfere with the operation of the market and must take into account other social policy measures in the Contracting Parties.<sup>97</sup> Therefore, the new directives impose an obligation for defining the concept of vulnerable customers (**Article 3(7) of the Electricity Directive, Article 3(3) of the Gas Directive**). To fulfill this requirement, the Contracting Parties must define the categories of consumer that will qualify as vulnerable customers.

Finally, new provisions on the roll out of Smart Meters that have the potential to improve information for consumers and provide a platform for tariff and service innovation, by 2020

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<sup>92</sup> EC, *Retail Markets*, 2010, p.5

<sup>93</sup> European Commission, *The Internal Energy Market – Time To Switch Into Higher Gear* (Non-paper), [http://ec.europa.eu/energy/gas\\_electricity/legislation/doc/20110224\\_non\\_paper\\_internal\\_energ\\_market.pdf](http://ec.europa.eu/energy/gas_electricity/legislation/doc/20110224_non_paper_internal_energ_market.pdf) (hereinafter: European Commission, Non-paper)

<sup>94</sup> EC, *Retail Markets*, 2010, p.6

<sup>95</sup> EC, *Retail Markets*, 2010, pp.6-7

<sup>96</sup> Articles 6 and 26 MC Decision, 2011

<sup>97</sup> European Commission, Non-paper

have been introduced.<sup>98</sup> The directives require that the Contracting Parties must ensure the implementation of intelligent metering systems that help consumers to participate actively in the electricity and gas supply markets (**Annex I(2) of the Electricity and Gas Directives**). The implementation of such metering systems may be subject to an economic assessment of all the long-term costs and benefits to the market and the individual consumer or of which form of intelligent metering is economically reasonable and cost-effective and which timeframe is feasible for their distribution. This assessment by the Contracting Parties must be completed by 1 January 2014. They enable consumers to directly control and manage their individual consumption patterns, notably if combined with time differentiated tariffs, providing, in turn, strong incentives for efficient energy use.<sup>99</sup>

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<sup>98</sup> The benefits of smart meters are listed in EC, *Retail Markets*, 2010, p.8

<sup>99</sup> European Commission, Non-paper



## **ANNEX 1**

### **REVIEW OF THE OWNERSHIP STRUCTURE IN THE ELECTRICITY SECTOR OF THE ENERGY COMMUNITY CONTRACTING PARTIES**

ELECTRICITY

ALBANIA				
<b>Legal Framework:</b>	<ul style="list-style-type: none"> <li>- Power Sector Law, Nr.9072/ 22.5.2003 with all the amendments does not require legal or ownership unbundling of the TSO</li> </ul> <p><b>Legal unbundling exists in practice:</b></p> <ul style="list-style-type: none"> <li>- Decision No. 797, dated 4.12.2003, for the creation of a Transmission System Operator JSC</li> <li>- On 14 July 2004, the Court of First Instance unbundled OST from KESH, marking its legal foundation as a joint stock company JSC.</li> </ul>			
<b>Legal Compliance:</b>	Amendments to the Power Sector Law to transpose ownership unbundling and to comply with the requirements of the 3 <sup>rd</sup> package are required.			
Function	Company	Type	Ownership	Comments
<b>TSO</b>	<b>OST Sh.A.</b>	Joint Stock Company Registered on 14 July 2004 <a href="http://www.ost.al/english/kush-jemi-ne">http://www.ost.al/english/kush-jemi-ne</a>	100% owned by the State  <b>Authority:</b> Ministry of Economy, Trade and Energy; Energy Regulatory Entity (ERE)	Legally unbundled from the generation and supply companies.
<b>DSO and Public Supply</b>	<b>CEZ Shperndarje</b> 98% of end-user supply	Joint Stock Company	76% CEZ Holding  24% Albanian State  <b>Authority:</b> Ministry of Economy, Trade and Energy; Energy Regulatory Entity (ERE)	Ownership unbundled;  There is ongoing initiative for a reverse process – further consideration is required
<b>Producer: Incumbent Company</b>	<b>KESH</b> 96,7% of domestic production 54,7 % of wholesale	Joint Stock Company	100% owned by the Albanian State  <b>Authority:</b> Ministry of Economy, Trade and Energy; Energy Regulatory Entity (ERE)	Legally unbundled from transmission and distribution companies.

<b>Comment:</b>	<p>TSO is legally unbundled from the incumbent generation company, the network assets are on the company's balance sheet.</p> <p>In 2013, ERE removed the distribution and supply licence of CEZ OSSH, the case will be settled by an international arbitration court.</p> <p>To comply with the requirements of the D72/2009 related to ownership unbundling (Article 9) (1) (b) and (c) must be ensured. Two separate public bodies exercising control over a transmission system operator and over an undertaking performing any of the functions of generation or supply on the other hand shall be deemed not to be the same person, i.e. Authority: Ministry of Economy, Trade and Energy.</p>
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### BOSNIA AND HERZEGOVINA

<b>Legal Framework:</b>	<ul style="list-style-type: none"> <li>- Law on Establishment of Electricity Transmission Company in Bosnia and Herzegovina (2004) - does not require ownership unbundling of the assets;</li> <li>- Law on Establishment of Independent System Operator for the Transmission System in Bosnia and Herzegovina (2004) - does not require ownership unbundling of the assets</li> <li>- Law on Electricity of Federation of BiH (2003, as amended)</li> <li>- Energy Law of Republika Srpska (2009)</li> <li>- Electricity Law of Republika Srpska (2009)</li> </ul> <p><b>Additional legal acts:</b></p> <ul style="list-style-type: none"> <li>- Enterprise Laws of Federation of BiH and Republika Srpska</li> <li>- Laws on Public Enterprises of Federation of BiH and Republika Srpska</li> </ul>			
<b>Legal Compliance:</b>	<p>At the moment the Laws on State level are outdated, short of many provisions and need revision, the Federation of BiH has a draft Electricity market law aimed to comply but not yet in adoption procedure, RS laws are relatively advanced but need substantial adjustment with the Third Package.</p> <p>There is an ongoing, IPA funded project for bringing of the overall legal framework of BiH (on State and Entity level including Brcko District) in compliance with the acquis (III package) – drafting of amendments is foreseen in 2013 with procedure for adoption and follow-up implementation.</p>			
<b>Function</b>	<b>Company</b>	<b>Type</b>	<b>Ownership</b>	<b>Comments</b>
<b>Transmission Network Operator</b>	Elektroprenos BiH	<p>Joint Stock Company,</p> <p>Registered in 2004</p> <p><a href="http://www.elprenosbih.ba/a3/index.php?lang=engleski&amp;id=2&amp;tr=">http://www.elprenosbih.ba/a3/index.php?lang=engleski&amp;id=2&amp;tr=</a></p>	<p>100% owned by the two Entities</p> <ul style="list-style-type: none"> <li>• Federation of BiH 58.90%</li> <li>• Republika Srpska 41.10%</li> </ul> <p><b>Authority:</b> Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina, State Energy Regulatory</p>	<p>Legally unbundled from all generation and supply companies, the assets are owned by the two constitutive Entities represented by the two Prime Ministers who constitute the shareholder's assembly and assume ownership rights</p>

