

Opinion 4/21

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC
– Ukraine – Certification of *Ukrenergo*

On 1 October 2021, the National Commission for State Regulation of Energy and Public Utilities of Ukraine (hereinafter “NEURC”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision (hereinafter “the Preliminary Decision”) on the certification of the Joint Stock Company National Power Company *Ukrenergo* (hereinafter “*Ukrenergo*”), the transmission system operator for electricity (hereinafter “TSO”). The Preliminary Decision was adopted on 1 October 2021¹ and based on Articles 31-34 of the Law on the Electricity Market of 2017 (hereinafter “the Electricity Market Law”).²

Pursuant to Article 10 of Directive 2009/72/EC³ (hereinafter “the Electricity Directive”) and Article 3 of Regulation (EC) No 714/2009⁴ (hereinafter, “the Electricity Regulation”) the Secretariat shall examine the notified Preliminary Decision and deliver its Opinion to NEURC as to the compatibility of such a decision with Article 9(8) and Article 13 of the Electricity Directive.

I. Background

On 14 August 2019, *Ukrenergo* had already submitted an application for certification under the ownership unbundling model to NEURC. On 7 October 2019, NEURC adopted a Preliminary Decision.⁵ On 5 February 2020, the Secretariat issued an Opinion on that Preliminary Decision, concluding that *Ukrenergo* could not be certified according to the ownership unbundling model, since one of the main criteria – ownership of the transmission assets by the TSO - was not fulfilled.⁶ On 23 April 2021, NEURC adopted the Final Decision and rejected the certification of *Ukrenergo* under the ownership unbundling model.⁷

In April 2021, the Law on amending certain legislative acts of Ukraine regarding certification of the transmission system operator has been adopted.⁸ This Law amended the Electricity Market Law to transpose the ISO unbundling model from Articles 13, 14 and 37(3) of the Electricity Directive. The Commercial Code, the Law on Management of Objects of State-owned Property and on the Cabinet of Ministers were amended by the same Law. These amendments complement the Law on Amendments to Certain Laws of Ukraine in Relation to Separation of Natural Gas Transportation

¹ NEURC Resolution No.1683 of 01.10.2021.

² Law No 2019 adopted on 13.04.2017.

³ 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 and repealing Directive 2003/54/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 06.10.2011.

⁴ 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 repealing Regulation (EC) No 1228/2003, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 06.10.2011.

⁵ NEURC Resolution No 2094 of 07.10.2019.

⁶ Secretariat’s Opinion 1/20 of 5 February 2020 on the certification of *Ukrenergo*.

⁷ NEURC Resolution No 714 of 23.04.2021.

⁸ Law No 1396-IX of 15.04.2021.

Activities of 2019,⁹ which had been pivotal to achieve unbundling and certification of the gas TSO *GTSO*.¹⁰

On 17 May 2021, *Ukrenergo* submitted an application for certification under the ISO model to NEURC. On 2 June 2021, NEURC adopted a Preliminary Decision¹¹ and notified the Secretariat. On 2 September 2021, *Ukrenergo* notified NEURC of a significant change in the factual and legal basis on which the Preliminary Decision was adopted. This change consisted in the transfer of the responsibility for exercising the state's shareholding rights in *Ukrenergo* and the asset ownership from the Ministry of Finance to the Ministry of Energy. On 1 October 2021, NEURC adopted the Preliminary Decision subject to this Opinion, by which it conditionally certified *Ukrenergo* as an electricity TSO and invalidated the previous Preliminary Decision of 2 June 2021.

1. The applicant *Ukrenergo*

Ukrenergo holds a license for transmission of electricity issued by NEURC,¹² and operates the electricity transmission network in Ukraine. It also performs dispatching, balancing and allocation of the interconnection capacities at the borders. The transmission system operates in a synchronous mode with the Unified Power System (UPS) of the Russian Federation, Belarus and Moldova, except for the so-called "Burshtyn Island" which is interconnected and synchronised with the ENTSO-E system (synchronous grid of Continental Europe).

Ukrenergo was created as a public enterprise in 1998,¹³ as a successor of the two state enterprises National Dispatch Centre of Ukraine and State Electric Company *Ukrelektroperedacha*. As from 2018, the state was represented in *Ukrenergo* by the Ministry of Finance.¹⁴ In 2019, *Ukrenergo* was transformed into a private joint stock company (with the Ministry of Finance as the sole shareholder).¹⁵ By the Cabinet of Ministers' Order No.50-r of 20 January 2021, the Ministry of Economy together with the Ministry of Energy and the Ministry of Finance were tasked to prepare the transfer of shares in *Ukrenergo*, and the transmission assets managed by it, from the Ministry of Finance to the Ministry of Energy. The transfer was to be preceded by the transfer of a number of state-owned generation and supply companies from the Ministry of Energy to the Cabinet of Ministers and the Ministry of Economy (as explained below). The transfer was approved by the Cabinet of Ministers' Order No. 833-r of 28 July 2021, which tasked the Ministry of Finance together with the Ministry of Energy to carry out the registration of the corporate rights on the name of the latter within two weeks. On 16 September 2021, the Ministry of Energy was listed in the business registry of Ukraine as representative of the State for 100% of the shares in *Ukrenergo*. On 21 September 2021, the Minister of Energy approved a new charter for *Ukrenergo*.¹⁶

a. Corporate Governance

⁹ Law No. 264-IX, 31.10.2019.

¹⁰ Secretariat's Opinion 4/19 of 17 December 2019 on the certification of *GTSO*.

¹¹ NEURC Resolution No. 901 of 02.06.2021.

¹² NEURC Resolutions No 1366 of 28.10.1998 and No 1012 of 17.07.2014.

¹³ Ministry of Energy Order No 54 of 15.04.1998.

¹⁴ Resolution of the Cabinet of Ministers No 1001-p of 14.11.2018.

¹⁵ The company's charter was adopted by Ministry of Finance, Order No 321 of 29.07.2019, amended by Order No 437 of 21.10.2019 and by Order No. 354 of 11.06.2021.

¹⁶ Ministry of Energy Order No 218 of 27.09.2021.

According to the charter, *Ukrenergo* comprises the following corporate bodies: the shareholder assembly, the supervisory board and the management board.

