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**COMMISSION OPINION**

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10 of Directive  
2009/72/EC - Finland – Fingrid Oyj**

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### I. PROCEDURE

On 18 November 2013, the Commission received a notification from the Finnish regulatory authority for energy, Energy Market Authority (hereafter, "EMA"), in accordance with Article 10(6) of Directive 2009/72/EC<sup>1</sup> (hereafter, "Electricity Directive"), of a draft decision on the certification of "Fingrid Oyj" (hereafter, "Fingrid") as a transmission system operator (hereafter, "TSO") for electricity.

Pursuant to Article 3(1) Regulation (EC) No 714/2009<sup>2</sup> (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

Fingrid is the owner of the entire Finnish transmission grid with the exception of the Estlink1 interconnector. Fingrid acquired ownership of the Finnish transmission system in August 2013 when an amendment in the Finnish legislation enabled the transfer of ownership of the transmission assets from the State of Finland to Fingrid. Fingrid itself continues to be majority owned by the Finnish state, which holds 53.1% of the shares. There are eleven other shareholders, ten of which are insurance companies. One shareholder, Imatran Seudun Sähkö (hereafter, "Imatran"), is engaged in local sales of electricity.

Fingrid has applied for certification in accordance with the ownership unbundling model, referred to in Article 9(1) Electricity Directive. In particular Fingrid 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 Fingrid under the Finnish legislation transposing the Electricity Directive.

EMA has come to the preliminary conclusion that Fingrid will comply with the requirements of the ownership unbundling model as laid down in the Finnish legislation transposing the Electricity Directive as of the moment it acquires ownership of Estlink 1. On this basis, EMA submitted its preliminary 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.

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<sup>1</sup> 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.

<sup>2</sup> 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. Exercise of control and rights in Fingrid

Article 9(1)(b)(i) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercising control or exercising any right over a transmission system operator or over a transmission system. Article 9(1)(b)(ii) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply. Article 9(1)(c) Electricity Directive prohibits the same person to appoint members of the supervisory board, the administrative board, or bodies legally representing the undertaking, of a transmission system operator or 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. Finally, 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 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.

Together, these articles constitute the legal background against which the participations of the persons holding participations in Fingrid need to be analysed.

### *a. The State of Finland as a shareholder*

The State of Finland holds 53.1% of the shares, representing 70.9% of the voting rights, in Fingrid. The State also has majority and minority shareholdings in various companies that engage in the production and/or supply of electricity and gas.

The Ministry of Finance is responsible for carrying out the State's functions as a shareholder of Fingrid whilst the Prime Minister's Office performs this task for other State participations including those in the state-owned gas and electricity companies. The autonomy of the Ministry of Finance in carrying out its tasks vis-à-vis Fingrid is ensured through three legal acts: the Government Resolution on the State ownership policy (3 November 2011), the Government decree on the Ministry of State (610/2003) and the State Shareholdings and Ownership Steering Act (1368/2007). Based on the latter, the Ministry of Finance is responsible for the corporate governance, the processes and the resolution of those matters linked to the State's ownership.

The Commission is satisfied that the separation between the Ministry of Finance and the Prime Minister's Office is sufficiently safeguarded by the aforementioned legal acts which ensure the required autonomy for the Ministry of Finance in its decision making regarding Fingrid. Moreover, the generally applicable principle of ministerial autonomy ensures that the Prime Minister cannot give instructions to the Ministry of Finance as regards Fingrid activities and that the Ministry of Finance has an independent power of decision in this respect.

### *b. Private shareholders*

As mentioned in Chapter II there are eleven other shareholders next to the State, ten of which are insurance companies and the remaining one, Imatran, is engaged in local sales of electricity.

### *Insurance companies*

As to the insurance companies, EMA notes in its preliminary decision that they 'may own electricity production and operations companies' and that for that reason Fingrid has approached its private shareholders with a letter advising to comply with the ownership unbundling requirements. Thereby, Fingrid underlines that the owners must manage Fingrid shares in a manner that the same persons are not entitled to make decisions both in Fingrid and regarding the operation of undertakings performing generation or supply of electricity. EMA adds that 'when appointing possible board members, it must also be noted that Fingrid board members cannot be legal representatives in an undertaking performing any of the functions of generation or supply of electricity.'