			Commission (DERK)	
<b>Electricity System Operator</b>	<b>NOS BiH</b> (Nezavisni Operator Sistema BiH)	Non-profit organization registered in BiH (2004) established by the two Entities, – no corporate status <a href="http://www.nosbih.ba/">http://www.nosbih.ba/</a>	No shares are issued, Entities waved their ownership rights – all rights transferred to the Management Board <b>Authority:</b> Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina, State Energy Regulatory Commission (DERK)	The Company law is not applicable, the organization operates as a regulated service provider, Management Board has all the powers under the Law
<b>Producer, DSO and Public Supplier</b>	<b>Elektroprivreda BiH</b> 74% production in FBiH 52% of production in BiH (2011) 61 % of end-user supply in FBiH 37% of consumption in BiH(2011)	Joint Stock Company (Operated as a Public Enterprise) <a href="http://www.elektroprivreda.ba/np/ep/epp?lang=EN&amp;bp=0&amp;mp=0">http://www.elektroprivreda.ba/np/ep/epp?lang=EN&amp;bp=0&amp;mp=0</a>	90% owned by Federation of BiH 10% private ownership <b>Authority:</b> Federal Ministry of Energy, Mining and Industry of the Federation of BiH, Federal Electricity Regulatory Commission (FERK)	Vertically integrated utility with no legal unbundling of DSO, also performing production, supply and trade activities, governing company of EP BiH Concern (assuming ownership rights in coal mines and equipment production companies in BiH) – NO sufficient unbundling
<b>Producer, DSO and Public Supplier</b>	<b>Elektroprivreda HZHB</b> 26% production in FBiH 18% of production in BiH (2011) 39 % of end-user supply in FBiH 23% of consumption in BiH(2011)	Joint Stock Company (Operated as a Public Enterprise) <a href="http://www.ephzhb.ba/ephzhb.aspx?id=1">http://www.ephzhb.ba/ephzhb.aspx?id=1</a>	90% owned by Federation of BiH 10% private ownership <b>Authority:</b> Federal Ministry of Energy, Mining and Industry of the Federation of BiH, Federal Electricity Regulatory Commission (FERK)	Vertically integrated utility with no legal unbundling of DSO, also performing production, supply and trade activities - NO sufficient unbundling

<b>Producer, DSO and Public Supplier</b>	<b>MH ERS (Elektroprivreda RS)</b> 100% production in RS 30% of production in BiH (2011) 100 % of end-user supply in RS 23% of consumption in BiH(2011)	Holding Company - Joint Stock Company (Operated as a Public Enterprise) <a href="http://www.ers.ba/">http://www.ers.ba/</a>	100% owned by Republika Srpska (owner of 65% shares in each subsidiary) <b>Authority:</b> Ministry of Industry, Energy and Mining of Republika Srpska, Regulatory Commission of Republika Srpska (RERS)	Holding structure – dominant shareholder in legally unbundled subsidiaries - 5 production companies (some of them including coal exploitation) and 5 distribution and supply utilities (with no legal unbundling of DSO), the Holding is also performing trading activities
<b>DSO and Public Supplier</b>	<b>Komunalno Brcko</b> 100% end-user supply in Brcko District	Vertically Integrated Public Utility (Operated as a communal service under the Brcko Government) <a href="http://www.komunalno.ba/">http://www.komunalno.ba/</a>	No shares are issued 100% assets owned by Brcko District <b>Authority:</b> Government of Brcko District State Energy Regulatory Commission (DERK)	The distribution and supply functions vertically integrated with other communal services – need functional unbundling No domestic generation company Subject to possible exemptions as a small system (cca 30.000 customers)
<b>Comment:</b>	<p>Elektroprenos BiH is legally unbundled and corporatized, ownership rights belong to political authorities of both Entities and provide formal legal basis for ownership unbundling (from the State authorities) – however the dependence of Entity policy interests is problematic and Management Board is not sufficiently independent. There are long standing management problems and stalemate in investment planning process in Elektroprenos provoked mainly by lack of political independence of the management structure of the company.</p> <p>NOS BiH is registered in a separate register, not corporatized, Management Board (appointed by the Supervisory Board which is appointed by the two Entities) who assumes all the powers is not independent from the political authorities of both Entities.</p> <p>The Utilities in Federation of BiH are 90% in state ownership, with high level of concentration (generation, supply) and no legal unbundling of DSO activities – both require serious reforms. The Holding of RS is legally unbundled but some functions need further unbundling (DSO, balance responsibility, etc).</p> <p>Regulatory framework is comprehensive but structured and independence from the political environment needs further enforcement.</p>			

CROATIA				
<b>Legal Framework:</b>	New Electricity Market Act has been adopted in February 2013 – however the text has not been published yet. It is expected that the requirements of ownership unbundling has been transposed, and the ISO model has been chosen for the TSO certification.			
<b>Legal Compliance:</b>	The compliance assessment could be made only after the text of the Energy Market Act will be available			
Function				
Function	Company	Type	Ownership	Comments
	<b>HEP Holding – HEP d.d.</b>	Joint Stock Company <a href="http://www.hep.hr/hep/en/group/Chart.aspx">http://www.hep.hr/hep/en/group/Chart.aspx</a>	100% owned by the Croatian State  <b>Authority:</b> Ministry of Economy, Labor and Entrepreneurship;  Croatian Energy Regulatory Agency (HERA)	Ministry of Economy appoints the Board of Administration and Supervisory Board members.
<b>TSO</b>	<b>HEP-OPS</b>  HEP- Operator prijenosnog sustava d.o.o.	Joint Stock Company  <a href="http://ops.hep.hr/ops/en/aboutus/default.aspx">http://ops.hep.hr/ops/en/aboutus/default.aspx</a>	100% owned by HEP Holding  HEP Holding 100% state owned  <b>Authority:</b> Ministry of Economy, Labor and Entrepreneurship;  Croatian Energy Regulatory Agency (HERA)	The assets belong to the parent company and not to the HEP-OPS. Assets right of use transferred to the TSO.  Compliance with Article 9 (1) (b) and (c) must be ensured.
<b>DSO and Public Supplier 1</b>	<b>HEP- ODS</b>  HEP Operator distribucijskog sustava d.o.o.  100 % of end-user supply	Joint Stock Company	100% owned by HEP Holding  HEP Holding 100% state owned	DSO and Supplier for tariff customers

