



EUROPEAN COMMISSION

Brussels, 13.12.2011
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COMMISSION OPINION

of 13.12.2011

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Hungary - Certification of MAVIR**

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I. PROCEDURE

On 14 October 2011, the Commission received a notification from the Hungarian national regulatory authority, Hungarian Energy Office (hereafter "HEO"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of the transmission system operator for electricity "MAVIR Magyar Villamosenergia-ipari Rendszerirányító Zártkörűen Működő Részvénytársaság" (hereafter "MAVIR"), dated 30 September 2011.

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (hereafter "Electricity Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority as to its compatibility with Article 10(2) and Article 9 of Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DECISION

Background

MAVIR is the transmission system operator for electricity in Hungary. It owns and operates a transmission network of approximately 3,750 Km and related operational, metering and IT equipment. As of May 2011 it employs 584 employees. In order to comply with the applicable rules on unbundling of transmission system operators, MAVIR has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Electricity Directive. This choice is available to MAVIR under the Hungarian legislation transposing the Electricity Directive.

Article 9 Directive 2009/72/EC sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8)(b) therein provides that where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1, provided that the Member State concerned complies with the provisions of Chapter V, establishing requirements for independent transmission operators (Articles 17 to 23 Electricity Directive).

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

² Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211/15 of 14.8.2009.

HEO has analysed whether and to what extent MAVIR complies with the unbundling rules of the ITO model as laid down in the Hungarian legislation transposing the Electricity Directive. In its decision, HEO has identified a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. The measures concerned have been summarized in paragraphs II.-V. of the decision of HEO. Compliance with these measures is formulated as a condition for a positive final certification decision.

These conditions include:

- By 2 March 2012 MAVIR shall terminate its agreement with the Vertically Integrated Undertaking ("VIU") concerning the provision of certain accounting, IT and SAP services and provide evidence thereof;
- By 2 March 2012 MAVIR shall separate its IT systems, security access systems equipment and buildings from the VIU and provide evidence thereof;
- By 2 March 2012 MAVIR shall ensure the appointment of an auditor different from the one used by the VIU and provide evidence thereof;
- By 2 March 2012 MAVIR shall modify its statutes to include all its tasks in that document and provide evidence thereof;
- By 2 March 2012 MAVIR shall appoint a compliance officer fulfilling the requirements of the Electricity Directive and provide evidence thereof;
- By 2 March 2012 MAVIR shall supply HEO with the details of the members of the Supervisory Body and provide evidence that they comply with the criteria as set out in Article 20 of the Electricity Directive.

In order to be able to take utmost account of the opinion of the Commission, HEO has formally suspended its certification procedure until it receives the Commission's opinion.

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision.

1. Choice of the ITO model

According to Article 9(8) Electricity Directive, the ITO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a VIU. The Commission agrees with HEO in the present case that the choice for the ITO model is legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

2. Services provided to the ITO by other parts of the VIU

Article 17(1)(c) Electricity Directive provides for specific rules on the contracting of services between other parts of the VIU and the ITO. As the ITO should be autonomous and not dependent on other parts of the VIU, contracting of services to the ITO by any other part of the VIU is prohibited by the Electricity Directive. As a preliminary remark the Commission considers that in view of the general prohibition of services provided to the ITO by other parts

of the VIU, a derogation could only be envisaged in exceptional circumstances. Such derogation should be construed narrowly and should not go beyond what is strictly necessary to protect overriding interests, such as the security and the reliability of the transmission system. Only in exceptional cases, where the services concerned are strictly necessary to protect overriding interests as referred to above, and where no other service provider except for the VIU could provide these services to the ITO could a derogation possibly be considered justified. Such derogation should also in principle be of a transitional nature, limited in time. In addition it should be ensured that transactions between other parts of the VIU and the ITO occur at arms length in order to avoid cross subsidisation.

From the draft decision it appears that there is a service agreement between the VIU and MAVIR providing the ITO with an access to the VIU's telecommunication network for system operation purposes. Although in the draft decision HEO has requested the contracting parties to modify the agreement, HEO has not clearly demonstrated that the provision of the telecommunication service could not also be provided by other service providers not related to the VIU, now or in the foreseeable future. The Commission considers that HEO should provide an assessment in its final certification decision in accordance with the principles referred to above.

3. Tasks of the ITO

According to the Electricity Directive, the ITO is required to carry out the activity of electricity transmission, including all the tasks of a TSO under Article 12 as well as a number of additional tasks listed in Article 17(2) Electricity Directive. For all these tasks the ITO has to be autonomous. In this regard the Commission welcomes the condition in chapter II, point 13 of the draft decision which requires MAVIR to list its tasks as an ITO in its statutes. The Commission recommends that HEO also entrusts MAVIR with the referred tasks in a dedicated TSO license, as HEO has foreseen in its draft decision of 30 September 2011 on the certification of the Hungarian transmission system operator for gas. The Commission acknowledges HEO's positive assessment regarding MAVIR's human, technical, physical and financial capabilities to carry out its tasks.