The rights and obligations of the shareholder assembly are exercised by the Ministry of Energy (in a manner described below) The shareholder assembly is vested with the power to decide on a broad range of issues, including amendments to the charter, individual financial transactions of a certain significance, loans, the appointment of supervisory board members etc. The shareholder also approves and monitors the implementation of *Ukrenergo*'s financial plans as well as annual and mid-term (three to five years) investment plans.¹⁷ The ten-years network development plan (hereinafter "TYNDP"), on the other hand, is developed by the management board of *Ukrenergo* and approved by NEURC.

The supervisory board controls and supervises the operation of the management board. Its competences include appointing the chairperson and members of the management board, and the appointment and dismissal of a compliance officer. Its seven members are appointed by the shareholder assembly, i.e. by the Ministry of Energy. According to the Law on the Management of State Property, a majority of the supervisory board members must be independent from the state administration and are selected through a different procedure.¹⁸ For the three state representatives, the shareholder selects candidates fulfilling the eligibility requirements, whereas for the four independent members, selection is based on a competitive procedure. For either category, the selected candidates are proposed to an inter-ministerial committee comprised of the First Vice Prime Minister of Ukraine, the Minister of Economy, the Minister of Finance, the Minister of Energy and five representatives of international organisations and financial institutions with an advisory vote. The candidates supported by the committee are approved by the Cabinet of Ministers of Ukraine before formally being appointed by the shareholder assembly (the Ministry of Energy).

The current supervisory board was established by the previous shareholder, i.e. the Ministry of Finance, on 29 July 2019.¹⁹ Besides one existing state representative, two additional representatives were approved by the Cabinet of Ministers on 21 July 2021.²⁰ In the Preliminary Decision, NEURC raised concerns about a possible conflict of interest, as one candidate also worked as a Director of Department in the state-owned electricity generation company *Ukrhydroenergo*, and the other one as an advisor to the Prime Minister. The appointment of four new independent members of the supervisory board is pending. The term of the existing independent members is expected to expire on 26 November 2021. That date has been postponed already several times.²¹

The management board of *Ukrenergo* is composed of five members appointed by the supervisory board, including a chairperson.

b. Exercise of the shareholding in Ukrenergo

¹⁷ Points 10.9.6., 11.13.5. and 12.9.16.1. of the charter of *Ukrenergo*.

¹⁸ Cabinet of Ministers' Resolution No 777 of 03.09.2008. The independent representatives are selected according to Resolution No142 of 10.03.2017, representatives of the state are selected according to Resolution No 143 of 10.03.2017.

¹⁹ Order of the Ministry of Finance No 321 of 29.07.2019.

²⁰ Cabinet of Ministers' Order No.815-p of 21.07.2021.

²¹ https://ua.energy/wp-content/uploads/2021/11/00100227_19.11.2021.pdf

According to the Regulations of the Ministry of Energy adopted by Resolution No. 507 of the Cabinet of Ministers and amended specifically for unbundling purposes in 2021,²² the Ministry of Energy independently exercises powers related to management of state property and management of corporate rights in the TSO. The 2021 amendments envisage that within the Ministry, “a Deputy Minister is appointed, who independently of the Minister, First Deputy Minister and other Deputy Ministers performs tasks related to state property management and / or management of corporate rights” in the electricity and gas TSOs. Moreover, the Deputy Minister is tasked to ensure compliance with the requirements for functional, administrative, operational independence and autonomy of the TSOs in decision-making, and may not participate in the activities of the Ministry related to developing and implementing policies for production and supply of electricity and gas.²³

The Deputy Minister in charge has been designated by the Minister’s Order No 224 of 27 September 2021.²⁴ Order No 224 defines the organigram of the Ministry and enumerates the tasks and rights of the Minister and the Deputy Ministers. Accordingly, the Deputy Minister entrusted with the management of *Ukrenergo*: performs or coordinates the functions of the Ministry in managing of corporate rights owned by the state in *Ukrenergo*, approves documents and signs regulations and other documents issued by the Ministry for that purpose, manages state property given to *Ukrenergo* on the basis of an economic management right; and approves the financial plans as well as the annual and mid-term investment plans. On the other hand, the Minister retained the power to approve the charter of *Ukrenergo*,²⁵ which he did on 29 September 2021.²⁶

c. Ownership and usage of assets

Under Ukrainian legislation, ownership of assets used for the transmission of electricity is and needs to remain with the state. According to Article 116(5) of the Ukrainian Constitution, state property is managed by the Cabinet of Ministers. By a Resolution of the Cabinet of Ministers of 2018,²⁷ the representation of the state’s ownership of the transmission assets was assigned to the Ministry of Finance. By Order No. 833-r of 28 July 2021 of the Cabinet of Ministers, this status was transferred to the Ministry of Energy (simultaneously with the task to exercise the state’s shareholding in *Ukrenergo*). The formal act of acceptance of the transfer of the property is expected to be signed by both ministries soon.

In 2017, the Cabinet of Ministers²⁸ had already granted *Ukrenergo* a so-called economic management right over the state-owned transmission assets. Based on Article 136 of the Commercial Code, an economic management right granted by the owner establishes a right of usage for specified commercial purposes. The scope of this right is defined by the Commercial Code and an agreement (hereinafter “the economic management rights agreement”) between the public body representing the state and the economic entity in question. Under the Commercial Code, the state-owned assets used by the TSO are carried in the latter’s books as its assets, and the owner of the transmission assets is not allowed to refuse financing of investments in the TSO agreed by

²² Resolution No. 507 on approval of the Regulation on the Ministry of Energy, dated 17.06.2020 as amended by CMU Resolution No. 863, dated 11.08.2021 and No.1025, dated 29.09.2021.

²³ Item 4¹ of Resolution No 507.

²⁴ Ministry of Energy Order No 224 of 27.09.2021.

²⁵ Point 4(9) of Order No 224 and point 10(21) of the Cabinet of Ministers’ Resolution No 507 of 17.06.2020

²⁶ Minister of Energy Order No.218 of 27.09.2021.

²⁷ Resolution of the Cabinet of Ministers No.1001-p of 14.11.2018.

²⁸ Resolution of the Cabinet of Ministers No 829-p of 22.11.2017.

