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Brussels, **XXX**
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COMMISSION OPINION

of **XXX**

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

COMMISSION OPINION

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I. PROCEDURE

On 3 February 2012, 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 Vorarlberger Übertragungsnetz GmbH (hereafter "VÜN"), on the basis of the application of VÜN of 15 December 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 DECISION

Background

VÜN was founded on 5 December 2011 by Vorarlberger Energienetze GmbH (hereafter "VEN"). VEN is a network operator and owns the transmission and distribution grid in Vorarlberg. VEN is currently the sole shareholder in VÜN and intends to transfer 51% of its shares to the Land Vorarlberg in the first half of the year 2012. The Land Vorarlberg currently owns 100% of the shares in Vorarlberger Illwerke AG, which owns 97% of the shares of the Vorarlberger Kraftwerke AG, which in turn owns 100% of the shares in VEN. Vorarlberger Illwerke AG and Vorarlberger Kraftwerke AG are active in generation and supply of electricity. The ownership of the transmission grid shall be transferred to VÜN by 30 April 2012. As a consequence VÜN will become the smallest transmission system operator for electricity in Austria. Once the assets have been transferred, VÜN will own and operate approximately 0.5 percent of the Austrian high voltage grid (36 km) and will belong to the Austrian Power Grid (hereafter "APG") control block. APG as control area manager will be

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.

the single contact point for foreign transmission system operators concerning questions on the system operation of the VÜN grid.

VÜN has applied for certification in accordance with the ownership unbundling model. In particular VÜN intends to make use of the possibility provided for in Article 9(6) Electricity Directive to implement the Ownership Unbundling model by means of separate public bodies within the Land Vorarlberg. This choice is available to VÜN under the Austrian Electricity Act. E-Control has analysed whether and to what extent VÜN complies with the requirements of the ownership unbundling model, as laid down in the Austrian Electricity Act. In its preliminary 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 preliminary 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. Non-compliance with the conditions set in the preliminary decision would lead to the annulment of the certification decision.

The preliminary certification decision of VÜN has been issued subject to the following conditions:

- (a) by 30 June 2012 at the latest, VÜN will not be (indirectly) under the control of a company performing activities of generation or supply, and the majority of VÜN shares will not be held (indirectly) by companies carrying out such activities.
- (b) by 30 June 2012 at the latest, the members of the body authorized to represent VÜN are not also members of bodies authorized to represent companies carrying out activities of generation and supply, or companies that are controlled (indirectly) by companies carrying out such activities.
- (c) by 30 June 2012 at the latest, members of the government of the Land Vorarlberg, or their deputies, do not control at the same time VÜN and other companies performing activities of generation or supply, or companies that are controlled (indirectly) by companies carrying out such activities.
- (d) by 30 June 2012 at the latest, VÜN has acquired the ownership of the transmission network from VEN.

With these conditions E-Control submitted its preliminary decision to the Commission, requesting an opinion.

III. COMMENTS

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

1. Choice of the Ownership Unbundling model

The model chosen for unbundling in the present case is ownership unbundling, in particular, the specific option referred to in Article 9(6) Electricity Directive, where the transmission activities are legally unbundled from any production or supply activities in gas or electricity

exercised by the State and the different types of activities are under the responsibility and control of separate public bodies within the State.

2. Tasks of the transmission system operator

Under Article 9(1)(a) of the Electricity Directive, each undertaking which owns a transmission system is required to act as a transmission system operator, including carrying out all the tasks of a transmission system operator under Article 12 Electricity Directive. Compliance with ownership unbundling means that the undertaking which is the owner of the transmission system also acts as the transmission system operator, and is as a consequence responsible, among other things, for granting and managing third-party access on a non-discriminatory basis to system users, and for collecting access charges, congestion charges, and payments under the inter-TSO compensation mechanism. As regards investments, the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning. Decisions related to the operation, maintenance and development of the network must be made by the transmission system operator and the network company must have enough resources at its disposal to carry out its tasks under Article 12 of the Electricity Directive independently.

Based on the information received the Commission doubts whether VÜN will have enough resources at its disposal to carry out its tasks as a transmission system operator independently. According to the preliminary decision of E-Control VÜN intends to hire only five employees to carry out these tasks. Two engineers will be made responsible for co-ordinating the maintenance and development of the network, as well as the conclusion and monitoring of service contracts. One employee will be made responsible for commercial operations, and one legal expert and one secretary will be hired by VÜN as well. The Commission notes that for the performance of its tasks as a transmission system operator VÜN intends to rely to a significant extent on services provided by VEN and Vorarlberger Kraftwerke AG, which are both part of the vertically integrated undertaking active in electricity generation, supply and distribution. In particular, services related to the administration of the transmission system operator will be exercised by VEN or by Vorarlberger Kraftwerke AG through service contracts. Also, the control room and the employed staff of the control room will remain with VEN and will be contracted by VÜN to execute switching and surveillance of the grid.