4. Management Board - independence

According to Article 19(3) Electricity Directive, the majority of members of the Management Board cannot have exercised any professional position or have had any responsibility or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. The Management Board of MAVIR can comprise of five to seven members. The majority of these members must comply with the strict independence requirements as set out in the Electricity Directive. The Commission has not been able to verify whether the independent members have been employed by the VIU or by its controlling shareholder in the past three years, or not. The draft decision of HEO does not contain sufficient information on this point. The Commission invites HEO to make a detailed assessment on this point in the final certification decision.

According to Article 19(8) Electricity Directive the majority of members of the Management Board is not entitled to have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of at least six months before their appointment. The Commission has not been able to verify whether this requirement on

independence has been complied with. The Commission invites HEO to make a detailed assessment on this point in the final certification decision.

According to the same Article 19(8) Electricity Directive, also persons directly reporting to the Management Board on matters related to the operation, maintenance or development of the network must comply with strict independence rules. The Commission notes that it is not clear from the draft decision to what extent this requirement has been fulfilled, as the draft decision does not contain detailed information on this. The Commission invites HEO to make a detailed assessment on this point in the final certification decision.

5. Conflict of interest after termination of office

According to Article 19(7) Electricity Directive, after termination of their term of office in the TSO, the persons responsible for its management shall have no professional position or responsibility, interest or business relationship with any part of the VIU other than the TSO, or with its controlling shareholders for a period of not less than four years. The Commission notes that it is not clear from the draft decision how HEO will ensure that this requirement will be complied with. The Commission therefore requests HEO to assess the measures necessary to ensure compliance with the above requirement and to make this assessment explicit in the final certification decision.

6. Supervisory Body – powers

Chapter V of the Electricity Directive provides for a detailed division of powers between the various bodies of the ITO, including between the Management Board and the Supervisory Body. According to the statutes of MAVIR, the Supervisory Body has the power to decide on all transactions including on loans and credits relating to the operation, maintenance of and investment in the transmission infrastructure which have a value of more than HUF 2bn. The Commission notes that this threshold appears to be too low to grant true autonomy for the Management Board as required by the Electricity Directive. Therefore, the Commission asks HEO to establish an appropriate threshold allowing the Management Board to act autonomously. In any event, this threshold should not apply to decisions related to the preparation and implementation of the 10 Year Network Development Plan, as this is a competence of the Management Board.

Moreover, the statutes of MAVIR provide that the Supervisory Body has the power to approve the 10 Year Network Development Plan to be submitted to HEO. As indicated above decisions related to the preparation and implementation of the 10 Year Network Development Plan are of the competence of the Management Board. Therefore the Commission considers that HEO should require in its final certification decision that MAVIR changes its statutes accordingly.

7. Supervisory Body - independence

According to Article 20(3) juncto 19(3) Electricity Directive, the independent members of the Supervisory Body cannot have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. According to MAVIR's statutes its Supervisory Body is composed of 6 members. Two of these members must comply with the strict rules on independence. From HEO's draft decision it appears that it has not yet been able to assess whether members of the Supervisory Body

concerned comply with the above requirements on independence. The Commission considers that HEO should examine the independence of the members as soon as they are nominated and make its assessment explicit in the final certification decision.

8. Compliance officer – independence

According to Article 21(2) Electricity Directive, the compliance officer of the ITO must fulfil requirements of independence similar to those which relate to the majority of members of the Management Board. HEO states in its draft decision that since MAVIR's compliance officer has not yet been appointed it cannot assess whether the requirements of independence are met. From the draft decision it appears that HEO, as a condition for a positive certification decision, has requested MAVIR to provide evidence in due course that a compliance officer fulfilling the requirements of the Electricity Directive has been appointed. The Commission supports this requirement and invites HEO to examine the independence of the compliance officer as soon as the person is nominated and make its assessment explicit in the final certification decision.

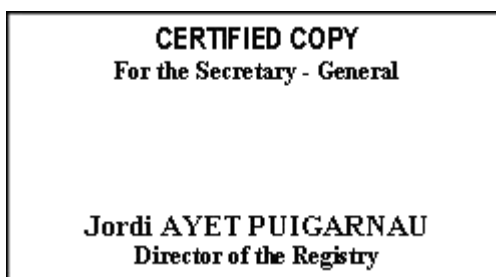
Pursuant to Article 3 Electricity Regulation, HEO shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of MAVIR, and when it does so, shall communicate this decision to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* national regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* national authorities responsible for the transposition of EU legislation, on the compatibility of any national implementing measure with EU law.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. HEO is invited to inform the Commission within five working days following receipt whether it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication³. Reasons should be given for any such request.

Done at Brussels, 13.12.2011

For the Commission
László ANDOR
Member of the Commission



³ Your request should be sent by email to Inge.Bernaerts@ec.europa.eu