**LEI No XX.XXX, DE XX DE XXXXX DE XXXX.**

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|  | Altera a Lei nº 11.909, de 4 de março de 2009, que "dispõe sobre as atividades relativas ao transporte de gás natural, de que trata o art. 177 da Constituição Federal, bem como sobre as atividades de tratamento, processamento, estocagem, liquefação, regaseificação e comercialização de gás natural". |

**O PRESIDENTE DA REPÚBLICA** Faço saber que o Congresso Nacional decreta e eu sanciono a seguinte Lei:

Art. 1o  A Lei n o 11.909, de 4 de março de 2009, passa a vigorar com as seguintes alterações:

“Art. 2o  ..........................................................................

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XXXIV - Área de mercado de capacidade: delimitação do sistema de transporte onde os carregadores potenciais poderão contratar serviços de transporte padronizados, oferecidos de forma conjunta e coordenada pelos transportadores;

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
| ABRACE: Não está claro a necessidade dessa definição. Quanto ao comentário da TBG, sugerimos excluir, pois irá conflitar com a previsão de adoção de mecanismos de *capacity release* aprovados pelo SC2. | Respeitadas as capacidades reservadas e condições estabelecidas nos contratos vigentes e a receita máxima permitida de cada transportador. |  |  | Usar iniciais maiúsculas: Área de Mercado de Capacidade | O IBP sugere incluir “escoamento” na ementa da Lei. |

XXXV - Base Regulatória de Ativos: representa o conjunto de ativos diretamente relacionados à atividade de transporte de gás natural;

XXXVI - Certificação de independência do transportador ou Certificação de independência: procedimento para a verificação do enquadramento do transportador nos modelos de independência e autonomia, com base em regras estabelecidas pela ANP;

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
| **VIDE AO FINAL DO PL** | Sugerimos substituir “independência e autonomia” por verificação do “tratamento isonômico por parte do transportador a todos os agentes da cadeia do gás interessados em utilizar os Sistema de transporte |  | No entendimento da Abiquim, a certificação de independência já deve considerar em lei apenas os modelos OU ou ISO. |  | Os conceitos devem ser definidos na Lei. |

XXXVII - Sistema de transporte: sistema formado por gasodutos interconectados.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
|  |  |  |  |  | XXXVII – Sistema Integrado de transporte: sistema formado por gasodutos interconectados. |

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“Art. 3o  ..........................................................................

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§ 1o  O regime de autorização de que trata o inciso II do **caput**deste artigo aplicar-se-á aos gasodutos de transporte propostos por empresas ou consórcio de empresas que atendam aos requisitos estabelecidos na Legislação, nos termos do art. 56 da Lei no 9.478, de 6 de agosto de 1997, enquanto o regime de concessão aplicar-se-á aos gasodutos de transporte propostos pelo Ministério de Minas e Energia.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
| **Sugere a seguinte inclusão sublinhada**: “O regime de autorização de que trata o inciso II do caput deste artigo aplicar-se-á aos gasodutos de transporte que envolvam acordos internacionais e aos­ gasodutos de transporte...”  Comentário ABRACE:  ABRACE: A redação ainda deixa a cargo do MME toda a responsabilidade pela expansão, em desacordo com a proposta conceitual de atribuir mais responsabilidade aos agentes: GIST, Transportadores ou Terceiros. | Em relação ao “propostos pelo Ministério de Minas e Energia”: Significa regime de autorização para dutos isolados de interesse específico, com publicidade no processo de contratação? Permanece autorização para gasodutos internacionais? | Sugestão de alteração do art.56 da Lei 9478:  Art. 56. Observadas as disposições das leis pertinentes, qualquer empresa ou consórcio de empresas que atender ao disposto no art. 5° poderá receber autorização da ANP para construir instalações e efetuar qualquer modalidade de transporte de petróleo, seus derivados e gás natural, seja para suprimento interno, conexão a sistema de transporte, ou para importação e exportação.  Dúvida: não há necessidade de revogar o § 3o original, uma vez que o mesmo foi reescrito no § 1o aqui proposto? |  |  |  |

” (NR)

"Art. 3o-A empresa ou o consórcio de empresas concessionários ou autorizados para o exercício da atividade de transporte de gás natural devem construir, expandir e operar as instalações de transporte com autonomia e independência com relação às atividades potencialmente concorrenciais da cadeia de valor da indústria do gás natural, sendo vedada a sua relação societária direta ou indireta de exercer ou ser exercida de controle, ou de coligação, nos termos da Lei nº 6.404, de 16 de dezembro de 1976, com empresas ou consórcio de empresas que atuem ou exerçam funções nas atividades de exploração, desenvolvimento, produção, importação, carregamento e comercialização de gás natural.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
| ABRACE: Previsão legal do que já está estabelecido na RANP 51/2013. Novamente, a palavra “independência” é adotada como se fosse necessária e suficiente para assegurar que, na realidade, de fato ela ocorrerá. É preciso maior detalhamento do que ela significa, quais são os critérios e como será obtida na prática. | Sugerimos substituir por “**novas** empresas ou consórcio” |  |  |  | Deveria ser incluído um artigo mencionando a necessidade de separação contábil. |

§ 1o O(s) responsável(is) para a escolha de membros do conselho de administração ou da diretoria ou de representante legal da empresa ou o consórcio de empresas concessionários ou autorizados para o exercício da atividade de transporte de gás natural não pode(m) ser a(s) mesma(s) pessoa(s) que possui(em) a responsabilidade de escolher os membros do conselho de administração ou da diretoria ou de representante legal de empresas ou consórcio de empresas que atuem ou exerçam funções nas atividades de exploração, desenvolvimento, produção, importação, carregamento e comercialização de gás natural.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
| § 1o O(s) ~~responsável(is) para a escolha de~~ membros do conselho de administração ou da diretoria ou de representante legal da empresa ou o consórcio de empresas concessionários ou autorizados para o exercício da atividade de transporte de gás natural não pode(m) ser ~~a~~o(s) mesm~~a~~o(s) ~~pessoa(s) que possui(em) a responsabilidade de escolher os~~  membros do conselho de administração ou da diretoria ou de representante legal de empresas ou consórcio de empresas que atuem ou exerçam funções nas atividades de exploração, desenvolvimento, produção, importação, carregamento e comercialização de gás natural.  ABRACE: O texto original estabelece uma vedação quase impossível de ser fiscalizada. | Sugerimos substituir por “**novas** empresas ou consórcio” |  |  |  |  |

§ 2o A empresa ou o consórcio de empresas que tenha sido autorizado ou que tenha celebrado contrato de concessão para o exercício da atividade de transporte de gás natural até a data da publicação desta Lei e não preencha os requisitos e critérios de autonomia e independência estabelecidos no caput e no § 1o poderão, alternativamente, se submeter à certificação de independência expedida pela ANP."

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
| ABRACE: Os critérios mínimos de independência devem estar previstos em Lei, deixando para a regulamentação apenas o seu detalhamento. De acordo apenas se a Lei trouxer os critérios mínimos de independência | Os critérios para certificação ainda deverão ser amplamente debatidos em consulta e audiência públicas antes de sua definição em regulação | Sugestão de inclusão, na Lei, dos possíveis modelos de independência: ISO, ITO e OU, proporcionando maior segurança jurídica à transição. |  | Inclusão de novo parágrafo:  § 3o A empresa ou o consórcio de empresas que tenha sido autorizado ou que tenha celebrado contrato de concessão para o exercício da atividade de transporte de gás natural poderá celebrar com terceiros contratos de compra e venda de gás natural e/ou contratos de prestação de serviço de estocagem com a única finalidade de garantir a operação e balanceamento das instalações de transporte. | Sugestão de inclusão, na Lei, dos possíveis modelos de independência: ISO, ITO e OU, proporcionando maior segurança jurídica à transição. |

 “Art. 4o  O Ministério de Minas e Energia poderá propor, por iniciativa própria, a construção ou ampliação de gasodutos de transporte, estabelecendo diretrizes para o processo de contratação de capacidade de transporte.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
| ABRACE: Idem comentário anterior sobre maior participação de outros agentes que não o Governo. | O que significam diretrizes? |  |  |  |  |

” (NR)

“Art. 5o  ..........................................................................

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§ 5o A construção ou ampliação de gasodutos que prever ou acarretar a interconexão entre gasodutos deverá observar as disposições do Art. 9o, inclusive com relação ao processo de chamada pública.

