



Brussels, 5.3.2015
C(2015) 1547 final

COMMISSION OPINION

of 5.3.2015

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Austria - Certification of Eneco Valcanale S.r.l.**

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I. PROCEDURE

On 9 January 2015 the Commission received a notification from the national regulatory authority in Austria, E-Control, in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of a Transmission System Operator (TSO) for electricity, namely of Eneco Valcanale S.r.l. (hereafter, "Valcanale").

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 their compatibility with Article 10(2) and Article 9 of Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DECISION

Valcanale is an electricity TSO that since November 2011 operates a small interconnector between Arnoldstein and Tarvisio on the Austrian-Italian border. The 132 kV cable is 12 kilometer long and has a capacity of around 160 MVA.

In November 2010 Valcanale received an exemption from Article 6(6)(a) and (b) Regulation (EC) No 1228/2003, the Second Energy Package Electricity Regulation, with regard to the use of congestion rents. Valcanale did not receive an exemption from the rules on capacity allocation or third party access.³

In October 2014 Valcanale applied to E-Control for an exemption from unbundling according to Article 17(1) of the Electricity Regulation (Third Energy Package). From the notified draft certification decision, it appears that E-Control has interpreted this application as an application for certification under the ownership unbundling model and has dealt with it accordingly.

E-control concludes in its draft decision that even though Valcanale does not comply with the ownership unbundling model, given that it is a vertically integrated undertaking, it is deemed to be certified for the period laid down in the exemption decision as an ownership unbundled TSO. E-Control submitted its draft decision to the Commission requesting an opinion.

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 See https://ec.europa.eu/energy/sites/ener/files/documents/2010_arnoldstein_travisio_decision_de.pdf

III. COMMENTS

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

1. APPLICABILITY OF THE UNBUNDLING RULES IN VIEW OF THE EXEMPTION

In its draft decision, E-control comes to the conclusion that Valcanale is a TSO and may be deemed to be certified as compliant with the ownership unbundling rules on the basis of the fact that it has received an exemption decision under the Second Package which continues to apply under the Third Package and in view of the fact that the ITO and ISO model may not be applied as the TSO did not exist and was not part of a vertically integrated undertaking before 3 September 2009. E-Control intends to make its decision conditional upon the fulfilment of the criterion that the capacity of the interconnector is marketed by third parties and in an independent manner.

The Commission first of all agrees with the fact that the cable operated by Valcanale is a transmission system in the sense of the Electricity Directive. The Commission also concurs with E-Control that the fact that Valcanale holds an exemption under Regulation (EC) No 1228/2003 is of relevance for the assessment of the applicability of the unbundling rules in this case and the compliance with these rules. Recital (23) of the Electricity Regulation reads:

"Investments in major new infrastructure should be promoted strongly while ensuring the proper functioning of the internal market in electricity.

(...)

Moreover, given the exceptional risk profile of constructing those exempt major infrastructure projects, undertakings with supply and production interests should be able to benefit from temporary derogation from the full unbundling rules for the projects concerned. Exemptions granted under Regulation (EC) 1228/2003 continue to apply until the scheduled expiry date as decided in the granted exemption decision."⁴

In its Opinion related to the certification of the Nabucco Gas Pipeline GmbH, the Commission underlined the following in relation to the applicability of the unbundling rules for exempted infrastructure:

"The Commission notes that this [fact that exemptions shall continue to apply] does not mean that exempted projects under Article 22 of Directive 2003/55/EC are not to be subject to any unbundling rules at all. Certain unbundling rules still have to be complied with, in particular the rules on legal and functional unbundling, as derived from Directive 2003/55/EC [Second Package] and any other relevant rules, as specified in the applicable exemption decisions.

Furthermore the Commission considers that, where infrastructure has not received a full exemption under Article 22 of Directive 2003/55/EC, the unbundling rules of the Directive 2009/73/EC are in principle to be complied with as regards the non-exempted part of the capacity, unless this is not possible without undermining the exemption obtained under Article 22 of Directive 2003/55/EC. Whether this is the case is to be subject to a case-by-case analysis, which needs, in particular, to focus on

⁴ Emphasis added.

whether it is ensured that the non-exempted capacity is marketed independently from any production or supply interests of the shareholders of the pipeline.”⁵

The Commission hence takes the view that in all cases of transmission systems subject to an exemption from certain regulatory rules an in-depth assessment is necessary to ensure that the right balance is struck between the objective of protecting the rights that come with that exemption on the one hand and the objective of ensuring competition through fair and non-discriminatory access to the network on the other. In essence, this means that the unbundling framework is to be applied in so far as this is not incompatible with the granted exemption. In case it is concluded that the application of ownership unbundling would undermine the exemption, a specific unbundling framework (including for example, ISO- or ITO-related rules)⁶ may be considered and applied if that is the most appropriate way to ensure the above-mentioned two objectives. The application of such a specific framework to exempted infrastructure is not precluded.

