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COMMISSION OPINION

of 9.1.2012

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC - Denmark - Certification of Energinet.dk (electricity)**

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I. PROCEDURE

On 9 November 2011, the Commission received a notification from the Danish regulator for energy (hereafter, "DERA"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of "Energinet.dk" as a Transmission System Operator (TSO) for electricity, dated 31 October 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

Energinet.dk is a transmission system operator for electricity in Denmark. It owns and operates the electricity transmission grid at the highest voltage level (400 kV) in Denmark. On 1 January 2008 it also acquired the regional transmission grid in North Zealand (Nordsjælland) from DONG Energy Sales & Distribution A/S. This regional net is currently owned by a subsidiary of Energinet.dk: Regionale Net.dk A/S. Energinet.dk furthermore owns the marine cables to Bornholm and Læsø, as well as the land section of all cables of over 200 kV from offshore wind farms to the Danish mainland. Energinet.dk will in the future also own a marine cable to the Anholt offshore wind farm.

Energinet.dk is also a transmission system operator for gas in Denmark. Energinet.dk owns the natural gas transmission grid in Denmark, comprising of 800 km robust steel pipelines, 42 measurement and regulation stations and four measurement stations. The certification of Energinet.dk as a transmission system operator for gas is subject to a separate procedure.

In addition to the transmission of electricity and gas, Energinet.dk is also engaged in natural gas storage. Energinet.dk furthermore holds participations in the Danish Gas Technology

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.

Centre A/S, the Danish gas exchange and the Nordic electricity exchange, as well as a European market coupling undertaking.

Energinet.dk is managed in accordance with the Act on Energinet.dk and the company may only undertake the activities authorised by law.

Apart from Energinet.dk there are a number of regional electricity transmission system operators in Denmark which are owned by different entities and which will have to be certified in separate certification procedures.

Energinet.dk has applied for certification in accordance with the ownership unbundling model. In particular Energinet.dk 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 Energinet.dk under the Danish legislation transposing the Electricity Directive.

DERA has analysed whether and to what extent Energinet.dk complies with the requirements of the ownership unbundling model as laid down in the Danish legislation transposing the Electricity Directive. In its preliminary decision, DERA found that Energinet.dk complies with the requirements of the ownership unbundling model under the following conditions:

- the Minister for Climate, Energy and Building which controls Energinet.dk is prohibited from controlling or exercising rights in relation to the Danish North Sea Fund/the North Sea Partner from the moment of their entry into the Dansk Undergrunds Consortium (DUC) as this Consortium is concerned with the production and supply of natural gas;
- it can be documented that the Minister for Climate, Energy and Building and the managing director of Energinet.dk observe Section 19a(4) of the Danish Electricity Supply Act, imposing independence requirements on persons who have the right to appoint board members in a TSO.

On this basis, DERA 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 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 both types of activities are under the responsibility and control of separate public bodies within the State.

2. Activities of the TSO and its subsidiaries

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. Article 9(3) Electricity Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of production and supply within the meaning of Directive 2009/73/EC³ (hereafter, "Gas Directive"). The Electricity Directive also defines what shall be understood by the terms "supply" and "generation". "Supply" is defined as sale or resale of electricity to customers, whereas "generation" means the production of electricity (Article 2, points 19 and 1 of the Electricity Directive, respectively).

As set out in the preliminary decision of DERA, Energinet.dk operates a number of activities in subsidiaries and associated companies. The Commission agrees with DERA that none of the activities currently undertaken by Energinet.dk can be described as electricity generation, electricity trading, gas production or gas supply activities, and therefore the requirement of Article 9(1)b(ii) *juncto* Article 9(3) Electricity Directive is complied with.

In particular the Commission notes that the fact that Energinet.dk owns and operates a gas storage in Lille Torup through its subsidiary Gaslager A/S does not create an obstacle to the certification of Energinet.dk as a TSO for electricity in the ownership unbundling model, as the ownership and operation of a gas storage facility falls outside of the scope of relevant activities listed in Article 9(1)b(ii) *juncto* Article 9(3) Electricity Directive. However, the Commission recalls that Gaslager A/S must comply with the rules on legal and functional unbundling laid down in Article 15 Gas Directive, and that DERA is responsible for verifying whether this is the case.

