



Brussels, **XXX**
[...] (2014) **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 - Slovenia - Certification of ELES, d.o.o.**

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I. PROCEDURE

On 23 October 2014, the Commission received a notification from the Slovenian regulator for energy, Agencija za energijo (hereafter, "the Energy Agency"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of "ELES, d.o.o." (hereafter, "ELES") as a Transmission System Operator (TSO) for electricity.

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 the Electricity Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

ELES is a transmission system operator for electricity in Slovenia which owns and operates the transmission network in the Republic of Slovenia. The network is approximately 2 843 kilometres long.

ELES was established in 1990 by the Republic of Slovenia which until this day is its only shareholder. In contrast to other state-owned enterprises in Slovenia, the rights and obligations connected to the state's shareholding are not administered by the Slovenian Sovereign Holding (hereafter, "SSH"), but by the Government.

In order to comply with the applicable rules on unbundling of transmission system operators, ELES has chosen the Ownership Unbundling model, referred to in Article 9(1) Electricity Directive. In particular, ELES intends to make use of the possibility of separation within the state as provided for in Article 9(6) Electricity Directive.

The Energy Agency has come to the preliminary conclusion that ELES complies with the requirements of the ownership unbundling model as laid down in the Slovenian legislation transposing the Electricity Directive. The Energy Agency has submitted its draft 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 draft decision.

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.

1. Separation within the State

Article 9(6) Electricity Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided that the respective activities are exercised by separate public entities. For the purpose of the rules on ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and should be able to control generation and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the rules on ownership unbundling. The public bodies concerned must be truly separate.

In the preliminary decision as notified to the Commission by the Energy Agency, the assessment of the true separation between the two bodies concerned does not go beyond the mere mentioning of the fact that the State's shareholding in ELES is governed by the Government whereas the State's participations in gas and electricity supply and generation companies are administered by the SSH. The Energy Agency does not assess who in the Government is responsible for ELES and what this person's possible powers with regard to SSH are. Similarly, the role of the Prime Minister is not assessed and hence it does not become clear whether he would be able to exercise influence over both the TSO and the supply and/or generation undertakings.

Based on a request for additional information, the Energy Agency provided some more details about the organization of the separation of the public bodies. From this additional information it has become clear that the powers of the Government related to ELES consist in its appointment of the General Assembly which is i.a. responsible for the appointment of the Supervisory Board. In practice, this task is carried out by the Prime Minister or by the Government. With regard to SSH, it is the National Parliament that appoints its Supervisory Board. In addition, the Government is entrusted with the duties and powers of the General Assembly of SSH. On this basis, it can be concluded that the General Assemblies of both entities are appointed by the Government. The Energy Agency explains in its additional information that with regard to the SSH's General Assembly the powers of the Government as a shareholder are carried out by the Minister of Finance, whereas the Minister of Infrastructure carries out these tasks with regard to ELES.

The Commission agrees with the Energy Agency that in principle assigning the tasks to different Ministries can prove a viable way of implementing Article 9(6) Electricity Directive. However, in the present case the information provided in the preliminary decision and the additional information does not provide the necessary degree of detail to conclude that the degree of separation indeed ensures a sufficient degree of distance between the two public bodies and from the Prime Minister, and is in fact laid down in legislation and applied in practice. The Commission takes the view that an in-depth assessment of the national legislation governing the organization of the government should be carried out to ascertain that principles such as exclusive ministerial responsibility for the allocated portfolios and the prohibition for the Prime Minister to interfere, e.g. by giving direct instructions to the responsible Ministers regarding individual shareholdings, are therein enshrined and applied in practice in the present case.

The Commission is of the opinion that certification cannot be granted before such legal and practical assessment is carried out by the Energy Agency and incorporated in the final decision.

2. ELES' share in Talum d.o.o.

The core principle of the Ownership Unbundling model is that the TSO or its owners are not involved in commercial activities related to the sale and purchase of the energy they transport. To that end, Article 9(1)(b) Electricity Directive requires that the same person or persons are not entitled directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an *undertaking* performing any of the functions of production or supply.³

Article 44(2) Electricity Directive qualifies this rule, by noting that:

'For the purposes of Article 9(1)(b), the notion 'undertaking performing any of the functions of generation or supply' shall not include final customers who perform any of the functions of generation and/or supply of electricity, either directly or via undertakings over which they exercise control, either individually or jointly, provided that the final customers including their shares of the electricity produced in controlled undertakings are, on an annual average, net consumers of electricity and provided that the economic value of the electricity they sell to third parties is insignificant in proportion to their other business operations'.

In other words, whenever an electricity TSO exercises rights in an undertaking that is a final customer but that is also active in the generation or supply of electricity then this is not necessarily incompliant with Article 9(1)(b) provided that certain criteria are fulfilled.

In its preliminary decision, the Energy Agency puts forward a list of undertakings in which ELES is a shareholder. From the list it appears that ELES holds a 83.44% share in the company Talum d.o.o. (hereafter, 'Talum'), a company based in Kidricevo and active primarily in the production of aluminium. The Energy Agency explains that Talum is a large user of electricity, but that it has also 'registered the activities' of electricity production and trading. The Energy Agency argues that Talum qualifies for the exception of Article 44(2) Electricity Directive, because it is a net consumer of electricity and the generation and supply activities of Talum and its daughter companies are non-existent or insignificant. The Energy Agency uses consumption figures of 2013 from Talum's annual report that demonstrate that ~99.97% of the electricity purchased by Talum (from different suppliers) was consumed by Talum's daughter companies; in electricity terms a mere ~175,000 kWh sold on for a total of EUR ~24,000 out of a total of 1.2 TWh purchased for EUR ~63.3 milion. The Energy Agency argues therefore that both conditions are complied with.

The Commission agrees with the Energy Agency that Talum's role as an electricity consumer clearly outweighs its role as a supplier. Moreover, the volumes that are sold on to non-related companies are evidently insignificant compared to its business agreement. The Commission therefore agrees with the Energy Agency that Article 44(2) Electricity Directive may be applicable in the present case. The Commission however considers it necessary for the Energy Agency to regularly monitor the situation with regard to Talum's activities on the electricity market. The Commission notes that the risk related to a TSO being the main shareholder in a company that is one of its bigger clients and a large user of its network brings with it the potential incentive for the TSO to treat this network user more favourably than others, thus jeopardizing independent network operation. Even if the Electricity Directive explicitly allows for such situation, it nevertheless remains crucial that non-discriminatory access, maintenance and development of the network are safeguarded. The Commission therefore recommends that the Republic of Slovenia, being, as described under point 1 of this Chapter,

³ Italics EC

the owner of ELES as well as the owner of the SSH, takes into consideration the possibility of transferring ELES's shares in Talum to be administered outside of the Ministry of Infrastructure.

IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, the Energy Agency shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of ELES, 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.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. The Energy Agency 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