The Commission is not satisfied that the approach undertaken by EMA, which is based on a letter by Fingrid to its private shareholders, provides sufficient comfort to assume compliance with the ownership unbundling rules. The Commission notes that it has laid down its views, in an interpretative Staff Working Document, on the application of the ownership unbundling rules in situations where financial investors hold diversified portfolios including participations in both the TSO concerned and companies active in the supply and/or generation of gas and/or electricity.<sup>3</sup> The Commission notes that it is for the applicant, in casu Fingrid, to demonstrate that it in fact complies with the rules rather than having pointed its shareholders to their obligations. It is for EMA to investigate, in the context of the certification procedure, whether the facts put forward by the applicant amount to compliance. It is thereby of central importance that it is demonstrated that the investors concerned do not have the incentive or the ability to influence the decision-making with regard to the TSO, and in particular with regard to its day-to-day operation and investments, in a way that would favour the investors' generation or supply activities to the detriment of the independent network operation. The aforementioned Staff Working Document contains various relevant criteria that can be taken into account to determine whether or not this is indeed the case.

The Commission hence calls upon EMA, before granting a final certification decision, to investigate in detail all participations of Fingrid's private shareholders in generation and/or supply companies and determine whether or not they give rise to a conflict of interest incompatible with the unbundling rules.

As a final remark, the Commission notes that Fingrid in addressing its shareholders and apparently referring to Finnish implementing legislation only refers to participations in electricity undertakings and not in companies active in the production or supply of natural gas. The Commission notes that it follows from Article 9(3) Electricity Directive that also the latter are of relevance in assessing a conflict of interest with regard to an electricity TSO.

### *Imatran*

Imatran is a company that is engaged in local sales of electricity and small scale production. It holds ten shares in Fingrid equivalent to 0.05% of the voting rights. In its preliminary decision, EMA underlines that the actual decision-making power that results from the shareholding of Imatran is de facto unsubstantial, both in terms of voting rights and in terms

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<sup>3</sup> Ownership unbundling, the Commission's practice in assessing the presence of a conflict of interest including in case of financial investors [SWD(2013) 177, 08/05/2013] [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/swd\\_2013\\_01\\_77\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/swd_2013_01_77_en.pdf)

of appointment of board members. Moreover, EMA points out that the State of Finland is in negotiations with Imatran with a view to acquire the shares. In October 2013 the Ministry of Employment and Economy informed the Commission that whilst no agreement on the purchase had been concluded yet, it would continue to negotiate the transfer of ownership. The Ministry also informed the Commission that in August 2013 Imatran indicated that it is willing to give up its shares in Fingrid.

Against this background, EMA concludes that Imatran's shareholding does not constitute an obstacle for certification. The Commission is of the view that whilst it would not be proportionate to refuse Fingrid certification on the basis of Imatran's modest participation, it is nevertheless important to continue to strive for the take-over of the shares by the Finnish State or by another party that is not engaged in generation or supply of electricity or gas, in order to fully comply with Article 9 Electricity Directive. The Commission therefore encourages EMA to include a condition in its final certification decision whereby the certification is withdrawn in case at a certain point in the near future the shares have not been transferred.

## **2. Ownership of Estlink 1**

Article 9(1)(a) Electricity Directive obliges each undertaking which owns a transmission system to act as a TSO. As outlined in Chapter II, the undersea cable Estlink 1, which connects Estonia with Finland, is currently not owned by Fingrid.

At present, Fingrid leases and operates Estlink 1 together with the Estonian electricity TSO Elering. The TSOs offer the capacity to the market in a non-discriminatory manner. The current owner of Estlink 1 is AS Nordic Energy Link which in turn is owned by Eesti Energia AS, Latvenergo, Lietuvos Energia and Finestlink Oy, companies active in the supply and generation of electricity.

In its preliminary decision, EMA indicates that Fingrid and Elering are in the advanced stages of a process that should lead to the acquisition of Estlink 1 with the transaction expected to be concluded in the beginning of 2014. EMA therefore grants Fingrid the certification under the condition that it indeed acquires ownership of Estlink 1 or gives up its operation. The Commission agrees with the approach taken by EMA taking into account that only the ownership unbundling model is transposed into the Finnish Electricity market Act.

## **IV. CONCLUSION**

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