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**Subject: State aid case N 764/2007– Lithuania
Construction of a 400 MW Combined Cycle Gas Turbine Plant at AB
Lietuvos Elektrinė**

Sir,

The Commission wishes to inform Lithuania that, having examined the information supplied by your authorities on the measure referred to above, it has concluded that the notified support for the construction of a 400 MW Combined Cycle Gas Turbine (CCGT) Plant at AB Lietuvos Elektrinė does not constitute State aid.

1. PROCEDURE

By electronic notification dated 19 December 2007, registered at the Commission on the same day, the Lithuanian authorities notified the Commission, pursuant to Article 88(3) of the EC Treaty, of the above-mentioned measure.

2. DESCRIPTION OF THE MEASURE

2.1 The project

- (1) The notified measure concerns the construction of a power generation unit with a capacity of 400 MW on the site of an existing power station called "the Lithuanian Power Plant" (LPP), operated by the Lithuanian company AB Lietuvos Elektrinė. The power will be produced by a CCGT intended to work in cogeneration. The heat generated by the operation of the turbine will be supplied for district heating to a nearby agglomeration.

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- (2) The costs of the construction of the power plant are estimated at LTL 915 million (EUR 265 million). The measure consists in a contribution from the Ignalina International Decommissioning Support Fund (hereinafter referred to as "the IIDSF"), in the form of a lump sum of LTL 587 million (EUR 170 million), which corresponds to approximately 70% of the estimated costs of the project. The remaining financing will be provided from commercial loans to, and own resources of AB Lietuvos Elektrinė. No financial assistance will be provided from the Lithuanian State budget.
- (3) The construction project is expected to begin on 1 May 2008, although the exact date of the start of the project would be known only after the closure of tendering procedures and negotiations with contractors. The project is expected to be completed by the end of 2010.
- (4) The Lithuanian authorities take the view that the measure at stake does not involve State resources and therefore does not constitute State aid within the meaning of Article 87(1) of the EC Treaty. They have notified the measure to the Commission for reasons of legal certainty.

2.2 The Ignalina Programme and the Ignalina International Decommissioning Support Fund (IIDSF)

- (5) The Ignalina Nuclear Power Plant currently accounts for one quarter of Lithuania's installed power generation capacities. Prior to its accession to the European Union, Lithuania committed to decommission Unit 1 of that power plant before 2005, and Unit 2 by 31 December 2009. That commitment is recorded in Protocol No 4 on the Ignalina nuclear power plant in Lithuania, annexed to the 2003 Act of Accession¹ (hereafter referred to as "the Protocol").
- (6) The Protocol also established the Ignalina Programme, whereby the European Community undertook to provide Lithuania with additional financial assistance in support of its efforts to decommission and to address the consequences of the closure and decommissioning of the Ignalina Nuclear Power Plant during the period 2004-2006 and beyond. The Protocol foresees that the Ignalina Programme shall, inter alia, cover modernisation measures of conventional production capacity to replace the production capacity of the two Ignalina Nuclear Power Plant reactors. It also foresees other measures which are consequential to the decision to close and decommission the nuclear power plant and which contribute to the necessary restructuring, environmental upgrading and modernisation of the energy production, transmission and distribution sectors in Lithuania as well as to enhancing the security of energy supply and improving energy efficiency in Lithuania.
- (7) Council Regulation (EC) No 1990/2006² sets down the rules for the Ignalina Programme from 2007 onwards. Article 5(2) of that Regulation foresees that

¹ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236, 23.09.2003, p. 33-49.

² Council Regulation (EC) No 1990/2006 of 21 December 2006 on the implementation of Protocol 4 on the Ignalina nuclear power plant in Lithuania to the Act of accession of the Czech Republic, Estonia,

financial assistance for measures under the Ignalina Programme, or parts thereof, may be made available as a Community contribution to the IIDSF.

(8) The IIDSF was established in 2000 by the European Bank for Reconstruction and Development (hereinafter referred to as "the EBRD") in order to pool international donors' contributions into the provision of financial assistance to Lithuania for the closure and decommissioning of the Ignalina Nuclear Power Plant and for measures made necessary by that closure, that contribute to the restructuring, upgrading and modernisation of the Lithuanian energy production, transmission and distribution sectors as well as to the improvement of energy efficiency in Lithuania. The Board of Directors of the EBRD has adopted the Rules of the Fund, whereby in particular:

1. the Assembly of Contributors is the governing body of the IIDSF and may establish an Operating Committee to carry out certain functions with respect to the operation and supervision of the IIDSF (due to the small size of the Assembly of Contributors, no Operating Committee has been set up);
2. the Assembly of Contributors is responsible for selecting projects and authorising grants financed from the resources of the IIDSF;
3. the Assembly of Contributors is composed of representatives of the Contributors; Since Lithuania became a Contributor as of 29.06.2007, Lithuanian representatives can attend the meetings and Lithuania has one vote out of seventeen votes in total.
4. the EBRD is entrusted with the administration and management of the IIDSF. In particular, it is responsible for submitting to the Assembly of Contributors specific project proposals developed in close cooperation with Lithuania;
5. no project can be undertaken without Lithuania's consent;
6. contributions may not be earmarked for specific projects, but only for one of the general purposes specified in Section 1.02 of the Rules of the IIDSF³;
7. the EBRD's Procurement Policies and Rules shall apply to grants made from the resources of the IIDSF, and procurement shall be limited to goods and services produced in or supplied from the countries of the Contributors or the Countries of Operations of the Bank, unless the Assembly of Contributors decides otherwise. This means in practice that for the project at stake, the EBRD will select a contractor for the construction of the power generation plant and pays it directly for the

Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [Ignalina Programme], OJ L 411, 30.12.2006, p. 10-17, Corrigendum L 27, 02.02.2007, p. 7-10.

