



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 - Czech Republic - Certification of ČEPS (electricity)**

COMMISSION OPINION

of **XXX**

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Czech Republic - Certification of ČEPS (electricity)

I. PROCEDURE

On 7 August 2012, the Commission received a notification from the Czech regulator for energy (hereafter "ERU"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of ČEPS a.s. (hereafter "ČEPS") as a Transmission System Operator (TSO) for electricity, dated 30 June 2012.

On 27 August 2012, the Commission requested additional information to ERU regarding the case, which was received on 7 September 2012.

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 Electricity Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

BACKGROUND

ČEPS is a State owned company, which owns and operates the electricity transmission system in the Czech Republic and which is the exclusive holder of the electricity transmission licence. ČEPS is managed in accordance with the Energy Act and the company may only undertake the activities authorised by law.

ČEPS is wholly owned by the State, and the Ministry of Industry and Trade is responsible for managing the participation in ČEPS.

ČEPS has applied for certification in accordance with the ownership unbundling model.

ERU has analysed whether and to what extent ČEPS complies with the requirements of the ownership unbundling model as laid down in the Czech legislation transposing the Electricity Directive. In its preliminary decision, ERU found that ČEPS complies with the requirements

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.

of the ownership unbundling model and did not impose any conditions. On this basis, ERU 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 comments on the preliminary decision.

Choice of the Ownership Unbundling model

The model chosen for unbundling in the present case is ownership unbundling. Of particular relevance is the specific option referred to in Article 9(6) Electricity Directive, where the transmission activities are legally unbundled from any production or supply activities in gas or electricity as exercised by the State, and where both types of activities are under the responsibility and control of separate public bodies within the State. This option is available to ČEPS under the Czech legislation transposing the Electricity Directive.

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 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. In these cases, it must be demonstrated that the requirements of ownership unbundling of Article 9 Electricity Directive are enshrined in national law and are duly complied with. This will have to be assessed on a case-by-case basis. The Commission has already expressed its views on the application of Article 9(6) in earlier cases, in particular, in its opinions on the certification of the Danish transmission system operator for electricity and for gas, Energinet.dk.³

From the preliminary decision it appears that ČEPS is fully owned by the Czech State, and that the Ministry of Industry and Trade is administering the participation in ČEPS.

According to the draft decision, the Ministry of Industry and Trade administers, apart from ČEPS, also the State participation in four other public limited companies. However, none of these companies are acting as an electricity producer, electricity trader, gas producer or gas trader. Moreover, none of the Members of either the Management Board or the Supervisory Board of these companies has rights in companies involved in the generation or supply of electricity or gas.

The Czech State also owns and controls other companies which perform activities of production, generation or supply of electricity or gas, and in which the participation is administered by Ministries or public bodies. In particular, according to publicly available

³ http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2012_007_dk_en.pdf

information⁴, the Czech Republic owns the majority of shares in the energy incumbent CEZ (69.78% as of 31 December 2010). The participation in CEZ is administered by the Ministry of Finance (69.7% of the shares) and the Ministry of Labour and Social Affairs (0.41% of the shares). The Commission notes that there may be other companies owned by the Czech State and controlled by Ministries or public bodies which perform activities of production, generation and supply of electricity and gas as well. However, in its draft decision ERU did not provide a complete list of such companies.

In general, the Commission considers that separate Ministries or public bodies controlling, on the one hand transmission of electricity and gas, and on the other hand activities of production, generation and supply of electricity or gas, can under certain circumstances constitute bodies with a sufficient degree of separation as required by Article 9(6) Electricity Directive.

However, the Commission notes that ERU, in its draft decision, has not undertaken any in-depth assessment as to whether the requirements of Article 9(6) Electricity Directive have been complied with. In the draft decision, ERU has limited itself to analysing whether any of the companies controlled by the same Ministry as ČEPS is, - i.e. the Ministry of Industry and Trade - are acting as an electricity producer, electricity trader, gas producer or gas trader. ERU has not assessed in the draft decision whether a sufficient degree of separation is guaranteed, in accordance with Article 9(6) Electricity Directive, between the Ministry of Industry and Trade and other Ministries or public bodies which, on behalf of the Czech State, administer a State participation in companies active in generation, production or supply of electricity or gas. Moreover, as stated above, ERU did not provide a complete overview of the State owned companies engaged in production, generation or supply of electricity or gas either.

As a consequence, the Commission sent a request for additional information to ERU on 27 August 2012, in particular asking for an assessment as to whether the requirements of Article 9(6) Electricity Directive were complied with in the present case, as well as a complete overview of the energy companies in which the State has a participation and an indication under the responsibility of which Ministry or public body these companies fall. ERU provided additional information by letter of 7 September 2012.

In its reply ERU focused primarily on the relationship between ČEPS and the energy incumbent CEZ and the Ministries under whose responsibility these two companies fall. ERU did not provide a complete overview of all energy companies owned by the Czech State. The Commission notes that in order to be able to verify whether the conditions of Article 9(6) Electricity Directive are complied with, a full overview is needed of all State owned companies active in the production, generation and/or supply of electricity and/or gas. The Commission invites ERU to collect this information in order to complete its assessment, and include this assessment in the final decision.

From the additional information provided by ERU it appears that according to Czech law (and in particular the Czech Constitution) as regards the degree of separation between different Ministries, every Ministry has its own responsibilities in its own area of competence and has an independent power of decision in the areas for which it is responsible. In particular, one Ministry cannot give instructions to another Ministry as to how it should act; the Ministers are

⁴ <http://www.cez.cz/en/cez-group/cez/structure-of-shareholders.html>

both legally and politically responsible for their own Ministry and have an independent power of decision in their areas of competence.

It also appears from the additional information provided by ERU that, according to Czech law (Article 24a, section 3, of the Czech Energy act), every State authority, local government authority or any other public sector body that exercises control over, or any rights in an electricity producer, gas producer, electricity trader or gas trader, must be independent of any State authority, local government authority or any other public sector body that exercises control over, or any right in the transmission system operator.

Moreover, more in particular as regards the relationship between the incumbent electricity company CEZ, in which the State participation is administered by the Ministry of Finance and the Ministry of Labour and Social Affairs, and the electricity transmission system operator ČEPS, in which the State participation is administered by the Ministry of Trade and Industry, ERU has confirmed that no person from any of these Ministries is a member of the Management Board or the Supervisory Board of ČEPS or CEZ. ČEPS is a separate legal entity and the day-to-day running of the company is undertaken by the management of ČEPS. According to Czech law (Article 24a, section 2f, of the Czech Energy act), members of the board of ČEPS are prohibited from having any commercial interest or cross-directorship in any entity that is an electricity producer, gas producer, electricity trader or gas trader. Additionally, ERU submits that ČEPS financial resources are kept separate from the State's financial resources.

In view of the above elements considered as a whole, and in particular in view of the independent power of decision of the Ministers of Industry and Trade, Finance, and Labour and Social Affairs in their respective areas of competence, the Commission considers that *prima facie* there is a degree of separation between different Ministries within the Czech Republic. However, the information provided by ERU, upon request of the Commission, is not sufficiently detailed and not complete, and must be further developed in order to be able to establish whether in the present case the degree of separation meets the requirements of Article 9(6) Electricity Directive. The analysis must be based on a complete overview of the companies owned by the Czech State which are active in the production, generation or supply of electricity and/or gas, and must assess *inter alia* which safeguards are in place to avoid that different Ministries are made subject to the common influence of another public entity which could seek to coordinate their decisions (such as another Ministry or the Prime-Minister) and how ERU will monitor and enforce compliance with Article 9(6) Electricity Directive in this respect. Also on the separation of ČEPS' financial resources from the State's financial resources additional clarification is needed.

The Commission concludes that based on the information provided by ERU, which is not complete, it is not able to confirm whether or not an effective separation of public bodies concerned within the Czech Republic has indeed been sufficiently guaranteed, in accordance with Article 9(6) Electricity Directive. The Commission invites ERU to complete the analysis on this point and include it in the final decision.

6. Conclusion

Pursuant to Article 3(2) Electricity Regulation, ERU shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of ČEPS, 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. ERU 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