



Brussels, **XXX**
[...] (2013) **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 - Estonia - Certification of Elering AS**

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I. PROCEDURE

On 28 August 2013, the Commission received a notification from the Estonian regulator for energy (hereafter, "Konkurentsiamet"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a preliminary decision on the certification of Elering AS (hereafter, "Elering") as a Transmission System Operator (hereafter, "TSO") for electricity.

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (hereafter, "Electricity Regulation") the Commission is required to examine the notified preliminary 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

Elering is the transmission system operator for electricity in Estonia. It owns and operates the entire onshore electricity transmission grid in Estonia. Together with Finnish electricity TSO Fingrid, Elering leases and operates the undersea cable Estlink 1 which connects Estonia with Finland. Currently, Estlink 1 is owned by Eesti Energia AS, Latvenergo, Lietuvos Energia and Finestlink Oy.

Until 27 January 2010 Elering belonged to the Eesti Energia AS group, Estonia's largest producer and seller of electricity. At that date, the ownership of Elering was transferred to the Estonian State. The Ministry of Economic Affairs and Communications (hereafter, "MEAC") is responsible for exercising the state's rights as an owner in Elering. The state's interests in Eesti Energia AS are administered by the Ministry of Finance (hereafter, "MoF").

Elering has applied for certification in accordance with the ownership unbundling model. In particular Elering 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 State. This choice is available to Elering under the Estonian legislation transposing the Electricity Directive.

Konkurentsiamet has analysed whether and to what extent Elering complies with the requirements of the ownership unbundling model as laid down in the Estonian legislation transposing the Electricity Directive. In its preliminary decision, Konkurentsiamet found that Elering complies with the requirements of the ownership unbundling model. On this basis, Konkurentsiamet submitted its preliminary 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.

III. COMMENTS

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

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 however that the respective activities are exercised by truly separate public entities.

The preliminary decision of Konkurentsiamet contains an extensive assessment of the separation between the two Ministries - MEAC and MoF - on the basis of the legal framework governing the organization of the state. On the basis of the Estonian 'State Assets Act', where a ministry is assigned to exercise the state's rights as an owner, it is required to do so without any conflict of interest between the different tasks of the state. A minister cannot receive instructions from another ministry. Only a limited number of high level decisions with regard to state assets, for instance on mergers and acquisitions of the undertaking, are taken by the Government of the Republic, comprising the Prime Minister and the ministers. These decisions are taken upon proposal by the administrating ministry.

Based on Konkurentsiamet's assessment, the Commission is satisfied that MEAC and MoF are sufficiently separated to achieve a satisfactory degree of independence with regard to the exercise of the state's rights in Elering.

2. Ownership of Estlink 1

Article 9(1)(a) Electricity Directive obliges ownership unbundled TSOs to own the network they operate. As outlined in Chapter II, the Estlink 1 interconnector is currently owned by companies active in the supply and generation of electricity. These companies have leased the cable to Elering and Fingrid which offer its capacity to the market in a non-discriminatory manner. The conditions of the lease agreement are subject to the approval of Konkurentsiamet. In its preliminary decision Konkurentsiamet points out that Elering and Fingrid are currently involved in negotiations with the present owners on acquisition of the Estlink 1 cable, which is said to be concluded before the end of 2013 and will result in a shared 50/50 ownership between Elering and Fingrid. Moreover, the preliminary decision indicates that a second cable, Estlink 2, is in the process of construction by Elering and Fingrid and expected to become operational in early 2014.

The Commission notes that the present ownership structure of Estlink 1 is incompatible with the ownership unbundling rules. The Commission considers however, that there are sufficient indications that that situation will soon be brought in line with the unbundling requirements following the acquisition of Estlink 1 by Elering and Fingrid. The Commission nevertheless recommends Konkurentsiamet to include, in its final certification decision, a condition requiring Elering to obtain ownership by a certain date in order for the certification to remain valid. The Commission also notes that Fingrid has to date not been certified as an unbundled TSO. In the absence of certification, the independent operation of neither Estlink 1 nor Estlink 2 is guaranteed. The Commission therefore invites Konkurentsiamet to clarify in its final decision that the certification of Elering is conditional upon the positive certification of Fingrid as unbundled TSO.

IV. CONCLUSION

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