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**COMMISSION OPINION**

**of 20.9.2019**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) Directive  
2009/72/EC - Germany - Certification of Baltic Cable AB as transmission system  
operator**

(ONLY THE GERMAN TEXT IS AUTHENTIC)

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## I. PROCEDURE

On 29 July 2019 the Commission received a notification from the German national regulatory authority (hereafter, 'BNetzA') of a draft decision on the certification of Baltic Cable AB (hereafter, 'Baltic Cable') as an independent transmission operator (hereafter, 'TTO').

Pursuant to Article 10 Directive 2009/72/EC<sup>1</sup> (hereafter "Electricity Directive") and Article 3 Regulation (EC) No 714/2009<sup>2</sup> (hereafter "Electricity Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority.

Since March 2012, the deadline for the implementation of unbundling<sup>3</sup>, Bundesnetzagentur has repeatedly pointed Baltic Cable to its default in not submitting an application for unbundling. On 23 January 2014, the Commission had already adopted an opinion on the certification of Baltic Cable.<sup>4</sup> In the previous procedure, BNetzA had *ex officio* opened a certification procedure and, as Baltic Cable could not demonstrate meeting the requirements of any unbundling model, had notified a draft negative certification decision. The Commission agreed with BNetzA that the Baltic cable high voltage line connecting the Swedish and the German transmission networks needed to be operated by a properly unbundled transmission system operator in accordance with one of the unbundling models laid down in the Electricity Directive and that Baltic Cable at that time could not be certified as transmission system operator as it had not demonstrated compliance with one of the unbundling models.

Baltic Cable appealed against the negative national certification decision. On 7 March 2017, the German Federal Court of Justice established that Baltic Cable was to be regarded as a transmission system operator and thus required certification under one of the unbundling models, rejecting the appeal by Baltic Cable against the negative certification decision.<sup>5</sup>

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<sup>1</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal electricity market and repealing Directive 2003/54/EC, OJ L 211/55 of 14.8.2009.

<sup>2</sup> 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.

<sup>3</sup> Cf. Article 9 paragraph 1 of the Electricity Directive

<sup>4</sup> Commission's Opinion on BnetzA's 's draft certification decision for Baltic Cable AB C(2014) 424 final of 23 January 2014, [https://ec.europa.eu/energy/sites/ener/files/documents/2013\\_091\\_de\\_de.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2013_091_de_de.pdf).

<sup>5</sup> Decision of 7 March 2017 in case EnVR 21/16.

## **II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION**

### **1. OPERATIVE PART OF THE DECISION**

The draft decision certifies Baltic Cable pursuant to Article 4a Energiewirtschaftsgesetz (the national law on the Energy Economy, hereafter “EnWG”), the equivalent of Article 10 of the Electricity Directive under German national law. Certification is made subject to a number of conditions, requiring Baltic Cable to fully meet the requirements for certification within a given deadline (within three months after adoption of the final certification decision for the majority of the imposed conditions). BNetzA announces the possibility of administrative penalty payments of EUR 500 000 in case those conditions are not respected.

### **2. THE VERTICALLY INTEGRATED UNDERTAKING**

The interconnector operated by Baltic Cable connects the Swedish and the German onshore transmission systems. It became operational in 1994 and has a nominal capacity of 600MW operating at 450 kV. Baltic Cable is owned by Statkraft Asset Holding AS, a 100% daughter company of Statkraft Energie AS (hereafter “Statkraft”), a vertically integrated undertaking with activities in the field of generation, transmission and supply of electricity which is in turn owned by the Kingdom of Norway through its Ministry of Finance. Until 6 December 2018, Statkraft directly owned Baltic Cable. The interconnector capacity is sold on the EPEX and Nordpoolspot power exchanges as part of day-ahead market coupling. Baltic Cable currently has five employees and three additional, currently vacant, posts.

### **3. QUALIFICATION AS A TRANSMISSION SYSTEM OPERATOR**

As already established in the first opinion of 23 January 2014, the Commission agrees that the operation of a high-voltage interconnector between Germany and Sweden is a transmission activity and Baltic Cable is thus to be qualified as a transmission system operator and would have needed to be fully unbundled as of March 2012. This was also confirmed by the highest ordinary court in Germany in March 2017.

