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COMMISSION STAFF WORKING DOCUMENT

OWNERSHIP UNBUNDLING

THE COMMISSION'S PRACTICE IN ASSESSING THE PRESENCE OF A CONFLICT OF INTEREST INCLUDING IN CASE OF FINANCIAL INVESTORS

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1. INTRODUCTION

The Electricity Directive and the Gas Directive of the Third energy package[1] have introduced a structural separation between transmission system operator activities on the one hand, and generation, production and supply activities on the other hand. The aim of these provisions on "unbundling" of networks is to avoid conflicts of interest and to make sure that transmission system operators ("TSOs") take their decisions independently, ensuring transparency and non-discrimination towards all network users. This is not only relevant for the day-to-day operational decisions of TSOs, but also for their strategic investment decisions.

The present document highlights the Commission's practice in dealing with certain aspects of the rules on unbundling of TSOs, as laid down in the Electricity and Gas Directives. The focus is on the application of the rules on ownership unbundling. In particular, the issue is addressed how the rules on ownership unbundling as set out in Article 9 of the Directives are to be appliedin situations where a shareholder in a TSO also has participations in generation, production and/or supply activities, while it can be demonstrated that in the specific circumstances of the case there is no incentive for this shareholder to influence the decision making in the TSO with the intention to favour his generation, production and/or supply activities to the detriment of other network users[2].

According to the Commission's experience in the application of the ownership unbundling rules this issue may arise, for instance, in case a holding company of a TSO at the same time has participations in certain generation, production and/or supply activities. Also different types of investors could be confronted with this question, for example financial investors such as pension funds, insurance companies and infrastructure funds with participations in the energy sector. Such financial investors often have diversified portfolios including

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1 Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55) and Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

2 The other unbundling models provided for by the Electricity and Gas Directives, in particular the Independent System Operator (ISO) and the Independent Transmission Operator (ITO), are not further discussed in this paper. However, the rules on ownership unbundling, in particular Article 9(1)(b), (c) and (d) Electricity and Gas Directives, are also relevant for the application of the ISO model in order to determine the independence of the system operator. See Article 13(2) Electricity Directive and Article 14(2) Gas Directive.

participations in energy transmission, generation, production and/or supply activities, located in different places[3].

The aim of the present paper is hence to illustrate how the rules on ownership unbundling of the Electricity and Gas Directives have been interpreted and applied by the Commission in the context of the certification procedure of TSOs. However, it is noted that the present document is not legally binding. Giving binding interpretation of European Union law is ultimately the role of the European Court of Justice.

2. OVERVIEW OF THE RULES ON OWNERSHIP UNBUNDLING

In order to provide the relevant background, a brief overview of the the rules on ownership unbundling is set out hereunder[4].

The rules on ownership unbundling are laid down in Article 9 Electricity and Gas Directives. Article 9(1)(b)(i) Electricity and Gas Directives requires that the same person cannot 'control' generation, production and/or supply activities, and at the same time 'control' or exercise 'any right' over a TSO or a transmission system. Furthermore, according to Article 9(1)(b)(ii) Electricity and Gas Directives, the same person cannot 'control' a TSO or a transmission system, and at the same time 'control' or exercise 'any right' over generation, production and/or supply activities.

The concept of 'control' is taken from Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation')[5] and should be interpreted accordingly (recital 13 Electricity Directive and recital 10 Gas Directive). Under Article 3(2) EC Merger Regulation, control is constituted by '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'.

Article 9(2) Electricity and Gas Directives clarify that the exercise of 'any right' includes in particular 1) the exercise of voting rights, 2) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, or 3) the holding of a majority share.

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3 Although financial investors form a relatively diverse group, they may nevertheless present certain common features: their investment strategy frequently involves investments in both renewable energy generation assets and transmission infrastructure, with a view to benefitting from regulated income, e.g. feed-in tariffs or network tariffs; their investments are typically made with a long-term perspective; their individual share in energy production may remain minor compared to the overall available production capacities; their assets are generally operated on a stand-alone basis; the operational management of their generation and transmission assets is handled by separate teams and is not coordinated; their participation in a TSO is often made together with other financial and/or strategic investors.

4 A more detailed overview of the legal framework of the ownership unbundling model is provided by the Commission staff working paper of 22 January 2010: "Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas - The unbundling regime", published on the DG Energy website.

5 OJ L 24, 29.1.2004, p. 1.

However, Article 9(2) does not exclude the holding of purely passive financial rights related to a minority shareholding, i.e. the right to receive dividends, without any voting rights or appointment rights attached to them.