<b>Supplier 2</b>	<b>HEP- Supply</b> HEP Opskrba d.o.o.,	Joint Stock Company	100% owned by HEP Holding HEP Holding 100% state owned	Supplier for eligible customers
<b>Supplier 3</b>	<b>HEP Trade</b> HEP-Trgovina d.o.o.	Joint Stock Company	100% owned by HEP Holding HEP Holding 100% state owned	
<b>Producer 1</b>	<b>HEP - Production</b> <b>HEP Proizvodnja d.o.o.</b> 74% of domestic production 55% of wholesale	Joint Stock Company	100% owned by HEP Holding HEP Holding 100% state owned	
<b>Producer 2</b>	<b>TE Plomin d.o.o.</b> 14% of domestic production 10,4% of wholesale	Joint Stock Company	50% owned by HEP d.d. 50% owned by RWE East	
<b>Producer 3</b>	<b>HEP – Renewable Energy</b> HEP Obnovljivi izvori energije d.o.o. 2% of domestic production	Joint Stock Company	100% owned by HEP Holding HEP Holding 100% state owned	
<b>Comment:</b>	The state of unbundling and compliance has to be further assessed after the Electricity Market Act become publicly available			

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA				
<b>Legal Framework:</b>	<ul style="list-style-type: none"> <li>– Energy Law of the Republic of Macedonia (2011)</li> </ul> <p><b>Additional Laws:</b></p> <ul style="list-style-type: none"> <li>– Trading Company Law of the Republic of Macedonia</li> </ul>			
<b>Legal Compliance:</b>	The Comprehensive Energy Law covers all areas of energy including electricity, recently adopted and later amended, significantly advanced but needs a substantial development in order to approach compliance with the III Package			
Function	Company	Type	Ownership	Comments
<b>TSO</b>	<b>MEPSO</b> (Makedonski Elektro-Prenosen Sistem Operator)	Joint Stock Company (2005) <a href="http://www.mepso.com.mk/">http://www.mepso.com.mk/</a>	100% in State ownership <b>Authority:</b> Ministry of Economy; Energy Regulatory Commission (ERC)	The company consists of two internal functional divisions for Transmission and System Operation – no legal unbundling between these functions
<b>Producer, DSO and Public Supplier</b>	<b>EVN Macedonija</b> 3.3% of production (2010) 73.4% of end-user supply (2010) (98% of regulated supply)	Joint Stock Company (2006) <a href="http://www.evn.mk/">http://www.evn.mk/</a>	90% shares in ownership of EVN AG (Austria) 10% shares in State ownership <b>Authority:</b> Ministry of Economy; Energy Regulatory Commission (ERC)	DSO and Supplier of tariff customers – DSO is not legally unbundled; 100% owner of assets of a subsidiary company for electricity generation (legally unbundled)
<b>Producer, DSO and Public Supplier</b>	<b>ELEM</b> (Elektrani na Makedonija) 96.7% of production (2010) 1.5% of end-user supply (2010) (2% of regulated supply)	Joint Stock Company (2006) <a href="http://www.elem.com.mk/en/">http://www.elem.com.mk/en/</a>	100% shares in State ownership <b>Authority:</b> Ministry of Economy; Energy Regulatory Commission (ERC)	ELEM is providing overall domestic generation allocated for public supply (of captive customers), a small distribution network operation and supply activities are not legally unbundled but are liable for exemption
<b>Producer</b>	<b>TEC Negotino</b> TPP generation plant (oil) NO (0%) production	Joint Stock Company (2005) <a href="http://www.tecnegotino.com.mk/">http://www.tecnegotino.com.mk/</a>	100% in state ownership <b>Authority:</b> Ministry of Economy; Energy Regulatory Commission (ERC)	11% of total installed capacity, not used in regular production due to comparably high fuel costs (mazut) – used as tertiary reserve



<b>Producer</b>	<b>TE-TO Skopje</b> CCHP generation plant (gas) 1% of end-user supply (2011)	Joint Stock Company (2005) <a href="http://www.te-to.com.mk/">http://www.te-to.com.mk/</a>	100% private ownership Joint venture between Toplifikacija - Skopje and Negusneft - Moscow	12% of total installed capacity (electricity), used for supply of eligible customers (market) and for exports
<b>Comment:</b>	<p>The TSO is not ownership-unbundled from the incumbent generation but ownership-unbundling from dominant (public) supply activities is in compliance,</p> <p>DSO is not unbundled from public supply activities;</p> <p>As much as 30% of the end-user supply is purchased directly on the market (2011)</p>			

<b>KOSOVO<sup>*100</sup></b>				
<b>Legal Framework:</b>	<ul style="list-style-type: none"> <li>- Law on Energy (2010)</li> <li>- Law on Electricity (2010)</li> <li>- Law on the Energy Regulator (2010)</li> </ul> <p><b>Additional Laws:</b></p> <ul style="list-style-type: none"> <li>- Law on Publicly Owned Enterprises</li> </ul>			
<b>Legal Compliance:</b>	All three Laws in the energy sector of Kosovo* have been updated in 2010 constituting a framework reasonably well adjusted to improve the investment climate and substantially advance the compliance, however in order to comply with the III package all three acts need further amendments			
<b>Function</b>	<b>Company</b>	<b>Type</b>	<b>Ownership</b>	<b>Comments</b>
<b>TSO</b>	<b>KOSTT</b> Transmission System and Market Operator	Joint Stock Company (2005) <a href="http://www.kostt.com/website/">http://www.kostt.com/website/</a>	100% in ownership of Kosovo* (operated as a public enterprise) <b>Authority:</b> Ministry of Economic Development of Kosovo* Energy Regulatory Office (ERO)	The company performs transmission, system operation and market operation in Kosovo*; The cross-border interconnection capacity is allocated by the Serbian TSO (EMS) - there is a dispute with

<sup>100</sup> The designation throughout this document is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence.