### **4. CONDITIONS ATTACHED TO THE CERTIFICATION**

BNetzA decides in the draft decision to grant the certification under the ITO model subject to the following conditions:

- (a) Baltic Cable shall within three months of adoption of the final certification decision provide for proof of the following:
  - (1) Baltic Cable shall be responsible for the balancing group, scheduling and market communication, tasks which are currently still being fulfilled by Statkraft;
  - (2) Baltic Cable shall fill the three vacant positions with qualified employees;
  - (3) Baltic Cable shall change the Rules of procedure for the Management of Baltic Cable so that (i) changes to the rules of procedure may only be introduced by the management of Baltic Cable rather than by the supervisory body, (ii) the management of Baltic Cable is exclusively competent to decide on the use of revenue from congestion rents without requiring approval of the supervisory board, (iii) management does not require approval by the supervisory board for the creation of joint

ventures within the meaning of Paragraph 10(1) second sentence point 5 EnWG, and (iv) changes to the Rules of procedure for the management shall be notified to BNetzA.

- (b) In case further financing is required after the current loan from Statkraft runs out, Baltic Cable needs to request at least three alternative market offers and demonstrate to BNetzA that the economically most beneficial offer was chosen.
- (c) In case Baltic Cable does not meet one of the conditions set out above, BNetzA announces the possibility of imposing an administrative penalty payment of EUR 500 000 per violation.

### **III. COMMENTS**

On the basis of the notification and the additional information provided by BNetzA the Commission has the following comments on the draft certification decision.

#### **1. TIMELINE AND POSSIBLE FINES**

Already in 2012, BNetzA informed Baltic Cable about the need to respect the unbundling requirements. In January 2014, the Commission opinion confirmed the assessment of BNetzA that unbundling requirements needed to apply and Baltic Cable did not meet those requirements. In March 2017, the highest ordinary court in Germany confirmed, after previous confirmation by a lower court, that BNetzA and Commission were correct in requesting unbundling. In the meantime, Baltic Cable did not respect the unbundling rules. In fact, the description of the procedure in the draft certification decision does not lead to the conclusion that Baltic Cable treated the need to respect its legal obligations with adequate urgency. To the contrary, after BNetzA had accepted to receive required information in different batches, Baltic Cable did not meet the agreed deadlines. In fact, the requirements for unbundling are still evidently not met, as some of the conditions to be fulfilled within three months after the final certification decision aim at compliance with key elements of the unbundling rules.

It is highly regrettable that legally compliant unbundling still has not been achieved. Not having achieved compliant unbundling more than two years after the highest court ruling and more than seven years after the legal deadline appears excessive. Against this background, the Commission welcomes BNetzA's statement in the draft decision regarding possible administrative penalty payments. In addition, the Commission would like to highlight the possibility for BNetzA to issue fines as regards the delays which have already occurred.

Regarding the level of penalties, it is important to note that Baltic Cable is currently still operated as part of a vertically integrated undertaking which also controls one of the biggest electricity generation and supply undertakings of the region, in a clear violation of the objective and purpose of the unbundling rules. It is thus important to highlight that according to Article 37 (4) lit. d) Electricity Directive, fines for non-compliance with the Electricity Directive can reach up to 10 % of the annual turnover of the vertically integrated undertaking, thus of the Statkraft turnover. Taking further account of the considerable value of the congestion rents which have

been attributed to Baltic Cable over the seven year period during which the illegal unbundling situation persisted,<sup>6</sup> the announced administrative penalty payments of EUR 500 000 per violation seem comparatively low. In fact, it appears plausible that Baltic Cable could pay one or several penalties of EUR 500 000 and maintain a profitable business case. Thus, should BNetzA decide not to impose fines for past violations and delays, the Commission would advise to consider increasing the announced penalties immediately or at the very least for any subsequent violations and delays.

## 2. THIRD COUNTRY CERTIFICATION

Article 11 Electricity Directive determines that where certification is requested by a transmission system owner or transmission system operator that is controlled by a person or persons from a third country or third countries, the regulatory authority shall refuse certification if it has not been demonstrated that the entity concerned complies with the applicable unbundling requirements (Article 11(3)(a)), and/or that granting the certification would not put at risk the security of supply of the Member State and the EU (Article 11(3)(b)).

