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COMMISSION OPINION

of 10.6.2024

pursuant to Article 51(1) of Regulation (EU) 2019/943 and Article 52(6) of Directive (EU) 2019/944 – Austria – Certification of Tiroler Übertragungsnetz GmbH (TÜN) as transmission system operator for electricity

(ONLY THE GERMAN TEXT IS AUTHENTIC)

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I. PROCEDURE

On 20 March 2024, the Commission received a notification from the regulatory authority in Austria, E-control, of a preliminary decision concerning the certification of Tiroler Übertragungsnetz GmbH (hereafter “TÜN”) as transmission system operator for electricity (hereafter “TSO”).

Pursuant to Article 51 of Regulation (EU) 2019/943¹ (hereafter "Electricity Regulation") and Article 52 of Directive (EU) 2019/944² (hereafter "Electricity Directive"), the Commission is required to examine the notified preliminary decision and to deliver an opinion to the relevant national regulatory authority as to its compatibility with Articles 43 and 52 of the Electricity Directive.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

TÜN will be the owner of the Austrian part of a cross-border 110 kV electricity line to Italy between the border at the Brenner and Steinach, a locality a few kilometers north of the Brenner. On the Italian side the electricity line is operated by the Italian TSO TERNA³. TÜN will operate the electricity line in cooperation with the Austrian TSO Austrian Power Grid AG (hereafter “APG”). APG will in particular be responsible for coordinating the operation of the electricity line with TERNA⁴.

Currently, TÜN is a 100% subsidiary of TINETZ-Tiroler Netze GmbH (hereafter “TINETZ”). TINETZ is a 100% subsidiary of TIWAG-Tiroler Wasserkraft AG (hereafter “TIWAG”). TINETZ is a distribution system operator (DSO). TIWAG is an undertaking generating electricity and fully owned by the Austrian federal state (‘*Bundesland*’) of Tirol (hereafter “Land Tirol”).

TINETZ plans to sell 51% of TÜN to the Land Tirol. TINETZ will not have the right to appoint members of the supervisory board of TÜN or of any other bodies legally representing TÜN. In the General Assembly (‘*Generalversammlung*’) the Land Tirol will have one vote per 10 Euro paid-in capital stock. TINETZ will in total only have one vote, despite its 49% interest in TÜN, in order to fulfil the requirement in § 39 Abs. 2 of the Austrian law on

¹ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.6.2019, p. 54.

² Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019, p. 125.

³ TERNA was subject of a Commission Opinion of 11 February 2013 (C(2013)810).

⁴ APG was subject of a Commission Opinion of 19 January 2012 (C(2012)220).

limited liability companies (hereafter “GmbH-Gesetz”)⁵ according to which each shareholder has at least one vote. It is planned that the shareholders’ agreement (*‘Gesellschaftsvertrag’*) ensure that no decision will require unanimity, hence that TINETZ will not have any veto powers.

Both TÜN and TIWAG will be controlled by the Land Tirol. According to Article 51 of the constitution of the Land Tirol (*‘Tiroler Landesordnung’*)⁶ tasks are allocated to individual members of the government of the Land Tirol with exception of those which have to be decided by the government as a whole (*‘Landesregierung als Kollegium’*). According to § 2(3) and (4) of the government’s rules of procedure (*‘Geschäftsordnung’*)⁷ neither the control of TÜN nor the control of TIWAG are among the tasks which have to be decided by the government as a whole. The annex to the rules of procedure allocates the control of TÜN and of TIWAG to two different members of the government of the Land Tirol. Those members are required to obey official secrecy rules, hence are prohibited from transferring confidential information obtained from controlling TÜN or TIWAG. The concrete exercise of the control of TÜN and TIWAG is delegated to civil servants who act as representatives of the responsible members of government. It will be ensured that those delegations are made to different persons.

Currently TÜN has two directors and both are also directors in TINETZ. However, TÜN plans to appoint new directors after the transfer of majority ownership to the Land Tirol. In this process it will be ensured that no director of TÜN is at the same time a director or other kind of legal representative of TINETZ or TIWAG.

In conclusion, E-control considers that TÜN can be certified as TSO applying the ownership unbundling model conditional that TÜN will fulfil certain conditions within six months. The certification decision would cease to be valid should those conditions not be fulfilled (*‘auflösende Bedingungen’*). The six month deadline can be extended by further six month in case E-control decides that the delay is due to reasons outside the control of TÜN.

Those conditions are:

- TÜN acquires ownership of the transmission system.
- TÜN is no longer directly or indirectly under the control of an undertaking performing any of the functions of generation or supply.
- No director or other legal representative of TÜN is at the same time a director or other kind of legal representative of an undertaking performing any of the functions of generation or supply or of an undertaking directly or indirectly controlled by an undertaking performing any of the functions of generation or supply.
- Rules for representing the member of the government of the Land Tirol responsible for TÜN are enacted which ensure that this representation is exercised by a person not involved in controlling an undertaking performing any of the functions of generation or supply.
- Control of TÜN is exercised by a member of the government of the Land Tirol who is not controlling an undertaking performing any of the functions of generation or supply.

⁵ Gesetz vom 6. März 1906, über Gesellschaften mit beschränkter Haftung (GmbH-Gesetz – GmbHG), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001720>

⁶ <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrT&Gesetzesnummer=10000103>

⁷ <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=LrT&Gesetzesnummer=20000249>

- TÜN concludes an agreement with APG.

On this basis, E-control notified its preliminary certification 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 certification decision.

