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COMMISSION OPINION

of 25.5.2021

pursuant to Article 3 of the Regulation (EC) No 715/2009 and Articles 10(6) of Directive 2009/73/EC – Croatia – Certification of PLINACRO d.o.o. as transmission system operator for gas

(ONLY THE CROATIAN VERSION IS AUTHENTIC)

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I. PROCEDURE

On 23 March 2021, the Commission received a notification from the regulatory authority in Croatia, the Croatian Energy Regulatory Agency (*Hrvatska Energetska Regulatorna Agencija*, hereafter “HERA”), of a preliminary decision concerning the certification of PLINACRO d.o.o. (hereafter “Plinacro”) as transmission system operator (hereafter “TSO”) for gas.

Pursuant to Article 3 of Regulation (EC) 715/2009¹ (hereafter "Gas Regulation") and Article 10 of Directive 2009/73/EC² (hereafter "Gas Directive"), the Commission is required to examine the notified draft decision and to deliver an opinion within two months to the relevant national regulatory authority as to its compatibility with Articles 9 and 10(2) of the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

The present preliminary decision concerns the certification of Plinacro, a limited liability company, as a TSO under the ownership unbundling model. Pursuant to its licence Plinacro performs the activity of gas transmission in the Republic of Croatia and owns almost all gas transmission infrastructure in Croatia. 20.77 km (0.82% of the total transmission pipeline length) are currently owned by the local distribution system operator PLIN VRBOVEC Ltd., but leased to Plinacro. Among Plinacro’s assets is a 100% subsidiary operating an underground gas storage facility and shares in an LNG terminal.

Plinacro is not performing any of the functions of generation or supply. However, HERA notes that in 2018 Plinacro acquired a 5.45% share in the company ‘PETROKEMIJA, d.d. for fertilizer production’ (hereafter “Petrokemija”). Petrokemija holds a licence for gas supply activities and a licence for thermal energy production activities. Given that the core activity of Petrokemija is fertiliser production and that Plinacro as minority shareholder, according to HERA, is fundamentally disabled to exercise control within the meaning of the applicable Croatian law, Plinacro’s interest in Petrokemija is not considered by HERA an obstacle to the certification.

¹ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005. OJ L 211, 14.8.2009, p. 36.

² Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. OJ L 211, 14.8.2009, p. 94.

Plinacro is fully owned by the Republic of Croatia and this interest is administered by a public body, the Centre for Restructuring and Sale (hereafter “CERP”), in accordance with the State Asset Management Act (ZUDI). Main activity of CERP, which does not receive government funding, is the management of interests in companies that are not identified as being of strategic or special interest to the Republic of Croatia, that are held by public pension or insurance entities or that are held by the state in the context of restructuring and privatising banks³.

According to the information provided by HERA and Plinacro, CERP does not manage any other entity that performs any of the functions of energy production or supply. Such other entities are managed by the Ministry of State Assets. CERP is an individual legal entity, separate from the government of the Republic of Croatia and individual government ministries.

Plinacro is governed by the following company bodies: a Board, a Supervisory Board and an Assembly.

The Board consists of one to five members which are appointed, and can be dismissed, by the Assembly. Currently the Board has three members. None of those is simultaneously member of a board or other body of an undertaking performing any of the functions of production or supply. This is explicitly prohibited by the Programme of Measures to Ensure the Implementation of Principles for its Independence and for Data Confidentiality. This prohibition also covers other employees with special authorities.

The Supervisory Board consists of three to five members, one of which is appointed by the employment representatives in accordance with the Croatian Labour Act. The others are elected by the Assembly. Currently the Supervisory Board has five members. None of those is simultaneously member of a board or other body of an undertaking performing any of the functions of production or supply.

The Assembly is comprised of the shareholders. Since the Republic of Croatia is the sole shareholder of Plinacro, the Assembly consists of a sole member, the Minister of Economy and Sustainable Development. HERA points out that Plinacro neither explained nor proved that the appointment of this member of the Assembly is in line with the unbundling requirements according to Croatian law. HERA notes that the Minister of Economy and Sustainable Development is also the representative in the Assembly of HEP d.d. (hereafter “HEP”) which is an entity performing the activities of electricity trade and gas supply and which is fully owned by the Republic of Croatia.

In accordance with Croatian law, CERP’s Management Board proposes to the Assembly of Plinacro the appointment of Board members and the election or recall of Supervisory Board members, thereby exercising indirect control over Plinacro. CERP’s Management Board is composed of, *inter alia*, representatives of different government ministries. Since the Management Board decides by majority, HERA does not see a legal basis for exercising decisive influence by any of its members.

HERA explains that Plinacro’s assets are not considered state property and that Plinacro has the authority to manage its assets. However, pursuant to the State Property Management Act, the representative of the Republic of Croatia in the Assembly shall seek prior approval for acquisition and disposal of real estate from the Minister of State Assets if the value exceeds 1,000,000 Croatian Kuna (HRK), around 135,000 Euro. HERA does not consider such rights by the Ministry of State Assets as constituting control or as being counter to unbundling rules.

³ Cf. <http://www.cerp.hr/o-cerp-u/9>

HERA concludes that Plinacro only partially complies with the requirements for certification as TSO under the ownership unbundling model. It therefore intends to certify Plinacro conditional to submitting no later than 22 March 2022 proof of compliance with the relevant rules on ownership unbundling according to Croatian law taking into account the provisions of applicable legislation. The required proof concerns in particular the procedure of election or appointment of the Assembly member. Otherwise HERA intends to adopt another decision repealing the certification.