In the present case, Baltic Cable is ultimately owned and controlled by Statkraft which is owned by the Kingdom of Norway. Norway is a Member of the European Economic Area (EEA). Pursuant to the EEA Agreement, Annex IV (22), the Articles 11 (3) b), 5(b) and (7) Electricity Directive, which would require the regulatory authority and the Commission to assess whether the control by a person or persons from a third country or third countries will put at risk the security of energy supply to the EU, shall not apply to the EFTA states. However, Decision No 93/2017 of the EEA Joint Committee of 5 May 2017 which would render this Annex applicable, has still not entered into force pursuant to Article 103 EEA Agreement. While Decision No 93/2017 would result in the application of the obligations of the Electricity Directive in Norway but this decision has not yet entered into force, one needs to interpret *e contrario* to Decision No 93/2017 that for the time being, currently all provisions of Article 11 Electricity Directive do apply to ownership by undertakings based in the Kingdom of Norway.

The draft decision does not provide for an assessment whether Baltic Cable is controlled by a person or persons from third countries as set out in Article 11 (1) of the Electricity Directive and whether this would put at risk the security of energy supply to the EU. Unless Decision No 93/2017 has entered into force at the time of adoption of a certification decision, such an assessment would however be required and the reasoning for concluding that third country control exists or does not exist would need to be included in the draft certification decision. The need for such an assessment is independent of any concrete risk for security of supply which would need to have been previously identified. Whether or not such a risk exists can only be established in the course of the assessment. The Commission understands that, under German law, such assessment would also require the involvement of another

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<sup>6</sup> According to the BNetzA report on revenues from cross-border capacity allocation from 1 July 2017 to 30 June 2018, Baltic Cable generated congestion revenues of EUR 10.83 million in this year alone, see [https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Energie/Unternehmen\\_Institutionen/Versorgungssicherheit/ErloeseEngpassmanagement/Bericht6-5EPMLL2018.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Energie/Unternehmen_Institutionen/Versorgungssicherheit/ErloeseEngpassmanagement/Bericht6-5EPMLL2018.pdf?__blob=publicationFile&v=2) page 2.

government entity, the Bundesministerium für Wirtschaft und Energie. Thus, one cannot conclude from the absence of any express statement to this effect that BNetzA has come to the conclusion that there is no risk for security of supply.

In view of the above facts, the Commission takes the view that an assessment under Article 11 has to be carried out by BNetzA before granting certification. The revised draft decision including such assessment under Article 11 shall be notified to the Commission in accordance with Article 10(6) Electricity Directive. Such a notification would however no longer be required if, at the time of adopting the revised certification decision, Decision No 93/2017 has entered into force and Article 11 Electricity Directive thus no longer applies to the Kingdom of Norway.

In view of the above-described long delays which have occurred already, it is important that such a new notification, if still required, does not result in longer possible deadlines for Baltic Cable to finally meet the unbundling requirements. In case BNetzA decides to give additional time as set out in the draft decision for some elements of the unbundling requirements, those deadlines should not be prolonged compared to the planning set out in the draft decision. Thus, a new draft decision should possibly already include an assessment by BNetzA whether the unbundling requirements are now met and, if this is not the case, could be accompanied by the imposition of penalties.

### **3. USE OF CONGESTION RENTS**

The draft certification relies on the possibility for Baltic Cable to make use of congestion rents particularly for maintenance, salaries and equipment cost in order to confirm that sufficient means for the operation of the interconnector are at the disposal of Baltic Cable. As BNetzA is aware, the use of congestion rents is currently subject of a reference to the European Court of Justice submitted by a Swedish Court (case C-454/18). The underlying procedure in Sweden is based on the position of the Swedish Regulatory Authority Energimarknadsinspektionen that the use of congestion rents by Baltic Cable is at least partly incompatible with the requirements under Article 16 (6) Electricity Regulation. This position of Energimarknadsinspektionen was shared by BNetzA in a separate publication.<sup>7</sup> Against this background, the Commission invites BNetzA to closely follow the Court procedure and revise the certification if required.

### **4. SERVICE PROVISION BY STATKRAFT**

The Commission welcomes the fact that BNetzA has made the certification subject to certain conditions.

Notably, the Commission agrees that the balancing group responsibility should be fulfilled by the transmission system operator Baltic Cable and may not be fulfilled by other parts of the vertically integrated undertaking. Article 17(1)(c) Electricity Directive provides for specific rules on the contracting of services between other parts of the vertically integrated undertaking and the ITO. As the ITO should be autonomous and not dependent on other parts of the vertically integrated undertaking, the contracting of services to the ITO by any other part of the vertically integrated undertaking is prohibited by the Electricity Directive. In its opinion on

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<sup>7</sup> Report on revenues from cross-border capacity allocation from 1 July 2017 to 30 June 2018, p.3.