Shareholding of TINETZ in TÜN

Article 43(1)(b)(i) of the Electricity Directive prohibits the same person(s) from directly or indirectly exercising control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercising control or exercising any right over a TSO or over a transmission system.

Via its subsidiary TINETZ TIWAG holds an indirect interest in TÜN. TIWAG is an undertaking generating electricity. Therefore, TIWAG is according to Article 43(1)(b)(i) of the Electricity Directive not allowed to exercise any right over a TSO like TÜN, neither directly nor indirectly via TINETZ.

In practice the requirements of Article 43(1)(b) of the Electricity Directives can be complied with as follows.

An undertaking performing any of the functions of generation or supply can keep a direct or indirect shareholding in a TSO, provided the following cumulative conditions are met:

- this shareholding does not constitute a majority share,
- the undertaking does not directly or indirectly exercise any voting rights as regards the shareholding,
- the undertaking does not directly or indirectly exercise the power to appoint members of bodies legally representing the TSO such as the supervisory board or the administrative board, and
- the undertaking does not directly or indirectly have any form of control over the network operator or the network system.

According to publicly available information, TÜN has a capital stock of EUR 35,000.⁸ The 51% direct share of the Land Tirol would hence translate into 1785 votes, since the Land Tirol will have one vote per 10 Euro paid-in capital stock.

With a 49% interest TINETZ will not hold a majority share in TÜN. TINETZ will also have no right to appoint members of the supervisory board of TÜN or any other bodies legally representing TÜN. However, TINETZ will have voting rights in the General Assembly of TÜN, although limited to one vote. E-control explains that this is necessary to fulfil a requirement under the GmbH-Gesetz that each shareholder has at least one vote.

As explained in the Commission's Interpretative Note 'The Unbundling Regime' of 22 January 2010⁹, the concept of voting rights as outlined in Article 43(2) of the Electricity Directive refers to any voting rights, no matter how limited. Article 43(2) of the Electricity

⁸ <https://www.wirtschaft.at/u/584451m>

⁹ https://energy.ec.europa.eu/document/download/a5a5f766-b3fa-4d6f-8934-9a365306077d_en?filename=2010_01_21_the_unbundling_regime.pdf

Directive implies that a shareholding can only provide financial rights, i.e. the right to receive dividends, but cannot confer any right to take part in the decision-making process of the company or exercise any influence on the company.

The Commission notes E-control's argument that, in combination with a shareholder agreement stipulating that no decision will require unanimity, the one vote of TINETZ will in effect have no positive or negative control over TÜN nor any other form of influence in TÜN. Should E-control decide to certify TÜN, then E-control should add as condition a requirement that TÜN has corporate governance arrangements in place which ensure that the rights TINETZ could actually exercise in TÜN with the one vote in the General Assembly do, in practice, not differ from a shareholding with only passive financial rights¹⁰.

Separation within the state

In accordance with Article 43(5) of the Electricity Directive, entities owned by a Member State or another public body can ensure compliance with the unbundling requirement by two separate public bodies exercising control over a TSO on the one hand, and over an undertaking performing any of the functions of generation or supply on the other hand.

As explained in the above mentioned Interpretative Note of 22 January 2010, the public bodies concerned must be truly separate. In the present case, TÜN and TIWAG will be controlled by different members of the government of the Land Tirol. According to the constitution of the Land Tirol, each member of the government has individual responsibility for his or her portfolio, similar to ministerial responsibility in a Member State government. Assigning the control of a TSO to one and the control of undertakings performing any of the functions of generation or supply to another ministry or government department, is the usual way of ensuring compliance of the unbundling requirements for state owned undertakings pursuant to Article 43(5) of the Electricity Directive or the equivalent Article 9(6) of Directive 2009/73/EC as regards TSOs for gas¹¹¹².

Conditionality of the certification decision

The Commission notes that certain requirements of ownership unbundling are not yet fulfilled by TÜN. This has been the case also in previous certification cases¹³. The Commission welcomes that E-control plans to include those requirements as conditions in the certification decision and that the certification decision would cease to be valid should those conditions not be fulfilled.

Ongoing monitoring

The Commission recalls the obligation set out in Article 52(4) of the Electricity Directive for regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of Article 43 of the Electricity Directive.

¹⁰ The Commission had already positively assessed corporate governance arrangements rendering "any rights" like voting rights ineffective in its Opinion of 13. September 2022 on the certification of Enagás Transporte S.A.U. as TSO for gas (C(2022) 6623 final).

¹¹ 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, OJ L 2011, 14.8.2009, p. 94.

¹² Cf. for example the case of Ireland described in the Commission Opinion of 28 October 2020 on the certification of Gas Networks Ireland (GNI) as transmission system operator for gas (C(2020)7584) or of Croatia as described in the Commission Opinion of 25 May 2021 on the certification of PLINACRO d.o.o. as transmission system operator for gas (C(2021)3856)..

¹³ Cf. for example the Commission Opinion of 25 May 2021 on the certification of PLINACRO d.o.o. as transmission system operator for gas (C(2021)3856).

Should E-control decide to certify TÛN, the Commission invites E-control to continue monitoring the case also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment.

IV. CONCLUSION

Pursuant to Article 51 of the Electricity Regulation, E-control shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of TÛN, and when it does so, shall communicate its decision to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* Member State regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* Member State authorities responsible for the transposition of EU legislation, on 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 therein to be confidential. E-control is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 10.6.2024

For the Commission
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Member of the Commission