NEURC.²⁹ An economic management rights agreement concluded on 27 May 2021 between the state, represented by the Ministry of Finance, and *Ukrenergo*³⁰ constitutes the title for usage of the transmission assets for an indefinite period for the purpose of transmission system operation, and sets out the rights and obligations of the signatories. The economic management rights agreement stipulates that the Ministry of Finance, as owner of the property, has no right to interfere in the economic activities of *Ukrenergo*. All TSO functions, such as ensuring access to the grids, operation, maintenance and development, as well as developing the TYNDP remain solely with *Ukrenergo*. The economic management rights agreement also stipulates that *Ukrenergo* has to finance the relevant costs from tariff revenues and (or) from other sources, as well as to take out property insurance, whereas the owner is expected to perform the obligations under the law without specifying them in further detail. The economic management rights agreement has not yet been amended to reflect the change in the representation of state ownership, which hinges on the formal conclusion of the transfer.

d. *Ukrenergo's financial situation*

As an operator of a regulated activities, the (capital and operational) costs of *Ukrenergo's* activities are covered through transmission and dispatch tariffs set by NEURC, based on methodologies set for the purpose.³¹ Article 7(8) of the Electricity Market Law underlines that the transmission tariffs need to cover costs, including for approved investments and a rate of return.

According to Article 33(5) of the Electricity Market Law, the transmission tariff may also include expenses of the transmission system operator in the event of fulfilling special obligations in the general public interests. *Ukrenergo* is indeed obliged by law to fulfil such special obligations. In accordance with Articles 63(6) and 65(7) of the Electricity Market Law, the company must compensate the offtakers of electricity produced from renewable energy for the difference between the feed-in tariff and the price at which the offtakers sell the electricity on the market, as well as a share of the costs for imbalance by renewable energy producers (hereinafter “the Renewables PSO”).³² The offtakers are the regional universal service suppliers for small installations and the state-owned Guaranteed Buyer for large installations.

According to information received from *Ukrenergo*, the company had accumulated debts vis-à-vis the Guaranteed Buyer in the amount of UAH 26.65 billion in 2020, and the first ten months of 2021. Financed by loans as well as the largest-ever Ukrainian green and sustainability-linked Eurobond secured by a state guarantee³³ and yielding UAH 21 billion, *Ukrenergo* settled its 2020 debts and the part of debts accumulated so far in 2021 in November 2021.

2. State activities in generation and supply of electricity and natural gas

The Cabinet of Ministers represents the state's shares in the fully state-owned *Naftogaz* (the vertically integrated gas company), *Ukrzaliznytsia* (the Ukrainian railways company supplying electricity and gas via subsidiaries), and *Ukroboronprom* (the State-owned defence conglomerate,

²⁹ Article 136 of the Commercial Code, Law No 436-IV of 16.01.2003.

³⁰ Contract No 13110-05/301 of 27.05.2021 between the Ministry of Finance and *Ukrenergo* on transfer of the right of economic management of objects of state property used in the course of electricity transmission.

³¹ NEURC applies two tariff methodologies adopted in April 2019 and amended since, one on transmission tariff setting (NEURC Resolution No 585 of 22.04.2019) and one on dispatch tariff setting (NEURC Resolution No 586 of 22.04.2019).

³² Point 11 of the Final and Transitional Provisions of the Electricity Market Law.

³³ Resolution No 1049 of 11.09.2021.

which also is engaged in the supply of electricity). Moreover, the management of corporate rights of the state in the electricity generators *Energoatom* (nuclear power), *Ukrhydroenergo* and *Lower Dniestr* (hydro power), *Kaluska-nova* (CHP) and *Lysychanska* (thermal power) which was previously exercised by the Ministry of Energy have been transferred to the Cabinet of Ministers, while *Ukrinterenergo* (state-owned supplier of last resort and trader) has been transferred from the Ministry of Energy to the Ministry of Economy.

The Ministry of Energy retains under its control *Kremenets DGSS*, a distribution system operator for natural gas, the *Donuzlavaska* wind power plant located on occupied territory and in the process of liquidation, as well as *Regional Electrical Networks*, a distribution system operator for electricity in the process of liquidation. Moreover, the shares of nine distribution system operators are expected to be transferred to the Ministry of Energy.³⁴ Five of those are vertically integrated undertakings including electricity supply activities, which are expected to be sold to *Energoatom*. Furthermore, the Preliminary Decision notes that the Ministry of Energy manages the state-owned corporate rights in 123 “business entities”, 5 “economic structures” and 275 “state enterprises, institutions and organisations”, apparently not active in generation and/or supply of electricity or natural gas. NEURC requested the Ministry of Energy to submit documents confirming this assumption. Finally, the exercise of the state’s shareholding right in the *Market Operator* was transferred from the Cabinet of Ministers to the Ministry of Energy. The *Market Operator* only facilitates trade and is not engaged in buying or selling electricity.³⁵

In its Preliminary Decision, NEURC also notes that the appointment of two new members of the supervisory board of *Ukrhydroenergo* (as state representatives) by the Cabinet of Ministers’ Order No.814-p of 21 July 2021 might raise concerns of potential conflicts of interest. One of them also held the position of Director General of the Directorate of Strategic Planning and European Integration in the Ministry of Energy (under supervision of the Deputy Minister in charge of TSOs), whereas the other one was an advisor to the Minister of Energy. According to the information available to the Secretariat, they both terminated their engagements with the Ministry, which had given rise to concerns about potential conflicts of interest. NEURC will verify this information before taking a Final Decision.

II. The Preliminary Decision

In the Preliminary Decision, NEURC comes to the conclusion that *Ukrenergo* can be certified preliminarily, but conditioned final certification on a number of measures to be taken and evidence to be submitted by the applicant. The operative part of the Preliminary Decision requires *Ukrenergo* to submit:

- proof that generation and/or supply undertakings are not using state property that is managed by the Ministry of Energy;
- proof that transferring the Market Operator to the Ministry of Energy complies with the requirements for unbundling;
- proof that transferring the universal service suppliers to *Energoatom* and the distribution system operators to the Ministry of Energy complies with the requirements for unbundling;
- amendments to the Order No.162 of 29 July 2021 on creating separate structural unit in the Ministry of Energy subordinated to the Deputy Minister managing the rights in

³⁴ Cabinet of Ministers’ Resolution No1222-r of 15.09.2021, Order of the Ministry of Energy No 273 of 01.11.2021.

³⁵ European Commission Opinion of 09.01.2013 on certification of *Energinet* (gas).