French gas TSO GRTgaz<sup>8</sup>, the Commission considered that in view of the general prohibition of services provided to the ITO by other parts of the vertically integrated undertaking, 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 vertically integrated undertaking 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 vertically integrated undertaking and the ITO occur at arm's length in order to avoid cross subsidisation.

It is thus regrettable that the transfer of the core function of managing the balancing group to the ITO has not taken place yet, contrary to the legal requirements. As regards possible penalties, reference is made to Section 1 above. Irrespective of whether or not penalties for past behaviour are seen as appropriate, BNetzA should set a sufficiently short deadline for the implementation of this obligation, as is proposed in the draft decision.

Finally, the Commission would like to highlight that BNetzA should assess whether the unbundling requirements are respected in their entirety, and not just in their majority. Thus, where doubts seem to exist such as with regard to the use of adequate information technology which is, according to BNetzA “largely” in line with the unbundling requirements (p. 29 of the draft certification), the Commission invites BNetzA to further assess the issue.

## **5. INDEPENDENCE OF MANAGEMENT AND EFFECTIVE DECISION-MAKING**

The Commission agrees with BNetzA that the independence of management of Baltic Cable needs to cover the use of congestion rents within the limits allowed by law as well as the possibility to change the rules of procedure for the management of Baltic Cable.

The requirement to have three additional and adequately qualified employees also appears to meet the minimum standards for an independent supervision of the activities of transmission system operation. The Commission agrees that for system operators which operate a single cable, a smaller number of employees and a broader range of delegation to other transmission system operators can be deemed justifiable on grounds of efficiency.

This being said, as has consistently been underlined by the Commission in previous opinions, the delegation of tasks to other entities cannot mean unbundling requirements are effectively bypassed. Thus, delegation is generally acceptable only in cases where the entity to which tasks are delegated is subject to at least the same standard of unbundling as the delegating transmission system operator.<sup>9</sup> TenneT TSO

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<sup>8</sup> Commission Opinion of 25.11.2011 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - France - Certification of GRTgaz

<sup>9</sup> See e.g. Commission Opinion C(2016) 701 final of 2 February 2016 on the certification of Gas Networks Ireland (UK), p. 4, [https://ec.europa.eu/energy/sites/ener/files/documents/2015\\_124\\_125\\_gni\\_uk\\_ni\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2015_124_125_gni_uk_ni_en.pdf).

GmbH is certified as an ownership unbundled transmission system operator, and thus subject to arguably stricter unbundling requirements than those applicable to Baltic Cable. The draft certification however provides no clear description of the unbundling status of E.On Sverige AB and the exact range of services E.On Sverige shall provide. The Commission asks BNetzA to ensure that any delegation of system operation functions can only occur to entities respecting at least equally strong unbundling requirements.

According to Article 19(3) *juncto* Article 19(8) Electricity Directive, the majority of the management cannot have exercised any professional position or have had any responsibility or business relationship, directly or indirectly, with any part of the vertically integrated undertaking, or with its controlling shareholders other than the transmission system operator, for a period of three years before their appointment.

In its draft decision, BNetzA makes reference to the German legislation transposing the Electricity Directive, the EnWG, according to which the independence requirement referred to above should not apply to members of the management of the ITO who were appointed before 3 March 2012. The Commission questions whether the German transposing legislation is in compliance with the Electricity Directive on this point and underlines that it might in certain cases undermine the effective independence of the ITO. The Commission therefore invites Bundesnetzagentur to reassess in its final certification decision whether the majority of the management of Baltic Cable in fact fulfils the independence criteria laid down in Article 19(3) Electricity Directive in full, even if their appointment predates 3 March 2012.

#### **IV. CONCLUSION**

Pursuant to Article 3(2) Electricity Regulation, BNetzA shall take utmost account of the above comments of the Commission and, unless Decision No 93/2017 has entered into force prior to adoption of a revised draft by Bundesnetzagentur, notify a revised draft certification.

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. BNetzA 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, 20.9.2019

*For the Commission*  
*Maroš ŠEFČOVIČ*  
*Vice-President*

