



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 - Belgium - Certification of Elia System Operator N.V.**

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PROCEDURE

On 10 August 2012, the Commission received a notification from the Belgian regulator for energy (Commission de Régulation de l'Électricité et du Gaz, hereafter "CREG"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of "Elia System Operator N.V." (hereafter, "Elia") as a Transmission System Operator (TSO) for electricity.

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 Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DECISION

Elia is the operator of the high voltage electricity transmission grid in Belgium. Its network consists of more than 8000 km of lines and underground cables. Elia has a daughter company, Elia Asset N.V. (hereafter, "Elia Asset"), that legally owns the transmission assets. Elia also indirectly has joint control over the German electricity TSO 50Hertz Transmission GmbH, which is the subject of a separate certification procedure by the German regulator for energy Bundesnetzagentur.

The ownership of Elia is structured as follows: 51.47% of the shares in Elia are listed on the stock exchange, of which 6,72% is owned by the ARCO Group. From the remaining shares, Publi-T CVBA (hereafter, "Publi-T") is the largest single shareholder owning 45,47% of the shares. Publipart NV (hereafter, "Publipart") owns the remaining 3,16% of the shares.

Elia has applied for certification in accordance with the ownership unbundling model, referred to in Article 9(1) of the Electricity Directive. This choice is available to Elia under the Belgian legislation transposing the Electricity Directive.

CREG has analysed whether and to what extent Elia complies with the requirements of the ownership unbundling model as laid down in the Electricity Directive. In its preliminary decision, CREG has come to the conclusion that, on the basis of the information that Elia and its shareholders have provided throughout the application process, it cannot come to a positive decision. In its preliminary decision CREG in particular expresses the following concerns:

a) unclarity remains as to whether there is joint control of Publi-T and Publipart over Elia.

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.

- b) unclarity remains as to whether there are shareholders of Publi-T and Publipart which indirectly exercise rights in Elia and at the same time exercise control over or exercise rights in an undertaking performing any of the functions of production or supply of electricity or gas;
- c) unclarity remains as to whether shareholders of Publi-T have joint control over Publi-T;
- d) unclarity remains as to whether the control of Elia over its daughter company Elia Asset - the legal owner of the transmission assets - is full and exclusive;
- e) the fact that two members of the Management Board of Elia and Elia Asset are at the same time board members of companies active in the generation of electricity.

CREG concludes that on the basis of the insufficient information it has received with regard to the first four of the abovementioned issues, it has not been able to come to a positive preliminary certification decision vis-à-vis Elia.

III. COMMENTS

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

The Commission agrees with CREG that as long as it has not received sufficient information that allows it to establish with certainty that the unbundling rules are complied with, certification cannot be granted.

In particular, the Commission agrees with CREG that it is necessary to obtain further information with regard to the persons exercising control over, or exercising rights in the companies that exercise control over Elia, or exercise rights in Elia. The Commission underlines that article 9(1)(b)(i) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over an undertaking performing any of the functions of production or supply, and *directly or indirectly* exercising control or exercising any right over a transmission system operator or over a transmission system. It is clear from the text that also the persons *indirectly* exercising rights in a TSO, notably through the shareholders of that TSO, fall within the scope of article 9(1)(b)(i) Electricity Directive. Any other interpretation would allow for circumvention of the unbundling rules, notably by the setting up of daughter companies. In the present case it is therefore relevant to assess the participations of persons *indirectly* exercising rights in a TSO, in companies which perform any of the functions of production or supply of electricity or gas.

Also in the cases identified by CREG where a board member in Elia is also a board member, or a delegated board member, in certain holding companies that appear to have participations in companies active in the generation and/or supply of electricity, a close examination of the relevant facts is necessary in order to establish whether the unbundling rules of Article 9(1)(b), (c) and (d) are complied with. Such examination is necessary as well in situations where the holding company does not perform the generation or supply activities itself, but may have control over daughter companies that do carry out such activities. The Commission recalls that the aim of the unbundling rules is to remove any incentive for a transmission system operator to favour certain generation or supply interests to the detriment of other network users as regards access to the network and investments in the network. The Commission invites CREG to further assess the above situations on the basis of additional information provided by Elia, taking into account the role and influence the board member has in the holding companies concerned, and the degree of control or influence the holding companies have over their subsidiaries.

The Commission also agrees with CREG that complete clarity with regard to the degree of control Elia has over its daughter company Elia Asset - which is the legal owner of the transmission assets - is a prerequisite for certification under the ownership unbundling model. The Commission notes in this respect that a structure in which the network is not owned directly by an ownership unbundled TSO, but by a subsidiary of this TSO, is not in itself an obstacle to certification as long as it can be demonstrated that the TSO has full control over this subsidiary.³ In the present case it is noted that Elia owns all the shares in Elia Asset except for one special share which has certain veto rights attached to it, which is owned by Publi-T, the controlling shareholder of Elia. The Commission agrees with CREG that in the present case the fact that this one share in Elia Asset is owned by Publi-T and not by Elia, even if it has certain veto rights attached to it, would not constitute an obstacle to certification, as Publi-T is in any event the controlling shareholder of Elia. However, the Commission underlines that, should certification be granted and the shareholder structure of Elia were to change subsequently, CREG must reassess the impact of the holding of this special share by Publi-T in Elia in the light of Article 9(1)(a) Electricity Directive.

On 12 September 2012 a meeting took place between representatives from Elia, its shareholders Publi-T and Publipart, CREG and the Commission's services, in which Elia announced that additional information and documentation would be provided in order to further clarify certain aspects of the file, including those issues described above. Elia sent additional information to CREG and to the Commission's services on 19 September 2012 and 25 September 2012. The Commission expects CREG to be able to issue a revised decision on this basis, where necessary subject to conditions.

IV. Conclusion

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

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