” (NR)

“Art. 9o  ..........................................................................

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§ 1o  A ANP regulará a formação de áreas de mercado de capacidade no sistema de transporte composto por gasodutos interconectados, assim como o processo de fusão entre áreas, com o objetivo de progressiva diminuição do número de áreas.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
|  |  |  |  |  | Defende a possibilidade em lei de os agentes do mercado proporem a definição destas áreas. |

§ 2o  Os transportadores se obrigam a cooperar para oferecer capacidade de transporte de forma conjunta e transparente aos carregadores potenciais na área de mercado e para transportar gás natural por meio do sistema de transporte de forma coordenada;

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
|  | Garantidas as Receitas Máximas permitidas conforme estabelecido no §3º a seguir, visando garantir receita suficiente e adequada à remuneração das transportadoras. |  |  | Usar iniciais maiúsculas para “Área de Mercado de Capacidade”.  Incluir no final do §2º: “Os transportadores se obrigam a cooperar para facilitar as operações de movimentação e nominação para os carregadores na Área de Mercado de Capacidade.” |  |

§ 3o  Os serviços de transporte padronizados a serem oferecidos de forma conjunta pelos transportadores da área de mercado de capacidade devem ser estruturados para permitir que cada transportador obtenha receita suficiente para arcar com seus custos e despesas vinculados à prestação dos serviços, obrigações tributárias, assim como para a obtenção da remuneração justa e adequada ao investimento em bens e instalações vinculados à prestação dos serviços de transporte e a depreciação e amortização das suas respectivas bases regulatórias de ativos.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
|  |  | Sugestão de inclusão em lei de possibilidade de contratação de serviços, tais como Estocagem e acesso a Terminais de GNL pelos transportadores.  Justificativa: Mesmo em situações balanceadas, tais mecanismos podem ser necessários para garantir a integridade da rede, uma vez que o modelo E/S implica simplificações temporais nas relações produção/consumo. |  | Usar iniciais maiúsculas para “Área de Mercado de Capacidade”. | Sugestão de inclusão em lei de possibilidade de contratação de serviços, tais como Estocagem e acesso a Terminais de GNL pelos transportadores.  Justificativa: Mesmo em situações balanceadas, tais mecanismos podem ser necessários para garantir a integridade da rede, uma vez que o modelo E/S implica simplificações temporais nas relações produção/consumo. |

§ 4o  A ANP regulará as bases para a cooperação entre transportadores e a padronização dos serviços de transporte de que tratam os §§ 1o , 2o e 3o.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
|  | Através da regulação de acordos de interconexão e demais regulações pertinentes. | Inclusão de §5º  §5º A ANP regulará critérios que promovam o uso eficiente dos sistemas de transporte, podendo criar mecanismos de incentivo à oferta de serviços de transporte adicionais pelos transportadores. |  | Incluir no final do §2º:  “Os custos relacionados aos eventuais contratos celebrados pelos transportadores, referidos no § 3° do art. 3, serão incluídos neste cálculo.” | Inclusão de §5º  §5º A ANP regulará critérios que promovam o uso eficiente dos sistemas de transporte, podendo criar mecanismos de incentivo à oferta de serviços de transporte adicionais pelos transportadores. |

” (NR)

“Art. 13  ..........................................................................

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§ 2o  As tarifas de transporte de gás natural a serem pagas pelos carregadores para o caso dos gasodutos objeto de concessão serão estabelecidas pela ANP com base na receita anual estabelecida no processo licitatório.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
|  |  |  |  | Inclusão sugerida:  Os custos relacionados aos eventuais contratos celebrados pelos transportadores referidos no §3° do artigo 3°, serão incluídos neste cálculo. |  |

” (NR)

Art. 2o  Revoga-se o § 2o do Art. 3º, o Inciso VII do Art. 17, o Inciso XIV do Art. 21 e o § 3o do Art. 30, da Lei no 11.909, de 4 de março de 2009.

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| **ABRACE** | **TBG** | **PETROBRAS** | **ABIQUIM** | **STOGAS** | **IBP** |
|  | Propomos período de exclusividade para gasodutos de interesse específico (dutos isolados). | Comentário: Deve-se prever mecanismos de exclusividade para casos específicos, como por exemplo em sistemas isolados. Sugestão de não revogar tais artigos e sim aplicá-los com maior restrição, sendo necessária a revisão do §3° do Art. 30, prevendo que o mesmo seja excepcional. |  |  |  |

Art. 3o  Esta Lei entra em vigor na data de sua publicação.

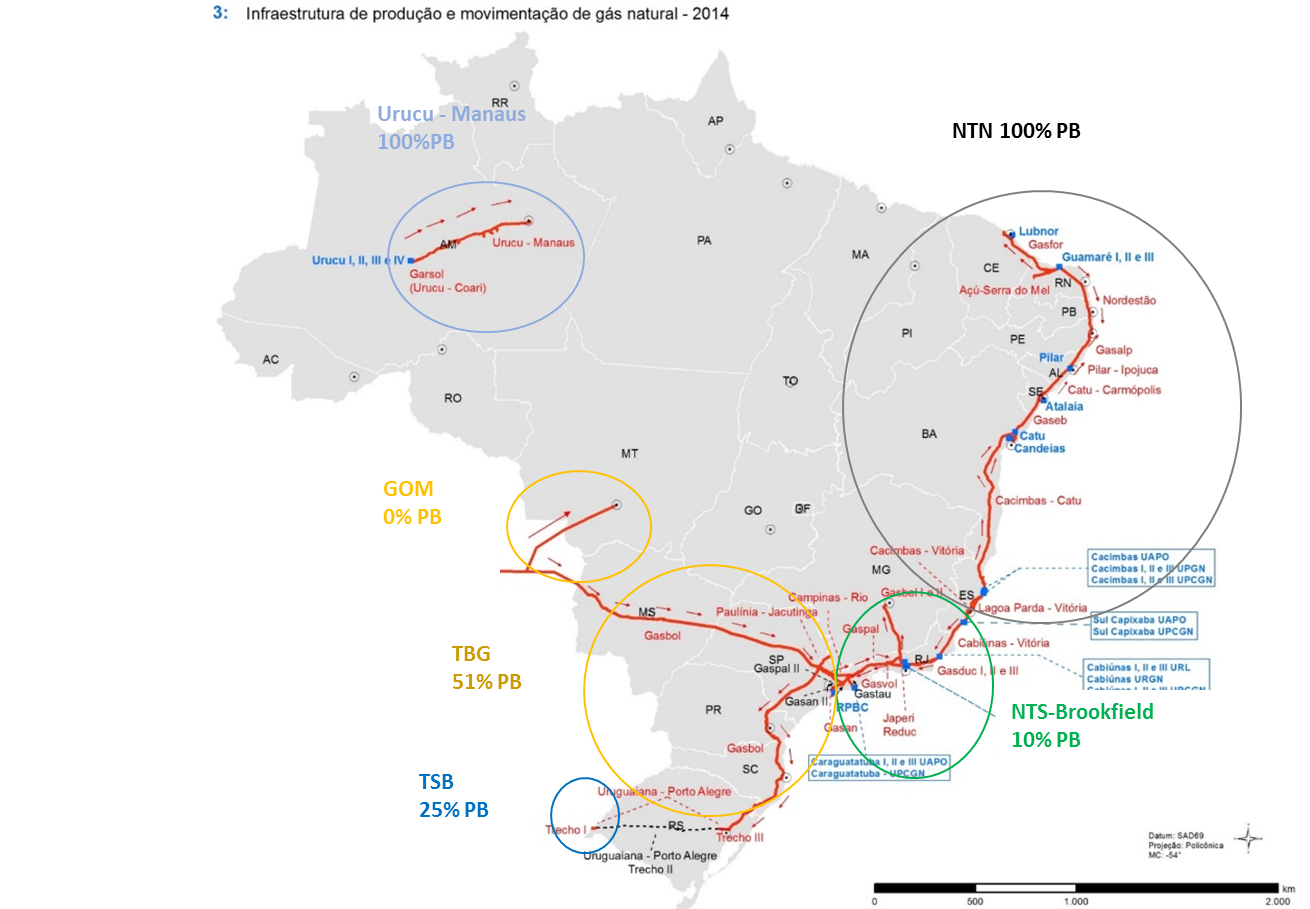
Brasília, XX de XXXX de XXXX; XXXo da Independência e XXXo da República.

