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COMMISSION OPINION

of 18.1.2016

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Germany - Certification of TenneT Offshore 9. Beteiligungsgesellschaft mbH

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I. PROCEDURE

On 23 November 2015, the Commission received a notification from the German Federal Network Agency (hereafter "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/72/EC (hereafter "Electricity Directive"), of a draft decision on the certification of "TenneT Offshore 9. Beteiligungsgesellschaft mbH" (hereafter "TenneT Offshore") as a transmission system operator (hereafter "TSO") for electricity.

Pursuant to Article 3(1) Regulation (EC) No 714/2009¹ (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 their compatibility with Article 10(2) and Article 9 of Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DECISION

TenneT Offshore is the owner and operator of the HelWin2 and DolWin2 cables connecting offshore wind parks in the North Sea to the German onshore grid. Both cables together have a capacity of approximately 1600 MW.

TenneT Offshore is for 51% owned, through intermediate companies, by TenneT Holding B.V., a company registered in the Netherlands, which is in turn wholly owned by the Dutch State. The German and Dutch transmission grids under the brand name of TenneT are also subsidiaries of TenneT Holding B.V. The remaining 49% of the shares in TenneT Offshore are held by Diamond Germany 2. Transmission GmbH which is ultimately owned by the Japanese Mitsubishi Corporation (hereafter "Mitsubishi"). An identical joint ownership structure by TenneT Holding B.V. and Mitsubishi for TenneT Offshore 1. Beteiligungsgesellschaft mbH, TSO of the 400 MW BorWin1 and 800 MW BorWin2 cables (hereafter "1. Beteiligungsgesellschaft") was subject to an earlier Commission certification Opinion.²

TenneT Offshore has applied for certification in accordance with the ownership unbundling model, referred to in Article 9(1) Electricity Directive. This choice is available to TenneT Offshore under the German legislation transposing the Electricity Directive.

In its draft decision, Bundesnetzagentur considers that the risk that Mitsubishi has the incentive and ability to use its influence over TenneT Offshore in a way so as to favour the proceeds of the electricity generated from generation assets with Mitsubishi shareholdings is absent for the following reasons. Firstly, given the fact that TenneT Offshore consists of two offshore cables only (four cables if those of 1. Beteiligungsgesellschaft are taken into account), the only way in which Mitsubishi could influence its power over TenneT Offshore

¹ 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.

² Commission's Opinion on Bnetza's 's draft certification decision for TenneT offshore C(2013) 5631.

to the benefit of the wind generation would be by interrupting the lines, leading to a decreased supply of electricity on the German wholesale market and hence a higher price. The Dutch market is coupled with the German market, which generally would mean a higher price in the Netherlands and hence increased profits for the electricity produced by the [BUSINESS SECRET]. Bundesnetzagentur however assesses that this impact would be marginal due to the fact that the amount of generation capacities linked to the cables is minor in comparison to the entire generation capacity on the German market. Moreover, by creating such a situation Mitsubishi would infringe the liability regime for interruptions, for which the potential fines would far outweigh the potential gains. Furthermore, TenneT Holding B.V., the biggest shareholder of TenneT Offshore and responsible for the daily operation of the TenneT Offshore assets, would have no interest in taking legal risks in order to increase revenues of its minority shareholder.

Bundesnetzagentur has come to the preliminary conclusion that, subject to two conditions, TenneT Offshore complies with the requirements of the ownership unbundling model as laid down in the German legislation transposing the Electricity Directive (hereafter "draft decision").

The draft decision makes certification subject to two conditions. First, the management of TenneT Offshore shall not include board members of undertakings directly or indirectly controlled by Mitsubishi which are active in generation of energy, nor shall it include members of any other body legally representing such undertakings. Second, TenneT Offshore shall submit quarterly reports to Bundesnetzagentur presenting the shareholdings of Mitsubishi as regards generation. Finally, Bundesnetzagentur reserves the right of revoking the certification decision.

Bundesnetzagentur has submitted the draft decision to the Commission requesting an opinion.

III. COMMENTS

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

Mitsubishi's generation interests

Article 9(1)(b)(i) Electricity Directive prohibits the same person(s) from directly or indirectly exercising control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercising control or exercising any right over a transmission system operator (TSO) or over a transmission system. Article 9(1)(b)(ii) Electricity 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.

Mitsubishi, directly or through various subsidiaries, holds participations in various undertakings involved in the production of electricity. [BUSINESS SECRET]. Further investments exist outside of the EU, but only in regions without a direct electric connection to the EU (mostly North and Central America as well as East Asia).

On the basis of the information provided in the notification, Mitsubishi has the following participations in generation capacities within the EU: [BUSINESS SECRET]

Commission assessment

The objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any *conflict of interest* between generators/producers, suppliers and TSOs. As

explained in the Staff Working Paper *Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors* (SWP (2013) 177), this objective is attained where it can be clearly demonstrated that there is no incentive or ability for a shareholder in a TSO to influence the TSO's decision making in order to favour its generation, production and/or supply interest to the detriment of other network users. It is therefore necessary to assess whether Mitsubishi's participations in various undertakings involved in the production of electricity give rise to a risk of discrimination in the operation of the TenneT Offshore networks.

In its Opinion on the certification of 1. Beteiligungsgesellschaft (which is operating other transmission systems but has a similar ownership structure as TenneT Offshore) the Commission concluded that *'an incentive for Mitsubishi to use its powers over TenneT Offshore in a discriminatory fashion is unlikely to exist. The Commission however underlines that this situation could change in the future as the North Sea Offshore Grid becomes reality and Mitsubishi's generation activities are directly linked to the lines it jointly operates. At that stage a re-assessment of the incentive to influence is necessary.'*

Compared to the notification regarding 1. Beteiligungsgesellschaft, [BUSINESS SECRET]. It thus has to be analysed whether these generation capacities, or the combination of the transmission capacities of TenneT offshore and 1. Beteiligungsgesellschaft result in the incentive and ability for Mitsubishi to use the operation of TenneT Offshore assets in a discriminatory manner.

As regards investments outside the EU, the regions have no connection to the EU electrical system, and no such connection is to be expected in the foreseeable future. Investment in all concerned Member States clearly remains [BUSINESS SECRET]. Notwithstanding this small share, the Commission notes that the Electricity Directive does not specify any threshold in the definitions of generation or supply in Article 2(1) and Article 2(19) respectively. Thus, the individual and aggregate generation capacity of generation assets can only be considered in the context of an *ad-hoc* analysis of potential conflicts of interests.

The Commission notes that as wholesale electricity markets in the EU become more integrated, there is a potential for control or rights over a transmission grid in Germany being exercised to favour generation interests in other markets. Therefore, the participation of Mitsubishi in generation in the [BUSINESS SECRET] Member States where they own assets must be assessed. [BUSINESS SECRET]

As regards [BUSINESS SECRET] generation capacities are generally limited, and situated farther away from the German market. As regards [BUSINESS SECRET], the participation is for all installations except a [BUSINESS SECRET]. In view of this low shareholding in limited generation capacities far from the German market it can be concluded that these shareholdings in generation capacities do not give Mitsubishi an incentive to use its influence over TenneT Offshore in a way so as to favour the proceeds of the electricity generated in [BUSINESS SECRET].

According to the notified documents, Mitsubishi currently holds in [BUSINESS SECRET] participations of [BUSINESS SECRET] each in [BUSINESS SECRET] different undertakings generating electricity from [BUSINESS SECRET]. The other [BUSINESS SECRET] shareholder is in all cases the [BUSINESS SECRET], the incumbent and strongest player on the [BUSINESS SECRET] electricity market.

[BUSINESS SECRET]. The relevant question to be answered in this context is whether or not Mitsubishi has the incentive and ability to use its influence over TenneT Offshore in a way so as to favour the proceeds of the electricity generated by the [BUSINESS SECRET].

[BUSINESS SECRET], the Commission shares the analysis provided by Bundesnetzagentur. The impact of interrupting the operation of the transmission lines operated by TenneT Offshore (either separately or in combination with those operated by 1. Beteiligungsgesellschaft) would be marginal due to the fact that the amount of generation capacities linked to the cables is minor in comparison to the entire generation capacity on the German market. Moreover, by creating such a situation Mitsubishi would infringe the liability regime for interruptions, for which potentially high fines would apply. Furthermore, TenneT Holding B.V., the biggest shareholder of TenneT Offshore and responsible for the daily operation of the TenneT Offshore assets, would have no interest in taking legal risks in order to increase revenues of its minority shareholder.