In order to avoid undue influence arising from vertical relations between gas and electricity markets, Article 9(3) Electricity and Gas Directives determine furthermore that ownership unbundling provisions apply across the gas and electricity markets, prohibiting influence over both an electricity generator or supplier and a gas TSO or a gas producer or supplier and an electricity TSO.

Article 9(1)(c) and (d) Electricity and Gas Directives provide for two additional requirements: under subparagraph (c), the same person is not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking of a TSO or a transmission system, and directly or indirectly to exercise control or any right over generation, production and/or supply activities. Subparagraph (d) addresses the issue of a conflict of interest for board members by prohibiting the same person from being a member of the board of both a TSO and a generator, producer or supplier.

3. AVOIDING ANY POTENTIAL CONFLICT OF INTEREST

As stated above, the objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any *conflict of interest* between generators/producers, suppliers and transmission system operators. It would not be in line with this objective if certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no *incentive* for a shareholder in a TSO to influence the TSO's decision making in order to favour his generation, production and/or supply interest to the detriment of other network users.[6]

The Commission found in the context of the certification procedure for TSOs that in certain situations referred to in Article 9(1)(b), (c) and/or (d) of the Directives, it was evident from the facts of the concrete case that the simultaneous participation in transmission activitities on the one hand, and in generation, production and/or supply activities on the other hand, did not give rise to any potential conflict of interest or incentive to exploit it, and as a consequence did not in any way risk to impact negatively on the independent management of the TSO. This was for instance the case where a shareholder had a participation in a transmission network in the EU, as well as a particpation in generation activities in the United States or in Australia, with no connection or interface between the energy systems concerned[7]. To refuse certification in such situations would have been clearly disproportionate in view of the objective of the unbundling rules concerned, namely to avoid potential conflicts of interest.

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6 See Recital 12 Electricity Directive and Recital 9 Gas Directive.

7 See for instance Commission opinion of 19 April 2012 on the certification of National Grid Electricity Transmission plc (009 - 2012 - UK), National Grid Gas plc (010 - 2012 - UK), and National Grid Interconnector ltd (011 - 2012 - UK), published on the DG Energy website. See also Commission opinion of 6 September 2012 on the certification of 50 Hertz Transmission GmbH (027 - 2012 - DE), published on the DG Energy website.

Such situations have also occurred where participations were held by financial investors[8]. For financial investors, ownership unbundled TSOs form an important class of potential investment opportunities, taking into account that investments in transmission infrastructure with regulated network tariffs offer stable, low risk returns that fit well with their investment profile[9]. Cooperation with financial investors may enable ownership unbundled TSOs to raise the necessary funds for the capital expenditure that is needed to realise the investments in the EU energy network infrastructure[10].

In situations as referred to above, where it can be clearly demonstrated that even though one or more of the circumstances referred to in Article 9(1)(b), (c) and/or (d) appear to be present, there is clearly no incentive for a shareholder in a TSO to influence the decision making in this TSO with the intention to favour its generation, production and/or supply interests to the detriment of other network users, the Commission has taken the view that a refusal to certify such a TSO given the fact that such participation in generation, production and/or supply activities does not lead to a situation which the unbundling rules seek to prevent. Any different interpretation of the unbundling rules of Article 9(1)(b) to (d) Electricity and Gas Directives could lead consequences which would not be justified by the objective the unbundling rules seek to pursue, notably, avoiding discrimination in the operation of the network and in the investment decisions concerning the network.

4. THE COMMISSION'S PRACTICE IN THE CERTIFICATION PROCEDURE FOR TSOS

The first case where the above approach was followed is the Commission's opinion on the certification of the three **National Grid** TSOs in the United Kingdom[11]. In this opinion, the Commission considered that the fact that the ultimate holding company of the three National Grid TSOs in the United Kingdom also controlled generation interests in the United States was no obstacle to certification under the ownership unbundling model, notably in view of the absence of any interface between the electricity systems of the United States and the United Kingdom. The Commission stated in its opinion:

"As set out in Ofgem's draft decision, National Grid plc, the ultimate controller of the Applicants, employs a number of activities in subsidiaries and associated companies. Some of these subsidiaries, under the umbrella of National Grid USA, a wholly owned subsidiary of National Grid plc, are involved in the generation of electricity in the United States. Ofgem concludes that these interests are not to be considered relevant interests as the national legislation transposing the Electricity Directive in Great Britain considers generators and suppliers operating outside the European Economic Area (EEA) as not relevant for certification purposes. Whilst the Commission points out that Article 9(1)(b)(ii) of the Electricity and Gas Directives is not restricted to generators, producers and suppliers operating in the EEA, it considers that, notably in view of the absence of any interface

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8 See Commission opinion of 30 April 2012 on the certification of Swedegas AB (018 - 2012 - SE), published on the DG Energy website, Commission opinion of 6 September 2012 on the certification of 50 Hertz Transmission GmbH (027 - 2012 - DE), published on the DG Energy website and Commission opinion of 23 January 2013 on the certification of Società Gasdotti Italia S.p.A. (047 - 2012 - IT)

9 However, financial investors could also play an important role in investing in (renewable) generation in the EU.

10 Ownership unbundled TSOs generally have to keep their ownership unbundled status unaffected when cooperating with financial investors on new developments or acquisitions, considering that once a TSO is ownership unbundled it cannot "go back" to another model.

11 See footnote 7.

between the US and the UK electricity systems, the activities of National Grid in the United States are not of such nature as to prevent certification of the Applicants."

Even though the application of Article 9 Electricity and Gas Directives is not limited to generation, production and/or supply activities within the EEA**,** it is clear that the closer to each other the relevant activities are, the greater the risk of a conflict of interest is. This is *a fortiori* the case if the activities concerned take place in the same Member State.

Also in the opinion on the certification of the Swedish gas TSO **Swedegas** the Commission analysed whether a conflict of interest could be identified[12]. In this case the Commission agreed with the Swedish regulatory authority EI that the fact that the ultimate controller of Swedegas also controlled a waste disposal company generating electricity in the neighbouring Member State Denmark could not form an obstacle to certification of Swedegas as an ownership unbundled TSO, given that in the specific case only limited quantities of electricity were being generated, as a mere by-product, and given that the electricity generated was subsequently sold for pre-established prices. Since in these circumstances it appeared impossible to use the gas transmission activities of Swedegas in a manner so as to favour the electricity generating interests of waste disposal company in Denmark, no risk of discrimination of network users could be identified, and therefore no obstacle to certification. The Commission stated:

"Swedegas is owned by the EQT Infrastructure Fund, an infrastructure investment fund. The ultimate ownership of the EQT Infrastructure Fund lies, via a number of intermediary legal persons, with SEP Capital B.V., registered in The Netherlands. In its draft decision, EI has assessed whether other companies owned and controlled by the EQT Infrastructure Fund perform any of the activities of generation, production or supply. EI has found that three companies perform such activities.

The first of these undertakings is Kommunekemi A/S, a waste treatment company operating in the neighbouring Member State Denmark, which uses heat from the processing of waste primarily for district heating purposes. During the summer months the heat is also used for the generation of limited quantities of electricity, which Kommunekemi A/S sells for guaranteed and pre-established prices. The Commission agrees with EI that, given that only limited quantities of electricity are being generated, as a mere byproduct, and given that the electricity generated is subsequently sold for pre-established prices, these generation activities cannot form an obstacle to certification of Swedegas as an ownership unbundled TSO. Since in the present case it appears impossible to use the transmission activities of Swedegas in a manner so as to favour the electricity generating interests of Kommunekemi A/S, there is no risk of discrimination of network users."

It is not excluded that a simultaneous participation in a gas TSO and in electricity generation and/or supply activities, or in an electricity TSO and in gas production and/or supply activities can also give rise to a conflict of interest. Nevertheless in situations where a shareholder has a participation in a gas TSO and simultaneously a share in electricity generation activities, the possibility to favour its electricity generation activities by influencing the gas transmission may under certain specific conditions be somewhat more limited than in situations where the transmission and generation activities both relate to electricity. In the opinions on the

[12] See Commission opinion of 30 April 2012 on the certification of Swedegas AB (018 - 2012 - SE), published on the DG Energy website.

certification of the Spanish electricity TSO **Red Electrica de Espana**[13] and the gas TSO **Enagas**[14], the Commission applied a similar approach. The Commission concluded after an analysis that it could not be expected that the shareholder in Red Electrica de Espana and in ENAGAS which also controlled certain small size coal-fired generation activities, which were performed under a regulated framework and benefitted from priority dispatching, was able to influence the transmission activities of Red Electrica de Espana or of ENAGAS in a discriminatory manner so as to favour its participation in these generation activities. The Commission stated in its opinion on Red Eléctrica de Espana:

"From the preliminary decision of CNE it appears that the main shareholder of Red Eléctrica Corporación, SEPI, owns a company, Hunosa, S.A., of which the main activity is mining and extraction of coal, and which also controls a thermal power plant in La Pereda (Asturias) of 50 MW. The question comes up how this participation of SEPI in Hunosa S.A. relates to the provisions of Article 9(1)(b)(i) and (ii). From the preliminary decision of CNE it follows that the generation activities concerned, which are considered important from a social and regional perspective but are not performed under normal commercial terms, are performed under a regulated scheme, the so called "regimen especial", set out by the Spanish legal framework under Royal Decree 661/2007. Their size is small, with production representing approximately 0.1375% of the Spanish total electricity generation. The Commission agrees with CNE that as long as these generation activities are performed under a regulated framework, can benefit by law from priority dispatching and remain small in size, it cannot be expected that SEPI will be able to influence the transmission activities of Red Eléctrica de España in a discriminatory manner so as to favour its participation in the generation activities of Hunosa S.A. In such circumstances the Commission agrees with CNE that an obstacle to certification cannot be identified."

Where generation activities have a guaranteed income such as specific feed-in tariffs that do not vary with market prices[15], they will no longer be sensitive to wholesale price fluctuations, and as a consequence will less easily give rise to a conflict of interest and an incentive to discriminate through transmission activities. A similar reasoning is included in the Commission's opinion on the certification of ENAGAS.

A further case which is relevant is the Commission's opinion on the certification of the German electricity TSO **50 Hertz Transmission**[16]. In this case a financial investor, IFM Global Infrastructure Fund, with a controlling participation in the TSO, also had several participations in generation and supply activities. One of these participations was a non-controlling participation in the Polish company Dalkia Polska. This company, through various local district heating plants and networks, was a supplier of heat on the regulated district heating market in Poland. As a by-product to the production of heat, Dalkia Polska also generated electricity, albeit limited in relative terms. In its draft decision the German regulatory authority analysed in detail whether any incentive could be identified for IFM Global Infrastructure Fund to influence the decision making in 50 Hertz as a TSO in Germany

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13 Commission opinion of 24 May 2012 on the certification of Red Electrica de Espana S.A.U. (021 - 2012 - ES), published on the DG Energy website

14 Commission opinion of 15 June 2012 on the certification of ENAGAS S.A. (024 - 2012 - ES), published on the DG Energy website.

15 However, in case of renewable energy generation, this form of feed-in tariff is expected to be phased out as renewable technologies mature and are increasingly being integrated in the market.

16 Commission opinion of 6 September 2012 on the certification of 50 Hertz Transmission GmbH (027 - 2012 - DE), published on the DG Energy website.

in order to favour the generation interests it had in Dalkia Polska or to discriminate against actual or potential competitors. As no such incentive could be identified, the participation of IFM Global Infrastructure Fund in Dalkia Polska was not considered to constitute an obstacle to the certification of 50 Hertz as an ownership unbundled TSO. The Commission stated in its opinion:

> "Bundesnetzagentur also examined the participation IFM Global Infrastructure Fund has in generation and supply activities in the EU. In particular, IFM Global Infrastructure Fund has a non-controlling participation of […] in the Polish company Dalkia Polska. It appears from the draft decision that this company, through various local district heating plants and networks, is a supplier of heat on the regulated district heating market in Poland. However, as a by-product to the production of heat, Dalkia Polska also generates electricity, albeit limited in relative terms. Decisions concerning the operation of the different plants of Dalkia Polska are taken on the basis of the heating needs of the consumers connected to the district heating network and not on the basis of needs of electricity generation. In practice, Dalkia Polska is a price taker on the Polish electricity market and does not have any influence on the electricity price. In its draft decision Bundesnetzagentur analysed in detail whether in the circumstances of the present case any incentive could be identified for IFM Global Infrastructure Fund to influence the decision making in 50 Hertz as a TSO in Germany in order to favour the generation interests it has in Dalkia Polska or to discriminate against actual or potential competitors. Bundesnetzagentur came to the conclusion that in the present case no such incentive could be identified, and that as a consequence the participation of IFM Global Infrastructure Fund in Dalkia Polska does not form an obstacle to the certification of 50 Hertz as an ownership unbundled TSO.
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> Based on the information in the draft decision, the Commission has no reason to question the assessment of Bundesnetzagentur in the present case and agrees to its conclusion. The Commission invites Bundesnetzagentur, however, to continue monitoring the case also after the adoption of the certification decision in order to satisfy itself that no new facts and circumstances emerge which would justify a change of its assessment and to include a condition in its final certification decision which requires 50 Hertz to regularly report to Bundesnetzagentur on the relevant circumstances."

