



EUROPEAN COMMISSION

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COMMISSION OPINION

of 19.1.2012

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

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I. PROCEDURE

On 22 November 2011, the Commission received a notification from the Austrian national regulatory authority, Energie-Control Austria (hereafter, "E-Control"), 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 "Austrian Power Grid AG" (hereafter, "APG"), on the basis of the application of APG of 2 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

Background

APG is the biggest transmission system operator for electricity in Austria. It owns and operates approximately 95 percent of the Austrian high voltage grid (6,713 km) and is the control area manager. In 2010 it employed 434 employees and transported 37,693 GWh electricity to both Austrian and foreign customers. In order to comply with the applicable rules on unbundling of transmission system operators, APG has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Electricity Directive. This choice is available to APG under the Austrian legislation transposing the Electricity Directive.

Article 9 Electricity Directive 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).

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.

E-Control has analysed whether and to what extent APG complies with the unbundling rules of the ITO model as laid down in the Austrian legislation transposing the Electricity Directive. In its draft decision, E-Control has identified a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. The draft decision of E-Control is hence a positive certification decision which is subject to the compliance with certain measures to be met by specific deadlines. Compliance with these measures is formulated as a condition of the positive decision. Therefore the non-compliance with the conditions set in the draft decision would lead to the annulment of the certification decision. The compliance of APG with the conditions laid down in II. g, h of the draft decision has to be checked by E-Control before issuing its final decision.

The draft certification decision of APG is issued subject to the following conditions:

- (a) Austrian Power Grid AG changes all of its external appearance, PR activities and branding in all regards by 31.12.2012 at the latest, in order to rule out the prospect of confusion with the vertically integrated undertaking, Verbund AG, and with undertakings controlled by Verbund AG.
- (b) The 'Agreement between Austrian Power Grid AG and Verbund Management Service GmbH on the purchase of VMS services for the APG 'Unbundling' project' (Annex 9 to the application) will expire on 31.3.2013 and Austrian Power Grid AG will not renew the Agreement.
- (c) With effect from 31.3.2012, Austrian Power Grid AG will not obtain from Verbund Group any of the services agreed under point I.1 of the 'Agreement between *Austrian Power Grid AG* and the *Verbund Management Service GmbH* on the purchase of VMS services for the APG 'Unbundling' project' (Annex 9 to the application).
- (d) With effect from 31.3.2013, Austrian Power Grid AG will not obtain from Verbund Group any of the services agreed under point I.2 of the 'Agreement between *Austrian Power Grid AG* and *Verbund Management Service GmbH* on the sale of VMS services for the APG 'Unbundling' project' (Annex 9 to the application).
- (e) Austrian Power Grid AG will not obtain any services from Verbund Umwelttechnik GmbH with effect from 3.3.2012, unless Verbund AG relinquishes its control of Verbund Umwelttechnik GmbH.
- (f) Austrian Power Grid AG will not obtain any services from *Pöyry Energy GmbH* with effect from 3.3.2012, unless Verbund AG relinquishes its control of *Pöyry Energy GmbH*.
- (g) Austrian Power Grid AG will have effective decision-making rights with effect from 1.1.12 at the latest and will not be subject to instructions or regulations from Verbund AG with effect from that date.
- (h) Austrian Power Grid AG will not participate in the Risk Management Committee of Verbund AG with effect from 1.1.2012.

- (i) Austrian Power Grid AG will ensure, by means of a contract with the Board members to be appointed, compliance with the independence provisions pursuant to Section 30(1) EIWOG 2010.
- (j) Austrian Power Grid AG will ensure, by means of a contract with the persons to be appointed as directors of the maintenance and development divisions, compliance with the independence provisions pursuant to Section 30(6) EIWOG 2010.
- (k) Austrian Power Grid AG will ensure with effect from 3.3.2012 compliance with the independence provisions pursuant to Section 31(2) EIWOG 2010 in respect of members of the supervisory board.
- (l) The deadlines laid down in operative points II.a to II.k may be exceeded by six months in exceptional cases, if the regulatory authority finds that the delay is attributable to circumstances beyond the control over Austrian Power Grid AG.

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 E-Control 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. Contracts for 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, 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 E-Control 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 E-Control 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, insurance and pensioner management services, telecom infrastructure services and technical and planning services should be assessed by E-Control in its final certification decision in accordance with the principles referred to above. This list is not exhaustive. In case E-Control comes to the conclusion that the services are strictly necessary and currently cannot be provided by other service providers not related to the VIU, the possibility of transferring the ownership of the service company to APG or third parties which are not part of the VIU should be considered.

3. Separation of IT systems

Article 17(5) Electricity Directive prescribes that the ITO shall not share, amongst others, IT systems or equipment with any part of the VIU. From the draft decision it is unclear whether the separation of IT systems will be implemented by 31 March 2012 or by 31 March 2013. The Commission is generally concerned about the potential conflicts of interests and abuses related to the use of commercially sensitive data that could take place as long as the IT systems have not been separated. Concerning the duration of the period which is proposed to bring the IT systems in conformity with the requirement of the Directive, the Commission invites E-Control to reason in their decision why the IT systems of APG cannot be completely separated by an earlier date than by 31 March 2013 and how appropriate safeguard measures are put in place during the transitional period to ensure that no abuse can arise.

4. 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 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. According to Article 20(3) *juncto* 19(4) Electricity Directive, the members of the Supervisory Body of the ITO cannot have any other professional position or responsibility, interest or business relationship, directly or indirectly, with any other part of the vertically integrated undertaking. Furthermore according to Article 20(3) *juncto* 19(5) Electricity Directive the members of the Supervisory Body of the ITO cannot hold an interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated undertaking other than the ITO. In addition, their remuneration must not depend on activities or results of the vertically integrated undertaking other than those of the TSO.

The Supervisory Body of APG is composed of 12 members. Five of these members must comply with the strict rules on independence. From the draft decision of E-Control 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 E-Control to clarify its assessment on this point in the final certification decision. Four members of the supervisory board of APG are employee representatives for which § 31(2) of the Austrian Electricity Act foresees that they are considered *per legem* as independent members of the Supervisory Board, even if they are at the same time employee representatives in the Supervisory Board of the parent company of the TSO. In particular, it appears that [BUSINESS SECRET] who is a member of the Supervisory Board of APG is also a member of the Supervisory Board of the VIU Verbund AG. The Commission takes the view that [BUSINESS SECRET], on this basis, cannot be considered a member fulfilling the independence requirements of Article 20(3) Electricity Directive. The Commission invites E-Control to assess in the final certification

decision the independence of the members of the Supervisory Board in view of Article 20(3) Electricity Directive.

5. 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 APG, 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. E-Control 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 for such a request should be given.

Done at Brussels, 19.1.2012

For the Commission
Joaquín ALMUNIA
Vice-President

