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COMMISSION OPINION

of 10.1.2018

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive
2009/72/EC - France - Certification of RTE**

(Only the French text is authentic)

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I. PROCEDURE

On 28 September 2017, the Commission received a notification from the French national regulatory authority, the *Commission de régulation de l'énergie* ("CRE"), in accordance with Article 10 (6) of Directive 2009/72/EC¹ (the "Electricity Directive"), of a draft decision on the certification of the transmission system operator for electricity, *RTE Réseau de transport d'électricité* ("RTE"), dated 14 September 2017. On 14 December 2017, CRE updated its draft decision and informed accordingly the Commission.

Pursuant to Article 3 (1) of Regulation (EC) No 714/2009² (the "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

Since 2012, RTE has been certified as the transmission system operator for electricity in France (see Commission Decision C(2011)8570³). RTE had chosen the Independent Transmission Operator ("ITO") model, as referred to in Article 9(8)(b) of the Electricity Directive. At the time of this certification, RTE was 100% controlled by *Electricité de France S.A.* ("EDF").

On 15 March 2017, RTE informed CRE of a transaction (the "transaction") whereby the holding company Coentreprise de Transport d'Electricité ("CTE") would hold 100% of the share capital of RTE. CTE would itself be held at 50.1% by EDF, at 29.9% by the public group Caisse des Dépôts et Consignations and at 20% by CNP Assurances.

Consequently, as of 31 March 2017, the date of completion of the transaction, 49.9 % of RTE is owned, via CTE, by CDC and CNP.

Following notification of the transaction, CRE decided to re-examine the certification of RTE.

Article 9 of the Electricity Directive sets out rules on the unbundling of transmission systems and transmission system operators. Paragraph (8), point (b), of Article 9 of the Electricity Directive provides that where on 3 September 2009 the transmission system belongs to a

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 L211/55 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.

³ Commission's Opinion on RTE's draft certification of RTE, C(2011)8570, https://ec.europa.eu/energy/sites/ener/files/documents/2011_001_rte_en.pdf

vertically integrated undertaking ("VIU"), a Member State may decide not to apply paragraph 1 (on the so-called ownership unbundling) of the same article, provided that the Member State concerned comply with the provisions of Chapter V, establishing requirements for ITOs (Articles 17 to 23 of the Electricity Directive).

CRE has analysed whether and to what extent RTE continues to comply following the transaction with the unbundling rules of the ITO model as laid down in the French legislation transposing the Electricity Directive. CRE has come to the preliminary conclusion that RTE continues, including after the transaction, to comply with these rules. CRE has identified a number of requirements that still need to be fulfilled in order to ensure full compliance with the unbundling rules.

III. COMMENTS

On the basis of the present notification and its update, the Commission has the following comments on the draft decision:

Article 2 (21) of the Electricity Directive defines a Vertically Integrated Undertaking (VIU). It sets out that the VIU covers all undertakings which are "controlled", directly or indirectly, by the same person or persons. The definition of the VIU should therefore be read as encompassing the entire economic unit or group structure to which the TSO belongs, not only those active in the field of generation or supply of electricity⁴. If the scope of the VIU were limited to entities of the group that directly carry out activities related to production or supply of electricity, the unbundling rules could be circumvented easily by creating additional subsidiaries within a given undertaking/group that do not carry out these activities but that, while not carrying out these activities, could nevertheless influence the TSO⁵.

This definition and its application in past cases (see footnote 5) would call for the inclusion of all entities controlled by CDC in the VIU and not only CDC and undertakings controlled by CDC and active in energy production and supply.

However, the nature of CDC is very specific as CDC is a particularly large and diversified conglomerate and not predominantly active in the field of energy. It is a long-term public financial investor in charge of handling and investing savings from regulated French savings accounts in a prudent manner and in the general interest. It invests in a large variety of sectors, including buildings, infrastructure, transport, tourism, leisure, digital economy etc. Energy is only one of these sectors.

The Commission notes that CDC holds controlling interests in a number of undertakings active in renewable electricity generation. However, these entities are always jointly controlled (directly or indirectly) by CDC and other investors and are of limited size. These entities are windfarms, solar parks and biomass installations spread across the French territory, amounting to an installed capacity of 996.8 MW, representing less than 1% of the total installed generation capacity in France. In addition, these investments represent a marginal share of the balance sheet of CDC (c. 0.04%). The weight of energy investments for CDC is therefore marginal.

⁴ This approach is consistent with the one taken in the application of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation"), referred to in recital 13 of the Electricity Regulation.

⁵ See for example the Commission opinion on the certification for GASCADE C(2012) 9106 or for NEL C(2013)7019

https://ec.europa.eu/energy/sites/ener/files/documents/certifications_decisions.pdf

Given the very particular nature of CDC as well as the marginal weight of its investments in electricity generation both in respect of the installed capacity and in relation to the total investments made by CDC, the question on whether or not it is necessary to include all entities of CDC in the definition of the VIU or only those in the field of electricity can be left open as the risk of conflict of interests between the entities is marginal and its effect can only be negligible on the French electricity market.

IV. CONCLUSION

Pursuant to Article 3 of the Electricity Regulation, the national regulatory authority shall take utmost account of the Commission's opinion when taking its final decision regarding the certification of the transmission system operator. The national regulatory authority should communicate its final decision to the Commission.

The Commission's position on this particular draft certification decision of CRE 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 on the compatibility of any national implementing measure with EU law.

The Commission will publish this opinion on its website. The Commission does not consider the information contained herein to be confidential. CRE is invited to inform the Commission within five working days following receipt of this opinion whether it considers that, in accordance with EU and national rules on confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication. Reasons for such a request should be given.

Done at Brussels, 10.1.2018

For the Commission

[...]

Member of the Commission