³ Pursuant to that section, the purpose of the Fund is to accept and make use of funds provided by contributors for the provision of technical assistance, public information, consultancy, civil works and engineering services and the acquisition, installation and placing into operation of equipment to *inter alia* finance or co-finance the provision of goods, works and services in the energy sector of the recipient country in support of measures which are consequential to the decision taken by the beneficiary country to close or decommission the relevant nuclear power plant units and which would assist the necessary restructuring, upgrading and modernisation of the energy production, transmission and distribution sectors as well as to improve energy efficiency.

goods and services provided upon presentation of invoices confirmed by AB Lietuvos Elektrinė, within the limit of the overall grant.

- (9) The largest contribution to the IIDSF is provided by the Community from its own resources. In recent years the Community has in fact been the only Contributor to the IIDSF.
- (10) Article 10 of Commission Decision C(2007)5538 (final)⁴ provides for an individual annual Combined Programming Document for implementation of the Ignalina Programme, setting out the priorities and actions to be undertaken. The Combined Programming Document was adopted by the Commission in November 2007.
- (11) That document recognises the construction of a combined cycle gas turbine unit with a capacity of up to 400 MW on the site of the Lithuanian Power Plant as a strategic objective of relevance to the Ignalina Programme, which is to be supported by the resources from the IIDSF.

3. ASSESSMENT

3.1 Presence of State aid under Article 87(1) of the EC Treaty

- (12) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.
- (13) It has been established by the Court, that in order to qualify as State aid, a measure must, *first*, be granted directly or indirectly through State resources and, *second*, be imputable to the State⁵.
- (14) The Court has recognised that the financial means involved in a measure did not need to be permanent assets of the public sector to qualify as State resources, but that the fact that such means constantly remain under public control and are therefore available to the competent national authorities was sufficient for them to be categorised as State resources⁶. Similarly, it follows from the Court's case law⁷ that State resources are not involved where the public authorities at no stage enjoy or acquire control over the funds which finance the economic advantage at issue. Therefore, what matters is whether the State exercises direct or indirect control over the resources in question despite the fact that the funds did not come from the State budget.

⁴ Commission Decision C(2007)5538 (final) of 21 November 2007 on the procedures related to the programming and monitoring of the measures and financial assistance under the Bohunice and Ignalina Programmes for the period 2007 to 2013 and under the Kozloduy Programme for the period 2007 to 2009, not yet published in the OJ.

⁵ See for example C-482/99, France v Commission, [2002] ECR I-4397, paragraph 24.

⁶ See C-83/98, France v Ladbroke Racing and Commission, [2000] ECR I-3271, paragraph 50 and T-358/94, Air France v Commission, [1996] ECR II-2109, paragraph 67.

⁷ See Opinion of AG Jacobs in case C-482/99 France/Commission [2002] ECR I-4397, paragraphs 38-42 and C-379/98, PreussenElektra, [2001] ECR I-2099, paragraphs 59-61.

- (15) Lithuania will have no control over the allocation of the amount of LTL 587 million (EUR 170 million) within the limit of the project. In the case at stake, the resources allocated from the IIDSF to the construction of a 400 MW CCGT at AB Lietuvos Elektrinė will be made available neither to the Lithuanian authorities nor to the State-owned company AB Lietuvos Elektrinė, which at no stage will enjoy or acquire control over them. These resources will be directly transferred by the EBRD to the contractor selected by it in accordance with the procurement rules upon presentation of invoices. Payment for the works, goods and services done will go directly to the selected contractor's account.
- (16) Consequently, the measure will not be financed from State resources.
- (17) According to the jurisprudence of the Court⁸, it is "*necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures. [...] The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken*".
- (18) The measure at stake cannot be regarded as imputable to the State. The supervisory body of the IIDSF (the Assembly of Contributors) have to authorise each grant financed from the resources of the fund, without leaving any margin of discretion to Lithuania with respect to:
- the allocation of the said resources to projects which may fall within the purpose and scope of activity of the IIDSF;
 - the selection of the beneficiaries of these projects and, following the EBRD procurement rules, of the undertakings providing goods or services at issue (the 'contractors');
 - the amounts allocated to the various projects undertaken by the IIDSF.
- (19) Furthermore, Lithuania does not have the power to designate specific project proposals and their beneficiaries for appraisal, as this responsibility lies with the EBRD. Similarly, Lithuania does not have the power to prevent the EBRD from submitting specific project proposals to the Assembly of Contributors. The mere fact that the EBRD has to work out project proposals "in close cooperation" with Lithuania and that no project can be undertaken without the consent of Lithuania is not sufficient for projects consisting in the provision of financial assistance from the resources of the IIDSF to be imputable to Lithuania.
- (20) Since Lithuania is not responsible for designation, implementation and management of the supported project in question, it follows that the decision to allocate a lump sum of LTL 587 million (EUR 170 million) to the construction of the 400 MW CCGT unit is not imputable to Lithuania.
- (21) It can thus be concluded that the resources allocated from the IIDSF are not under control of or at the disposal of Lithuania and the spending decision

⁸ Ibid, paragraphs 50-56.

about the ultimate allocation of these resources is not imputable to Lithuania. Thus, the allocation of the lump sum of LTL 587 million (EUR 170 million) is not subject to State aid rules.

4. CONCLUSION

The Commission has accordingly decided that N 764/2007 ‘Construction of a 400 MW Combined Cycle Gas Turbine Plant at AB Lietuvos Elektrinė’ does not involve State resources and is not imputable to the State. Therefore, it does not constitute State aid within Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement.

If this letter contains confidential information, which should not be disclosed to third parties, please inform the Commission within 15 working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/community_law/state_aids/

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax No: +32-2-296 12 42

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission