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[...] (2014) **XXX** draft

COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10 of Directive
2009/72/EC - Poland – Polskie Sieci Elektroenergetyczne S.A.**

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I. PROCEDURE

On 10 February 2014, the Commission received a notification from the the Polish regulatory authority for energy, Energy Regulatory Office (hereafter, "ERO"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), on the certification of the electricity transmission system operator (hereafter, "TSO") Polskie Sieci Elektroenergetyczne S.A. (hereafter, "PSE").

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

PSE is the transmission system operator for the entire Polish electricity transmission grid. It is also the owner of the large majority of the transmission lines and associated substations and interconnections with neighbouring countries. It operates the grid on the basis of a licence to transmit electricity in Poland granted to it by ERO.

PSE is a fully state-owned company and has applied for certification under the ownership unbundling model. In particular PSE 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.

ERO has come to the preliminary conclusion that PSE has sufficiently demonstrated that it complies with the requirements of the ownership unbundling model as laid down in the Polish legislation transposing the Electricity Directive and that it therefore can be certified. ERO has submitted its draft decision to the Commission requesting an opinion.

III. COMMENTS

1. Ownership of the transmission system

Article 9(1)(a) Electricity Directive requires that in the ownership unbundling model each undertaking that owns a transmission system also acts as its operator.

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.

PSE is the owner of the entire Polish transmission grid with the exception of some limited assets, which are not its property but are under its administration. These concern lines and interconnector bays of 220 kV or short sections of 220 kV lines that are located at the property of five companies, being large chemical companies, coal mines and electricity distributors. These assets are used by PSE on the basis of usufruct contracts³ whereby the legal owners of the assets authorize PSE to use the facilities.

ERO considers that these assets are to be considered 'electrical equipment' and are not part of the transmission network as they are not included in the definition of 'transmission network' as provided in Article 3 point 11 of the Polish Energy Law.

The Commission notes that the definition of the term 'transmission' in Article 2(3) Electricity Directive and the requirement in its Article 9(1)(a) make no such distinction. Moreover, it appears from the preliminary certification decision that the legal owners retain the responsibility for the technical conditions of the assets and their operation. The preliminary decision does not provide clarity on the question to what extent these assets are merely used to supply the owners of the cables or perform a function that would require third party access to be applied in a non-discriminatory manner. Finally, the Commission notes that no intention appears to exist for PSE to acquire these assets.

Given this background, the Commission encourages ERO, in order to ensure that operatorship and ownership remain in the same hands, to assess in more detail whether PSE indeed carries out the functions of the TSO in relation to these assets and, if that is the case, whether the provisions of the existing usufruct agreements also ensure that PSE has the rights of use and disposal equivalent to those of an owner in relation to these assets. The Commission notes that on 26 March 2014 ERO has provided additional information that contains relevant information on some of the issues raised above.⁴ The Commission encourages ERO to take this information into account in its analysis and to include it in its final certification decision. In case ERO concludes that a risk exists that the non-discriminatory access to the relevant infrastructure is jeopardized, the Commission calls upon ERO to investigate whether a condition to the certification of PSE can be set that, if needed with the application of a transitional period, would require a process to be initiated leading to the acquisition of the relevant parts of the network by PSE.

2. 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 and Gas Directives are enshrined in national law and are duly complied with.⁵

The Polish State Treasury holds 100% of the shares in PSE. However, it is the Ministry of Economy that is authorised to manage the state's participation in PSE. The transfer of the

³ With the exception of one company, [BUSINESS SECRET], where no such agreement is signed.

⁴ Notably with regard to the usufruct rights and the actual use of the assets concerned.

⁵ The Unbundling regime, Commission staff working document, 22 January 2010, p. 10.

management of PSE⁶ from the Ministry of Treasury to the Ministry of Economy took place in September 2013, after an amendment in the Polish Energy Law that implemented the Third energy package. The transfer was done in order to comply with the independence criteria in the ownership unbundling model.

The preliminary decision as notified by ERO addresses in detail the criteria related to the separation within the State.

The Ministry of Economy is responsible for the management of PSE, and apart from the limited activities in the generation and trade of electricity in the coal mining sector as described below, this Ministry does not exercise control/rights in companies producing and trading electricity or gas. The Ministry of Treasury owns and manages the Polish State's majority participations in a number of companies active in generation and/or supply of gas and electricity (including the gas incumbent PGNiG and four main electricity producers: PGE, Energa, ENEA and Tauron). Therefore, there is a need to assess how the separation within the Polish State is guaranteed under the Polish law.

ERO considers that a sufficient degree of separation between the Ministry of Economy and the Ministry of Treasury exists on the basis of the Polish Constitution and the legal order of the country which together ensure the principle of autonomous ministerial responsibility. Although both Ministers are members of the same body, i.e. the Council of Ministers, they are independent from each other and their tasks are clearly defined in statutory law and in detailed sectoral regulations which delineate the competences of each Ministry. The role of the Prime Minister in giving orders to Ministers is limited by the Act on the Council of Ministers that does not give the Prime Minister the power to issue instructions in matters handled by the entities controlled by various Ministers. On this basis, ERO concludes that the separation within the State is guaranteed. The Commission agrees that on the basis of the constitutional order of the Polish State as well as the governance structure of the Council of Ministers a sufficient degree of separation exists between the two public bodies, i.e. the Ministry of Treasury and the Ministry of Economy, and between these bodies and the Prime Minister.

However, as mentioned above, the preliminary decision of ERO also refers to the fact that the Ministry of Economy exercises rights attached to the shares held by the Ministry of Treasury in four companies⁷ active in the supply and generation of electricity and natural gas. All these companies are active in the field of coal production in coal mines. The Ministry of Economy has traditionally been tasked with the oversight of mining activities in Poland.

Three out of the four companies are not only active in coal mining but also, as a non-commercial by-product, produce electricity for their own use and sell limited volumes of it through local, isolated distribution systems at the premises of the coal mines and on the basis of a license and against a regulated tariff. None of the electricity produced by the undertakings is sold at the Polish power exchange. ERO argues that none of these companies is directly connected to the transmission network and, therefore, PSE cannot favour these undertakings vis-à-vis other transmission network users. Additionally, ERO claims that generation and trade of electricity for these entities is only a very small scale side activity in areas confined to their industrial plants. Usually, the electricity is a side product resulting from heat production that is used for the local provision of electricity, in the absence of a connection to the transmission grid.

⁶ The same holds for the Polish Gas TSO Gaz-System.

⁷ These are: Spółka Restrukturyzacji Kopalń S.A. in Bytom, Katowicki Holding Węglowy S.A. in Katowice, Kompania Węglowa S.A. in Katowice and Jastrzębska Spółka Węglowa S.A. in Jastrzębie Zdrój.

The Commission agrees for these three companies that given the minor quantities of electricity produced (together amounting to less than 0,05% of Polish generation) and given the fact that the power is generated in isolated systems not connected to PSE's transmission grid, neither the incentive nor the ability exists for the Ministry of Economy to abuse its influence over PSE in order to favour its interests in these companies to the detriment of users of the PSE network. However, the Commission deems it important that ERO continues to monitor and ensure that the activities of the companies concerned remain confined to the isolated areas in which they operate today.

A fourth company, in which the Ministry of Economy exercises rights attached to a shareholding held by the Ministry of Treasury, is Jastrzębska Spółka Węglowa S.A. in Jastrzębie Zdrój. This company holds 100% of shares in Spółka Energetyczna "Jastrzębie" S.A. that generates electricity and heat energy in the EC Moszczenica, EC Zofiówka, EC Pniówek and EC Suszec facilities, with aggregate capacities of 125 MWe and 598 MWt. This company holds licenses to generate electricity and to generate and transmit heat energy. It is unclear from the draft decision, if, in the case of this particular company, the same limitations as described in the case of the three other undertakings, apply. In the additional information provided by ERO, it is further explained that the 96% of the electricity produced by Spółka Energetyczna "Jastrzębie" S.A. is used by its mother company, Jastrzębska Spółka Węglowa S.A., and all other sales are confined to the local market. The Commission therefore invites ERO to add this additional information and assess in its final decision whether the relevant criteria are met for Jastrzębska Spółka Węglowa S.A. as well. Furthermore, the Commission deems it important that ERO continues to monitor and ensure that the activity of this company remains confined to the isolated areas in which it operates today.

IV. CONCLUSION

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