PRESIDENTE  
*Ministro  
Ministro*

**OBSERVAÇÃO:** VIDE ESTOCAGEM EM PL À PARTE

**COMENTÁRIO DA ABRACE SOBRE O INCISO XXXVI DO ART. 2º**

(XXXVI - Certificação de independência do transportador ou Certificação de independência: procedimento para a verificação do enquadramento do transportador nos modelos de independência e autonomia, com base em regras estabelecidas pela ANP)



ABRACE:

O gráfico acima demonstra a forte presença do monopolista incumbente sobre a operação de gasodutos de transporte no Brasil. A despeito da venda de 90% na participação da NTS, até então o incumbente terá a responsabilidade de operar estes ativos e não parece haver obrigação legal de que não seja assim. A respeito dos demais gasodutos, não se sabe se, quando e em quais condições serão vendidos, o que não enseja segurança sobre a possibilidade de desverticalização deste segmento. Portanto, não há evidência a partir das condições de mercado que apontem para uma efetiva desverticalização voluntária.

Como a ABRACE apontou na contribuição à Consulta Pùblica do Gás para Crescer, no Termo de Compromisso publicado pela ANP, a Transpetro continuará como operadora dos gasodutos vendidos pela Petrobras, o que demonstra que ainda haverá forte integração entre a comercialização e o transporte. Ainda, não está claro se o Network Code poderia garantir a independência necessária a partir dos mecanismos propostos.

Neste contexto é importante ressaltar que a redação proposta no PL é incompleta e não oferece segurança de que, se adotado o modelo proposto, haverá a efetiva independência dos transportadores. Deixar para regulamentação posterior critérios tão relevantes quanto os de independência provocará questionamento ao modelo ora proposto.

A experiência internacional demonstra que a efetiva independência dos transportadores é condição necessária e central para assegurar acesso não discriminatório à infraestrutura de transporte e são três as opções adotadas na União Europeia para faze-lo: Ownership Unbundling, Independent System Operator (ISO) e Independent Transmission Operator (ITO). **A ABRACE entende que é necessário que a Lei seja clara sobre a obrigatoriedade de adoção sobre uma destas três opções**. Quanto ao mérito delas, a ABRACE questiona qual seria a viabilidade institucional de se aplicar no Brasil um modelo como o do ITO, que irá requerer uma fiscalização intensa e continua das atividades e relações entre o transportador e o produtor e questiona quais são as condições necessárias para que esse modelo efetivamente se reflita em independência. Sendo assim, **dentre os três modelos exaustivamente citados pela literatura sobre o tema, para o caso brasileiro a ABRACE entende serem mais adequados o UO ou o ISO, sendo necessário que seus critérios mínimos constem em Lei.**

Tal posicionamento decorre de estudos de consultorias contratadas pela ABRACE nos últimos anos e que apontaram que a experiência internacional demonstra que\*:

Tal posicionamento decorre de estudos de consultorias contratadas pela ABRACE nos últimos anos e que apontaram que a experiência internacional demonstra que\*:

1. Em mercados em que houve a instituição de empresas subsidiárias para atuar na operação do transporte afiliadas à empresa supridora, não houve desenvolvimento da competição entre agentes, nem a expansão do mercado de gás, que se manteve altamente concentrado. As empresas incumbentes não promoviam a comercialização independente de gás e novos entrantes eram dependentes das empresas verticalmente integradas.
2. Do mesmo modo foram listadas evidencias de que a critérios frágeis de independência entre produtores/comercializadores e transportadores ensejam riscos à competição, tais como: i) restrições da empresa controladora quanto aos investimentos das empresas de transporte; ii) contratos de gás (molécula) firmados de forma conjunta com os contratos de transporte, prejudicando a transparência das informações; iii) condições contratuais, nominações de acesso ao transporte e tarifas mais favoráveis para empresas supridoras afiliadas ao operador de transporte.
3. Por fim, relatório da UE propõe diversas medidas remediadoras, as quais merecem destaque: i) a separação obrigatória da propriedade e maior transparência das informações relativas à disponibilidade de capacidade; e ii) regulação de mecanismos de gerenciamento do congestionamento contratual – use-it-or-lose-it – para a capacidade de transporte que não estivesse sendo utilizada.
4. A revisão promovida pelo DG Energia da UE concluiu que empresas operadoras que combinam a propriedade do sistema de transporte com operação independente (ITSO) têm uma performance melhor do que operadores que são meramente um spin off da empresa mãe.

\*A despeito da primeira diretriz da UE, no início dos anos 2000 a Europa ainda contava com sistemas de gás semi-verticalizados, com pouca liquidez e onde terceiros interessados tinham dificuldade de acesso à capacidade de transporte. Em 2005 a Diretoria de Competição em Energia da UE iniciou um levantamento sobre a eficácia das diretrizes. O estudo foi publicado em 2007. Análise elaborada pela Consultoria Energix Strategy a pedido da ABRACE.

Também, estudo do Grupo de Economia da Energia da UFRJ ressalta:

*A resolução ANP n. 51, de dezembro de 2013, proíbe qualquer carregador de gás de se envolver diretamente ou através de subsidiárias com a atividade de transporte de gás. Esta restrição se aplica a novos gasodutos de transporte, mas não obrigou a Petrobras a se desfazer totalmente dos seus ativos de transporte. A empresa continua envolvida simultaneamente no transporte, fazendo carregamento e comercialização de gás natural. Assim, propõe-se estender as regras da resolução 51 aos gasodutos existentes, estabelecendo-se um prazo para que a Petrobras venda seus ativos de transporte. Além disso, é importante garantir não só a venda dos ativos de transporte pela Petrobras, mas uma operação independente com eles. Por isso, este estudo propõe que o governo avalie a criação de um operador nacional independente para todos os gasodutos (Operador Nacional do Gás), tendo em vista a nova estrutura patrimonial da rede de transporte após a venda dos ativos pela Petrobras[[1]](#footnote-1)*.

Nesta mesma diretriz, a FGV-CERI, consultoria também contratada pela ABRACE para avaliar a necessidade de estabelecer uma operação independente no transporte sob a lógica do modelo de entradas e saídas, destaca:

*A lógica do regime entrada-saída é frequentemente visualizada como um sistema onde os usuários trocam gás em um hub virtual. Direitos de entrada e saída outorgam o direito de trocar em um ‘Ponto de Intercâmbio Virtual’ (PIV). Nele, o gás não pode ser diferenciado pela sua origem, representando, portanto, uma commodity homogênea. O exemplo tradicional de PIV é o National Balancing Point da Grã-Bretanha. O regime supõe que existe um operador do sistema de entrada-saída, o que requer um nível mínimo de desverticalização - normalmente especificado através de modelos autorizados de desverticalização.*

Finalmente, vale ressaltar que em sua contribuição ao PL, a empresa transportadora contribui no sentido de flexibilizar critérios de independência, sugerindo a substituição do termo “independência” na definição. A ABRACE é contrária a essa contribuição. Ainda, contribuição feito pela ANP ao PL que propõe a criação do GIST – transcrito abaixo – se aplica também aqui.

“(...) é flagrantemente contrário ao objetivo de desverticalização do segmento de transporte de gás natural e o princípio da gestão independente do sistema de transporte, o que vai de encontro às diretrizes de: reforço da separação entre as atividades potencialmente concorrenciais, produção e comercialização de gás natural, das atividades monopolísticas, transporte e distribuição (Inciso VI do Art. 2º da Resolução CNPE nº 10/2017) e implantação de modelo de Gestão Independente e Integrada do Sistema de Transporte de Gás Natural – STGN (Inciso VII do Art. 2º da Resolução CNPE nº 10/2017);”

Em suma, o modelo ora proposto precisa ser aperfeiçoado no que diz respeito a aspectos relacionados à independência, sob pena de não respeitar diretriz básica do CNPE, conforme citado acuma. Adicionalmente, vale destacar a necessidade de que todas as transportadoras existentes comprovem possuir expertise suficiente para fazer a operação coordenada dos dutos, considerando todas as atribuições listadas pelo SC2, para que o modelo possa vir a ser considerado como uma opção para o novo modelo de gás natural do país.

**COMENTÁRIOS DA ANP A PARTIR DAS SUGESTÕES RECEBIDAS**

1. **Período de Exclusividade**

A ANP considera que de fato deverá ser mantida a previsão de período de exclusividade para gasodutos que estejam fora do sistema de transporte.