				Serbia over these rights;
<b>Producer</b>	<p><b>KEK</b> Kosovo* Energy Corporation, 100% of production (2011), 92.3% of the consumption (2011)</p>	<p>Joint Stock Company (2005) <a href="http://www.kek-energy.com/en/default.asp">http://www.kek-energy.com/en/default.asp</a></p>	<p>100% in ownership of Kosovo* (operated as a public enterprise) <b>Authority:</b> Ministry of Economic Development of Kosovo* Energy Regulatory Office (ERO)</p>	<p>The company consists of divisions for coal mining and production – not legally unbundled. The Distribution and supply are incorporated in a subsidiary (separate legal entity established by KEK) and privatized</p>
<b>DSO and Public Supplier</b>	<p><b>KEDS</b> Kosovo* Electricity Distribution and Supply 100% of end-user supply (2012)</p>	<p>Joint Stock Company (2012) <a href="http://mzhe.rks-gov.net/?page=2,270">http://mzhe.rks-gov.net/?page=2,270</a></p>	<p>100% private ownership Limak &amp; Calik (Turkey) <b>Authority:</b> Ministry of Economic Development of Kosovo* Energy Regulatory Office (ERO)</p>	<p>The company consists of divisions for electricity distribution (DSO) and supply – not legally unbundled, and represents the whole electricity supply business in Kosovo*</p> <p>Originally a subsidiary of KEK, in 2012 a contract was signed with Limak &amp; Çalik (Turkey) for privatization of Kosovo* Electricity Distribution and Supply (KEDS) JSC.</p>
<b>Comment:</b>	<p>The TSO is corporatized but remains in and assets are in state ownership which calls for the need of structural reforms, another area of consideration is the resolution of the dispute of Serbia with KOSTT over the operation of the interconnections</p> <p>The entire sector is highly concentrated and dominated by the production (coal-fired) company KEK, responsible for the wholesale part of the market – owned by Kosovo*, and KEDS (a subsidiary of KEK) which is 100% privatized and dominates the supply (retail part of the market).</p>			

MOLDOVA				
<b>Legal Framework:</b>	Electricity Law 2009 – article 35 (5) (6) – required legally unbundling of the TSO from generation, distribution and supply. Independence in decision making of the administrators from other competitive business is transposed.  State Enterprise "Moldelectrica" has been created with the Government Decision 1000/02 October 2000 and Ministry of Industry Order 92/19 October 2000 related to separation of assets of Moldtranelectro. The enterprise is registered in the Register of the Minister of Justice with no: 102105264/ 26 October 2000, certificate number A nr. 155763. Ministry of Economy is the state institution in charge to appoint the members of the Board of Administration.			
<b>Legal Compliance:</b>	Amendments to the Power Sector Law to transpose ownership unbundling and to comply with the requirements of the 3 <sup>rd</sup> package are required.			
Function				
Function	Company	Type	Ownership	Comments
TSO	MOLDELECTRICA	State Enterprise <a href="http://www.moldelectrica.md/index_r_o.html">http://www.moldelectrica.md/index_r_o.html</a>	State owned  <b>Authority:</b> Ministry of Economy	The status of a public enterprise means that the capital is not split in shares and there are no shareholders. The assets are included in the enterprise capital.
DSO [and/or] Public Supply 1	RED- Nord 17% of end-user supply	Joint Stock Company	100% State owned  <b>Authority:</b> Ministry of Economy	Unbundling of distribution from supply will have to be made by 1 January 2015.
DSO [and/or] Public Supply 2	RED- Nord Vest 8.6% of end-user supply	Joint Stock Company	100% State owned  <b>Authority:</b> Ministry of Economy	Unbundling of distribution from supply will have to be made by 1 January 2015.
DSO [and/or] Public Supply 3	RED- Gas Natural Fenosa 72% of end-user supply	Joint Stock Company	100% private – Gas Union Fenosa	Unbundling of distribution from supply will have to be made by 1 January 2015.
Producer 1	CET -1	Joint Stock Company	100% State owned	Generation unbundled from transmission or distribution. Same Ministry in charge with

	<b>66 MW installed power</b> 7% of domestic production * 1,5% of wholesale		<b>Authority:</b> Ministry of Economy	appointing the members of the BoA.
<b>Producer 2</b>	<b>CET -2</b> <b>240MW (3x80MW)</b> 76,8% of domestic production* 16,4% of wholesale	Joint Stock Company	100% State owned <b>Authority:</b> Ministry of Economy	Generation unbundled from transmission or distribution. Same Ministry in charge with appointing the members of the BoA.
<b>Producer 3</b>	<b>CET – Nord</b> <b>28,4 MW</b> 6,8% of domestic production* 1,4% of wholesale	Joint Stock Company	100% State owned <b>Authority:</b> Ministry of Economy	Generation unbundled from transmission or distribution. Same Ministry in charge with appointing the members of the BoA.
<b>Producer 4</b>	<b>HPP Costesti-Stanca</b> <b>16 MW</b> 8,83% of domestic production* 1,89% of wholesale	Joint Stock Company	100% State owned <b>Authority:</b> Ministry of Economy	Generation unbundled from transmission or distribution. Same Ministry in charge with appointing the members of the BoA.
<b>Comment:</b>	*: Internal production is without CTE Moldoveneasca To comply with the requirements of the D72/2009 related to ownership unbundling (Article 9) (1) (b) and (c) must be ensured. Two separate public bodies exercising control over a transmission system operator and over an undertaking performing any of the functions of generation or supply on the other hand shall be deemed not to be the same person, i.e. Authority: Ministry of Economy.			

MONTENEGRO				
<b>Legal Framework:</b>	– Energy Law of Montenegro (2010)			
<b>Legal Compliance:</b>	The Comprehensive Energy Law which covers electricity is recently adopted and advanced - substantial development is still needed in order to approach compliance with the III Package			
Function	Company	Type	Ownership	Comments
<b>TSO</b>	<b>CGES</b> (Crnogorski Elektroprenosni Sistem) - Electricity Transmission System of Montenegro	Joint Stock Company (2011) <a href="http://cges.me/">http://cges.me/</a>	55% shares in State ownership 22% shares owned by Terna (2011)  23% private (publicly traded) <b>Authority:</b> Ministry of Economy; Energy Regulatory Agency (RAE)	The company performs transmission and system operation but the market operator is unbundled Shares of Terna are acquired through the project to construct submarine cable to Italy
<b>MO</b>	<b>COTEE</b> (Crnogorski Operator Trzista Elektricne Energije) Electricity Market Operator of Montenegro	LLC (2011) <a href="http://www.cotee.me/">http://www.cotee.me/</a>	100% in State ownership <b>Authority:</b> Government of Montenegro Energy Regulatory Agency (RAE)	The Electricity MO is established by the Government as a Limited Liability Company – administering the market operation activities
<b>Producer, DSO and Public Supplier</b>	<b>EPCG</b> (Elektroprivreda Crne Gore) Electricity Company of Montenegro 100% of production (2011) 63% of end-user supply (2011)	Joint Stock Company (1997) <a href="http://www.epcg.co.me/">http://www.epcg.co.me/</a>	55% shares in State ownership  43.7% shares in ownership of A2A (Italy) 1.3% shares in private ownership  <b>Authority:</b> Ministry of Economy; Energy Regulatory Agency (RAE)	Producer, DSO and Supplier of tariff customers – DSO is not legally unbundled; dominantly in State ownership
<b>Comment:</b>	The TSO is corporatized and partially private but still dominantly state-owned and not yet fully ownership-unbundled from the incumbent generation and supply, MO is span-out in a separate Market operator, MO is de facto state owned,  DSO is not unbundled from public supply activities;			

	<p>100% of the local production and supply activities are concentrated in one utility</p> <p>Significant level of private (foreign) capital is already engaged in the industry</p>
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SERBIA				
<b>Legal Framework:</b>	<p>– Energy Law of Serbia (2011)</p> <p><b>Additional legal acts:</b></p> <p>- Law on Public Enterprises</p>			
<b>Legal Compliance:</b>	The Comprehensive Energy Law which covers all energy aspects including electricity is recently adopted and well advanced - substantial development however is still needed in order to approach compliance with the III Package			
Function	Company	Type	Ownership	Comments
<b>TSO</b>	<p><b>EMS</b></p> <p>(Elektromreza Srbije) - Electricity Network of Serbia</p>	<p>Public enterprise established by the Government (2005)</p> <p><a href="http://www.ems.rs/">http://www.ems.rs/</a></p>	<p>Not corporatized,</p> <p>100% assets are in State ownership</p> <p><b>Authority:</b> Ministry of Energy, Development and Environment Protection of Serbia Energy Regulatory Agency (AERS)</p>	<p>The company performs transmission, system operation and market operation in Serbia;</p> <p>The company also performs allocation of interconnection capacity on the borders of Kosovo* as well and there is a dispute with KOSTT (Kosovo*) over these rights;</p>
<p><b>Producer,</b></p> <p><b>DSO and</b></p> <p><b>Public Supplier</b></p>	<p><b>EPS</b></p> <p>(Elektroprivreda Srbije)</p> <p>Electricity Company of Serbia</p> <p>99.96% of production (2011)</p> <p>100% of end-user supply (2011)</p>	<p>Vertically integrated Public Enterprise established by the Government (2005)</p> <p><a href="http://www.eps.rs/SitePages/index.aspx">http://www.eps.rs/SitePages/index.aspx</a></p>	<p>100% assets are in State ownership</p> <p><b>Authority:</b> Ministry of Energy, Development and Environment Protection of Serbia Energy Regulatory Agency (AERS)</p>	<p>The Public Enterprise consists of 12 subsidiary Economic Undertakings (LL enterprises) - 7 in electricity production and 5 in distribution and supply; the Coal-fired Power plants include integrated exploitation of coal</p> <p>The management structure (Management Board, Supervisory</p>

				<p>Board and Management) of EPS are all appointed by the Government;</p> <p>Production, DSO and Supply are legally unbundled but not corporatized;</p> <p>The Company has partial ownership of 49% in two HPP and 50% in one CCHP project companies</p>
<b>Comment:</b>	<p>The TSO is not corporatized and assets are in state ownership which calls for the need of structural reforms, another area of consideration is the resolution of the dispute of Serbia with KOSTT over the operation of the interconnections</p> <p>The entire sector is highly concentrated and dominated by the EPS which is in full dependence of the Government – unbundling process is required in both segments of the market.</p>			

<b>UKRAINE</b>	
<b>Legal Framework:</b>	<ul style="list-style-type: none"> <li>- Law on Electricity Industry of Ukraine (2003)</li> <li>- Law on Combined Generation of Heat and Electricity</li> </ul> <p><b>Additional legal acts:</b></p> <ul style="list-style-type: none"> <li>- Law on Public Monopolies</li> <li>- Law on licensing of Certain Types of Economic Activities</li> <li>- Law On Nuclear Energy Utilization and Radiation Safety</li> </ul>
<b>Legal Compliance:</b>	<p>The principal applicable legal framework for the electricity sector is outdated (despite the past amendments) and the enforced market environment is deficient, the draft Energy Market Law which is in Parliamentary procedure is more advanced and pretends to achieve significant level of unbundling, however there are still many substantial provisions missing for full compliance with the III package</p> <p>The overall legal framework is fragmented and requires higher level of transparency</p> <p>The legal enforcement of NERC is recently amended and the Regulator is reestablished in a new position with potential for higher competences</p>

Function	Company	Type	Ownership	Comments
<b>TSO</b>	<b>NPC UKRENERGO</b> (National Power Company)	State-owned enterprise - established by the Government (1998) <a href="http://www.ukrenergo.energy.gov.ua/ukrenergo/control/en/publish/category?cat_id=36371">http://www.ukrenergo.energy.gov.ua/ukrenergo/control/en/publish/category?cat_id=36371</a>	Not corporatized, (assets are in State ownership) <b>Authority:</b> Ministry of Energy and Coal Industry of Ukraine National Energy Regulatory Commission (NERC)	The enterprise performs central transmission and system operation, consisting of a main and 8 regional systems controlling the United Power System of Ukraine, not corporatized
<b>MO</b>	<b>ENERGORYNOK</b> (Energy Market)	State-owned enterprise – established by the Government (2000) <a href="http://www.er.gov.ua/">http://www.er.gov.ua/</a>	Not corporatized, (assets are in State ownership) <b>Authority:</b> Ministry of Energy and Coal Industry of Ukraine National Energy Regulatory Commission (NERC)  General Board of the Wholesale Electricity Market	The enterprise is legally unbundled from Ukrenergo, not corporatized. It performs as single buyer and wholesale supplier on the market, including scheduling, balancing and financial settlement. The state dominance over the market is implemented through this enterprise.
<b>Producer</b>	<b>ENERGOATOM</b> 49% of production (2010)	Vertically integrated Public Enterprise established by the Government (2005) <a href="http://www.energoatom.kiev.ua/en/index_eng.htm">http://www.energoatom.kiev.ua/en/index_eng.htm</a>	Not corporatized (assets are in State ownership) <b>Authority:</b> Ministry of Energy and Coal Industry of Ukraine National Energy Regulatory Commission (NERC)	The enterprise performs generation of electricity in 4 nuclear power plants, in 15 operating units.  Privatization is forbidden by the Law.
<b>Producer, DSO and Public Supplier</b>	<b>NJSC ECU</b> National Energy Company of Ukraine 51% of production (2010) 68% of end-user supply (2010)	Joint Stock Company established by the Government (2004) <a href="http://www.ecu.gov.ua/en/">http://www.ecu.gov.ua/en/</a>	Consolidated holding mixed ownership (subject to privatization) <b>Authority:</b> Ministry of Energy and Coal Industry of Ukraine National Energy Regulatory	Holding structure including all state-owned share packages of generation companies comprising 45% of installed capacity (2010) and distribution and supply companies.  Most of the companies are partially