Similar arguments apply regarding Mitsubishi's shareholdings in generation assets [BUSINESS SECRET]. The limited impact of TenneT Offshore on the German wholesale price equally applies here, and the impact of such actions on the [BUSINESS SECRET] wholesale price cannot be expected to be higher than the impact on prices [BUSINESS SECRET], economic incentives by increases in wholesale prices are furthermore limited.

Both in [BUSINESS SECRET], the share of Mitsubishi assets in total generation capacity is also very limited, thus further reducing the potential to create targeted benefits to those installations by exerting the (small) influence on German wholesale prices. Finally, the participations of Mitsubishi [BUSINESS SECRET] are limited to [BUSINESS SECRET] each, thus any potential benefit would need to be shared with the other shareholder.

It can thus be concluded that an incentive for Mitsubishi to use its influence over TenneT Offshore, either separately or in combination with 1. Beteiligungsgesellschaft, in a discriminatory fashion is very unlikely at present. The Commission however underlines that this situation could change in the future as the North Sea Offshore Grid becomes reality and Mitsubishi's generation activities are directly linked to the lines it jointly operates. At that stage a re-assessment of the incentive to influence is necessary. The Commission thus calls upon Bundesnetzagentur to reassess the decision whenever significant progress is made on the North Sea Offshore Grid, and make use of the right to withdraw the certification if this is necessary.

Furthermore, the Commission notes that the ability for Mitsubishi to influence the independent network operation is limited. The power Mitsubishi has over TenneT Offshore is confined to rights related to the protection of the value of its investment. [BUSINESS SECRET], on the basis of service contracts with TenneT Offshore which are overseen by its management. The management of TenneT Offshore consists of two persons, a CEO and a CFO, [BUSINESS SECRET]. Bundesnetzagentur has attached a condition to its preliminary certification decision establishing that the management of TenneT Offshore shall not include board members of undertakings directly or indirectly controlled by Mitsubishi which are active in generation or supply of energy, nor shall it include members of any other body legally representing such undertakings. On the basis of the notified draft decision, this condition is already adhered to in practice. The division between TenneT TSO GmbH and TenneT Offshore indirectly creates a distance between Mitsubishi and the actual operation of the cables. However, in addition to preventing influence by the shareholder on the TSO, the unbundling provisions also aim at preventing the disclosure of sensitive information to other parts of the vertically integrated undertaking. In its opinion on the certification of 1. Beteiligungsgesellschaft, the Commission had raised concerns on the extent to which the Mitsubishi manager is informed of sensitive information regarding the operation of TenneT Offshore that could be passed on to Mitsubishi before being made public to other network users. [BUSINESS SECRET]. It should be noted that this statement merely confirms existing legal obligations. The Commission thus calls upon Bundesnetzagentur to verify in its final

certification decision that appropriate safeguards are indeed put in place, e.g. as regards any contractual reporting obligations of the Mitsubishi manager. The Commission furthermore underlines that in the event of any non-respect of confidentiality obligations, Bundesnetzagentur should make adequate use of the full range of regulatory powers at its disposal under the Electricity Directive, including the right to impose penalties on the vertically undertaking reaching up to 10 % of its annual turnover. The Commission welcomes the regular reporting obligation in the draft decision on shareholdings of Mitsubishi regarding undertakings active in generation. The Commission however recalls that this reporting obligation should cover all activities generally incompatible with the activity of transmission system operation under the Electricity Directive. In particular, the provision in the draft decision does not appear to include activities in supply of electricity or natural gas. The Commission thus requests Bundesnetzagentur to clarify in the final certification decision the reporting obligation accordingly. Subject to this, the Commission accepts the view put forward by Bundesnetzagentur that at present there does not appear to be an incentive or ability of Mitsubishi to influence TenneT offshore towards a discriminatory behaviour.

In view of the above, the Commission considers that in the present case the generation interests of Mitsubishi do not give rise to a risk of discrimination in the operation of the TenneT Offshore networks.

IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, Bundesnetzagentur shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of TenneT Offshore, 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. Bundesnetzagentur 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, 18.1.2016

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