1. **Detalhamento em Lei dos modelos de independência**

As principais características dos modelos de independência estão descritos no quadro a seguir.

**Principais Características dos Modelos de Independência**

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| --- | --- | --- |
| **OU** | **ISO** | **ITO** |
| * Empresa transportadora totalmente separada dos elos da produção, importação e comercialização, sendo a detentora dos ativos e operadora do sistema de transporte * Sem acionistas em comum entre a empresa transportadora e as demais atividades da IGN * Sem membros em comum no Conselho de Administração ou na diretoria da transportadora e dos demais agentes da IGN | * Os ativos de transporte podem permanecer sendo da empresa verticalmente integrada, mas em uma entidade organizacional e legalmente distinta, ou com um proprietário independente do operador do sistema * O sistema de transporte é gerenciado e controlado por uma companhia independente, o ISO * Além dos custos de se certificar a independência deste agente, são exigidos maiores custos de supervisão regulatória (aprovação de contratos entre o proprietário dos ativos e o ISO, monitoramento das comunicações e das relações entre os dois, resoluções de conflitos, etc.) | * A empresa verticalmente integrada mantém a propriedade dos ativos de transporte por meio de ente legalmente separada. * Medidas organizacionais e de governança para garantir que a atividade de transporte de gás natural está separada das demais atividades e sua operação é independente. * Alternativa de maior custo regulatório de controle e supervisão (monitoramento da relação comercial e financeira entre a empresa transportadora e os demais negócios, aprovação dos serviços prestados por partes relacionadas, revisão e aprovação de mudanças no Conselho de Administração da empresa transportadora, etc.) |

A critério do CTGN, podem ser detalhados em Lei os modelos de independência (UO, ISO, ITO), embora a ANP considere que o texto legal deva ser o mais genérico possível, conforme proposição legal apresentada, sendo mais conveniente realizar o detalhamento em nível infralegal.

Dessa forma, caso se opte por uma norma mais pormenorizada, a ANP considera interessante o texto da União Europeia em sua Diretiva 2009/73/CE e, caso se opte por uma lei ainda mais esmiuçada, o texto da Parte 3 da Lei de Gás da Áustria (*Gaswirtschaftsgesetz* 2011, versão de 18/09/2013), os quais encontram-se a seguir:

**DIRETIVA 2009/73/CE**

**(Arts. 9º, 10, 14, 15, 16, 17, 18, 19, 20 e 21)**

*“CHAPTER III*

*TRANSMISSION, STORAGE AND LNG*

*Article 9*

***Unbundling of transmission systems and transmission system operators***

*1.   Member States shall ensure that from 3 March 2012:*

|  |  |
| --- | --- |
| *(a)* | *each undertaking which owns a transmission system acts as a transmission system operator;* |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| *(b)* | *the same person or persons are entitled neither:*   |  |  | | --- | --- | | *(i)* | *directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor* |  |  |  | | --- | --- | | *(ii)* | *directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;* | |

|  |  |
| --- | --- |
| *(c)* | *the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; and* |

|  |  |
| --- | --- |
| *(d)* | *the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.* |

*2.   The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:*

|  |  |
| --- | --- |
| *(a)* | *the power to exercise voting rights;* |

|  |  |
| --- | --- |
| *(b)* | *the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or* |

|  |  |
| --- | --- |
| *(c)* | *the holding of a majority share.* |

*3.   For the purpose of paragraph 1(b), the notion ‘undertaking performing any of the functions of production or supply’ shall include ‘undertaking performing any of the functions of generation and supply’ within the meaning of 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 the terms ‘transmission system operator’ and ‘transmission system’ shall include ‘transmission system operator’ and ‘transmission system’ within the meaning of that Directive.*

*4.   Member States may allow for derogations from points (b) and (c) of paragraphs 1 until 3 March 2013, provided that transmission system operators are not part of a vertically integrated undertaking.*

*5.   The obligation set out in paragraph 1(a) of this Article shall be deemed to be fulfilled in a situation where two or more undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in two or more Member States for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved under Article 14 as an independent system operator or as an independent transmission operator for the purposes of Chapter IV.*

*6.   For the implementation of this Article, where the person referred to in points (b), (c) and (d) of paragraph 1 is the Member State or another public body, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons.*

*7.   Member States shall ensure that neither commercially sensitive information referred to in Article 16 held by a transmission system operator which was part of a vertically integrated undertaking, nor the staff of such a transmission system operator, is transferred to undertakings performing any of the functions of production and supply.*

*8.   Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1.*

*In such case, the Member State concerned shall either:*

|  |  |
| --- | --- |
| *(a)* | *designate an independent system operator in accordance with Article 14, or* |

|  |  |
| --- | --- |
| *(b)* | *comply with the provisions of Chapter IV.* |

*9.   Where, on 3 September 2009, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Member State may decide not to apply paragraph 1.*

*10.   Before an undertaking is approved and designated as a transmission system operator under paragraph 9 of this Article, it shall be certified according to the procedures laid down in Article 10(4), (5) and (6) of this Directive and in Article 3 of Regulation (EC) No 715/2009, pursuant to which the Commission shall verify that the arrangements in place clearly guarantee more effective independence of the transmission system operator than the provisions of Chapter IV.*

*11.   Vertically integrated undertakings which own a transmission system shall not in any event be prevented from taking steps to comply with paragraph 1.*

*12.   Undertakings performing any of the functions of production or supply shall not in any event be able to directly or indirectly take control over or exercise any right over unbundled transmission system operators in Member States which apply paragraph 1.*

*Article 10*

***Designation and certification of transmission system operators***

*1.   Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5 and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009.*

*2.   Undertakings which own a transmission system and which have been certified by the national regulatory authority as having complied with the requirements of Article 9, pursuant to the certification procedure, shall be approved and designated as transmission system operators by Member States. The designation of transmission system operators shall be notified to the Commission and published in the Official Journal of the European Union.*

*3.   Transmission system operators shall notify to the regulatory authority any planned transaction which may require a reassessment of their compliance with the requirements of Article 9.*

*4.   The regulatory authorities shall monitor the continuing compliance of transmission system operators with the requirements of Article 9. They shall open a certification procedure to ensure such compliance:*

|  |  |
| --- | --- |
| *(a)* | *upon notification by the transmission system operator pursuant to paragraph 3;* |

|  |  |
| --- | --- |
| *(b)* | *on their own initiative where they have knowledge that a planned change in rights or influence over transmission system owners or transmission system operators may lead to an infringement of Article 9, or where they have reason to believe that such an infringement may have occurred; or* |

|  |  |
| --- | --- |
| *(c)* | *upon a reasoned request from the Commission.* |

*5.   The regulatory authorities shall adopt a decision on the certification of a transmission system operator within a period of four months from the date of the notification by the transmission system operator or from the date of the Commission request. After expiry of that period, the certification shall be deemed to be granted. The explicit or tacit decision of the regulatory authority shall become effective only after the conclusion of the procedure set out in paragraph 6.*

*6.   The explicit or tacit decision on the certification of a transmission system operator shall be notified without delay to the Commission by the regulatory authority, together with all the relevant information with respect to that decision. The Commission shall act in accordance with the procedure laid down in Article 3 of Regulation (EC) No 715/2009.*

*7.   The regulatory authorities and the Commission may request from transmission system operators and undertakings performing any of the functions of production or supply any information relevant for the fulfilment of their tasks under this Article.*

*8.   The regulatory authorities and the Commission shall preserve the confidentiality of commercially sensitive information.*

*(…)*

*Article 14*

***Independent system operators***

*1.   Where the transmission system belongs to a vertically integrated undertaking on 3 September 2009, Member States may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to approval by the Commission.*

*2.   The Member State may approve and designate an independent system operator only where:*

|  |  |
| --- | --- |
| *(a)* | *the candidate operator has demonstrated that it complies with the requirements of Article 9(1)(b), (c) and (d);* |

|  |  |
| --- | --- |
| *(b)* | *the candidate operator has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13;* |

|  |  |
| --- | --- |
| *(c)* | *the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;* |

|  |  |
| --- | --- |
| *(d)* | *the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and* |

|  |  |
| --- | --- |
| *(e)* | *the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 715/2009 including the cooperation of transmission system operators at European and regional level.* |

*3.   Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and of paragraph 2 of this Article shall be approved and designated as independent system operators by Member States. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009 or in Article 11 of this Directive shall be applicable.*