			Commission (NERC)	privatized, some are periodically promoted for privatization through open tenders organized by the Government
<b>Comment:</b>	<p>The TSO is not corporatized and its assets are in State ownership, the operation is under full control of the Government.</p> <p>The MO is not corporatized and its assets are in State ownership, it is a central wholesale market (WEM) utility based on constitutive agreement for participation between the stakeholders. The management is appointed by the Government and empowered by a General Board (Council) of WEM constituting of representatives from the industry (with dominant participation of State-owned companies) – it is the vehicle of State dominance over the market performance.</p> <p>Nuclear production is fully under State control and not foreseen for privatization;</p> <p>The industry is well advanced into the process of privatization and diversification of the operational control. NJSC ECU is a corporate structure (holding) established in 2004, consisting of energy undertakings with fully or partially State-owned capital, the constituent companies are open to further gradual privatization organized and ruled by the Government, the domain including (2011):</p> <ul style="list-style-type: none"> <li>- 4 TPP (oil/gas or coal fired) companies;</li> <li>- Ukrhydroenergo – a State owned company operating 6 hydropower plants and 2 pump-storage facilities (;</li> <li>- 5 CHP plants (out of 32) participating in ECU with 100% of shares - the rest being with shares partially transferred to ECU and/or remaining in state, local government or private ownership;</li> <li>- 15 Oblenergo (out of 27) - distribution and supply companies, most are partially privatized;</li> </ul> <p>The transfer of ownership and operational powers to private investors is in line with the need of providing necessary new investments in the deteriorated infrastructure.</p> <p>Equally important is to ensure proper unbundling of the DSO from supply and local production (CHP) - regardless of ownership status of the utility.</p>			

## **ANNEX 2**

### **REVIEW OF THE OWNERSHIP STRUCTURE IN THE GAS SECTOR OF THE ENERGY COMMUNITY CONTRACTING PARTIES**

GAS

**SERBIA**

<b>Legal Framework:</b>	<p>Energy Law (Official Gazette of RS No. 57/2011) – esp. articles 15-19 (unbundling regime)</p> <p>Law on public enterprises and performing economic activities of general interest (new) (Official Gazette of RS No. 119/2012), especially articles 3, 9, 11-21,49,50,52-54, 58</p> <p>Agreement of Associations of Srbijagas</p> <p>Government Decree on founding PE Srbijagas (Official gazette of RS No. 60/05, 51/06)</p>
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Function	Company	Type	Ownership	Comments
<b>TSO</b>	Srbijagas	<p>Public Enterprise (in the sense of the Law on public enterprises)</p> <p><a href="http://www.srbijagas.com">www.srbijagas.com</a></p>	100% state-owned – (Ministry of Energy and Environment, Government represent the state (Republic of Serbia) which is a founder of the company)	<p>Srbijagas is a VIU, founded in 2005, in charge of natural gas transmission and system operation, supply, distribution, storage and trade of natural gas.</p> <p>Management Board appointed by the Government</p> <p>6 members nominated by the Ministry of Energy, and 3 by the management from the employees</p> <p>CEO is appointed by the Government</p> <p>However, all the important decisions have to be approved by the Government (company structure, guarantees, policy decisions, investments etc)</p> <p>Business Plan has to be approved by the Government and in particular by the 5 Ministries (social, energy, finance,</p>

				economy, trade)
<b>TSO</b>	Yugorosgaz	Joint Stock Company (JSC)  www.yugorosgaz.rs	Current shareholders  Gazprom, Moskva - 50%, PE Srbijagas, Belgrade - 25% and Central ME Energy and Gas, Vienna - 25% (Ownership Structure - 100% Centrex Europe Energy & Gas AG)  Management board structure:  3 Gazprom  1 Srbijagas (CEO of Srbijagas)  1 Central ME Energy and Gas	Yugorosgaz JSC was established in 1996. Yugorosgaz JSC activities include procurement of natural gas from Gazprom for all customers in Serbia, as well as natural gas transmission, distribution and supply.
<b>Supply</b>	PE Srbijagas is the dominant market player with 76% of share in total natural gas sales in 2011.	See above	See above	The Government appointed Srbijagas as a last resort natural gas supplier referred to in Article 146 of the Energy Law, as well as a supplier to supply public suppliers of natural gas in January 2013
<b>NIS – producer of natural gas</b>	Natural gas production, which is not a regulated activity, is performed solely by NIS JSC. Major NIS owner is the Russian company Gaspromnjeft, while other shareholders represent both the Republic of Serbia and a great number	JSC  www.nis.rs	56.15% Gaspromnjeft, Russia  29.87% state-owned (Serbia)  13.98% small shareholders	Shareholders Assembly is the highest body of NIS through which the shareholders pass and approve the basic corporate decisions.  As long as the Republic of Serbia will hold at least a 10% stake in NIS share capital, the affirmative vote of the Republic of Serbia will be required for the passing of major Shareholders

	of small shareholders.			<p>Assembly decisions.</p> <p>The Government appoints the SA member on behalf of Serbia.</p> <p>Shareholders Assembly nominates Board of Directors (11 members). Board of Directors is the executive managerial body, personalized in the CEO, a member of this Board.</p>
<b>Comment:</b>				

Natural gas transmission and transmission system operations are performed by PE Srbijagas and Yugorosgaz JSC

Comments on management structure in public enterprises in Serbia: the new Law on public enterprises and performing economic activities of general interest was adopted late December 2012. The major provisions remained the same. The novelties are that the CEO will be appointed after a public tender have been published.

