

Opinion 1/21

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

On 8 March 2021, the Georgian National Energy and Water Supply Regulatory Commission (hereinafter “GNERC”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision on the certification of JSC Georgian State Electrosystem (hereinafter “GSE”), a transmission system operator (hereinafter “TSO”) for electricity in Georgia (hereinafter “the Preliminary Decision”). The Preliminary Decision was adopted on 4 March 2021 based on Article 50 of the Energy Law,¹ as well as the Certification Rules adopted by GNERC.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 is required to examine the notified Preliminary Decision and deliver its Opinion to GNERC as to the compatibility of such a decision with Article 10(2) and Article 9 of the Electricity Directive.

I. Background

1. The applicant GSE

Today, GSE is the State-owned TSO for electricity in Georgia. It holds three licenses issued by GNERC, namely for electricity transmission,⁵ for electricity dispatch,⁶ and for electricity market operation.⁷ In January 2021, GSE merged with the fully State-owned *Energotrans*, which previously operated as a separate TSO. Since then, GSE owns and operates also the transmission assets previously operated by *Energotrans*.

GSE was created by reorganization of the *Georgian State Electrosystem LLC* in 2002 and transformed into a joint stock company in 2011. The State’s shares of GSE were represented by the National Agency of State Property (hereinafter “State Property Agency”). The State Property Agency is an agency subordinated to the Minister of Economy and Sustainable Development. In 2020, the State Property Agency transferred the rights and obligations associated with shareholding to the

¹ Law on Energy and Water supply of 27 December 2019, No. 5646-rs, as amended.

² GNERC, Certification Rules, Resolution No.9 of 27.03.2020.

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 6 October 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 6 October 2011.

⁵ License №004, series 12, GNERC Decision N100 of 20.12.2002.

⁶ License №004, series 13, GNERC Decision N100 of 20.12.2002.

⁷ License №002, series 17, GNERC Decision No 39/3 of 28.05.2020.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

Ministry of Economy and Sustainable Development (hereinafter “the Ministry”).⁸ Under the transfer agreement, the Ministry can appoint and dismiss directors, approve reports and select an auditor. It needs the consent of the owner (the State Property Agency) only for decisions concerning the alienation of shares, the liquidation of the company, the disposal, pledging or transfer of assets, and withdrawal and contributions to the share capital.

On 4 January 2021, *GSE* concluded a lease agreement with *Sakrusenergo*, a company that holds another transmission license issued by GNERC.⁹ The shares of *Sakrusenergo* are owned 50% by the State of Georgia, represented by the Ministry (transferred to it again from the State Property Agency), and 50% by the *Federal Grid of the United Energy System JSC* registered in the Russian Federation.

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

In addition to *GSE* and *Sakrusenergo*, the State also fully owns other undertakings active in the energy sectors. In the electricity sector, those undertakings are: the generation company *Enguri HPP* (which in turn own the shares of *s Vardnili HPP Cascade*), the wholesale trading and supply company *Electricity System Commercial Operator* (hereinafter “*ESCO*”), and the wholesale trading company *Karchal Energy* registered in Turkey. In the gas sector, those companies are: the transmission system operator *Georgian Gas Transportation Company* (hereinafter “*GGTC*”) and the wholesale trading company *Georgian Oil and Gas Corporation* (hereinafter “*GOGC*”). Moreover, the Ministry owns the shares of the JSC Energy Development Fund of Georgia. The rights and obligations associated with shareholding in these companies are also exercised by the Ministry.

II. Description of the notified Preliminary Decision

In December 2019, Georgia adopted a new Energy Law to transpose the Third Energy Package as incorporated in the Energy Community. Chapter XI, Articles 44 et seq. of the Energy Law transposes the so-called ownership unbundling and independent system operator model of unbundling of electricity TSOs.