*4.   Each independent system operator shall be responsible for granting and managing third-party access, including the collection of access charges and congestion charges, for operating, maintaining and developing the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.*

*5.   Where an independent system operator has been designated, the transmission system owner shall:*

|  |  |
| --- | --- |
| *(a)* | *provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;* |

|  |  |
| --- | --- |
| *(b)* | *finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties;* |

|  |  |
| --- | --- |
| *(c)* | *provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and* |

|  |  |
| --- | --- |
| *(d)* | *provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.* |

*6.   In close cooperation with the regulatory authority, the relevant national competition authority shall be granted all relevant powers to effectively monitor compliance of the transmission system owner with its obligations under paragraph 5.*

*Article 15*

***Unbundling of transmission system owners and storage system operators***

*1.   A transmission system owner, where an independent system operator has been appointed, and a storage system operator which are part of vertically integrated undertakings shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission, distribution and storage.*

*This Article shall apply only to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33.*

*2.   In order to ensure the independence of the transmission system owner and storage system operator referred to in paragraph 1, the following minimum criteria shall apply:*

|  |  |
| --- | --- |
| *(a)* | *persons responsible for the management of the transmission system owner and storage system operator shall not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;* |

|  |  |
| --- | --- |
| *(b)* | *appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner and storage system operator are taken into account in a manner that ensures that they are capable of acting independently;* |

|  |  |
| --- | --- |
| *(c)* | *the storage system operator shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the storage facilities. This shall not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the storage system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of storage facilities, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and* |

|  |  |
| --- | --- |
| *(d)* | *the transmission system owner and the storage system operator 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. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.* |

*3.   The Commission may adopt Guidelines to ensure full and effective compliance of the transmission system owner and of the storage system operator with paragraph 2 of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).*

*Article 16*

***Confidentiality for transmission system operators and transmission system owners***

*1.   Without prejudice to Article 30 or any other legal duty to disclose information, each transmission, storage and/or LNG system operator, and each transmission system owner, shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its activities, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner. In particular, it shall not disclose any commercially sensitive information to the remaining parts of the undertaking, unless this is necessary for carrying out a business transaction. In order to ensure the full respect of the rules on information unbundling, Member States shall ensure that the transmission system owner including, in the case of a combined operator, the distribution system operator, and the remaining part of the undertaking do not use joint services, such as joint legal services, apart from purely administrative or IT functions.*

*2.   Transmission, storage and/or LNG system operators shall not, in the context of sales or purchases of natural gas by related undertakings, misuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.*

*3.   Information necessary for effective competition and the efficient functioning of the market shall be made public. That obligation shall be without prejudice to protecting commercially sensitive information.*

***CHAPTER IV***

***INDEPENDENT TRANSMISSION OPERATOR***

*Article 17*

***Assets, equipment, staff and identity***

*1.   Transmission system operators shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under this Directive and carrying out the activity of gas transmission, in particular:*

|  |  |
| --- | --- |
| *(a)* | *assets that are necessary for the activity of gas transmission, including the transmission system, shall be owned by the transmission system operator;* |

|  |  |
| --- | --- |
| *(b)* | *personnel necessary for the activity of gas transmission, including the performance of all corporate tasks, shall be employed by the transmission system operator;* |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| *(c)* | *leasing of personnel and rendering of services, to and from any other parts of the vertically integrated undertaking shall be prohibited. A transmission system operator may, however, render services to the vertically integrated undertaking as long as:*   |  |  | | --- | --- | | *(i)* | *the provision of those services does not discriminate between system users, is available to all system users on the same terms and conditions and does not restrict, distort or prevent competition in production or supply; and* |  |  |  | | --- | --- | | *(ii)* | *the terms and conditions of the provision of those services are approved by the regulatory authority;* | |

|  |  |
| --- | --- |
| *(d)* | *without prejudice to the decisions of the Supervisory Body under Article 20, appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available to the transmission system operator in due time by the vertically integrated undertaking following an appropriate request from the transmission system operator.* |

*2.   The activity of gas transmission shall include at least the following tasks in addition to those listed in Article 13:*

|  |  |
| --- | --- |
| *(a)* | *the representation of the transmission system operator and contacts to third parties and the regulatory authorities;* |

|  |  |
| --- | --- |
| *(b)* | *the representation of the transmission system operator within the European Network of Transmission System Operators for Gas (ENTSO for Gas);* |

|  |  |
| --- | --- |
| *(c)* | *granting and managing third-party access on a non-discriminatory basis between system users or classes of system users;* |

|  |  |
| --- | --- |
| *(d)* | *the collection of all the transmission system related charges including access charges, balancing charges for ancillary services such as gas treatment, purchasing of services (balancing costs, energy for losses);* |

|  |  |
| --- | --- |
| *(e)* | *the operation, maintenance and development of a secure, efficient and economic transmission system;* |

|  |  |
| --- | --- |
| *(f)* | *investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;* |

|  |  |
| --- | --- |
| *(g)* | *the setting up of appropriate joint ventures, including with one or more transmission system operators, gas exchanges, and the other relevant actors pursuing the objective to develop the creation of regional markets or to facilitate the liberalisation process; and* |

|  |  |
| --- | --- |
| *(h)* | *all corporate services, including legal services, accountancy and IT services.* |

*3.   Transmission system operators shall be organised in a legal form as referred to in Article 1 of Council Directive 68/151/EEC.*

*4.   The transmission system operator shall not, in its corporate identity, communication, branding and premises, create confusion in respect of the separate identity of the vertically integrated undertaking or any part thereof.*

*5.   The transmission system operator shall not share IT systems or equipment, physical premises and security access systems with any part of the vertically integrated undertaking, nor use the same consultants or external contractors for IT systems or equipment, and security access systems.*

*6.   The accounts of transmission system operators shall be audited by an auditor other than the one auditing the vertically integrated undertaking or any part thereof.*

*Article 18*

***Independence of the transmission system operator***

*1.   Without prejudice to the decisions of the Supervisory Body under Article 20, the transmission system operator shall have:*

|  |  |
| --- | --- |
| *(a)* | *effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the transmission system; and* |

|  |  |
| --- | --- |
| *(b)* | *the power to raise money on the capital market in particular through borrowing and capital increase.* |

*2.   The transmission system operator shall at all times act so as to ensure it has the resources it needs in order to carry out the activity of transmission properly and efficiently and develop and maintain an efficient, secure and economic transmission system.*

*3.   Subsidiaries of the vertically integrated undertaking performing functions of production or supply shall not have any direct or indirect shareholding in the transmission system operator. The transmission system operator shall neither have any direct or indirect shareholding in any subsidiary of the vertically integrated undertaking performing functions of production or supply, nor receive dividends or any other financial benefit from that subsidiary.*

*4.   The overall management structure and the corporate statutes of the transmission system operator shall ensure effective independence of the transmission system operator in compliance with this Chapter. The vertically integrated undertaking shall not determine, directly or indirectly, the competitive behaviour of the transmission system operator in relation to the day to day activities of the transmission system operator and management of the network, or in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.*

*5.   In fulfilling their tasks in Article 13 and Article 17(2) of this Directive, and in complying with Article 13(1), Article 14(1)(a), Article 16(2), (3) and (5), Article 18(6) and Article 21(1) of Regulation (EC) No 715/2009, transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition in production or supply.*

*6.   Any commercial and financial relations between the vertically integrated undertaking and the transmission system operator, including loans from the transmission system operator to the vertically integrated undertaking, shall comply with market conditions. The transmission system operator shall keep detailed records of such commercial and financial relations and make them available to the regulatory authority upon request.*

*7.   The transmission system operator shall submit for approval by the regulatory authority all commercial and financial agreements with the vertically integrated undertaking.*

*8.   The transmission system operator shall inform the regulatory authority of the financial resources, referred to in Article 17(1)(d), available for future investment projects and/or for the replacement of existing assets.*

*9.   The vertically integrated undertaking shall refrain from any action impeding or prejudicing the transmission system operator from complying with its obligations in this Chapter and shall not require the transmission system operator to seek permission from the vertically integrated undertaking in fulfilling those obligations.*

*10.   An undertaking which has been certified by the regulatory authority as being in compliance with the requirements of this Chapter shall be approved and designated as a transmission system operator by the Member State concerned. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009 or in Article 11 of this Directive shall apply.*