On this basis, HERA submitted its draft decision to the Commission requesting an opinion.

III. COMMENTS

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

Conditionality of the certification decision

Pursuant to the Gas Regulation, the unbundling requirements should be fulfilled at the time of the certification of the TSO. HERA states that they lack the necessary explanations and proof to conclude if Plinacro complies with the ownership unbundling requirements and therefore intends to grant a certification only with the explicit reservation that it will be revoked in case Plinacro does not comply with the unbundling requirements by 22 March 2022.

A deferred implementation of the unbundling requirements can only be justified in exceptional circumstances. For example, if a relevant agreement is only available as a draft, the certification could be made conditional to the conclusion and entry into force of the agreement by a certain date and without changes to the draft as regards content. However, the Commission observes that the conditions under which HERA plans to grant the certification concern compliance with core rules intended to ensure the independence of a TSO under the ownership unbundling model, and the required follow-up by Plinacro is not specified concretely, but mostly referring to the need to bring the situation of Plinacro in line with the applicable regulations. Furthermore, the conditionality would not be with automatic legal effect: according to HERA, a new decision would be required for repealing the certification.

The Commission is therefore of the opinion that Plinacro should only be certified once HERA is reasonably sure that the TSO complies with the applicable rules on ownership unbundling. Should a certification decision be attached with conditions, then those should be specific and measurable. In case of non-compliance of a TSO with such conditions, the legal consequence should be an automatic repeal, not requiring an additional decision; HERA may also consider the use of condition precedents.

Plinacro's interest in Petrokemija

Article 9(1)(b)(ii) of the Gas Directive prohibits the same person(s) from directly or indirectly exercising control over a TSO or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of generation or supply. Article 9(2) of the Gas Directive clarifies that "exercising any right" includes the power to exercise voting rights, e.g. in a company's general assembly, or the power to appoint members of company bodies. Unless Plinacro's 5.45% share is a purely passive interest, e.g. without voting rights in the company's general assembly, Plinacro would exercise rights in Petrokemija within the meaning of Article 9(2) of the Gas Directive. This would be against the unbundling rules should Petrokemija perform any of the functions of

production or supply. Article 2(7) of the Gas Directive defines “supply” as “the sale, including resale, of natural gas, including LNG, to customers”. HERA notes that Petrokemija holds licences for gas supply activities and for thermal energy production. This appears to enable Petrokemija to enter into gas supply activities. It is therefore not clear to the Commission if such licences under Croatian law could constitute production or supply activities which would run counter to the objective of the unbundling rules of the Gas Directive: to exclude the possibility to use infrastructure to influence competition in generation or supply activities.

Separation within the State

In accordance with Article 9(6) of the Gas Directive, entities owned by a Member State or another public body can ensure compliance with the unbundling requirement by two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other hand.

Plinacro is fully owned by the Republic of Croatia, which also owns undertakings performing any of the functions of production or supply. The Commission understands that the Republic of Croatia’s interest in Plinacro is administered by CERP, whereas the interests in energy production and supply companies is administered directly by the Ministry of State Assets.

However, the Commission understands that the Minister of Economy and Sustainable Development is the Republic of Croatia’s representative both in the Assembly of Plinacro and in the Assembly of HEP, hence is exercising control both in a transmission system operator and in a gas supplier, which would not be in line with unbundling rules.

CERP appears to exercise at least indirect control over Plinacro, since it proposes to Plinacro’s Assembly the appointment of Board members and the election or recall of Supervisory Board members. The Ministry of State Assets is represented in CERP’s Management Board and while, in line with HERA’s assessment, the Ministry of State Assets may not exercise decisive influence, it nevertheless has “rights” in Plinacro. Since the Ministry of State Assets controls energy production and supply companies, it would not be in line with unbundling rules if the Ministry of State Assets participated in decisions of CERP’s Management Board concerning Plinacro.

Furthermore, the Minister of State Assets’ prior approval right for acquisition and disposal of real estate if the value exceeds 1,000,000 Croatian Kuna (HRK) could at least be considered as the Ministry of State Assets exercising “rights”, but could also constitute control which is defined in Article 1(36) of the Gas Directive *inter alia* as “the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking [...]”. While certain reserve rights in order to safeguard government property may be acceptable, such a right linked to a relatively low threshold of around 135,000 Euro likely constitutes decisive influence and hence control, given that a TSO’s business regularly involves the need to take investment decisions. Since the Ministry of State Assets also controls or has rights in energy production and supply companies, having decisive influence on Plinacro would be against the unbundling rules. The certification should therefore ensure that no such rights exist.

Ongoing monitoring

The Commission recalls the obligation set out in Article 10(4) of the Gas Directive for regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of Article 9 of the Gas Directive.

Should HERA, after carefully assessing that Plinacro fulfils the unbundling rules and having taken utmost account of the above comments of the Commission, decide to certify Plinacro, the Commission invites HERA to continue monitoring the case also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment.

IV. CONCLUSION

Pursuant to Article 3 of the Gas Regulation, HERA shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of Plinacro, and when it does so, shall communicate its decisions to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* Member State regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* Member State authorities responsible for the transposition of EU legislation, on 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 therein to be confidential. HERA is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 25.5.2021

For the Commission
Kadri SIMSON
Member of the Commission