In situations where no conflict of interest is found it may still be important to continue to monitor the case, as new facts or circumstances might emerge in the future that could change the initial assessment made. Such monitoring is primarily a responsibility for the national regulatory authorities.

Finally, reference is made to the Commission's opinion concerning the certification of the Italian gas TSO **Società Gasdotti Italia** ("SGI")[17]**.** In this case a financial investor, Eiser Global Infrastructure Fund ("Eiser"), the ultimate owner of the TSO, also had participations in companies active in electricity generation. Concerning Eiser's participations in two solar energy companies located in Spain, the Commission agreed with the assessment of the Italian regulatory authority that, considering the fact that the interface between the Spanish electricity market and the Italian gas market was limited, and as long as the generation activities

[17] Commission opinion of 23 January 2013 on the certification of Società Gasdotti Italia S.p.A. (047 - 2012 - IT)

concerned would be performed under the Spanish regulated framework, could benefit by law from priority dispatching and remained small in size, it could not be expected that Eiser would be able to influence the transmission activities of SGI in a discriminatory manner so as to favour its participations in the generation activities of Aries Solar Termoelectrica S.L. and Dioxipe Solar S.L. The Commission stated in its opinion:

"First, the participations of Eiser in Aries Solar Termoelectrica S.L. (36.95%) and Dioxipe Solar S.L. (33.83%) concern companies located in Spain which are active in production of electricity from solar energy. The two power units concerned, currently still under construction, will have a generation capacity of 50MW each. According to the Spanish regulatory framework applicable to renewable energy, the electricity will be sold to the local distribution company at a regulated price. The Commission agrees with the assessment of AEEG that the interface that exists between the Spanish electricity market and the Italian gas market is very limited and that as long as the generation activities concerned are performed under the Spanish regulated framework, can benefit by law from priority dispatching and remain small in size, it cannot be expected that Eiser will be able to influence the transmission activities of SGI in a discriminatory manner so as to favour its participations in the generation activities of Aries Solar Termoelectrica S.L. and Dioxipe Solar S.L. In such circumstances the Commission agrees with AEEG that an obstacle to certification cannot be identified."

Concerning Eiser's participation in a waste management company in the United Kingdom which generated electricity from waste and biogas through two production units of relatively small size (resp. 66MW and 50MW), the Commission agreed with the assessment of the Italian regulatory authority that the geographical distance between the place where the electricity was generated and where the gas transmission network of SGI was located excluded the possibility for Eiser to discriminate between network users of its gas transmission network in order to favour its participation in the generation activities of the waste management company in the United Kingdom. Also here an obstacle to certification could not be identified. The Commission stated in its opinion:

"Second, the participation of Eiser in the Cory Environmental Holding (33.3%) concerns a waste management company, generating electricity from waste and biogas through two production units of relatively small size (resp. 66MW and 50MW) located in the United Kingdom. In this case the electricity is sold on the wholesale market through bilateral contracts. The Commission agrees with the assessment of AEEG that the geographical distance between the place where the electricity is generated and where the gas transmission network of SGI is located excludes the possibility for Eiser to discriminate between network users of its gas transmission network in order to favour its participation in the generation activities of the Cory Environmental Holding. Also here no obstacle to certification can be identified."

Eiser finally had a participation in the company Herambiente, an Italian waste management company, which, as a by-product, produced renewable electricity from waste. In particular in view of the small size of the different production units concerned, the fact that part of the electricity was sold at a regulated price and the fact that the production units were not located in the area where the gas network of SGI is situated, the Commission in its opinion agreed with the Italian regulatory authority that the participation of Eiser in Herambiente did not create a conflict of interest with the gas transmission activities of SGI. The Commission stated in its opinion:

"Finally, the participation of Eiser in Herambiente S.p.A concerns an indirect 12.5% stake in an Italian waste management company, which, as a by-product, produces renewable electricity from waste. The electricity is produced in seven different production units with a capacity of less than 20 MW on average, operating independently from each other. The production units do not make use of any gas for the production of electricity. Part of the electricity is sold at a regulated price, the remainder benefits from priority dispatching and is sold on the wholesale market through bilateral contracts. Moreover, the production units are not located in the same area as where the gas network of SGI is situated, but in the Northern part of Italy. On the basis of these circumstances, and in particular in view of the small size of the different production units concerned, the fact that part of the electricity is sold at a regulated price and the fact that the production units are not located in the area where the gas network of SGI is situated, AEEG has concluded that the participation of Eiser in Herambiente does not create a conflict of interest with the gas transmission activities of SGI and that there is, as a consequence, no risk of discrimination in the handling of the activities of the gas TSO. Based on the information in the draft decision, the Commission has no reason to question the assessment of AEEG in the present case and agrees to its conclusion. The Commission invites AEEG, however, to continue monitoring the situation also after the adoption of the certification decision in order to satisfy itself that no new facts and circumstances emerge, such as for example the opening of more generation units in the vicinity of the SGI network that would interfere with the transmission business, which would justify a change of its assessment."

Also in this case the Commission invited the national regulatory authority to continue monitoring the case after the adoption of the certification decision, in order to satisfy itself that no new facts and circumstances would emerge which could justify a change of the assessment.

It is underlined that further cases are still to be submitted to the Commission in the context of the certification procedure of TSOs, and that more opinions will therefore be published on the website of DG Energy.

5. FINAL REMARKS

In some cases it may not be straightforward to establish whether or not a conflict of interest exists in case a shareholder with a participation in generation, production and/or supply activities has invested in a TSO. Notably in those situations an in-depth analysis on a case-by-case basis will be required by the national regulatory authority and by the Commission in the context of the certification procedure, as certification can only be granted if any conflict of interest is clearly excluded. A complete file will have to be provided by the TSO, containing all the relevant facts and circumstances, together with a clear argumentation on whether participations of the shareholder in generation, production and/or supply interests give rise to a potential conflict of interest and an incentive to exploit it.

It is for the TSO to be certified to bring to the attention of the regulatory authority, where appropriate, that even though one or more of the circumstances set out to in Article 9(1)(b), (c) and/or (d) of the Directive may arguably be present, no conflict of interest exists in the particular case. The burden of proof as to the absence of a conflict of interest or an incentive to exploit it lies with the TSO to be certified and its shareholders, and includes an obligation to submit all the relevant information. The regulatory authority is to take the presented

information into account and include it in its assessment whether the unbundling rules of Article 9 Electricity and Gas Directives are complied with.

Several elements could be of relevance for this case-by-case assessment, such as for instance the geographic location of the transmission activities and the generation, production and/or supply activities concerned; the value and the nature of the participations in these activities, as well as the size and market share of the generation, production and/or supply activities. Also the question whether wholesale price evolution of the commodity would have consequences for the emergence of a conflict of interest could be relevant. This list is indicative and not exhaustive, and none of these elements is necessarily decisive on its own. An overall assessment will always be required, taking various elements into account, where relevant, in order to show that by way of exception clearly no conflict of interest may arise. This is illustrated by the cases referred to in Chapter 4 of this Note, which the Commission has assessed in the context of the certification procedure for TSOs.

An additional point of attention concerns the access to confidential information. In the in-depth analysis specific attention should be given to arrangements preventing access to business sensitive information relevant for the generation, production and/or supply business. Even if an incentive to influence the decision making in the TSO is absent, the access the investor has to confidential information may still give this investor an advantage over its competitors on the generation, production and/or supply market.

It is underlined that if it were to follow from the assessment that a shareholder with a participation in generation, production and/or supply interests may have an incentive to discriminate, it would still be allowed for this shareholder to maintain a passive minority shareholding in the TSO, without being entitled to directly or indirectly exercising voting rights related to this shareholding, or to appoint board members in the TSO. Its financial rights in relation to its shareholding, in particular the right to receive dividends, would remain unaffected in such case.

Any material changes in the production, generation and/or supply activities of the shareholder concerned may trigger the need for a reassessment of the TSO's compliance with the unbundling rules and should be notified to the national regulatory authority in accordance with the Electricity and Gas Directives. The national regulatory authority can open a new certification procedure on its own initiative, in case it has acquired knowledge of a material change in rights or influence over a TSO that may lead to a violation of Article 9 Electricity and Gas Directives, or of plans to that extent. Also the Commission may issue a reasoned request to the national regulatory authority to open a certification procedure[18]. Regulatory authorities and TSOs concerned should be encouraged to find pragmatic and proportionate ways for the TSOs to notify such changes to the national regulatory authorities in order to allow these authorities to carry out their monitoring duties.

[18] See Article 10(3) and (4) Electricity and Gas Directives