Ukrenergo as well as to several other Regulations on the structural units of the Ministry of Energy have been adopted;

- amendments to the Orders of the Ministry of Energy related to distribution of functional responsibilities within the Ministry,
- amendments to regulations eliminating the risk of the Ministry of Energy's influence on the activities of economic entities engaged in the production and/or supply of electricity or natural gas,
- proof that Ministry of Energy will be replaced by another public body in international agreements (loan agreements) to which the Ministry of Energy is a party and which are aimed at financing the activities of generation companies,
- proof that appointments of Mr. [...] and Mr. [...] as members of supervisory board of *Ukrenergo* comply with unbundling and independence requirements,
- proposal for appointment of a compliance officer of *Ukrenergo* and a draft contract to be concluded for the approval by the NEURC,
- proof of economic management rights agreement signed between the Ministry of Energy and *Ukrenergo*,
- proof that appointments of Mr. [...] and Mr. [...] as members of the supervisory board of *Ukrhydroenergo* would be in line with the unbundling of *Ukrenergo*;
- amendments to the Ministry of Energy's compliance program are adopted.

From the wording of the Preliminary Decision, it appears that fulfilment of those criteria is a precondition for adoption of a Final Decision on certification.

III. Assessment of the Preliminary Decision

1. The ISO model of unbundling

At the outset, the Secretariat recalls that the unbundling provisions were designed to separate, in vertically integrated undertakings,³⁶ control over transmission system operation as a natural monopoly, on the one hand, and over production and supply activities as competitive activities, on the other hand, to eliminate potential conflicts of interest between transmission and other activities performed by vertically integrated undertakings.³⁷ The rules on unbundling thus aim to prevent vertically integrated undertakings from using their privileged position as operators of a transmission network by obstructing access of network users other than their affiliated companies to their network or other conduct affecting fair and undistorted competition, market integration or infrastructure investment.

By contrast, the ISO model enshrined in Article 13 of the Electricity Directive envisages that the transmission network is not managed by the vertically integrated undertaking, including any of its subsidiaries, but by an operator which is fully independent from supply and production interests in the vertically integrated undertaking. In the conditions of the present case, where different bodies in the government exercise the roles of shareholder, owner of the assets as well as control over energy generation and supply companies, the unbundling rules do not only apply to the relations between

³⁶ A vertically integrated undertakings is defined in Article 2(21) of the Electricity Directive as “an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity”.

³⁷ Secretariat Opinion 2/17 of 22 April 2017 on the certification of *Yugorosgaz Transport*.

the ISO and the vertically integrated undertaking but also with and between different bodies within the government of Ukraine. The ISO also must effectively perform all TSO functions required by the Electricity Directive and the Electricity Regulation, most notably operation, development and maintenance of the system. As a precondition, it must be ensured that the ISO has the necessary powers and resources to operate the system independently from the vertically integrated undertaking.³⁸

2. Independence of the transmission system operator

According to Article 13(2)(a) of the Electricity Directive, an ISO may be designated only where it complies with Articles 9(1)(b), (c) and (d) of the Electricity Directive. These provisions aim at establishing the independence of the system operator by separating the exercise of control over or any rights in production and supply activities, on the one hand, and transmission activities on the other hand. Article 9(3) of the Electricity Directive stipulates that the independence requirements apply also across the natural gas and electricity markets, thereby prohibiting joint influence over an electricity generator or supplier and a natural gas TSO, or over a natural gas producer or supplier and an electricity TSO.³⁹ Under the conditions of Article 9(6) of the Electricity Directive, two separate public bodies exercising control over a transmission system operator on the one hand, and over an undertaking performing any of the functions of production or supply on the other hand, may be deemed to be independent from one another.

The term 'control' is defined in Article 2(34) of the Electricity Directive as "*any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*"⁴⁰ The rights include in particular the power to exercise voting rights, the holding of a majority share and the right to act as, and the power to appoint members of the TSO's corporate bodies and those legally representing the TSO (Article 9(2) of the Electricity Directive).

It is evident from the Preliminary Decision that *Ukrenergo* itself does not control any activities related to the production or supply of network energy. It is equally clear that the Ministry of Energy exercises full control over *Ukrenergo* within the meaning of Article 2(34) of the Electricity Directive, which is reinforced by the fact that the same Ministry also represents the state as the owner of the transmission assets, made available to *Ukrenergo* via economic management rights.

The Cabinet of Ministers and the Ministry of Economy, on the other hand, control a number of public energy production and supply companies, respectively. Some of those, including *Energoatom* and *Ukrhydroenergo*, have been transferred from the Ministry of Energy only recently, with the purpose to avoid conflicts of interest and comply with the unbundling rules. The ones still under the Ministry of Energy's control seem either not operational anymore, or pursue activities which do not conflict with control over transmission system operation.⁴¹ From the information available, the Secretariat is

³⁸ Secretariat Opinion 4/19 of 17 December 2019 on the certification of *GTSO*.

³⁹ Secretariat Opinion 2/17 of 22 April 2017 on the certification of *Yugorosgaz Transport*, Secretariat Opinion 4/19 of 17 December 2019 on the certification of *GTSO*.

⁴⁰ This definition is taken from the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and should be interpreted accordingly (recital 13 of the Electricity Directive).

⁴¹ Derogations may be possible where such activities are "*truly incidental to the core activity of an undertaking ... , and the quantity of energy is also insignificant*", European Commission Opinion of 26.4.2013 on the certification of *Thanet*.

generally satisfied that the Ministry of Energy does not simultaneously exercise control over transmission system operation and public energy generation or supply companies. With respect to the five distribution system operators, the shares of which are to be transferred to the Ministry of Energy, the Secretariat requests NEURC to verify and confirm, before adopting the Final Decision, that any exercise of control by the Ministry over the supply activities related to distribution system operation is excluded.

To the extent they do not occupy functions in the Ministry of Energy anymore, the Secretariat is also not concerned about conflicts of interest of two members of the supervisory board of *Ukrhydroenergo*. It encourages NEURC to verify and monitor the status.

However, that does not entirely exclude the potential for conflicts of interest associated with the Ministry's control over *Ukrenergo*. Such potential exists in two dimensions: Firstly, there is a risk of direct influence of the government (the Cabinet of Ministers) and/or the Prime Minister exercising control over the Ministry of Energy and hence indirectly over *Ukrenergo*. Article 9(6) of the Electricity Directive precludes a third public body such as the Prime Minister from giving instructions vis-a-vis the two public bodies designated to control the TSO and generation/supply companies respectively.⁴² Secondly, unlike the previous public body in control of *Ukrenergo* (the Ministry of Finance), the Ministry of Energy is involved by definition in policy-making and implementation in the energy sector, which includes markets for generation and supply. In the past, policy-making and implementation has in several cases been paramount to direct interventions in the business of electricity generation companies.

a. The relation between the Cabinet of Ministers and the Ministry of Energy

The Constitution of Ukraine establishes the Cabinet of Ministers as the highest body within the executive branch of the state. As a collegial body, it comprises, inter alia, the Prime Minister and the Ministers. According to Article 116(9) of the Constitution, the Cabinet of Ministers directs and coordinates the operation of ministries.

In this respect, the Secretariat recalls that a while a government and a ministry may be considered separate public bodies,⁴³ the relation of subordination between the government and or the prime minister and a ministry gives rise to conflict of interests, especially where the government directly controls generation and supply activities.

As already established in Opinion 4/19 on the gas transmission system operator *GTSO* of Ukraine, however, a number of safeguards built in the legislative framework, as well as in *Ukrenergo's* corporate governance and the governance structure in place for the Ministry of Energy, sever the chain of control between the Cabinet of Ministers and the Ministry of Energy at least *de iure* to an extent reconcilable with Article 13(2)(a) of the Electricity Directive.

Namely, Article 11(3) of the Law on Management of State Property Objects stipulates that “*the management of the corporate rights of the state, as well as the establishment of management bodies in the economic entities operating in the field of electricity and natural gas transmission... shall be carried out in accordance with the requirements for the unbundling and independence.*” The Cabinet of Ministers' right to repeal acts of ministries under Article 21(6) of the Law on the Cabinet of Ministers

⁴² European Commission Opinion of 25.07.2014 on certification of *GAZ-SYSTEM*.

⁴³ Secretariat Opinion 1/18 of 27.02.2018 *CGES*, Opinion 3/19 of 17.06.2019 *MEPSO*.

have been removed by amendments in April 2021, which excluded this competence of the Cabinet of the Ministers “*in relation to decisions of ministers and other public bodies if such decisions are taken in exercising the management corporate rights in the electricity TSO.*” According to Article 44(6) of the same Law, a Ministry exercising control over an electricity transmission system operator shall exercise its control “*individually and independently, under the principles of openness and transparency, responsibility for the decisions made. These rights shall not extend to management and allocation of capacities nor to investment planning, which shall be the competence of the economic entities conducting electricity ... transmission activity. ... Interference with the exercise by the Ministry of powers set forth by this part, shall be prohibited.*” The provision carves out only a number of decisions from this exclusive competence of the Ministry, namely: “*reorganization (merger, acquisition, splitting, spin-off) or winding-up of such economic entities or economic organizations; transactions that may result in termination of the right of economic management for the property used in the process of carrying out the ... electricity transmission activity, of such economic entities or economic organizations; introduction to the charter of such economic entities or economic organizations of amendments that pertain to the objective, scope, main areas of activity thereof; approval of the part of net profit of such economic entities or economic organizations that has to be allocated for payment of dividends.*” These decisions require the Cabinet of Ministers’ approval. In all other areas, “*the Cabinet of Ministers of Ukraine, the Prime Minister of Ukraine, ..., according to the requirements for unbundling and independence of the electricity ... transmission system operator as set forth by law, shall not coordinate and control economic entities acting based on the license for carrying out the activity of electricity ... transmission, as well as not appoint members of management bodies of such economic entities.*” (Article 44(4) of the Law on the Cabinet of Ministers).

Another layer of safeguards was recently introduced in a reorganization of the Ministry of Energy, by which one person, a Deputy Minister, was appointed with the exclusive competence to carry out all tasks related to the management of shares in, and the management of the state property operated by *Ukrenergo*. According to a legally binding resolution adopted by the government,⁴⁴ the designated Deputy Minister acts independently of the Minister and other Deputy Ministers, and is accountable for transgressions. The resolution is implemented by an internal order of the Minister,⁴⁵ vesting the designated Deputy Minister in charge with the powers necessary to perform his tasks. The Secretariat appreciates the autonomy granted to the Deputy Minister in charge of managing TSOs as an additional element in preventing the possibility of the Cabinet of Ministers, controlling Ukraine’s public production and supply companies, from exerting control over *Ukrenergo*. On the other hand, under the Minister’s Order No. 224, the designated Deputy Minister lacks the competence to approve the charter of *Ukrenergo*.⁴⁶ It is also not entirely clear from that Order whether the Deputy Minister is in charge of appointing members of the supervisory board. While this could be covered by the wording in the Cabinet of Ministers’ Resolution No 507 (according to which the designated Deputy Minister shall “*perform tasks related to state property management and other functions on management of corporate rights*”), the Secretariat invites NEURC to request the Ministry to clarify the Minister’s Order No. 224 on both accounts.

As regards *Ukrenergo*’s corporate governance, the Ministry of Energy as sole member of the shareholder assembly is indeed *Ukrenergo*’s supreme organ under Ukrainian corporate law and exercises direct control within the meaning of Article 2(36) of the Electricity Directive. That said, the

⁴⁴ Resolution No 507, as amended.

⁴⁵ Order No 224.

⁴⁶ Point 4 of Order No 224 and point 10(21) of Resolution No 507 of 17.06.2020.

charter also explicitly prevents the shareholder from interfering in the company's operational and commercial activities, and commit it to respecting the tasks of its subsidiary *Ukrenergo* in line and compliance with the ISO model. *Ukrenergo*'s supervisory board was designed to mitigate unfettered control by the Ministry. While the supervisory board's members are formally appointed by the Ministry of Energy, a majority of its members must be independent from the state administration and are selected through a competitive procedure. Furthermore, the Secretariat notes that the Electricity Market Law as well as the charter of *Ukrenergo* envisage the appointment of a compliance officer, who is tasked to implement a compliance programme with measures to avoid discriminatory behaviour and conflicts of interest. The compliance programme also aims at monitoring the shareholder's, i.e. the Ministry of Energy's, duty under the law to respect the obligations for unbundling and independence. The compliance programme was approved by NEURC on 6 August 2021.⁴⁷ The Secretariat supports the request of NEURC for the supervisory board of *Ukrenergo*, once established, to appoint a compliance officer in *Ukrenergo*.

b. The Ministry of Energy as shareholder and policy-setter

The Ministry of Energy not only controls the transmission system operator *Ukrenergo* but also develops and, to a large extent implements the energy policy of Ukraine in or relevant for the production of electricity such as nuclear, coal, storage of oil and gas, renewable energy etc. The potential for conflicts of interest is exacerbated by the oligopolistic power market structure in Ukraine and the high level of public ownership.