*Article 19*

***Independence of the staff and the management of the transmission system operator***

*1.   Decisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office, of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall be taken by the Supervisory Body of the transmission system operator appointed in accordance with Article 20.*

*2.   The identity of, and the conditions governing the term, the duration and the termination of office of, the persons nominated by the Supervisory Body for appointment or renewal as persons responsible for the executive management and/or as members of the administrative bodies of the transmission system operator, and the reasons for any proposed decision terminating such term of office, shall be notified to the regulatory authority. Those conditions and the decisions referred to in paragraph 1 shall become binding only if the regulatory authority has raised no objections within three weeks of notification.*

*The regulatory authority may object to the decisions referred to in paragraph 1 where:*

|  |  |
| --- | --- |
| *(a)* | *doubts arise as to the professional independence of a nominated person responsible for the management and/or member of the administrative bodies; or* |

|  |  |
| --- | --- |
| *(b)* | *in the case of premature termination of a term of office, doubts exist regarding the justification of such premature termination.* |

*3.   No professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it or its controlling shareholders other than the transmission system operator shall be exercised for a period of three years before the appointment of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are subject to this paragraph.*

*4.   The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall have no other professional position or responsibility, interest or business relationship, directly or indirectly, with any other part of the vertically integrated undertaking or with its controlling shareholders.*

*5.   The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall hold no interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated undertaking other than the transmission system operator. Their remuneration shall not depend on activities or results of the vertically integrated undertaking other than those of the transmission system operator.*

*6.   Effective rights of appeal to the regulatory authority shall be guaranteed for any complaints by the persons responsible for the management and/or members of the administrative bodies of the transmission system operator against premature terminations of their term of office.*

*7.   After termination of their term of office in the transmission system operator, the persons responsible for its management and/or members of its administrative bodies shall have no professional position or responsibility, interest or business relationship with any part of the vertically integrated undertaking other than the transmission system operator, or with its controlling shareholders for a period of not less than four years.*

*8.   Paragraph 3 shall apply to the majority of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator.*

*The persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are not subject to paragraph 3 shall have exercised no management or other relevant activity in the vertically integrated undertaking for a period of at least six months before their appointment.*

*The first subparagraph of this paragraph and paragraphs 4 to 7 shall be applicable to all the persons belonging to the executive management and to those directly reporting to them on matters related to the operation, maintenance or development of the network.*

*Article 20*

***Supervisory Body***

*1.   The transmission system operator shall have a Supervisory Body which shall be in charge of taking decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator, in particular decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the transmission system operator and the amount of dividends distributed to shareholders. The decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day to day activities of the transmission system operator and management of the network, and in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.*

*2.   The Supervisory Body shall be composed of members representing the vertically integrated undertaking, members representing third party shareholders and, where the relevant legislation of a Member State so provides, members representing other interested parties such as employees of the transmission system operator.*

*3.   The first subparagraph of Article 19(2) and Article 19(3) to (7) shall apply to at least half of the members of the Supervisory Body minus one.*

*Point (b) of the second subparagraph of Article 19(2) shall apply to all the members of the Supervisory Body.*

*Article 21*

***Compliance programme and compliance officer***

*1.   Member States shall ensure that transmission system operators establish and implement a compliance programme which sets out the measures taken in order to ensure that discriminatory conduct is excluded, and ensure that the compliance with that programme is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet those objectives. It shall be subject to approval by the regulatory authority. Without prejudice to the powers of the national regulator, compliance with the program shall be independently monitored by a compliance officer.*

*2.   The compliance officer shall be appointed by the Supervisory Body, subject to the approval by the regulatory authority. The regulatory authority may refuse the approval of the compliance officer only for reasons of lack of independence or professional capacity. The compliance officer may be a natural or legal person. Article 19(2) to (8) shall apply to the compliance officer.*

*3.   The compliance officer shall be in charge of:*

|  |  |
| --- | --- |
| *(a)* | *monitoring the implementation of the compliance programme;* |

|  |  |
| --- | --- |
| *(b)* | *elaborating an annual report, setting out the measures taken in order to implement the compliance programme and submitting it to the regulatory authority;* |

|  |  |
| --- | --- |
| *(c)* | *reporting to the Supervisory Body and issuing recommendations on the compliance programme and its implementation;* |

|  |  |
| --- | --- |
| *(d)* | *notifying the regulatory authority on any substantial breaches with regard to the implementation of the compliance programme; and* |

|  |  |
| --- | --- |
| *(e)* | *reporting to the regulatory authority on any commercial and financial relations between the vertically integrated undertaking and the transmission system operator.* |

*4.   The compliance officer shall submit the proposed decisions on the investment plan or on individual investments in the network to the regulatory authority. This shall occur at the latest when the management and/or the competent administrative body of the transmission system operator submits them to the Supervisory Body.*

*5.   Where the vertically integrated undertaking, in the general assembly or through the vote of the members of the Supervisory Body it has appointed, has prevented the adoption of a decision with the effect of preventing or delaying investments, which under the ten-year network development plan, was to be executed in the following three years, the compliance officer shall report this to the regulatory authority, which then shall act in accordance with Article 22.*

*6.   The conditions governing the mandate or the employment conditions of the compliance officer, including the duration of his mandate, shall be subject to approval by the regulatory authority. Those conditions shall ensure the independence of the compliance officer, including by providing it with all the resources necessary for fulfilling his duties. During his mandate, the compliance officer shall have no other professional position, responsibility or interest, directly or indirectly, in or with any part of the vertically integrated undertaking or with its controlling shareholders.*

*7.   The compliance officer shall report regularly, either orally or in writing, to the regulatory authority and shall have the right to report regularly, either orally or in writing, to the Supervisory Body of the transmission system operator.*

*8.   The compliance officer may attend all meetings of the management or administrative bodies of the transmission system operator, and those of the Supervisory Body and the general assembly. The compliance officer shall attend all meetings that address the following matters:*

|  |  |
| --- | --- |
| *(a)* | *conditions for access to the network, as defined in Regulation (EC) No 715/2009, in particular regarding tariffs, third party access services, capacity allocation and congestion management, transparency, balancing and secondary markets;* |

|  |  |
| --- | --- |
| *(b)* | *projects undertaken in order to operate, maintain and develop the transmission system, including investments in new transport connections, in expansion of capacity and in optimisation of existing capacity;* |

|  |  |
| --- | --- |
| *(c)* | *energy purchases or sales necessary for the operation of the transmission system.* |

*9.   The compliance officer shall monitor the compliance of the transmission system operator with Article 16.*

*10.   The compliance officer shall have access to all relevant data and to the offices of the transmission system operator and to all the information necessary for the fulfilment of his task.*

*11.   After prior approval by the regulatory authority, the Supervisory Body may dismiss the compliance officer. It shall dismiss the compliance officer for reasons of lack of independence or professional capacity upon request of the regulatory authority.*

*12.   The compliance officer shall have access to the offices of the transmission system operator without prior announcement.”*

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**EXTRATO DA PARTE 3 DA LEI DE GÁS DA ÁUSTRIA**

*"Part 3*

*Unbundling of Transmission System Operators*

***Chapter 1***

***Ownership Unbundling of Transmission System Operators Prerequisites***

*Section 108. (1) The transmission system operator shall be the owner of the transmission system.*

*(2) One person shall not be entitled to*

*1. directly or indirectly exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercise control or exercise any right over a transmission system operator; nor*

*2. directly or indirectly exercise control over a transmission system operator, and directly or indirectly exercise control or exercise any right over an undertaking performing any of the functions of production or supply; nor*

*3. appoint members of the supervisory board or bodies legally representing the undertaking of the transmission system operator, and directly or indirectly exercise control or exercise any right over an undertaking performing any of the functions of production or supply; nor*

*4. be a member of the supervisory board or bodies legally representing the undertaking of both an undertaking performing any of the functions of production or supply and a transmission system operator or the owner of a transmission system.*

*(3) The rights referred to in para. 2 above shall include, without limitation,*

*1. the power to exercise voting rights;*

*2. the power to appoint members of the supervisory board or bodies legally representing the undertaking;*

*3. the holding of a majority share.*

*(4) The obligation set out in para. 1 above shall be deemed to be fulfilled in a situation where two or more undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in two or more member states for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved as an independent system operator under section 109 or as an independent transmission operator under section 112.*

*(5) Where the person referred to in para. 2 above is the member state or another public body, 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 generation or supply on the other shall be deemed not to be the same person.*

*(6) Para. 2 items 1 and 2 shall also apply to electricity undertakings in the meaning of section 7 para. 1 item 11 Elektrizitätswirtschafts- und –organisationsgesetz (Electricity Act) 2010, Federal Law Gazette I no 110/2010.*

*(7) Neither commercially sensitive information held by a transmission system operator which was part of a vertically integrated undertaking nor the staff of such transmission system operator may be*

*transferred to undertakings performing any of the functions of production or supply. Section 11 shall*

*remain unaffected thereby.*

***Chapter 2***

***Independent System Operators (ISO)***

***Prerequisites***

*Section 109. (1) Where the transmission system was owned by a vertically integrated gas undertaking on 3 September 2009, there shall be the option of not applying ownership unbundling pursuant to section 108 and instead designating an independent system operator upon a proposal from the transmission system owner.*

*(2) The independent system operator shall furnish documentation to prove that*

*1. it complies with the prerequisites in section 108 para. 2;*

*2. it has at its disposal the required financial, technical, human and physical resources;*

*3. it undertakes to implement the ten-year network development plan monitored by the regulatory authority;*

*4. it is able to comply with its obligations under Regulation (EC) No 715/2009 including the cooperation of transmission system operators at European and regional level;*

*5. the owner of the transmission system is able to fulfil its obligations pursuant to section 110 para. 2. For this purpose, all agreements, including, without limitation, with the independent system operator, shall be provided.*

***Obligations***

*Section 110. (1) Each independent system operator shall be responsible for granting and managing*

*third-party access, including the collection of access charges and congestion management charges, for operating, maintaining and expanding the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including licensing and permitting procedures), construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with the applicable stipulations. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.*

*(2) The transmission system owner shall 1. provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;*

*2. finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any other interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties;*

*3. provide for the coverage of liability relating to the system assets, excluding the liability relating to the tasks of the independent system operator;*

*4. provide guarantees to facilitate financing of any system expansions with the exception of those*

*investments where, pursuant to item 2, it has given its agreement to financing by any interested*

*party including the independent system operator.*

***Independence of Transmission System Owners***

*Section 111. (1) Where the transmission system owner is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission or distribution.*

*(2) The independence of the transmission system owner shall be ensured by way of compliance with*

*the following criteria:*

*1. the persons responsible for the management of the transmission system owner must not participate in business structures of the vertically integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, distribution or supply of natural gas;*

*2. appropriate measures shall be taken to ensure that the professional interests of the persons responsible for the management of the transmission system owner are taken into account so that their independence of action is ensured;*

*3. 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. The compliance programme shall set out the specific obligations of employees to meet those objectives. The compliance officer shall submit annual reports to the regulatory authority on the measures taken and such reports shall be published. If the compliance officer is an employee of the transmission system operator, for the duration of his or her appointment as compliance officer he or she shall be treated as a safety officer (section 73 para. 1Control ArbeitnehmerInnenschutzgesetz [Employees Protection Act], Federal Law Gazette no 450/1994) in terms of protection against dismissal or removal.*

***Chapter 3***

***Independent Transmission System Operators (ITO)***

*Assets, Independence, Services, Branding*

*Section 112. (1) Where the transmission system was owned by a vertically integrated natural gas*

*undertaking on 3 September 2009, there shall be the option of not applying ownership unbundling*

*pursuant to section 108 and instead designating an independent transmission system operator.*

*(2) The independent transmission system operator shall have at its disposal all human, technical, physical and financial resources necessary for fulfilling its obligations and carrying out the activity of*

*transmission. Without prejudice to the decisions of the supervisory body, appropriate financial resources for future investment projects and for the replacement of existing assets shall be made available to the independent transmission system operator in due time by the vertically integrated gas undertaking following a related request from the independent transmission system operator. Operation of the transmission system shall comply with the following criteria, without limitation:*

*1. the independent transmission system operator shall be the owner of the transmission system and*

*the assets. Operating third-party upstream pipeline systems shall be admissible;*

*2. the staff must be employed at the independent transmission system operator. In particular, the independent transmission system operator must have its own legal, accountancy and IT services;*

*3. rendering of services, including leasing of personnel, by the vertically integrated undertaking to the independent transmission system operator shall be prohibited. The independent transmission system operator may render services, including leasing of personnel, to the vertically integrated undertaking if the provision of those services does not discriminate between users, is available to all users on the same terms and conditions and does not restrict, distort or prevent competition in production or supply.*

*(3) Subsidiaries of the vertically integrated gas undertaking performing any of the functions of production or supply shall not have any direct or indirect shareholding in the independent transmission system operator. The independent transmission system operator shall neither have any direct or indirect shareholding in any subsidiary of the vertically integrated gas undertaking performing any of the functions of production or supply, nor receive dividends or any other financial benefit from that subsidiary. The overall management structure and the corporate statutes of the independent transmission system operator shall ensure effective independence of the independent transmission system operator. The vertically integrated undertaking shall not influence, directly or indirectly, the competitive behaviour of the independent transmission system operator in relation to the day-to-day activities of the independent transmission system operator and management of the system, or in relation to activities necessary for the preparation of the network development plan.*

*(4) The independent transmission system operator shall not, in its entire public activities, communication and branding, create confusion in respect of the separate identity of the vertically integrated gas undertaking or any part thereof. The independent transmission system operator may*

*therefore use only such signs, logos, images, names, characters, numbers, shapes, representations and presentations as are suitable to distinguish the activities and services of the transmission system operator from those of the vertically integrated gas undertaking.*

*(5) The independent transmission system operator shall not share IT systems or equipment, physical*

*premises or security access systems with any part of the vertically integrated gas undertaking.*

*(6) The independent transmission system operator shall not use the same consultants or external contractors for IT systems or equipment, and for security access systems, as the vertically integrated*

*undertaking.*

*(7) The accounts of the independent transmission system operator shall be audited by an auditor other than the one auditing the vertically integrated gas undertaking or any part thereof. Inasmuch as this is necessary to obtain the audit certificate for the consolidated accounts of the vertically integrated gas undertaking or for other good reasons, the auditor of the vertically integrated gas undertaking shall have the right to inspect parts of the accounts of the independent transmission system operator, unless the regulatory authority raises objections by official decision in the interest of safeguarding independence.*

*Advance written notice of any good reasons shall be given to the regulatory authority. The auditor shall be obliged to maintain confidential any economically sensitive information and to particularly refrain from disclosing such information to the vertically integrated gas undertaking.*

*(8) The activity of the independent transmission system operator shall include at least the following*

*tasks in addition to those listed in section 62:*

*1. the representation of the independent transmission system operator and contacts to third parties*

*and the regulatory authorities;*

*2. the representation of the independent transmission system operator within the ENTSO for Gas;*

*3. the granting and managing of third-party access without discriminating between system users or classes of system users;*

*4. the collection of all the transmission system related charges including access charges, imbalance*

*charges for ancillary services such as purchasing of services (imbalance charges, energy for losses);*

*5. the operation, maintenance and development of a secure, efficient and economic transmission system;*

*6. investment planning ensuring the long-term ability of the system to meet reasonable demand and*

*guaranteeing security of supply;*

*7. setting up appropriate joint ventures, including with one or more transmission system operators, gas exchanges, and other relevant actors pursuing the objective to promote the creation of regional markets or to facilitate the liberalisation process. In the case of joint ventures with regard to natural gas trade, the operator of the virtual trading point shall be adequately included in such cooperation.*

*(9) Only undertakings that take one of the legal forms specified in Article 1 Directive 2009/101/EC may be designated as independent transmission system operators.*

***Independence of Transmission System Operators***

*Section 113. (1) Without prejudice to the decisions of the supervisory body, the independent transmission system operator shall have effective decision-making rights, independent from the vertically integrated gas undertaking, with respect to the assets and resources necessary to operate, maintain or expand the transmission system, and have the power to raise money on the capital market in particular through borrowing and capital increase.*

*(2) The independent transmission system operator shall act so as to ensure at all times that it has the resources it needs in order to carry out the activity of transmission system operation properly and efficiently and develop and maintain an efficient, secure and economic transmission system.*

*(3) Any commercial and financial relations between the vertically integrated gas undertaking and the*