The Commission notes that in the present case such an in-depth assessment has not sufficiently been carried out by E-Control in its draft decision and recommends E-Control not to proceed with the final certification of Valcanale until it has ascertained that the independent network operation is ensured. In such assessment the Commission retains the following elements of particular relevance.

First, it needs to be underlined that Valcanale's exemption does not concern third party access. This means that the regular capacity allocation framework is in principle applicable to the full capacity of the cable operated by Valcanale to the extent that such application does not affect the rights granted by the exemption. The exemption should therefore be regarded as a partial exemption only in the sense that it does not concern the capacities of the cable but merely the rules related to the congestion rents the capacities yield after they have been allocated in accordance with the rules of the Third Energy Package. It is the central aim of the unbundling rules to ensure that capacities are calculated and allocated in a non-discriminatory manner. In its draft decision E-Control underlines the important fact that the capacities are indeed allocated independently and without the possibility for Valcanale, as a vertically integrated undertaking, to abuse its potential conflict of interest as a generator. This conclusion is based on the fact that the full capacities of Valcanale are attributed to the market coupling mechanism through the Austrian and Italian certified TSO APG and TERNA. As can be seen by the possibility for Member States to allow existing vertically integrated undertakings to make use of the ISO model, allocation of capacities by other certified unbundled TSOs can in principle be a way to achieve non-discriminatory capacity allocation in cases where the full application of the ownership unbundling model is not possible in view of an existing exemption decision pre-dating Directive 2009/72/EC. This is the approach taken by E-Control, which makes the certification decision subject to the condition that the allocation of capacities is done in a non-discriminatory way by third parties. In order to ensure that those third parties are not themselves subject to discriminatory incentives in capacity allocation, the final decision should take into account that only the capacity allocation by unbundled third parties can provide the added security that is sought by this condition. The final decision should also assess whether the independent calculation of capacities is ensured.

Secondly, the assessment of E-Control in the final decision needs to take into account the nature of Valcanale's generation and supply interests. In its draft decision, E-Control suffices

⁵ https://ec.europa.eu/energy/sites/ener/files/documents/2012_045_at_en.pdf

⁶ For such a specific unbundling regime in the context of exemptions, see the Commission exemption decision for the Trans-Adriatic Pipeline (TAP) which was exempted under the Third Gas Directive and whereby the ITO-model was considered applicable. https://ec.europa.eu/energy/sites/ener/files/documents/2013_tap_decision_en.pdf

by stating that these are of such a nature that no advantages can be derived for these interests, but lacks the facts and assessment to underpin this statement. The Commission notes that a useful starting point for such assessment can be the relation of the total interconnection capacities between Austria and Italy on one hand and the limited capacities concerned by the present decision on the other hand. Furthermore, a description of the importance of Valcanale's generation and supply interests relative to those of competitors, e.g. on the basis of market shares or pivotal supplier data can be of relevance as well.

Thirdly, the Commission notes that E-Control limits its assessment to non-discriminatory network access. However, the independent network operation that the unbundling rules seek to ensure also entails other TSO-activities, in particular the day-to-day operation of the network, the maintenance of the network, the development of the network and the availability of adequate means for the TSO to carry out its tasks. Also for these elements of grid operation a balance should be struck between the applicability of the unbundling rules and the protection of the right for Valcanale as granted to it through the exemption to decide itself on the destination of the congestion rents, which has to be fully maintained. E-Control should ensure through its certification that these core TSO tasks are carried out independently.

The Commission expects E-Control, on the basis of the in-depth assessment, to develop and apply a specific unbundling model to Valcanale proportionate to the identified concerns and taking account of the need not to undermine the existing exemption.

IV. CONCLUSION

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

Done at Brussels, 5.3.2015

For the Commission
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Member of the Commission