On 21 January 2021, *GSE* submitted an application for certification to GNERC under the ownership unbundling model. On 4 March 2021, GNERC adopted the Preliminary Decision subject to the Secretariat’s review in the present Opinion. In its operative part, the Preliminary Decision certifies *GSE* under the ownership unbundling model, under the following conditions:

„a) by December 31, 2021, all measures necessary for compliance with the requirements of paragraph 1, Article 4 of the Transmission System Operator Unbundling Plan adopted by the

⁸ Agreement on Transfer of Management Rights of State-Owned Shares of JSC Electricity System Commercial Operator, JSC Georgian State Electrosystem and JSC United Energy System *Sakrusenergo* of 04.05.2020. Under the Law on State Property, the shares are considered state-owned assets and are administered by the State Property Agency, unless transferred to another body.

⁹ License №001, series 12, GNERC Decision No.8, of 23.02.2000.

Government of Georgia through Resolution N682, dated November 13, 2020 shall be implemented;

b) by January 3, 2022, the documents certifying full implementation of the measures foreseen by subparagraph "a" of this Article shall be submitted to the Commission."

III. Assessment of the Preliminary Decision

According to the Secretariat's well-established practice,¹⁰ the following aspects matter in particular when assessing the compliance of the Preliminary Decision with the unbundling model enshrined in Article 9 of the Electricity Directive:

- a) The undertaking to be certified needs to be the owner of the transmission assets as required by Article 9(1)(a) of the Electricity Directive;
- b) The undertaking to be certified needs to perform the functions and tasks of a transmission system operator as required by Article 9(1)(a) of the Electricity Directive;
- c) Control over and exercising rights in the undertaking to be certified need to be separated from control over and exercising rights in undertakings involved in production or supply of electricity and natural gas as required by Article 9(1)-(3),(6),(7) and (12) of the Electricity Directive.

a. *Ownership of the electricity transmission system*

Article 9(1)(a) of Directive 2009/72/EC requires that "each undertaking which owns a transmission system acts as a transmission system operator". This means, in principle, that the undertaking applying for certification is the owner of the assets, i.e. the transmission system. Only in exceptional cases the European Commission and the Secretariat have accepted that a TSO's right to use, manage and dispose of the transmission system through arrangements such as lease or concession agreements may be considered equivalent to ownership.¹¹ They require that, in its capacity as lessee or concessionaire, (1) the TSO has the transmission system assets feature on its balance sheets can use them as a guarantee (collateral) in acquiring financing on the capital market; (2) the lessee or concessionaire is responsible for exercising all of the TSO's tasks, which include the planning, construction, operation and maintenance of the entire infrastructure and the financing thereof; and (iii) upon the expiry of the lease or concession, the lessor compensates the TSO with an amount equivalent to the corresponding value of the lease or concession assets.

¹⁰ Secretariat Opinion 1/16 of 3 February 2016 *TAP AG*; Opinion 1/17 of 23 January 2017 *OST*; Opinion 3/17 of 23 January 2017 *EMS*; Opinion 2/17 of 22 April 2017 *Yugorosgaz Transport*; Opinion 1/18 of 27 February 2018 *CGES*; Opinion 2/19 of 1 February 2019 *KOSTT*; Opinion 3/19 of 17 June 2019 *MEPSO*; Opinion 4/19 of 17 December 2019 *GTSO*.

¹¹ Commission's Opinion on URE's draft certification decision for *PSE S.A.* of 9 April 2014 (C(2014) 2471; Commission's Opinion on certification of *REN Rede Eléctrica Nacional S.A.* and *REN Gasodutos S.A.*, C(2014) 3255; Commission's Opinion on certification of *Transelectrica D.A.*, C(2015) 7053; Secretariat's Opinion 1/20 of 5 February 2020, *Ukrenergo*.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone	+43 (0)1 535 2222
Email	contact@energy-community.org
Web	www.energy-community.org

Based on the Preliminary Decision, *GSE* owns the transmission assets that it manages and operates. However, in addition to the transmission assets it owns, *GSE* operates the assets owned by *Sakrusenergo* based on a lease agreement.

In its Preliminary Decision, GNERC has not assessed in details whether the rights of *GSE* based on the lease agreement could be regarded as equivalent to those of an owner in accordance with the requirements set out above. The Secretariat invites GNERC to carry out such an assessment in the Final Decision. In doing so, GNERC should clarify whether the assets owned by *Sakrusenergo* feature on the balance sheet of *GSE* and whether they are taken into account by GNERC when setting transmission tariffs, as well as whether *Sakrusenergo* is obliged to compensate *GSE* for the investments in the network at the end of the lease agreement. The Secretariat further notes that, based on the terms of the lease agreement, *GSE* possesses, fully operates and uses these assets as a collateral, provided that the supervisory board of *Sakrusenergo* gives its consent.¹² In this respect, GNERC should assess whether and to what extent such consent could be withheld by the supervisory board under *Sakrusenergo*'s corporate governance and reality. At the same time, GNERC in its overall assessment should also take into account the size (in relation to the overall transmission network owned by *GSE*) and the impact of the transmission system owned by *Sakrusenergo* for trade on the domestic electricity market.

b. The applicant undertaking performs core tasks as operator of the transmission system

Article 9(1)(a) of the Electricity Directive requires that the undertaking in question “acts as a transmission system operator”. The notion of transmission system operator is defined by Article 2 No 4 of the Electricity Directive. It follows from this definition that the key elements for an undertaking to be considered a transmission system operator are the operation, the maintenance and the development of a transmission network.¹³ A regulatory authority's assessment in this respect needs to establish in particular whether a given undertaking is, by law and in fact, performing each of these core tasks, and whether it disposes of the necessary (human, technical, financial) resources for doing so.¹⁴

GNERC did not specifically analyse compliance with these requirements in its Preliminary Decision. It also did not include any information, and in particular not on the human, technical and financial resources of *GSE*. While the Secretariat has no reason to doubt that *GSE* satisfies these requirements with respect to the network it operates under ownership, the operation of the network operated by *Sakrusenergo* deserves more attention.

In this respect, GNERC assessed the rights of *Sakrusenergo* and its role under the lease agreement with regard to maintenance, investment and development of the system and concluded that the rights of *Sakrusenergo* do not encroach upon *GSE*'s autonomy in performing the tasks of a TSO over the assets subject to the lease agreement. Two issues were considered more specifically by

¹² Articles 10.1.6 and 10.2.4 of the Lease Agreement, read together with paragraph 8.5.2 of the Charter of *Sakrusenergo*.

¹³ Secretariat Opinion/16 of 3 February 2016 *TAP AG*.

¹⁴ Commission's Opinion on certification of *VÜN C(2012) 2244* final of 29.3.2012.

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Am Hof 4, Level 5, 1010 Vienna, Austria

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Email	contact@energy-community.org
Web	www.energy-community.org

GNERC in this respect: (1) GSE's commitment to outsource maintenance tasks to *Sakrusenergo*, and (2) the right of *Sakrusenergo* to provide comments to GSE on the latter's Ten-Year-Network-Development-Plan.

(1) As regards outsourcing maintenance services to the lessor, *Sakrusenergo* the Secretariat recalls that contracting core services is prohibited in principle. Under Article 12(1) lit (a), maintenance is a core service that shall be performed by the TSO itself.¹⁵ As an exception, such outsourcing is possible if the execution of the tasks in question is being sub-contracted under the following conditions:¹⁶

- contracting out of core TSO functions can only be acceptable either if the transmission system is operated jointly as part of a wider transmission system or if a fully resourced TSO makes an independent commercial decision to sub-contract services on efficiency grounds;
- such contracting out of core TSO functions should be organized in the form of a tender;
- the TSO should itself have sufficient resources to oversee, control and provide instructions to the subcontractor;
- only entities which meet the unbundling requirements for TSO should be eligible to provide such services.

In its Preliminary Decision, GNERC stated that GSE has the available technical and human resources to exercise control over the works performed by *Sakrusenergo* and that the cost of the lease and maintenance repair services are reviewed by GNERC when setting the transmission tariffs. However, GNERC did not analyse compliance with the other requirements for such outsourcing, namely whether outsourcing to *Sakrusenergo* is indeed the most efficient solution and to which extent *Sakrusenergo* fulfils the criteria for ownership unbundled TSO. This latter question would only arise if *Sakrusenergo*, based e.g. on its existing transmission license, would continue operating a transmission system and/or its shareholders were engaged in generation or supply with a relevant impact on the Georgian market. GNERC is invited to clarify this in the Final Decision.

(2) In relation to the right of *Sakrusenergo* to provide comments to GSE's investment plans, the Secretariat recalls that the Electricity Directive requires that the TSO is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning,¹⁷ and discharges this responsibility in full autonomy. GNERC considered that *Sakrusenergo*'s right to provide comments, and the obligation of GSE to review the received remarks and opinions jointly with *Sakrusenergo* and, upon its request to prepare a substantiated response, is not impinging on

¹⁵ See: Commission's Opinion on certification of *VÜN C*(2012). See also Commission Opinion on certification of *TAG C* (2013) 649, where the Commission held that "due to the fact that operation, maintenance and development of the network belong to the core tasks of a TSO they are to be carried out by the TSO itself."

¹⁶ Commission's Opinion on certification of *VÜN C*(2012); Commission's Opinion on certification of *Premier Transmission Limited* (2013 UK); Commission's Opinion on certification of *Gas Networks Ireland* (2016).

¹⁷ EU Commission, Staff Working Paper – Interpretative Note on Unbundling Regime, 22.01.2010, p.8.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

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Web	www.energy-community.org

GSE's autonomy in this respect. The Secretariat would appreciate a more detailed assessment in the Final Decision.

c. Separation of control over transmission from generation/supply

To satisfy the independence requirements in the ownership unbundling model, Article 9(6) of the Electricity Directive provides that two separate public bodies may be seen as two distinct persons within the meaning of Article 9(1) and (2) of the Electricity Directive, and may control production and supply activities, on one hand, and transmission activities on the other hand. The notion of control is further defined by the Merger Regulation¹⁸ and includes the rights enumerated in Article 9(1)(b), (c) and (d) and (2) of the Electricity Directive, including the power to exercise voting rights, the holding of majority share and the power to appoint members of the TSO's corporate bodies and those legally representing the TSO.¹⁹ The objective of these provisions is to ensure an effective separation of control between the two public bodies in question capable of potential and actual conflicts of interest within the State structures controlling different energy activities.²⁰ The Preliminary Decision fails to assess these requirements and to draw the appropriate consequences from such assessment.

As described in the Preliminary Decision, control over GSE as well as the other undertakings active in generation and supply of electricity and natural gas is exercised by the public body exercising the respective shareholding rights, the Ministry. By a Ministerial Order of 2 December 2020, different departments within the Ministry have been entrusted with the exercise of rights and obligations associated with shareholding in the TSO, on the one hand, and in the other undertakings active in generation and supply of electricity and natural gas, on the other hand.²¹ Namely, the department of energy policy and investments exercises the Ministry's shareholding rights in GSE, Sakrusenergo, GGTC and the Energy Development Fund of Georgia,²² whereas the department of energy reforms and international relations exercises the Ministry's shareholding rights in ESCO, GOGC and Enguri HPP (which in turn owns the shares of Vardnili HPP).

Moreover, in its Preliminary Decision, GNERC noted that under the Law of Georgia on the Structure, Powers and Rules of Activities of the Government, the ministries are operating on the basis of a "one-person rule", which "*implies the sole responsibility of the Minister on decision-making*". The Minister is the only authority to approve both the statutes of the different structural divisions of the Ministries (the departments), and to take decisions falling within the competences of the Ministry. GNERC also explained that the Ministerial Order entrusting the task to exercise shareholding rights to different departments "*does not establish any special powers of decision-making for the Deputy Minister, structural divisions of the Ministry and/or their heads.*" From the Preliminary Decision it

¹⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the, Official Journal L 24, 29.01.2004, p. 1-22.

¹⁹ Article 9(2) of Directive 2009/72/EC and Article 54(4) of the Power Sector Law.

²⁰ Secretariat Opinion 1/17 of 23 January 2017 OST.

²¹ Minister's Order N1-1/521 on "Establishing a Different Rule for Assigning and Reallocation of the Functions among the Divisions of the Ministry of Economy and Sustainable Development of Georgia", 02.12.2020.

²² The Preliminary Decision contains no information on this fund. GNERC is invited to assess whether this fund is engaged in energy generation or supply activities, or whether it controls any energy undertaking.

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Am Hof 4, Level 5, 1010 Vienna, Austria

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seems clear that the charter of *GSE*, its CEO and the members of the management board have been appointed by the Minister as recent as 20 January 2021.²³

The Secretariat concludes that separation of control within the State in line with Article 9(6) read in conjunction with Article 9(1)(b) and (c) of the Electricity Directive has not taken place even in its most basic requirement, the designation of two public bodies. The formal separation of competences between public bodies constitutes a *sine qua non* for unbundling of a state-owned TSO.²⁴ In similar cases, the Secretariat has already held that TSO's cannot be certified as compliant with the Electricity Directive's provisions on ownership unbundling for this reason alone.²⁵ The separation between two departments of the same Ministry does not comply with the independence requirements because the departments are units of a Ministry without legal personality. The heads of departments can prepare draft decisions (including for action of the Ministry as shareholder) but not take any decision. Therefore, the departments of one Ministry cannot be considered two different and independent public bodies. Without any separation in control over *GSE* and the other companies active in generation and supply of electricity and gas, one of the main objectives of the Electricity Directive's unbundling provisions, the elimination of an interest by the body in charge of the TSO in discriminating in favour of generation and supply companies controlled by it, is likely to be frustrated.

Finally, even though the State Property Agency has transferred the management of *GSE*, *Sakrusenergo* as well as *Enguri HPP* to the Ministry, it has retained certain rights as an owner related to alienation of shares, the liquidation of the company, the disposal, pledging or transfer of assets, and withdrawal and contributions to the share capital. The State Property Agency is under the control of the Ministry. GNERC is invited to, firstly assess whether the shareholding rights retained by the State Property Agency amounts to control within the meaning of the Electricity Directive and secondly, if this were to be the case ensure in the Final Decision that any control exercised by the State Property Agency over transmission or production and supply activities does not coincide with the Ministry's control over production and supply or transmission activities.

The Preliminary Decision, based on the unbundling plan submitted by *GSE*, assumes that the separation of control within one public body, the Ministry, through internal divisions of the Ministry is a temporary measure.²⁶ That plan foresees the obligation of the Ministry to ensure reallocation of the management rights of energy enterprises within the state institutions in a manner achieving the goals of independence and unbundling requirements provided by the Law by 31 December 2021. Therefore, it „*should not be considered as a ground for refusal of preliminary certification.*“ On the

²³ Minister's Order No.1-19, 20.01.2020.

²⁴ Secretariat Opinion 1/17 of 23 January 2017 *OST*.

²⁵ Secretariat Opinion 3/17 of 15 June 2017 *EMS*.

²⁶ The Government of Georgia adopted the Unbundling Plan through the Resolution N682 on 13.11.202, and it entered into force on 17.11.2020.

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Am Hof 4, Level 5, 1010 Vienna, Austria

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Email	contact@energy-community.org
Web	www.energy-community.org

basis of this plan, GNERC preliminarily certified *GSE* under the condition that it would comply with the unbundling criteria by 31 December 2021.

However, the Secretariat considers this requirement too broad, unclear and vague as to what *GSE* is concretely obliged to do and can do. It is unclear already whether *GSE* is merely under an obligation to act or is obliged to reach a specific result. It is also not clear to what extent existing legislation would need to be amended, and if yes, how *GSE* can influence such amendments to legislation. Finally, the effect of the requirements is also highly questionable. The requirements do not constitute actual conditions for *GSE*'s certification. The consequence in case of non-compliance with the requirement at the end of the prescribed period set is the Preliminary Decision is not clear. In practice, this arrangement would mean that *GSE* is certified without meeting the requirements necessary for compliance with the provisions of the ownership unbundling model and thus in breach of Energy Community law. In similar situations, the Secretariat has considered that maintaining a license under these conditions would *de facto* perpetuate a breach of one of the most fundamental requirements for TSO under European law, unbundling.²⁷

Moreover, the Secretariat cannot agree to GNERC's conclusion from a procedural point of view. As a separation of public bodies in a yet unspecified manner is supposed to take place after the Secretariat's Opinion and GNERC's Final Decision, the factual and legal basis on which *GSE* will be considered as unbundled will be fundamentally different from the one on which the Secretariat bases its present Opinion. To ensure compliance with the Electricity Directive and Regulation, the Secretariat requests GNERC to include a statement in the operative part of its Final Decision announcing the opening of a recertification procedure for the assessment of compliance by *GSE* with the unbundling criteria stipulated in Article 9 of Directive 2009/72/EC once the conditions imposed by the Final Decision are fulfilled, i.e. by 3 January 2022 at the latest. In the course of this recertification procedure, the Secretariat will be in a position to issue another Opinion on the basis of the set of law and facts ultimately applicable to the separation in control of *GSE* as well as generation and supply companies.

IV. Conclusions

Based on the information displayed in the Preliminary Decision, the Secretariat concludes that *GSE* is currently not unbundled in line with the ownership unbundling model as required by Article 9 of the Electricity Directive. Most notably, *GSE* is still directly and indirectly controlled by the same public body controlling also the public companies active in generation and/or supply of natural gas or electricity.

Against this background, the Secretariat requests that GNERC in its final decision:

- Reflects the conclusions of this Opinion and the invitations to clarify open issues, including

²⁷ Secretariat Opinion 3/17 of 15 June 2017 *EMS*, Secretariat Opinion 2/17 of 22 April 2017 *Yugorosgaz-Transport*.

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- whether the rights of *GSE* based on the lease agreement with *Sakrusenergo* may be regarded as equivalent to those of an owner;
 - whether *GSE* disposes of the necessary (human, technical, financial) resources, in particular whether outsourcing of maintenance services to *Sakrusenergo* complies with the criteria listed and whether *GSE* enjoys autonomy to exercise control over the works performed by *Sakrusenergo* in line with the case law;
 - which criteria are to be fulfilled for *GSE*, on the one hand, and State-owned generation and supply companies, on the other hand, to be controlled by truly separate public bodies, independent not only from each other but also from third bodies such as the Government, the Prime Minister or the President.
- Specifies the consequences for non-compliance with the conditions from the Final Decision, i.e. the automatic revocation of the certification granted by the Final Decision.
 - Includes a statement in the operative part announcing the opening of a recertification procedure for the assessment of compliance by *GSE* with the unbundling criteria stipulated in Article 9 of Directive 2009/72/EC once the conditions imposed by the Final Decision are fulfilled in the view of *GSE*, which will include the request for a new Opinion by the Secretariat.

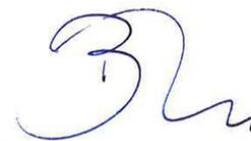
Pursuant to Article 3 of the Electricity Regulation, GNERC shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *GSE*. GNERC shall also communicate its final decision to the Secretariat and publish its decision together with 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. GNERC is invited to inform the Secretariat within five working days following receipt whether and why it considers that this document contains confidential information, which it wishes to have deleted prior to such publication.

Vienna, 26 March 2021



Janez Kopač
Director



Dirk Buschle
Deputy Director/Legal Counsel