



Brussels, **XXX**
[...] (2013) **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 – Lithuania - Certification of LITGRID AB**

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I. PROCEDURE

On 9 May 2013 the Commission received a preliminary decision from the Lithuanian regulatory authority (hereafter, "NCC") on the certification of LITGRID AB (hereafter "Litgrid") as Transmission System Operator (TSO) for electricity, in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive").

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 the Electricity Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

Litgrid is the owner of the entire Lithuanian electricity transmission network, operating the high voltage (110-330 kV). Litgrid's shares are ultimately for 97.5% owned by the Lithuanian State. The remaining 2.5% of the shares are traded at the stock exchange or held by minor shareholders.

Litgrid has applied for certification in accordance with the ownership unbundling model. In particular Litgrid 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. NCC has analysed whether and to what extent Litgrid complies with the requirements of the ownership unbundling model. In its preliminary decision, NCC found that Litgrid complies with the requirements of the ownership unbundling model. On this basis, NCC submitted its preliminary decision to the Commission requesting for an opinion.

III. COMMENTS

On the basis of the present notifications the Commission has the following comments on the draft decisions.

1. SEPARATION WITHIN THE STATE

Article 9(6) Electricity Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of the rules on ownership unbundling, two separate public

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.

bodies should therefore 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 rules on ownership unbundling. The public bodies concerned must be truly separate.

Article 9(1)(b)(i) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercising control or exercising any right over a transmission system operator or over a transmission system. Article 9(1)(b)(ii) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply. Article 9(3) Electricity Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of production and supply within the meaning of Gas Directive 2003/55/EC.

In the present case, the Lithuanian State's participation in Litgrid is managed by the Ministry of Energy. Until September 2012, Litgrid formed part of the vertically integrated electricity undertaking Visagino Atomine Elektrine UAB (hereafter, "VAE"), performing generation and supply activities in Lithuania. Following the implementation of the Electricity Directive, the responsibility over VAE was transferred to the Ministry of Economy and later on to the Ministry of Finance.

In its preliminary decision, NCC has undertaken an in-depth evaluation of the degree of separation between the two Ministries concerned, underlining that these are not subordinate to each other and that their spheres of activity are clearly divided. The Lithuanian Constitution defines the role of the Minister as being in charge of the Ministry and responsible for the issues assigned to his Ministry, and in particular being responsible to carry out the Government's objectives in his area of competence. NCC further mentions that all Ministers are subordinate to the Prime Minister. It does not become clear from the preliminary decision to what extent this means that the Prime Minister has the power to influence, for example by means of giving direct instructions, the Ministers' decision making with regard to Litgrid and VAE in a way that could favour the interests of the latter to the detriment of other users of Litgrid's transmission grid. The Commission invites NCC to assess this matter more deeply before issuing a final certification decision.

It appears from the preliminary decision that the Ministry of Energy also holds participations in two companies that are active in the supply of natural gas: Lietuvos Dujos AB (hereafter, "Lietuvos Dujos") and Klaipedos Nafta AB (hereafter, "Klaipedos Nafta").

Lietuvos Dujos is a vertically integrated gas company in which the Ministry owns 18% of the shares. The other owners of Lietuvos Dujos are OAO Gazprom (39%) and EON SE (37%). The unbundling of Lietuvos Dujos is not a subject of the present certification procedure. However, the abovementioned prohibition of Article 9(1)(b)(ii) Electricity Directive does apply to the Ministry of Energy. In its preliminary decision, NCC has not undertaken an assessment of the Ministry's competences with regard to Lietuvos Dujos. The Commission underlines that such an assessment is necessary to ensure compliance with the ownership unbundling requirements. Before granting a final certification decision, it must be demonstrated that the Ministry of Energy does not exercise any right over Lietuvos Dujos or at least that no conflict of interest exists that could lead the Ministry to use its control over Litgrid to favour the interests of Lietuvos Dujos to the detriment of other network users.

Klaipėdos Nafta is the company responsible for the development of an LNG terminal in Lithuania. The terminal is scheduled to enter into operation in December 2014. A subsidiary of Klaipėdos Nafta, LitGas UAB (hereafter, "LitGas"), has been established in December 2012 with the objective to carry out the activities related to the trade and supply of the LNG. The preliminary decision specifies that LitGas will commence these activities only once the LNG Terminal becomes operational. In the meantime, this activity has been assigned to the 'Lithuanian Oil Products Agency', an agency under the responsibility of the Ministry of Energy. In its preliminary decision NCC argues that it cannot be said of either LitGas or the Lithuanian Oil Products Agency that it is currently active in the supply of natural gas, since LNG Terminal has not become operational yet. Moreover, NCC has been assured by the Ministry of Energy that, as soon as the LNG Terminal becomes operational, LitGas shall be brought under the control of a different Ministry in order to comply with the unbundling requirements. Moreover, NCC notes that LitGas will only be able to commence its supply activities once it has received the appropriate licence, which is issued by NCC itself and only once it has been ascertained that *inter alia* the unbundling requirements are complied with.

The Commission is satisfied that sufficient safeguards are in place to ensure that from the date LitGas will commence its trading activities it will be effectively separated from Klaipėdos Nafta and no longer be directly or indirectly controlled by the Ministry of Energy. The Commission notes however that it does not become clear from the assessment of NCC what the function of supply activity entails today nor why this function at present needs to be carried out by an Agency under the Ministry of Energy. The Commission invites NCC to assess the activities currently undertaken by the Lithuanian Oil Products Agency - and subsequently by LitGas - in fulfilling this task in order to ensure that no conflict of interest exists or arises in the future. The Commission finally notes that persons currently under employment by LitGas are at the same time employees of the Ministry of Energy. The Commission underlines that also this is a situation that needs to be addressed once the LNG terminal becomes operational.

IV. CONCLUSION

Pursuant to Article 3(2) of the Electricity Regulation, NCC shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Litgrid, and when they do 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. NCC 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