This aspect has been discussed extensively between the Ministry and the Secretariat in the context of transferring control over TSOs from the Ministry of Finance to the Ministry of Energy. The Secretariat is satisfied with the new organizational structure ring-fencing the Deputy Minister in charge of managing the shares in TSOs from the Ministry's departments in charge of policy-making and implementing. In particular, the Cabinet of Ministers' Resolution No 507 explicitly bans the Deputy Minister from participating in the activities of the Ministry related to developing and implementing policies for production and supply of electricity and gas. The Secretariat supports NEURC's request to fully align the Ministry's internal governance, including the Minister's Order No. 224, with the Cabinet of Ministers' Resolution.

c. Conclusion

Based on the legislative, administrative and corporate safeguards in place, the Secretariat considers the independence of *Ukrenergo* sufficiently sheltered from control and influence by the Cabinet of Ministers as the public body controlling energy production and supply activities, as well as from influence from the Ministry of Energy in its capacity as designing and implementing energy policy. That said, legislation and good governance are indispensable but not necessarily sufficient to avoid interference in the autonomy of the TSO and the avoidance of conflicts of interest. In this regard, the Secretariat underlines that the rules and practices applied in implementing the legal provisions need to comply with the standards from the Electricity Directive as well.

In particular, the Secretariat notes that in spite of Article 44 of the Law on the Cabinet of Ministers, the Ministry continues to approve and monitor the implementation of *Ukrenergo*'s annual and mid-term (three to five years) investment plans. Investment planning serves the purpose of matching the investment in transmission with the developments in generation and consumption. The neutrality of

⁴⁷ NEURC Resolution No1281of 06.08.2021.

the TSO and its independence of specific supply and demand interests with regard to investment planning is one of the objectives of unbundling. The Electricity Directive in Articles 22 regulates in detail the long-term investment plan (TYNDP) to be developed by the TSO on an annual basis, and assigns a key role to the national regulatory authority in approving and monitoring the implementation of it. The competences of the regulatory authority are even more explicit under the ISO model (Articles 13(2)(c) and 37(3)(c)) of the Electricity Directive). According to Article 13(4) of the Electricity Directive, the transmission system owner may not be responsible for investment planning. Against this background, the Secretariat requests NEURC to ensure that any involvement of the Ministry of Energy in the short and mid-term investment and development planning is explicitly excluded. In its Final Decision, NEURC should require all three relevant documents⁴⁸ to be amended by repealing the shareholder assembly's and/or the Ministry of Energy's competence to approve or otherwise validate investment plans of *Ukrenergo*.

The Secretariat further notes that in the past, and contrary to Article 21(6) and Article 44(6) of the Law on the Cabinet of Ministers, even formal interventions by decisions of the Cabinet of Ministers in the autonomy of the ministry controlling the (gas) TSO could not be entirely ruled out. The Secretariat encourages NEURC to monitor the Cabinet of Ministers' future practice in this respect, and intervene if need be.

Finally, the Secretariat notes that the new members of the supervisory board have not been appointed yet. It requests NEURC to monitor the situation and to insist that no gap occurs between the outgoing and the incoming supervisory board. The Secretariat also shares NEURC's concerns related to two candidates for state members in *Ukrenergo's* supervisory board related to potential conflicts of interest. According to the information received by the Secretariat, one of these candidates has since withdrawn his candidature, whereas the second one seems to continue working as an advisor to the Prime Minister. The Secretariat requests NEURC to verify and monitor that state members and independent members of the supervisory board do not hold positions associating them with the Cabinet of Ministers, the Prime Minister, the Ministry of Energy or any electricity generation or supply company.

To address those and other discrepancies between the legal framework on the books and practical reality requires constant monitoring by the regulatory authority NEURC taking into account all relevant circumstances of law and fact. In this respect, the Secretariat welcomes the introduction of compliance programme both at the level of the Ministry of Energy – a requirement under Article 14(2)(c) of the Electricity Directive, and of *Ukrenergo* (as discussed above). The Ministry of Energy approved the compliance programme on 17 September 2021.⁴⁹ It contains measures to avoid discriminatory actions and influence on the activities of the TSO including, standards and procedures to be followed by the officials and employees of the Ministry of Energy, the procedures for interaction of the Ministry of Energy with the TSO as well as rules for access to information about the activities of *Ukrenergo*. The compliance program also contains a prohibition for the Deputy Minister to give any instruction or to request information related to the role of the Ministry of Energy concerning generation and supply of electricity and natural gas. The Ministry of Energy has also appointed a compliance officer.⁵⁰

⁴⁸ Point 3(33) of the Cabinet of Ministers' Resolution No 507, Point 10(14) of Minister's Order No 224 and Point 10.9.6. of the charter of *Ukrenergo*.

⁴⁹ Ministry of Energy, Order No 209 of 17.09.2021.

⁵⁰ Ministry of Energy, Order No 33-ag of 30.09.2021.

3. Disposal by the transmission system operator of the required financial, technical, physical and human resources to carry out its tasks

Article 13(2)(b) of the Electricity Directive provides that an ISO may be designated only where it has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks listed under Article 12 of the Electricity Directive. They describe in more details the core functions of any transmission system operator related to the operation, the maintenance and the development of a transmission network.⁵¹ A regulatory authority's assessment in this respect needs to establish in particular whether a given undertaking is by law and fact actually performing the core tasks of a transmission system operator, and whether it disposes of the necessary (human, technical, financial) resources for this.⁵²

Based on the information available to the Secretariat on the organisation, tasks and resources of *Ukrenergo*, but also on its own long-standing experience and cooperation with the company, the Secretariat in principle agrees with NEURC's findings that *Ukrenergo* satisfies the criteria of having available the necessary human, technical and physical resources to effectively perform the tasks of a transmission system operator. This is subject to two qualifications.

a. Economic management rights agreement

With regard to access and usage of the transmission assets, the Secretariat recalls that despite the transfer of the state's property rights from the Ministry of Finance to the Ministry of Energy, the economic management rights agreement with *Ukrenergo* is still signed by the former. According to the Secretariat's information, the existing economic management rights agreement will be amended once the asset transfer between the ministers has been formally concluded, so as to reflect the change in representing state ownership. The Secretariat supports NEURC's request for the amendments to enter into force following a compliance verification before the Final Decision is taken.

b. Financial viability

As regards the availability of sufficient financial resources, the Preliminary Decision notes that *Ukrenergo* is exclusively financed through transmission and dispatch tariffs set by NEURC. The reliance on regulated tariffs, recognizing the costs associated with performing the TSO functions, should indeed suffice to ensure *Ukrenergo's* financial viability.⁵³

In practice, however, two main factors affect *Ukrenergo's* capacity to fully recoup its costs. They have brought the company in serious financial difficulties in the past and, without remedial action being taken, are likely to affect the viability of the company again in the future. Firstly, the TSO still seems to be exposed to a significant level of non-payment of the transmission tariff, for instance by the state-owned supplier of last resort, *Ukrinterenergo*, or certain exporters from Burshtyn island. Secondly, the Renewables PSO described above creates payment obligations by *Ukrenergo* towards the offtakers of renewable electricity, and in particular the Guaranteed Buyer. As the renewable surcharge forms part of the transmission tariff, *Ukrenergo's* capacity to honour those obligations depends on the tariff set by NEURC covering the costs fully and timely. That has not always been the case in the past, and the Secretariat is not convinced that it will change in the future.

⁵¹ Secretariat Opinion1/16 of 3 February 2016 TAP AG.

⁵² European Commission Opinion on certification of VÚN C(2012) 2244 final of 29.03.2012.

⁵³ See, for comparison, Secretariat Opinion 4/19 of 17 December 2019 on certification of GTSO.

According to draft legislation pending in Parliament, *Ukrenergo* might even become subject to additional public service obligations related to financing storage capacities.

Alternative sources of compensation for the renewable support mechanism, such as the state budget,⁵⁴ have not been made available in practice. As a result, *Ukrenergo* has accumulated a significant deficit, which the company was only able to recover through loans and most recently the placing of a Eurobond, which evidently entails further payment obligations to investors. Due to NEURC's decision not to include the full cost of Renewables PSO in the transmission tariff, it is likely that *Ukrenergo* will continue to accumulate arrears towards the Guaranteed Buyer.

In the Secretariat's view, the root cause of this permanent threat to *Ukrenergo*'s financial viability lies to a large extent in the poorly designed Renewables PSO, which makes the renewable surcharge to be paid by final customers an integral part of the transmission tariff rather than a separate levy. As cost-recovery is not ensured and alternative financing mechanisms are not in place, *Ukrenergo* may have to be constantly depending on the financial markets to cover costs which do not form part of the tasks of a TSO under the Electricity Directive. The Secretariat understands that amending the current Renewables PSO would require changes to the Electricity Market Law. The Secretariat has recently received the commitment by the Ministry of Energy that such changes will be proposed in a manner to address the problem of jeopardizing *Ukrenergo*'s solvency. The Secretariat suggests that NEURC closely monitors and ensures *Ukrenergo*'s financial viability as a condition for an unbundled ISO. The Secretariat also suggests that NEURC, in its Final Decision, requests *Ukrenergo* within one month to propose a time-bound solution eliminating permanently the risks for its financial viability resulting from the Renewables PSO, which can be implemented with the support of the Secretariat.

4. The role of the transmission system owner

As in Opinion 4/19, the Secretariat recalls that the system owner's activities must be limited to enabling the ISO to carry out its tasks by fulfilling the obligations laid down in Article 13(5) of the Electricity Directive.⁵⁵

To that end, Article 14 of the Electricity Directive requires legal and functional unbundling of the transmission system owner. Legal unbundling requires that the network is owned by a company separate from the other activities not related to transmission and must be responsible for all the decisions assigned to the transmission system owner under the Electricity Directive. Functional unbundling requires that this company is independent in terms of its organisation and decision making from other activities not related to transmission. In particular, Article 14(2) of the Electricity Directive sets the following minimum criteria:

- persons responsible for the management of the transmission system owner shall not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of electricity;

⁵⁴ According to Law № 810-IX on the Amendments to Certain Laws of Ukraine on Improving the Conditions of Support for Electricity Production from Alternative Energy Sources of 21.07.2020, not less than 20% of the forecast production of electricity produced from renewable energy sources for the relevant year should be compensated from the state budget directly to the Guaranteed Buyer.

⁵⁵ Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*.

- appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner are taken into account in a manner that ensures that they are capable of acting independently;
- the transmission system owner shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored.

In applying these criteria to the Ministry of Energy, the Secretariat agrees that a ministry can be considered an equivalent to a separate legal entity, which – in accordance with the assessment carried out above – is also functionally independent from other entities within the government performing or controlling energy production or supply activities. That extends, to the Secretariat's best knowledge, also to the persons responsible within the Ministry of Energy, and in particular the Deputy Minister designated by the Minister's Order No 224.

Moreover, the Secretariat recalls that the Ministry of Energy acts in a dual function in the present set-up, namely as the body representing the state as owner of the transmission system as well as the body controlling the operator of that system, *Ukrenergo*. Together with the laws and measures designed to separate the Ministry in the latter function from the Cabinet of Ministers, similar safeguards were put in place to reduce the influence of the Ministry in its function as transmission system owner over the ISO. In particular, Article 136 of the Commercial Code stipulates that *Ukrenergo* "shall be fully independent in deciding on the use, operation, maintenance, planning and development of such state-owned property and its financing" from the state as system owner and grantor of the economic management right. Similarly, Article 44(3) of the Law on the Cabinet of Ministers limits the Ministry of Energy's control rights in the manner that "such rights shall not be exercised in respect of operation and allocation of capacity and investment planning that falls under the competence of economic entities conducting natural gas transmission activities."

Furthermore, the economic management rights agreement signed with the Ministry of Finance – once transferred to the Ministry of Energy – required *Ukrenergo* to adhere to the TYNDP approved by NEURC, and assigned the responsibility for its implementation exclusively to *Ukrenergo* in line with Article 36² of the Electricity Market Law. The ISO's obligation to elaborate and submit annually for approval to the regulatory authority a ten-year network development plan, as required by Article 37(3)(c) of the Electricity Directive, follows from Article 36² of the Electricity Market Law. Under the law and the economic management rights agreement, *Ukrenergo* would be fully and solely responsible for its long-term planning and the implementation (in particular constructing and commissioning new infrastructure) of these plans, as required by Article 13(4) of the Electricity Directive.⁵⁶ As discussed above, NEURC should request that the Ministry of Energy is not involved in the short and mid-term investment planning of *Ukrenergo*.

Article 13(2)(c) of the Electricity Directive further requires that a candidate ISO has undertaken to comply with a ten-year network development plan monitored by the regulatory authority. The Preliminary Decision confirms that *Ukrenergo* has proposed such a plan for 2021-2030, and that NEURC approved it on 20 January 2021.⁵⁷

⁵⁶ See Secretariat Opinion 4/19 on certification of GTSO, European Commission Opinion on certification of *Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline*.