*independent transmission system operator, including loans from the independent transmission system operator to the vertically integrated undertaking, shall comply with market conditions. The independent transmission system operator shall keep detailed records of such commercial and financial relations and make them available to the regulatory authority upon request. The transmission system operator shall also submit for approval by the regulatory authority all commercial and financial agreements with the vertically integrated gas undertaking. If the agreements comply with market conditions and are nondiscriminatory, the regulatory authority shall grant such approval by official decision within four weeks. After expiry of that period, the approval shall be deemed to be granted.*

*(4) The independent transmission system operator shall inform the regulatory authority of the financial resources, referred to in section 112 para. 2, available for future investment projects and for the replacement of existing assets.*

*(5) The vertically integrated undertaking shall refrain from any action impeding or prejudicing the independent transmission system operator from complying with its obligations and shall not require the independent transmission system operator to seek permission from the vertically integrated gas*

*undertaking in fulfilling those obligations.*

***Independence of Management and Staff***

*Section 114. (1) The persons responsible for the management must be professionally independent. In particular, they shall*

*1. have no professional position or responsibility, interest or business relationship, directly or indirectly, with any other part of the vertically integrated gas undertaking or with its controlling shareholders;*

*2. have had no professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated gas undertaking, any part of the vertically integrated gas undertaking or any of its controlling shareholders other than the independent transmission system operator for three years prior to their appointment. This time period shall apply to appointments made after 3 March 2012;*

*3. after termination of their term of office in the independent transmission system operator, have no*

*professional position or responsibility, interest or business relationship with any part of the vertically integrated gas undertaking other than the independent transmission system operator or with its controlling shareholders for a period of not less than four years;*

*4. hold no interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated gas undertaking. Their remuneration shall not depend on activities or results of the vertically integrated gas undertaking other than those of the independent transmission system operator.*

*(2) The independent transmission system operator shall inform the regulatory authority without delay of the identity of and the conditions governing the function as well as term and termination of office*

*of the persons responsible for the management, and the reasons for their nomination or termination of their contract.*

*(3) The regulatory authority may raise objections by way of official decision against persons responsible for the management ex officio or upon the application of a person responsible for the management or the compliance officer within three weeks if*

*1. there are doubts as to the professional independence in the meaning of para. 1 above in the appointment or employment conditions including the remuneration; or*

*2. in the case of premature termination of a term of office, doubts exist regarding the justification of such premature termination. Premature termination of a term of office is unjustified if such premature termination was based on circumstances which do not comply with the provisions governing the independence from the vertically integrated gas undertaking. An action by a person responsible for the management cannot be brought until the official decision of the regulatory authority in the dispute settlement procedure pursuant to section 12 para. 4 Energie-Control-Gesetz (E-Control Act) has been served or until the time limit for the regulatory authority to arrive at a decision has elapsed.*

*(4) Para. 1 item 2 shall apply to the majority of the persons responsible for the management of the independent transmission system operator. The persons responsible for the management of the independent transmission system operator who are not subject to para. 1 item 2 shall have exercised no management or other relevant activity in the vertically integrated gas undertaking for a period of at least six months before their appointment.*

*(5) Para. 1 item 1 above shall equally apply to all employees of the independent transmission system operator.*

*(6) Para. 1 items 1, 3 and 4 as well as para. 3 item 2 shall equally apply to the persons directly subordinate to the management in the areas of operation, maintenance and development of the system.*

***Independence of Supervisory Bodies***

*Section 115. (1) The supervisory body of the independent transmission system operator shall be in charge of taking decisions which may have a significant impact on the value of the assets of the shareholders within the independent transmission system operator, in particular decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the independent transmission system operator and the amount of dividends distributed to shareholders. Decisions regarding the appointment, renewal, employment conditions including remuneration and the termination of the term of office of the persons responsible for the management of the independent transmission system operator shall be taken by the supervisory body of the transmission system operator, unless other statutory stipulations rule differently. The decisions falling under the remit of the supervisory body shall exclude those that are related to the day-to-day activities of the independent transmission system operator and management of the system, and those related to activities necessary for the preparation of the network development plan.*

*(2) Section 114 paras 1 to 3 shall equally apply to half of the members of the supervisory body minus one. Employee representatives in the meaning of the Arbeitsverfassungsgesetz (Labour Constitution Act) in the supervisory body of the parent undertaking of the transmission system operator shall count among those members of the supervisory body of the transmission system operator who fulfil*

*the prerequisites of section 114 paras 1 to 3 for half of the members of the supervisory body minus one.*

***Compliance Programmes and Compliance Officers***

*Section 116. (1) The independent transmission system operators shall develop a compliance programme which sets out measures taken to ensure that discriminatory conduct is excluded. The compliance programme shall set out the specific obligations incumbent upon the employees to meet those objectives. It shall be subject to approval by the regulatory authority. Observance of the programme shall be monitored by a compliance officer.*

*(2) The compliance officer shall be appointed by the supervisory body, subject to approval by the regulatory authority by official decision. The regulatory authority may refuse the approval of the compliance officer only for reasons of lack of independence or professional capacity, by official decision.*

*The compliance officer may be a natural or legal person or a registered partnership. Section 114 paras 1 to 3 shall equally apply to the compliance officer.*

*(3) The compliance officer shall be in charge of*

*1. continuously monitoring the implementation of the compliance programme;*

*2. elaborating an annual report setting out the measures taken in order to implement the compliance*

*programme and submitting it to the regulatory authority;*

*3. reporting to the supervisory body and issuing recommendations on the compliance programme*

*and its implementation;*

*4. notifying the regulatory authority on any substantial breaches with regard to the implementation*

*of the compliance programme;*

*5. reporting to the regulatory authority on any commercial and financial relations between the vertically integrated gas undertaking and the transmission system operator.*

*(4) The compliance officer shall submit the proposed decisions on the investment plan or on individual investments in the system to the regulatory authority. This shall occur at the latest when the management of the independent transmission system operator submits them to the supervisory body.*

*(5) Where the vertically integrated undertaking, in the general assembly or through the vote of the members of the supervisory body it has appointed, has prevented the adoption of a decision with the effect of preventing or delaying investments which under the network development plan were to be executed in the following three years, the compliance officer shall report this to the regulatory authority, which then shall act in accordance with section 65.*

*(6) The conditions governing the mandate and the employment conditions of the compliance officer,*

*including the duration of his or her mandate, shall be subject to approval by the regulatory authority by official decision. Those conditions shall ensure the independence of the compliance officer, including by providing all the resources necessary for fulfilling his or her duties. During his or her mandate, the compliance officer shall have no other professional position, responsibility or interest, directly or indirectly, in or with any part of the vertically integrated gas undertaking or its controlling shareholders.*

*(7) The compliance officer shall report regularly, either orally or in writing, to the regulatory authority and shall have the right to report regularly, either orally or in writing, to the supervisory body of the transmission system operator.*

*(8) The compliance officer may attend all meetings of the management of the independent transmission system operator, and those of the supervisory body and the general assembly. The compliance officer shall attend all meetings that address the following matters:*

*1. conditions for access to the system as defined in Regulation (EC) No 715/2009, in particular regarding system charges, third-party access services, capacity allocation and congestion management, transparency, balancing and secondary markets;*

*2. projects undertaken in order to operate, maintain or develop the transmission system, including investments in new transport connections, in expansion of capacity and in optimisation of existing capacity;*

*3. energy purchases or sales necessary for the operation of the transmission system.*

*(9) The compliance officer shall monitor the compliance of the independent transmission system operator with section 11.*

*(10) The compliance officer shall have access to all relevant data and to the offices of the independent transmission system operator and to all the information necessary for the fulfilment of his or her tasks. The compliance officer shall have access to the offices of the independent transmission system operator without prior announcement.*

*(11) After prior approval by official decision of the regulatory authority, the supervisory body may dismiss the compliance officer. It shall also dismiss the compliance officer for reasons of lack of independence or professional capacity upon request by the regulatory authority by official decision.*

*(12) If the compliance officer is an employee of the transmission system operator, for the duration of his or her appointment as compliance officer he or she shall be treated as a safety officer (section 73 para. 1 ArbeitnehmerInnenschutzgesetz [Employees Protection Act], Federal Law Gazette no 450/1994) in terms of protection against dismissal or removal."*

1. GEE-IE – UFRJ. Reestruturação do Setor de Gás Natural: Uma Agenda Regulatória. 2016. [↑](#footnote-ref-1)