EUROPEAN
COMMISSION

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COMMISSION OPINION

of XXX

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Lithuania - Amber Grid

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I. PROCEDURE

On 26 January 2015 the Commission received a notification from the Lithuanian national regulatory authority (hereafter, 'NCC') of a draft decision on the certification of AB Amber Grid (hereafter, 'Amber Grid') as Transmission System Operator (hereafter, 'TSO') for gas, in accordance with Article 10(6) of Directive 2009/73/EC[1] (hereafter "Gas Directive").

Pursuant to Article 3(1) Regulation (EC) No 715/2009[2] (hereafter "Gas Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

Amber Grid owns and operates the entire gas transmission system of Lithuania, consisting of 2.000 kilometres of gas transmission pipelines, 66 gas distribution station, 8 gas metering stations and 2 gas compressor stations.

Lithuania implemented the unbundling rules for its gas sector in August 2013 when the separation of the vertically integrated gas undertaking Lietuvos Dujos was completed and Amber Grid was established for the purpose of exclusively owning and operating the transmission grid. Today, 96.58% of the shares in Amber Grid are ultimately held by the Lithuanian State – via the Ministry of Energy – with the remainder being free-float on the stock exchange. The State also has participations in energy supply and generation companies which however fall under the remit of the Ministry of Finance.

Amber Grid has applied for certification in accordance with the ownership unbundling model. In particular Amber Grid intends to make use of the possibility provided for in Article 9(6) Gas Directive to implement the ownership unbundling model by means of separate public bodies within the State. NCC has analysed whether and to what extent Amber Grid complies with the requirements of that model. In its preliminary decision, NCC found that Amber Grid complies with the requirements of the ownership unbundling model. On this basis, NCC submitted its preliminary decision to the Commission requesting an opinion.

III. COMMENTS

On the basis of the notification and the additional information provided by NCC the Commission has the following comments on the draft decision.

Separation within the State

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1 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.

2 Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211/36 of 14.8.2009.

Article 9(6) Gas 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 July 2013 the Commission issued its Opinion on the certification of Litgrid, Lithuania's electricity TSO.[3] The situation with regard to Amber Grid is highly similar to that of Litgrid in the sense that the ownership structure is essentially the same. In its Opinion on Litgrid the Commission assessed the separation within the state and raised a point with regard to the Prime Minister's powers regarding instructions to different Ministers and how that could influence the independent decision making of the Ministry of Energy in Litgrid. With regard to powers of the Prime Minister, NCC has elaborated its argumentation and concludes that whilst the Government, in acting as a collegial body, has the right to repeal acts of a Minister, the Prime Minister cannot do so without the joint decision of the Government. The Commission is satisfied with the assessment by NCC in this respect.

In its Opinion on the certification of Litgrid, the Commission also raised doubts as regards the shareholding of the Ministry of Energy in Klaipedos Nafta, the company that developed the Klaipeda LNG Terminal, and its – then full daughter – Litgas, entrusted with the task of marketing the gas. At the time of the Litgrid Opinion, July 2013, the LNG terminal had not yet commenced operations. NCC had assured the Commission that as soon as the trading activities would begin Litgas would be effectively separated from Klaipedos Nafta and would no longer be controlled by the Ministry of Energy, thus eliminating any conflict of interest.

In December 2014 the Klaipeda LNG Terminal entered into operation. From NCC's draft decision it appears that in August 2013 the Government adopted a resolution that resulted in the issuing of new shares in Litgas and the obligation on the Ministry of Finance to ensure that the state owned energy company UAB Lietuvos energia, which falls under the Ministry of Finance, would acquire these new shares and with it obtain a share of at least 2/3 of the total shares (and with it votes). Today, the shareholder structure of Litgas is as follows: 33.33% are owned by Klaipedos Nafta and 66.67% is owned by UAB Lietuvos energia. Klaipedos Nafta in turn is for 70.63% owned by the Ministry of Energy.

NCC on this basis calculates that the Ministry of Energy indirectly controls 23.52% of the shares and votes in Litgas. NCC goes on to assess whether this indirect shareholding in Litgas gives the Ministry of Energy, which exercises control over the Amber Grid, also direct or indirect control or rights over Litgas, which is prohibited by Article 9(1)(b)(ii) Gas Directive. In this context a relevant development is the signing of a shareholder's agreement between Klaipedos Nafta and UAB Lietuvos energia on 23 December 2013 whereby Klaipedos Nafta has *inter alia* relinquished its right to participate in the management of the company and to vote in the shareholder's meeting or in the board of Litgas.

The Commission notes that the concept adopted by the Lithuanian Government as regards the ownership of Klaipedos Nafta and Litgas is not identical to the approach proposed at the time of the certification of Litgrid. Whilst the Commission agrees that the adopted structure is to a large extent effective in eliminating the risk that the TSO is operated and developed in a non-independent way, the Commission deems it unsatisfactory that no full assessment into the

[3] https://ec.europa.eu/energy/sites/ener/files/documents/2013_071_lt_en.pdf

remaining indirect rights of the Ministry of Energy over Litgas in the sense of Article 9(2) Gas Directive has been carried out. Moreover, it does not become clear from NCC's draft decision why the separation between the two public bodies was only partially carried out and not in full, as originally planned. The Commission understands that initially practical reasons existed for keeping the development of the Klaipeda LNG Terminal and the marketing of its gas in the same hands, but notes that these synergies are no longer present. Moreover, the Commission is concerned that the financial incentives of the Ministry of Energy as a shareholder in a gas supplier may lead it to unduly influencing Amber Grid, for instance on issues related to capacity allocation, maintenance or investment. The Commission therefore urges NCC to make the certification of Amber Grid conditional upon the full transfer of Klaipedos Nafta's shareholding in Litgas. Where such a process also requires a transfer of staff a reasonable transition time, for instance of twelve months, may be granted.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, NCC shall take utmost account of the above comments of 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