



EUROPEAN COMMISSION

Brussels, 25.11.2011
C(2011) 8570 final

COMMISSION OPINION

of 25.11.2011

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

COMMISSION OPINION

of 25.11.2011

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

I. PROCEDURE

On 27 September 2011, the Commission received a notification from the French national regulatory authority, Commission de régulation de l'énergie (hereafter "CRE"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of the transmission system operator for electricity "RTE EDF Transport SA" (hereafter "RTE"), dated 15 September 2011.

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 DRAFT DECISION

Background

RTE is the transmission system operator for electricity in France. In order to comply with the applicable rules on unbundling of transmission system operators, RTE has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Electricity Directive. This choice is available to RTE under the French legislation transposing the Electricity Directive.

Article 9 Directive 2009/72/EC sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8)(b) therein provides that where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1, provided that the Member State concerned complies with the provisions of Chapter V, establishing requirements for independent transmission operators (Articles 17 to 23 Electricity Directive).

The CRE has analysed whether and to what extent RTE complies with the unbundling rules of the ITO model as laid down in the French legislation transposing the Electricity Directive. In

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.

its draft decision, the CRE has identified a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. The measures concerned have been summarized in point 7 of the CRE's draft decision.

III. COMMENTS

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

1. Choice of the ITO model

According to Article 9(8) Electricity Directive, the ITO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a Vertically Integrated Undertaking ("VIU"). The Commission agrees with the CRE in the present case that the choice for the ITO model is legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

2. Definition of VIU

Article 2(21) Electricity Directive provides for a definition of the concept of VIU. The definition of VIU is relevant for the application of a considerable number of unbundling provisions in the Electricity Directive. In its draft decision, the CRE makes reference to the concept of VIU as defined in the French legislation transposing the Electricity Directive. The Commission questions whether the definition in the French legislation is in compliance with the Electricity Directive. The Commission notes that the definition of VIU in the French legislation, *inter alia*, seems to exclude categorically without apparent justification companies which are controlled by the VIU but are located outside the European Economic Area. Moreover, the definition of VIU in the French legislation seems to exclude without apparent justification distribution system operators controlled by the VIU. In the Commission's view, the definition of VIU in the French legislation appears inconsistent with Article 2(21) Electricity Directive. The Commission considers that the CRE should apply in its final certification decision a definition of VIU which is in conformity with Article 2(21) Electricity Directive.

3. Tasks of the ITO

According to the Electricity Directive, the ITO is required to carry out the activity of electricity transmission, including all the tasks of a TSO under Article 12 as well as a number of additional tasks listed in Article 17(2) Electricity Directive. For these tasks the ITO has to be autonomous. The draft decision does not make clear whether RTE has indeed been entrusted with all these relevant tasks. The Commission considers that the CRE should clarify in the final certification decision how it has verified whether RTE has been entrusted with all relevant tasks.

4. Contracts for services between the VIU and the ITO

A. Services provided to the ITO by other parts of the VIU

Article 17(1)(c) Electricity Directive provides for specific rules on the contracting of services between other parts of the VIU and the ITO. As the ITO should be autonomous and not

dependent on other parts of the VIU, contracting of services to the ITO by any other part of the VIU is prohibited by the Electricity Directive. As a preliminary remark the Commission considers that in view of the general prohibition of services provided to the ITO by other parts of the VIU, a derogation could only be envisaged in exceptional circumstances. Such derogation should be construed narrowly and should not go beyond what is strictly necessary to protect overriding interests, such as the security and the reliability of the transmission system. Only in exceptional cases, where the services concerned are strictly necessary to protect overriding interests as referred to above, and where no other service provider except for the VIU could provide these services to the ITO could a derogation possibly be considered justified. Such derogation should also in principle be of a transitional nature, limited in time. In addition it should be ensured that transactions between other parts of the VIU and the ITO occur at arms length in order to avoid cross subsidisation. In the draft decision the CRE has not clearly demonstrated that all the services which are provided to the ITO by other parts of the VIU in the present case are strictly necessary to protect the overriding interests referred to above. Neither has the CRE demonstrated whether the services concerned, even if strictly necessary as such, could also be provided by other service providers not related to the VIU, now or in the foreseeable future. The Commission considers that in the present case contracts for services provided to the ITO by other parts of the VIU, such as, by way of example, those for system services to ensure balancing, security and reliability of the system, should be assessed in accordance with the principles referred to above. This list is not exhaustive.