### Ukraine – Overview

The full cycle of operations for gas field exploration and development, production and exploratory drilling, gas transport and storage, supply of natural gas and LPG to customers is done by the National Joint-Stock Company Naftogaz of Ukraine (Naftogaz), which is a vertically integrated oil and gas company *subordinated to the Ministry of Fuel and Energy*. It was founded with 25 May 1998 Cabinet resolution No. 747 "On foundation of the National Joint-Stock Company Naftogaz Ukrainy". Following the decree, the Naftogaz Ukrainy was founded instead of 240 state-owned enterprises within the oil and gas complex.

More than 97 % of oil and gas extracted in Ukraine are produced by Naftogaz or its subsidiaries.

Naftogaz is organised as follows (as of 2011: n.b. not exhaustive list):

- Subsidiary companies (SC) – Ukrgasproduction, Ukrtransgaz;
- Subsidiary enterprises (SE) – Ukrnaftogazkomplekt, Ukravtogaz, Naftogazbezpeka;
- Production and marketing enterprise (PME) Naftogaz, Naukanaftogaz, LIKVO;
- Public joint-stock companies (PJSC) – Chornomornaftogaz, Ukrspetstransgaz, Ukrnafta, Ukrtransnafta.

On 27 October 2011, the Government decided by decree (No. 656) to liquidate Gaz Ukrainy, the former subsidiary of Naftogaz responsible for gas supply, and to merge it with Naftogaz.

Naftogaz company undergoes regular audits which are made public, but this not the case with its affiliated companies.

Gas distribution pipelines are state property, but they are operated by regional gas distribution companies (Gascos), which also supply retail consumers at regulated tariffs. 52 licensed suppliers, so-called ‘guaranteed’ suppliers, operate at a regulated tariff. Naftogaz holds stakes of shares in most of them, either as a major or minor shareholder.

According to a Government Resolution of June 2012, sub-companies of *Naftogaz* in charge of cross-border transport (transit) and gas production will be reorganized into public enterprises under *Naftogaz* control, whereas another Government Resolution of October 2011 calls for the privatization of gas distribution assets of *Naftogaz* with at least a 25% remaining share for the state.

Amendments to Ukraine’s Pipeline Transport Law, that became effective on 6 May 2012 now allow for the restructuring of *Naftogaz*. They have dissolved the ban on reorganization (restructuring) of the transport, distribution and storage companies in the gas sector. The amendments also introduced a prohibition against transfer assets dedicated to carrying out grid activities in transmission, distribution or storage undertakings to any new owner not 100% state-owned. Assets not used for grid-related activities can be assigned to non-state-companies upon decision by the government.

Ukraine				
<b>Legal Framework:</b>	The Law of Ukraine of 08.07.2010 No. 2467 On the Principles of Functioning of the Natural Gas Market; The Law of Ukraine of 20.04.2000 No. 1682 On Natural Monopolies; The Law of Ukraine of 12.07.2001 No. 2665 On Oil and Gas; The Law of Ukraine of 15.05.1996 No. 192 On Pipeline Transport. The Law of Ukraine of 01.06.2000 No. 1775 On Licensing of certain economic activities Cabinet resolution of 25.05.1998 No. 747 On foundation of the National Joint-Stock Company Naftogaz Ukrainy			
<b>Legal Compliance:</b>	[comment on the legal framework]			
Function	Company	Type	Ownership	Comments

<b>TSO</b>	SC "Ukrtransgaz"	affiliated company of NJSC "Naftogaz of Ukraine  <a href="http://www.utg.ua">http://www.utg.ua</a>	State-owned (100%); Ministry of Fuel and Energy, Government of Ukraine	Affiliated Company of National Joint-Stock Company «Naftogaz of Ukraine» was founded to the Resolution of the Cabinet of Ministers of Ukraine «On Distribution of Production, Transmission, Storage and Sales of Natural Gas» dated June 24, 1998.
<b>TSO</b>	Chornomornaftogas	Subsidiary JSC  <a href="http://www.blackseagas.com/index.php/ru/onas/kto-my">http://www.blackseagas.com/index.php/ru/onas/kto-my</a>	Owned by Naftogaz (100%)	VIU created in the Autonomous Republic of Crimea  (engaged in oil and gas related business)
<b>Gas producers</b>	97% of gas produced in UA Cca 18,113 bcm produced gas in 2011  Ukrnafta; Ukrgasvydobuvanya; Chornomornaftogas.  Represents between 30-34% of the consumption (no available accurate data on the 2011 consumption figure)	Affiliated companies of Naftogaz	at least 51% state-owned – Ministry of Fuel and Energy	These gas producers sell their output at regulated prices
<b>Other gas producers</b>	Unknown		50%+1 state owned	
<b>Supplier</b>	Naftogaz	NJSC  <a href="http://www.naftogaz.com">www.naftogaz.com</a>	State owned (100%)  Ministry of Fuel and Energy; Government	Naftogaz is a wholesale supplier, purchasing practically all the outputs from domestic state owned producers (at regulated prices) and is in charge of import quantities from Russia.

<b>Comment:</b>	The unbundling provisions of the acquis are transposed into the Gas Law. However, even though the law stipulates standards for a combined operator, the relationship between the operator of the Unitary Gas Transportation System of Ukraine (Naftogaz) and gas network operators as its subsidiaries remains open. This refers not only to the legal setup but also to the management and decision-making rights of a TSO or DSO. In praxi, proper unbundling is not implemented.
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<b>BOSNIA AND HERZEGOVINA</b>				
<b>Legal Framework:</b>	[Law]  [Article 1]  [Article 2]  ...			
<b>Legal Compliance:</b>	[comment on the legal framework]			
<b>Function</b>	<b>Company</b>	<b>Type</b>	<b>Ownership</b>	<b>Comments</b>
<b>TSO in fBiH</b>	BH Gas d.d.o.	Public Limited Company	100% by the Government of Federation BiH  Ministry in charge: Federal Ministry of Energy, Mining and Industry and Ministry in charge of trade	- Transmission system operation at the entity level bundled with import and whole sale activities at the state level (100% wholesale)
<b>TSO in RS</b>	Gaspromet AD Pale	Joint Stock Company	65% State owned Fund  10% Pension Fund	- Beside the license for transmission system operation, the company poses also licenses for transport, trade and supply (although not performing import, trade and supply)



			<p>5% Restitution Fund</p> <p>20% Investment funds &amp; private small shareholders</p> <p>Ministry in charge: Ministry of Industry, Energy and Mining of RS</p>	
<b>Transporter in RS</b>	Sarajevogas AD Istocno Sarajevo	<p>Joint Stock Company</p> <p>Listed at Banja Luka Stock Exchange</p>	<p>108 shareholders as of 31 December 2011 (tbc)</p> <p>Ministry in charge: Ministry of Industry, Energy and Mining of RS</p>	- The company performs transport, distribution system operation and retail supply in RS
<b>Public Supply in fBiH</b>	<p>Sarajevogas d.o.o. Sarajevo</p> <p>(cca 55% of supply in BiH)</p>	Public Limited Company	<p>100% by Canton Sarajevo</p> <p>Ministry in charge: Federal Ministry of Energy, Mining and Industry and ministry in charge of trade</p>	- The company acts as DSO and retail supplier
<b>Public Supply in RS</b>	<p>Sarajevogas AD Istocno Sarajevo</p> <p>(cca 17% of supply in BiH)</p>	<p>Joint Stock Company</p> <p>Listed at Banja Luka Stock Exchange</p>	<p>108 shareholders as of 31 December 2011 (tbc)</p> <p>Mainly institutional funds, as for Gaspromet Pale</p> <p>Ministry in charge: Ministry of Industry, Energy and Mining of RS</p>	- The company performs transport, distribution system operation and retail supply in RS
<b>Comment:</b>	[general comment on state of unbundling and compliance]			

CROATIA				
<b>Legal Framework:</b>	[Law] [Article 1] [Article 2] ...			
<b>Legal Compliance:</b>	[comment on the legal framework]			
Function				
Function	Company	Type	Ownership	Comments
<b>TSO</b>	Plinacro Ltd	Public Limited Company	100% by the State of Croatia  Ministry in charge: Ministry of economy	<ul style="list-style-type: none"> <li>- Fully (ownership) unbundled from INA Group in 2002</li> <li>- UGS Operator (PSP Okoli) is 100% by Plinacro</li> <li>- LNG Operator (LNG Hrvatska) is 50% owned by Plinacro</li> </ul>
<b>Public Supply</b>	Prirodni Plin Ltd  cca 80% of supply	Limited Company / Member of INA Group	100% owned by INA  Ministry in charge: Ministry of economy	<ul style="list-style-type: none"> <li>- All suppliers (48) have PSO</li> <li>- Market share of Prirodni Plin is continuously decreasing (from 100% a 2 years ago)</li> </ul>
<b>Producer</b>	INA AD  100% of domestic production	Joint Stock company  Listed at London and Zagreb Stock Exchange	47,26 % MOL, Hungary  44,83% State of Croatia  7,91% Institutional & private investors  Ministry in charge: Ministry of economy	

<b>Comment:</b>	[general comment on state of unbundling and compliance]
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**FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

<b>Legal Framework:</b>	[Law] [Article 1] [Article 2] ...
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<b>Legal Compliance:</b>	[comment on the legal framework]
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**FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

Function	Company	Type	Ownership	Comments
<b>TSO</b>	GAMA AD Skopje	Jont Stock Company	Agreement: 50% by the State and 50% by Makpetrol until the Court decide in the case pending since 2006  Ministry in charge: Ministry of Economy	- The Company performs transmission and transmission system operation according to the licenses, but licenses have to be harmonized with the Energy Law 2011 – network operator and/or system operator  - One of the owner – Makpetrol – is involved in gas trade activity
<b>Public Supply</b>	Promgas	Limited Company / Makpetrol' Daughter company	Promgas 100% owned by Makpetrol	- Makpetrol is a Joint Stock Company in full private ownership (1998) listed at MSE

		Makpetrol = Joint Stock Company	<p>Makpetrol ownership:</p> <p>Workers 30%</p> <p>Retired workers 13,6%</p> <p>Former workers 4%</p> <p>Management 0,1%</p> <p>Oilko 20%</p> <p>Outside (Makpetrol) 25,4%</p> <p>External subjects 6,9%</p> <p>Ministry in charge: Ministry of Economy</p>	
<b>Comment:</b>	[general comment on state of unbundling and compliance]			

MOLDOVA				
<b>Legal Framework:</b>	[Law] [Article 1] [Article 2] ...			
<b>Legal Compliance:</b>	[comment on the legal framework]			
Function				
Function	Company	Type	Ownership	Comments
<b>TSO</b>	Moldovatrangaz	Limited Company / Moldovagaz' Daughter company	100% by Moldovagaz  Ministry in charge: Ministry of Economy	<ul style="list-style-type: none"> <li>- TSO on the right bank of river Dniester</li> <li>- Several DSOs and retail supplier are also daughter companies of Moldovagaz</li> </ul>
<b>TSO</b>	Tiraspoltrangaz	Limited Company / Moldovagaz' Daughter company	100% by Moldovagaz  Ministry in charge: Transnistria Authority	<ul style="list-style-type: none"> <li>- TSO on the left bank of river Dniester</li> </ul>
<b>Public Supply</b>	Moldovagaz and different daughter companies – covering different distribution areas	Joint Stock Company	50% Gazprom  35,33% Moldova's state  13,44% Transnistria authority	

			Ministry in charge: Ministry of Economy	
<b>Comment:</b>	Decision No D/2012/05/MC-EnC concerning the implementation of Article 9 of Directive 2009/73/EC by the Republic Moldova, as of 5 December 2012, extends Moldova's deadline to implement Article 9 (1) of the Directive 2009/73/EC on common rules for the internal market in natural gas with a new deadline for unbundling the natural gas market set on 1st <b>January 2020</b> .			

## ANNEX 3

# Energy Community Workshop Effective implementation of the Third Energy Market Package

27 June 2013 (Vienna)

**9.00 Welcome address**

**9.05 Setting the Scene: The Third Package in the Energy Community**

*ECS/EC*

**9.30 Main Challenges: Unbundling**

*(Initial) Summary by the ECS*

*Contracting Parties*

*Discussion (CP, ECS, EC)*

**11.30 Coffee Break**

**11.45 Main Challenges: Consumer Protection and Vulnerable Customers**

*(Initial) Summary by the ECS*

*Contracting Parties*

*Discussion (CP, ECS, EC)*

**13.15 Sandwich lunch**

**14.00 Main Challenges: Regulatory Authorities**

*(Initial) Summary by the ECS*

*Contracting Parties*

*(Complementary) Summary by the ECS*

**16.00 Coffee Break**

**16.15 Lessons learned by an EU Member State in implementing the Third Package**

**16.45 Wrap up/Conclusions**

**17.00 End of Workshop**