



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 - Slovak Republic - Certification of Slovenská elektrizačná  
prenosová sústava a.s**

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### I. PROCEDURE

On 11 June 2013, the Commission received a notification from the Slovak regulator for energy (hereafter, "URSO"), in accordance with Article 10(6) of Directive 2009/72/EC<sup>1</sup> (hereafter, Electricity Directive), of a preliminary decision on the certification of Slovenská elektrizačná prenosová sústava a.s (hereafter, "SEPS") as a Transmission System Operator (hereafter, 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 preliminary 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

SEPS is the transmission system operator for electricity in Slovakia. It owns and operates the entire electricity transmission grid in Slovakia (400 kV, 220 kV and a portion of 110 kV lines, which serve for electricity transmission purposes). Its shares are fully owned by the Slovak Republic. According to the preliminary certification decision, SEPS is primarily governed by the provisions of the Commercial Code, i.e. the day-to-day issues associated with the running of the company are handled by the company's management or by the Board of Directors of SEPS. SEPS does not draw on national budget funds or receive any other state support, and its activities are therefore independent of the national budget finances.

SEPS has applied for certification in accordance with the ownership unbundling model. In particular SEPS 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. This choice is available to SEPS under the Slovak legislation transposing the Electricity Directive.

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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.

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

### **III. COMMENTS**

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

#### **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. 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.

From the preliminary decision it appears that SEPS is fully owned by the Slovak Republic and administered by the Ministry of Finance. According to the preliminary decision, the Ministry of Finance administers, apart from SEPS, also the State participation in six other companies. URSO notes in its preliminary decision that none of these other companies holds an authorisation to generate or supply electricity or to produce or supply gas. However, the Commission notes that URSO does not assess whether these companies exercise control or exercise any right over an undertaking performing any of the functions of production or supply. As Article 9 (1b) Electricity Directive also includes the indirect exercise of control or indirect exercise of any right over an undertaking performing any of the functions of production or supply, the Commission invites URSO to make this assessment in its final decision.

The Slovak Republic also owns a substantial number of companies which are active in the generation and supply of electricity. The different companies are administered by different public bodies: the Ministry of the Environment, the Ministry of Transport Construction and Regional Development, the Ministry of the Economy and the National Property Fund which administers the majority of these companies.

The Commission considers that two separate ministries or a ministry and another public body, such as the National Property Fund, which control, on the one hand, transmission of electricity and/or gas, and on the other hand, activities of generation and/or supply of

electricity and/or gas, can under certain circumstances constitute bodies with a sufficient degree of separation as required by Article 9(6) Electricity Directive.<sup>3</sup>

In its preliminary decision URSO has undertaken an evaluation of the degree of separation between the different ministries, based on the Slovak Constitution and Act No 575/2001. URSO notes in its preliminary decision that the ministries in the Slovak Republic perform state administration within the scope of their competencies and other tasks as laid down under Constitutional laws and other generally-binding legal regulations. URSO further notes that the competences of each ministry are original and that the ministries are legally and politically independent of each other and, within their competencies, are not subordinate to any other ministry. No ministry is connected to another in terms of its personnel.

Furthermore, when analysing whether it is ensured that rights in SEPS are exercised independently from generation, production and supply activities, URSO takes into account that SEPS is a legal entity and is primarily governed by the provisions of the Commercial Code, i.e. the day-to-day issues associated with the running of the company are handled by the company's management or by the Board of Directors of SEPS. URSO also notes that SEPS does not draw on national budget funds or receive any other support from the state, and its activities are therefore independent of the national budget finances.

In the present case the Commission agrees with URSO that the considerations it has put forward are relevant indicators to establish whether a sufficient degree of separation exists between the ministries as regards transmission activities and generation and supply interests, as required by Article 9(6) Electricity Directive.

However, the Commission notes that it does not become sufficiently clear from the preliminary decision to what extent the Ministry of Finance can take decisions independently with regard to transmission activities of SEPS, without being influenced or controlled by any overarching public authority, taking into account the interests of the Slovak Republic as shareholder in companies that are active in the generation and supply of electricity or gas.

For instance, it does not become clear from the preliminary decision whether the independence of the individual ministers in the areas for which they are competent also precludes the prime minister or the government from giving orders or instructions as regards the minister's responsibilities in transmission of electricity. In this context it also does not become clear which entity in the Slovak Republic has a financial interest in SEPS, insofar as the preliminary decision does not address how dividends are paid out and to whom.

Furthermore, the Commission notes that the preliminary decision does not assess the independence between the Ministry of Finance and the National Property Fund. For instance, it does not become clear from the preliminary decision which public body controls the National Property Fund, whether there are structural links between the Ministry of Finance and the National Property Fund and how a sufficient degree of separation between the body controlling the National Property Fund and the Ministry of Finance as required by Article 9 (6) Electricity Directive is ensured. In view of the substantial interest of the National Property Fund in companies active in generation and supply, the Commission is of the view that this assessment is essential in order to grant SEPS a certification as ownership unbundled TSO.

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<sup>3</sup> Commission Opinion of 9.1.2012 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Denmark - Certification of Energinet.dk (electricity), C(2012) 88 final

In view of the above, the Commission invites URSO to ensure that measures are in place which guarantee that the Ministry of Finance can act in an independent manner in particular from any overarching public authority and the National Property Fund.

## **2. Tasks of the transmission system operator**

Under Article 9(1)(a) of the Electricity Directive, each undertaking which owns a transmission system is required to act as a transmission system operator, including carrying out all the tasks of a transmission system operator under Article 12 Electricity Directive. Compliance with ownership unbundling means that the undertaking which is the owner of the transmission system also acts as the transmission system operator and is as a consequence responsible, among other things, for granting and managing third-party access on a non-discriminatory basis to system users and for collecting access charges, congestion charges, and payments under the inter-TSO compensation mechanism. As regards investments, the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning. Decisions related to the operation, maintenance and development of the network must be made by the transmission system operator and the network company must have enough resources at its disposal to carry out its tasks under Article 12 of the Electricity Directive independently.

The Commission notes that the Slovak Act on Energy, transposing Article 12 of the Electricity Directive, contains in section 28 rights and obligations of the transmission system operator. However, as the compliance of SEPS with Article 9(1)(a) in conjunction with Article 12 of the Electricity Directive has not been assessed by URSO in its preliminary decision, the Commission invites URSO to do so in its final decision.

## **IV. CONCLUSION**

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