B. Services provided by the ITO to other parts of the VIU

Article 17(1)(c) Electricity Directive allows in specific circumstances for the provision of services by the ITO to other parts of the VIU, in particular if there is no discrimination of other system users, if there is no restriction of competition in generation or supply and if the regulatory authority has approved the provision of the services concerned. The CRE refers in its draft decision to a significant number of contracts for services provided by the ITO to other parts of the VIU. The Commission takes the view that in the analysis of the contracts concerned, the CRE should assess, in situations where a functioning market for the services concerned cannot be identified, whether the terms of the service contract can be considered cost reflective so as to ensure that there is no undue cross subsidization. This analysis has not always been made in the draft decision. The Commission considers that the CRE should consistently make such analysis and take its outcome into account in the final certification decision.

5. Corporate identity, communication and branding

According to Article 17(4) Electricity Directive, the ITO must not, in its corporate identity, communication or branding create confusion in respect of the separate identity of other parts of the VIU. This implies a general obligation to avoid any confusion for consumers between the TSO and the supply company. From the draft decision it appears that the official company name of RTE is "RTE EDF Transport SA". The Commission agrees with the CRE that the reference to EDF in the company name of the ITO is a violation of the Electricity Directive. The Commission takes the view that the CRE should require an amendment of the company name in its final certification decision.

6. Separation of auditors

According to 17(6) Electricity Directive, auditors of the ITO may not be the same as the auditors of other parts of the VIU. The Commission supports the CRE in requiring RTE to change its statutes to ensure that the auditors who audit the ITO and those who audit other parts of the VIU cannot be the same.

7. Management Board - Powers

Chapter V of the Electricity Directive provides for a detailed division of powers between the various bodies of the ITO, including between the Management Board and the Supervisory Body. From the draft decision it appears that the statutes of RTE do not explicitly state which body within RTE shall have the power to prepare and submit to the CRE the 10 Year Network Development Plan. The CRE correctly takes the view that this should be the Management Board and not the Supervisory Body. For reasons of legal certainty the Commission considers that the CRE should require that the competence of the Management Board in this respect is unambiguously defined in the statutes of RTE.

8. Management Board - independence

According to Article 19(3) Electricity Directive, the majority of members of the Management Board cannot have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. The Management Board of RTE is composed of seven members. Four of these members must comply with the strict independence requirements as set out in the Electricity Directive. The Commission has not been able to verify whether the proposed independent members have been employed by the VIU or by its controlling shareholder in the past three years, or not. The draft decision of the CRE does not contain sufficiently detailed information on this point. The Commission invites the CRE to give the detailed reasons of its assessment on this point in the final certification decision

From the draft decision it appears that some members of the Management Board still maintain financial interests in the VIU. The Commission takes the view that the CRE should require that these members sell these financial interests, or as a minimum give them in the hands of an independent trustee. The Commission considers it necessary that the CRE strengthens its initial position on this, which appears to provide for a recommendation in this respect, but not a binding requirement.

According to Article 19(8) Electricity Directive the majority of members of the Management Board is not entitled to have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of at least six months before their appointment. The Commission has not been able to verify whether this requirement on independence has been complied with. The Commission invites the CRE to clarify its assessment on this point for all Board Members concerned in the final certification decision.