Furthermore, the Commission takes the view that the fact that Energinet.dk holds shares in companies engaged in facilitating trade of electricity and gas on exchanges does not create an obstacle to certification. Energinet.dk holds 20% of shares in Nord Pool Spot SA, 50% of shares of Nord Pool Gas A/S and 20% of shares in European Market Coupling Company GmbH (hereafter, "EMCC"). Nord Pool Spot SA and Nord Pool Gas SA are operators of power and gas exchanges in the Nordic and Danish markets respectively. Both exchanges function as platforms facilitating trade of electricity and gas by matching supply and demand on the respective markets. The exchanges are, however, not themselves engaged in the buying or selling of electricity or gas. The Commission therefore agrees with DERA that the activities of these exchanges cannot be qualified as "supply" of electricity or gas within the meaning of the Electricity and Gas Directive. Similarly the activities of EMCC cannot be qualified as supply of electricity as defined in the Electricity Directive. Although EMCC is placing bids on both the European Power Exchange EPEX and on Nord Pool Spot, the purpose of these bids is not to buy and subsequently sell electricity to customers but rather to establish a price signal related to the congestion of interconnectors of the coupled markets. In view of the above the Commission agrees with DERA that the holding of shares by Energinet.dk in Nord Pool Spot SA, Nord Pool Gas A/S and EMCC is not an obstacle for certification under the ownership unbundling model.

³ 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.

3. Operation of the regional network

From the preliminary decision of DERA it appears that a subsidiary of Energinet.dk, Regionale Net.dk, owns the 132 kV regional transmission grid which is located in North Zealand (Nordsjælland). However, Energinet.dk currently is not operating this regional transmission grid. Until May 2013, the technical operation of the grid is in the hands of a vertically integrated company involved in generation and supply of electricity, in particular DONG Energy Sales and Distribution. After May 2013 this regional grid will be operated by Energinet.dk, except for the activities of voltage regulation and coupling management. This is without prejudice to the obligations that may apply to Energinet.dk as a result of existing or future network codes.

The Commission agrees with DERA that this is an exceptional situation which is directly related to acquisition by Energinet.dk of the regional transmission grid concerned in 2008. From the preliminary decision it appears that a transitional period has proven to be necessary during which Energinet.dk can prepare the integration of the networks, adapt the operating procedures and allow for appropriate training of its personnel. The Commission considers that a transitory period up to May 2013 is reasonable in the present circumstances, given the complexity of the integration project. However, there should be no prolongation of this period.

The Commission furthermore takes note and supports that during this transitional period adequate precautionary measures are put in place to protect the interest of market participants. In particular, DONG Energy A/S will have no privileged access to commercially sensitive information.

The Commission furthermore notes that the regional grid is at present not owned by Energinet.dk itself, but by its subsidiary, Regionale Net.dk. DERA has assessed this situation in its preliminary decision, and underlines that the subsidiary is 100% owned by Energinet.dk, which operates the grid. Apart from ownership of the regional electricity transmission network there are no other activities in the subsidiary concerned. Furthermore, the board of directors of Regionale Net.dk is composed of leading employees from Energinet.dk and is appointed by the General Assembly of the subsidiary, which itself is composed of members of the board of Energinet.dk. Under these circumstances, which do not refer to any limitation or weakening of the control which Energinet.dk can exercise over its subsidiary, the Commission agrees with DERA that this situation does not form an obstacle to certification.

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, 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. In these cases, it must be demonstrated that the requirements of

ownership unbundling of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with. This will have to be assessed on a case-by-case basis.⁴

From the preliminary decision it appears that Energinet.dk is fully owned by the Danish State, which also owns 76.49 % of the shares in DONG Energy A/S, which is active in generation, production and supply of electricity and gas. The ownership of Energinet.dk is administered by the Danish Minister for Climate, Energy and Building, who can make decisions on any matters pertaining to Energinet.dk and has control over Energinet.dk. The ownership of DONG Energy A/S is administered by the Danish Minister of Finance.

The Commission considers that two separate Ministries controlling, on the one hand transmission of electricity and gas, and on the other hand activities of production, generation and supply of electricity and gas, can under certain circumstances constitute bodies with a sufficient degree of separation as required by Article 9(6) Electricity Directive.

In its preliminary decision DERA has undertaken an in-depth evaluation of the degree of separation between the two Ministries concerned, focusing on the Danish ministerial hierarchy in accordance with Danish legal tradition and constitutional theory.

According to Danish constitutional law, individual Ministers have an independent power of decision in the areas for which they are responsible, and enjoy a high degree of independence. The Minister of Finance which controls the production and supply interests of DONG Energy S.A. has no legal means to give instructions to the Minister of Climate, Energy and Building which controls the transmission activities of Energinet.dk and vice versa. The Ministers are ultimately both legally and politically responsible for their own Ministry, and have as a consequence an independent power of decision in their areas of competence.

In the specific Danish situation, the independence of the individual Ministers in the areas for which they are competent also precludes the Prime Minister from giving orders or instructions as regards the Minister's responsibilities in transmission of electricity and gas.

In view of the above, the Commission considers that the independent position of individual Ministers in their area of competence in the Danish situation is an important element in establishing whether a true separation of public bodies as required by Article 9(6) Electricity Directive exists.

The Commission has however also identified a number of other elements in the present case which strengthen the separation between the handling of the transmission activities and the production, generation and supply interests.

The Commission notes that Energinet.dk is a separate legal entity and that the day-to-day running of the company is undertaken by the board and the management of Energinet.dk. The board and the management of Energinet.dk is prohibited from having commercial interests or cross-directorships in generation, production, or supply activities. The independence of Energinet.dk is further developed by its Internal Monitoring Programme which is applicable to all its employees, and which aims at preventing discriminatory behaviour and gives detailed instructions on the handling of confidential information. The Commission notes that the Minister for Climate, Energy and Building has the power to take decisions concerning the day-to-day management and investment planning (the powers of the Ministry are being

⁴ The Unbundling regime, Commission staff working document, 22 January 2010, p. 10.

compared by DERA to the powers of a General Assembly in a private company), but as stated above, such decisions taken by the Minister for Climate, Energy and Building cannot be influenced or controlled by the Minister for Finance or the Prime Minister.

The Commission observes that Energinet.dk's financial resources are kept separate from the State's financial resources. Also, Energinet.dk is not allowed to pay out dividends to the State and must take out the necessary insurances itself, as it is not covered by State insurance. These additional measures, which are enshrined in law, remove possible conflicts of interest between the Minister of Climate, Energy and Building and the Minister for Finance.

Finally, the Commission recalls that Energinet.dk has been established in 2004 with the very objective that system responsibility and general transmission of both electricity and gas would be publicly owned, separate from the commercial interests of production and supply. Already for a number of years this envisaged separation of responsibilities is being visibly applied in practice.

In view of the above elements considered as a whole, and in particular in view of the independent power of decision of the Minister for Climate, Energy and Building and of the Minister for Finance for their respective areas of competence, the Commission considers that the requirements of Article 9(6) Electricity Directive are complied with.

5. Danish North Sea Fund

The Commission also analysed the participation of the Danish State in the Danish North Sea Fund. The responsible Minister is the Minister of Climate, Energy and Building that also supervises the fund. The Minister for Climate, Energy and Building may determine provisions for the fund's activities and the Minister also appoints the managing director for the North Sea Partner, which manages the Fund.

As the Fund will be concerned with the production and supply of natural gas as from 9 July 2012 following its planned participation in the Dansk Undergrunds Consortium (DUC), the Minister for Climate, Energy and Building will from that date control both transmission activities and production and trading activities. This is not compatible with the rules on ownership unbundling. As stated above under 2, 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, while Article 9(3) Electricity Directive makes an explicit cross reference to the functions of production and supply under the Gas Directive.

The Commission agrees with DERA that certification of Energinet.dk must be conditional on the Minister for Climate, Energy and Building being prohibited from having any control of or rights with regard to the North Sea Fund/the North Sea Partner following the Fund's intended participation in DUC.

5. Independence requirements; declarations on honour

Article 9(1)(c) and (d) Electricity Directive require that members of the management of the TSO and persons that have the right to appoint them, must fulfil certain requirements of independence.

Energinet.dk intends to ensure observance of these requirements by requiring the persons concerned to sign a declaration on honour and renew this declaration every year. The persons concerned will be required to declare on honour that they will comply with the applicable requirements of independence. The board of Energinet.dk and of its subsidiary Regionale Net.dk A/S, as well as the management of Energinet.dk and of its subsidiary Regionale Net.dk, will have to sign such a declaration.

Considering that a breach of a declaration on honour will lead to effective and dissuasive sanctions, including fines or imprisonment, the Commission is satisfied that the requirements of independence of Article 9(1)(c) and (d) Electricity Directive will be observed.

6. Conclusion

Pursuant to Article 3(2) Electricity Regulation, DERA shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Energinet.dk, 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. DERA 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, 9.1.2012

For the Commission
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Member of the Commission