⁵⁷ NEURC Resolution No 57 of 20.01.2021.

Based on these considerations, the Secretariat concurs with the Preliminary Decision that these measures significantly limit the possibilities of the transmission system owner, the Ministry of Energy, to intervene in the transmission system operation performed by *Ukrenergo*. Any remaining risk of conflict of interests within the Ministry of Energy in the exercise of its dual role can be addressed by implementing the compliance programme required by Article 14(2) of the Electricity Directive. Article 36³ of the Electricity Market Law requires the Ministry of Energy in its capacity as transmission system owner to develop and implement such a compliance programme. As stated above, the Ministry of Energy adopted the compliance programme on 17 September 2021.⁵⁸ It is meant to ensure that the persons responsible to perform the functions of the transmission system owner within the Ministry of Energy enjoy a sufficient level of independence of other functions in the Ministry. A compliance officer was appointed on 30 September 2021.⁵⁹

Furthermore, Article 13(2)(d) of the Electricity Directive requires that the transmission system owner has demonstrated its ability to comply with its obligations under Article 13(5) of the Electricity Directive, namely to

- provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks (Article 13(5)(a));
- finance the investments decided by the ISO and approved by the regulatory authority or give its agreement to financing by any interested party including the ISO (Article 13(5)(b));
- provide for the coverage of liability relating to the network assets (Article 13(5)(c)); and
- provide guarantees to facilitate financing any network expansions (Article 13(5)(d)).

The relation between the transmission system owner – the state represented by the Ministry of Energy – and the ISO – *Ukrenergo* – is currently defined by law and, once it is signed, and by the economic management rights agreement. The draft agreement defines the roles, obligations and rights of both parties. The economic management rights agreement explicitly recognizes the owner's duties under Article 13(5) of the Electricity Directive. It also stipulates an obligation on the Ministry of Energy to facilitate the performance by *Ukrenergo* of its tasks as a transmission system operator.

As regards the coverage of liability relating, Article 13(5)(c) of the Electricity Directive requires the network owner to cover liability resulting from the technical condition of the network, but not from the management of the network.⁶⁰ The Electricity Market Law transposes this requirement in Article 36². The existing economic management rights agreement with the Ministry of Finance, by contrast, puts the obligation to take out the insurance on the TSO.⁶¹ The Secretariat requests that NEURC assesses this clause against the background of Article 13(5)(c) of the Electricity Directive and requests the necessary amendments.

As regards financing of the investments to be decided by *Ukrenergo* and approved by NEURC, Article 13(5) of the Electricity Directive envisages two options; either financing by the transmission system owner – the state represented by the Ministry of Energy – or the latter's agreement to financing by any interested party including *Ukrenergo* itself. The Electricity Market Law allows both options in Article 36² as well. Article 136 of the Commercial Code as well stipulate that the Ministry of Energy "*may not refuse financing ... by the electricity transmission system operator ... or by other*

⁵⁸ Ministry of Energy, Order No 209 of 17.09.2021.

⁵⁹ Ministry of Energy, Order No 33-ag of 30.09.2021.

⁶⁰ European Commission Staff Working Paper of 22 January 2010 – The Unbundling Regime.

⁶¹ Point 7.2.5 of that agreement.

interested parties". The (existing) economic management rights agreement stipulates that the Ministry as network owner provides all necessary cooperation and support to the TSO, and performs all duties provided for by the Electricity Market Law.

Finally, Article 37(3) of the Electricity Directive stipulates a set of additional powers and duties for the national regulatory authority related to the transmission system owner in case of the ISO model. Those powers and duties have been properly transposed in the Electricity Market Law with the amendments of April 2021. If properly implemented, these requirements can indeed be considered fulfilled.

Based on the above, the Secretariat's assessment supports the finding of the Preliminary Decision from the perspective of Articles 13(2)(c), 13(2)(d) and (5), 14 and 37(3) of the Electricity Directive.

5. Conditions imposed by the Preliminary Decision

According to the formulation used by NEURC, („[I]n order to make a final decision on the certification of the transmission system operator, *Ukrenergo* shall provide...”), the conditions listed by the Preliminary Decision seem to be meant by NEURC not necessarily as conditions to be imposed by the Final Decision, but as (pre-)conditions to be fulfilled by *Ukrenergo* before issuing the Final Decision. While the Secretariat agrees with the conditions, it believes that they should be verified before adoption of NEURC's Final Decision or imposed by the Final Decision, to the extent not addressed before.

The Secretariat suggests the following issues to be reflected additionally in the Final Decision, if not addressed before:

- to verify that the Ministry of Energy does not exercise control over supply activities related to the distribution system operators transferred to that Ministry;
- to request changes or clarifications ensuring that the designated Deputy Minister is in charge of amending the charter of *Ukrenergo* and to formally appoint members of the supervisory board of *Ukrenergo*;
- to ensure that members of the supervisory board are not associated with the Cabinet of Ministers, the Prime Minister, the Ministry of Energy or any electricity generation or supply company;
- to request the supervisory board of *Ukrenergo* to appoint a compliance officer in *Ukrenergo* before the Final Decision;
- to discontinue the shareholder assembly's and/or the Ministry of Energy competence to approve and monitor the implementation of investment plans of *Ukrenergo* within an appropriate deadline;
- to request the entry into force of the amended economic management rights agreement between the Ministry of Energy and *Ukrenergo* before the Final Decision, and after verifying compliance, including with Article 13(5)(c) of the Electricity Directive;
- to request the Ministry of Energy (as *Ukrenergo*'s shareholder) within one month to propose a time-bound solution effectively eliminating the risks for *Ukrenergo*'s financial viability inherent in the current Renewables PSO.

IV. Conclusion

Based on the information displayed in the Preliminary Decision and all other information obtained in the course of the present procedure, the Secretariat concludes that *Ukrenergo* can be certified as envisaged by the Preliminary Decision, subject to the provisions mentioned in the previous chapter.

Pursuant to Article 3 of the Electricity Regulation, NEURC shall take utmost account of the above comments of the Secretariat when taking its Final Decision regarding the certification of *Ukrenergo*. According to the same provision, NEURC must issue the Final Decision within two months upon receiving the Secretariat's Opinion. NEURC shall communicate its Final Decision to the Secretariat and publish its decision together with the Secretariat's Opinion.

The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. NEURC is invited to inform the Secretariat within five working days following receipt of this opinion whether and why it considers that this document contains confidential information which it wishes to have deleted prior to such publication.

Vienna, 25 November 2021



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