According to the same Article 19(8) Electricity Directive, also persons directly reporting to the Management Board on matters related to the operation, maintenance or development of the network must comply with strict independence rules. The Commission notes that it is not clear from the draft decision to what extent this requirement has been fulfilled, as the draft

decision does not contain detailed information on this. The Commission invites the CRE to clarify its assessment on this point in the final certification decision.

9. Supervisory Body – powers

Chapter V of the Electricity Directive provides for a detailed division of powers between the various bodies of the ITO, including between the Management Board and the Supervisory Body. According to the statutes of RTE, prior authorisation by the Supervisory Body is required for certain decisions of the Management Board relating to loans, credits, and settlements in case of litigations, above a certain threshold. These thresholds are defined by the Supervisory Body. The Commission underlines that thresholds should not be set at a too low level as this could undermine the autonomy of the Management Board enshrined in the Electricity Directive. The Commission considers it necessary that the CRE assesses whether the levels of the thresholds as referred to in the statutes are appropriate and allow the ITO to be autonomous. The Commission asks the CRE to establish an appropriate level of these thresholds. In any event, these thresholds should not apply to decisions related to the preparation and implementation of the 10 Year Network Development Plan, as this is a competence of the Management Board.

Moreover, the statutes of RTE provide that the Supervisory Body when taking decisions on the budget, the financing policy, the establishment of securities and guarantees, and the creation of legal entities, must have a favourable vote of the majority of members of the Supervisory Board as well as of the majority of members appointed by the General Assembly of shareholders. The same rule of double majority applies to decisions above a certain threshold concerning the sale or purchase of assets, and the establishment of securities of guaranties of any nature. The Commission notes that the corresponding levels of the thresholds in the statutes appear to be low (€5 million for decisions on sale and purchase of assets, and €20 million for decisions on establishing securities and guarantees) and risk undermining the autonomy of the Management Board of the ITO in favour of the Supervisory Body and the General Assembly of shareholders. The Commission invites to CRE to reassesses in its final certification decisions whether these thresholds need to be increased.

10. Supervisory Body - independence

According to Article 20(3) juncto 19(3) Electricity Directive, the independent members of the Supervisory Body cannot have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. The Supervisory Body of RTE is composed of 12 members. Five of these members must comply with the strict rules on independence. From the draft decision of the CRE it does not become clear whether the five members of the Supervisory Body concerned fully comply with the above requirements on independence. The Commission invites the CRE to clarify its assessment on this point in the final certification decision.

In particular it appears from the draft decision that one of the proposed independent members, [...]. The Commission takes the view that [...], on this basis, cannot be considered an independent member.

According to Article 20(3) juncto 19(4) Electricity Directive the independent members of the Supervisory Body cannot hold an interest in or receive any financial benefit, directly or indirectly, from any part of the VIU other than the ITO. From the draft decision it appears that some independent members of the Supervisory Body still have financial interests in the VIU. The Commission takes the view that the CRE should require in its final certification decision that these members sell these financial interests, or as a minimum give them in the hands of an independent trustee. The Commission considers it necessary that the CRE strengthens its initial position on this, which appears to provide for a recommendation in this respect, but not a binding requirement.

11. Compliance officer – independence

According to Article 21(2) Electricity Directive, the compliance officer of the ITO must fulfil the similar requirements of independence which relate to the majority of members of the Management Board. The Commission has not been able to verify whether [...], as proposed compliance officer of the ITO, complies with these requirements of independence. In particular the draft decision does not clarify whether [...] has had any business relation with the VIU or its controlling shareholder in the three years before his appointment as compliance officer. [...]. The Commission invites the CRE to clarify its assessment on these points in the final certification decision.

12. Conclusion

Pursuant to Article 3 Electricity Regulation, the CRE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of RTE, 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, 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 herein to be confidential. The CRE 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 publication³. Reasons for such a request should be given.

³ Your request should be sent by email to [to be completed]

Done at Brussels, 25.11.2011

For the Commission
Günther OETTINGER
Member of the Commission

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry