



EUROPEAN COMMISSION

Brussels, **XXX**  
[...] (2012) **XXX** draft

**COMMISSION OPINION**

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of  
Directive 2009/72/EC - Sweden - Certification of Affärsverket svenska kraftnät**

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### I. PROCEDURE

On 8 March 2012, the Commission received a notification from the Swedish regulator for energy Energimarknadsinspektionen (hereafter, "EI"), in accordance with Article 10(6) of Directive 2009/72/EC<sup>1</sup> (hereafter, "Electricity Directive"), of a draft decision on the certification of "Affärsverket svenska kraftnät" (hereafter, "Svenska Kraftnät") as a Transmission System Operator (TSO) for electricity.

Pursuant to Article 3(1) Regulation (EC) No 714/2009<sup>2</sup> (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.<sup>3</sup>

### II. DESCRIPTION OF THE NOTIFIED DECISION

Svenska Kraftnät is a transmission system operator for electricity in Sweden, which manages and operates the electricity lines and associated installations for the transmission of high-voltage electricity (220 kV and 400 kV) in Sweden, including those cross-border connections owned by the Swedish state.

Svenska Kraftnät is a state-owned public authority that is part of the public administration.

Svenska Kraftnät has applied for certification in accordance with the ownership unbundling model. In particular Svenska Kraftnät intends to make use of the possibility provided for in Article 9(6) Electricity Directive to implement the Ownership Unbundling model by means of separate public bodies within the State.

EI has analysed whether and to what extent Svenska Kraftnät complies with the requirements of the ownership unbundling model as laid down in the Swedish legislation transposing the Electricity Directive. In its preliminary decision, EI found that Svenska Kraftnät complies with the requirements of the ownership unbundling model. On this basis, EI submitted its preliminary decision to the Commission requesting for an opinion.

### III. COMMENTS

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> The case has been registered as 017 – 2012 – SE.

## Separation within the State

Article 9(6) Electricity Directive creates the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided that the respective activities are exercised by separate public entities. For the purpose of the rules on ownership unbundling, two separate public bodies should be seen as two distinct persons and should be able to control generation and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the ownership unbundling rules. The public bodies concerned must be truly separate. In these cases, it must be demonstrated that the requirements of ownership unbundling of Article 9 Electricity and Gas Directives<sup>4</sup> are enshrined in national law and are duly complied with. This will have to be assessed on a case-by-case basis.<sup>5</sup>

From the draft decision it appears that Svenska Kraftnät is fully owned by the Swedish State, which also wholly owns Vattenfall AB, a company active in the generation and supply of electricity.

While Svenska Kraftnät falls within the area of competence of the Swedish Ministry of Enterprise, Energy and Communications, Vattenfall AB falls within the area of competence of the Ministry of Finance.

In its draft decision EI has assessed the degree of separation between the two Ministries concerned, emphasizing in particular two considerations to be taken into account. The first consideration is that it is forbidden under Sweden's constitutional 'ban on ministerial government' for any individual Minister to directly intervene in the day-to-day operations of a state-owned public service company that is part of the public administration, such as Svenska Kraftnät. This means that the Ministry of Enterprise, Energy and Communications can only control Svenska Kraftnät via general policy guidelines and not by interfering with decision-making in concrete day-to-day cases. The second consideration is that Svenska Kraftnät is legally and organisationally entirely separate from Vattenfall AB.

The Commission first of all confirms that two separate Ministries controlling, on the one hand transmission of electricity, and on the other hand activities of generation and supply of electricity, can under certain circumstances constitute bodies with a sufficient degree of separation as required by Article 9(6) Electricity Directive.

In the present case the Commission agrees with EI that the two considerations it has put forward here above are relevant indicators to establish whether a sufficient degree of separation exists between the two Ministries as regards transmission activities and generation and supply interests, as required by Article 9(6) Electricity Directive, in particular as far as day-to-day decisions are concerned. However, in so far as non-day-to-day decisions are concerned, the Commission notes that it does not become sufficiently clear from the draft decision to what extent the Ministry of Enterprise, Energy and Communications, can take decisions independently with regard to transmission activities of Svenska Kraftnät, without being influenced or controlled by the Ministry of Finance or by any overarching public authority, taking into account the interests of the Swedish State as shareholder in Vattenfall AB. For instance, it does not become clear from the draft decision how the fact that the Swedish government establishes on a yearly basis in the "Regleringsbrev" a number of

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<sup>4</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94 of 14.8.2009

<sup>5</sup> Commission staff working document, The Unbundling regime, 22 January 2010, p. 10.

detailed conditions regarding investments by Svenska Kraftnät, can be considered compatible with the requirement of independence of the Ministry of Enterprise, Energy and Communications following from Article 9(6) Electricity Directive and how it is ensured that such a "Regleringsbrev" is not influenced by the interests of the Swedish State in Vattenfall AB.

In view of the above, the Commission invites EI to verify whether the Ministry of Enterprise, Energy and Communications, in particular for non-day-to-day decisions concerning transmission activities carried out by Svenska Kraftnät, can indeed act in an independent manner, without being influenced or controlled by the Ministry of Finance or by any overarching public authority taking into account the interests of the Swedish State in Vattenfall AB, and to clarify this in the final decision.

#### **IV. CONCLUSION**

Pursuant to Article 3(2) Electricity Regulation, EI shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Svenska Kraftnät, 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 as regards 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. EI 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 publication. Reasons should be given for any such request.

Done at Brussels,

*For the Commission*

*Member of the Commission*