The Commission considers that this situation, whereby core tasks of transmission system operation are outsourced to a vertically integrated undertaking, is not compatible with the ownership unbundling model. For VÜN to be considered as an ownership unbundled transmission system operator, the Commission considers that it should at least carry out the administration of the transmission system and the control room services itself.

3. No exercise of voting rights by VEN in VÜN

VEN is currently the sole shareholder in VÜN and intends to transfer 51% of its shares to the Land Vorarlberg in the first half of the year 2012. From the preliminary decision of E-Control it appears that VEN as part of a vertically integrated undertaking will keep 49% of the shares in VÜN. Article 9(1)(b)(ii) 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 generation or supply. In view of the requirement of Article 9(1)(b)(ii) Electricity Directive VEN cannot have the power to exercise any voting rights in VÜN. From the preliminary decision it follows that it is foreseen that the

Land Vorarlberg will receive 3.499 votes in VÜN. This implies that in general the remaining participation of VEN in VÜN will be purely passive and should have no voting rights attached. However, E-control explains in its preliminary decision that under § 39 (2) of the Austrian Limited Liability Companies Act requires that a shareholder of a private limited liability company needs to have at least one voting right. The Commission invites E-Control to ensure measures are in place which guarantee that the remaining voting right as a shareholder in VÜN is not directly or indirectly exercised by VEN. The fact that in the shareholder agreement it is foreseen that no decision of shareholders will require unanimity provides an additional safeguard that VEN will not be able to influence the outcome of voting in the general assembly of VÜN.

4. 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 and supply activities, provided however that the respective activities are exercised by separate public bodies. For the implementation of the rules on ownership unbundling, two separate public bodies should be seen as two distinct persons. The separate public bodies 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 body in violation of the rules on ownership unbundling. The public bodies concerned must be truly separate. In this case, it must be demonstrated that the requirements of ownership unbundling of Article 9 Electricity Directives are enshrined in law and are duly complied with. This will have to be assessed on a case-by-case basis.³

According to the preliminary decision of E-Control, in the situation of Vorarlberg the control in respect of the transmission system operator is conferred to the Landesstatthalter (and Vice-Chair of the government) of Vorarlberg. The control over the generator and supplier of electricity in Vorarlberg, Illwerke AG, which itself owns 97% of the shares in Vorarlberger Kraftwerke AG, which in its turn owns 100% of the shares in VEN, is exercised by the Landeshauptmann (Chair of the government).

In the preliminary decision E-Control has undertaken an evaluation of the degree of separation between the two members of government concerned. According to Vorarlberger constitutional law, the government has to agree in its rules of procedures on the specific responsibilities of each member of government. E-Control concludes in its preliminary decision that the independence of the individual members in the areas for which they are competent precludes the Landeshauptmann from giving orders or instructions as regards the Landesstatthalter's responsibilities in transmission of electricity. The Landeshauptmann, who controls the generation and supply interests of Vorarlberg, has no legal means to give instructions to the Landesstatthalter, who controls the transmission activities of Vorarlberg. Also, each member of the government has to treat commercially sensitive information confidentially. The Landeshauptmann and the Landesstatthalter are ultimately both legally and politically responsible for their own areas of competence.

However, on the basis of the information received the Commission has doubts whether in the present case there is a sufficient degree of separation as required by Article 9(6) Electricity Directive, and has identified a number of elements which would need to be present in order to

³ The Unbundling regime, Commission staff working document, 22 January 2010, p. 10.

ensure an adequate separation between the handling of the transmission activities and of the generation and supply activities in the present case.

The Commission considers first of all that the fact that in Vorarlberg the Landeshauptmann and the Landesstatthalter cannot give orders or instructions to each other on their respective areas of competence relating to electricity generation and supply or transmission is not sufficiently clearly established as a rule.

The Commission furthermore notes that the power of decision of individual members of the government of Vorarlberg in the areas for which they are responsible appears to be limited by the requirement of a collegial decision in specific situations. § 3 of the Rules of Procedures of the government of Vorarlberg provides that certain decisions outlined in the Annex of the Rules of Procedures have to be taken by the government as a collegial body. Insofar as an issue is subject to a collegial decision, the independent power of decision of a member of the government when executing its competences will be limited. For example, rules of procedures provide for a college decision where expenses exceed 25.000 Euro and no prior legal or contractual obligation for these expenses exists. E-Control has not explicitly considered this situation in its preliminary decision.

The Commission also notes that the preliminary decision leaves open whether and how the separation between the handling of the transmission activities and the generation and supply interest is implemented at the level of the administrative staff of the Land Vorarlberg. The Commission is of the view that the separation of the interests concerned must be ensured not only at the level of the members of government, but also at the level of supporting staff and administration. The government of Vorarlberg must have effective measures in place to prevent undue coordination, discriminatory behaviour and undue dissemination of confidential information, including at staff level.

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 VÜN, 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 preliminary 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,

For the Commission

Member of the Commission