



EUROPEAN COMMISSION

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 - Spain - Certification of Red Eléctrica de España, S.A.U.
(electricity)**

COMMISSION OPINION

of XXX

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Spain - Certification of Red Eléctrica de España, S.A.U. (electricity)

I. PROCEDURE

On 28 March 2012, the Commission received a notification from the Spanish regulator for energy (hereafter, "CNE"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of "Red Eléctrica de España S.A.U." (hereafter, "Red Eléctrica de España") as a Transmission System Operator (TSO) for electricity, dated 28 March 2012.

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

According to the draft decision notified, Red Eléctrica de España is the sole transmission system operator for electricity in Spain and it owns and operates the totality of the electricity transmission grid at the highest voltage level in accordance with the Spanish Electricity Act (Law 54/1997)³. Red Eléctrica de España does not own other transmission assets in the EU.

The company is organized as a holding where the mother company is Red Eléctrica Corporación, S.A. (hereafter, "Red Eléctrica Corporación") who owns 100% of two companies: "Red Eléctrica de España, S.A." that carries out the activities of transmission and system operation in Spain and "Red Eléctrica Internacional" responsible for the international activities of the group⁴.

The participation in the capital of Red Eléctrica Corporación is limited by law. In accordance with Royal Decree Law 13/2012⁵ any individual or legal person may participate in the capital provided that the sum of its direct or indirect participation does not exceed 5% of the share capital, neither exercise any voting rights over 3%. For individual or legal persons who carry out activities in the electricity sector including their shareholders with a share over 5%, the exercise of voting rights is limited to 1%. For undertakings performing any of the functions of

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.

³ Article 35 and 9th transitory provision of Law 54/1997.

⁴ The main activity of Red Eléctrica Internacional is the investment in foreign electricity transmission assets, notably in Peru.

⁵ Royal Decree Law 13/2012 amends Article 34.1 and the 23th additional provision of Law 54/1997. BOE N° 78. Pages 26876-26967.

generation and supply, the unbundling provisions of Article 9 Electricity Directive apply without restriction.

The above mentioned limitations on the participation in the capital of Red Eléctrica Corporación do not apply to the state owned company "Sociedad Estatal de Participaciones Industriales" (hereafter, "SEPI"), whose participation in Red Eléctrica Corporación by law must be at least 10%, and currently is 20%.

The Commission notes that the Spanish legislation referred to above *prima facie* raises certain questions as to its compatibility with the provisions of the Treaty on the Functioning of the European Union, in particular the provisions on the free movement of capital, which need to be further clarified with the competent Spanish authorities.

Red Eléctrica de España applied for certification in accordance with the ownership unbundling model provided for in Article 9 Electricity Directive.

CNE analysed whether and to what extent Red Eléctrica de España complies with the requirements of the ownership unbundling model as laid down in Article 9 Electricity Directive. CNE's assessment was completed before Royal Decree Law 13/2012 of 31 March 2012 was adopted, which transposes the provisions of Electricity Directive into national law. By letter of 16th April 2012, CNE informed the Commission that the transposition of Electricity Directive by the above-mentioned Royal Decree Law did not modify its analysis and that the preliminary decision did not have to be amended. Furthermore, CNE confirmed that the legal framework set out by Royal Decree Law 13/2012 will explicitly be referred to in the final decision on the certification of Red Eléctrica de España.

In its preliminary decision, CNE concludes that Red Eléctrica de España complies with the requirements of ownership unbundling model, in particular under the following condition:

- A member of the board of Red Eléctrica de España is also member of the board of "Abengoa Solar S.A", an undertaking carrying out activities of electricity production in Spain. This is a violation of Article 9(1)(d) Electricity Directive which must be remedied.

The above mentioned member of the board as well as Red Eléctrica de España have declared that the above incompatibility will be solved within 2 months with a view to complying with Article 9(1)(d) Electricity Directive. Taking into account this commitment, CNE considers that Red Eléctrica de España will be in compliance with Article 9(1)(d) Electricity Directive at the time it will adopt the final decision on certification.

On this basis, CNE submitted its preliminary decision to the Commission requesting for an opinion.

III. COMMENTS

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

1. Control by the major shareholder of generation activities

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. Article 9(1)(b)(ii) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly

exercising control or exercising any right over an undertaking performing any of the functions of production or supply.

From the preliminary decision of CNE it appears that the main shareholder of Red Eléctrica Corporación, SEPI, owns a company, Hunosa, S.A., of which the main activity is mining and extraction of coal, and which also controls a thermal power plant in La Pereda (Asturias) of 50 MW. The question comes up how this participation of SEPI in Hunosa S.A. relates to the provisions of Article 9(1)(b)(i) and (ii). From the preliminary decision of CNE it follows that the generation activities concerned, which are considered important from a social and regional perspective but are not performed under normal commercial terms, are performed under a regulated scheme, the so called "regimen especial", set out by the Spanish legal framework under Royal Decree 661/2007. Their size is small, with production representing approximately 0.1375% of the Spanish total electricity generation. The Commission agrees with CNE that as long as these generation activities are performed under a regulated framework, can benefit by law from priority dispatching and remain small in size, it cannot be expected that SEPI will be able to influence the transmission activities of Red Eléctrica de España in a discriminatory manner so as to favour its participation in the generation activities of Hunosa S.A. In such circumstances the Commission agrees with CNE that an obstacle to certification cannot be identified.

2. Monitoring of compliance of unbundling rules by shareholders

Red Eléctrica Corporación is a listed company in the Spanish stock exchange market. SEPI has a stake of 20% and the remaining 80% is free float. As participations in a listed undertaking may change continuously, mechanisms should be clearly defined to guarantee the compliance with unbundling provisions of the Electricity Directive as transposed into Spanish national legislation.

The current legal framework under Royal Decree Law 13/2012 foresees an ex post mechanism of control, giving CNE the duty to monitor the application of the unbundling rules and the power to enforce these rules. CNE shall monitor compliance with the unbundling provisions and report annually on the activities it has carried out and consequently on the results of its activities⁶. A violation of the unbundling rules is considered a severe infringement and CNE has the power to impose effective, proportionate and dissuasive penalties on the persons responsible for such violations.

The Commission considers that the existing ex post mechanism foreseen by the Spanish Law adequately ensures compliance with the unbundling rules.

3. Composition of the board

Article 9(1)(d) Electricity Directive prohibits the same person to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system.

The Commission agrees with CNE that the situation of the member of the board of Red Eléctrica Corporación who is also member of the board of the electricity generation and supply company "Abengoa Solar, S.A" is not in compliance with Article 9(1)(d) Electricity Directive and action is required to remedy the situation. The Commission has taken note of the fact that the above mentioned member of the board as well as Red Eléctrica de España

⁶ Royal Decree Law 13/2012 amends accordingly the additional provision 11.3.1 of Hydrocarbons Law 34/1998, BOE N°78, Pages 26917-26919.

have declared that the above incompatibility will be solved within 2 months with a view to complying with Article 9(1)(d) Electricity Directive.

4. Conclusion

Pursuant to Article 3(2) Electricity Regulation, CNE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Red Eléctrica de España, 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-a-vis national regulatory authorities on any other notified draft measures concerning certification or vis-a-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. CNE 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