



EUROPEAN COMMISSION

Brussels, **XXX**
[...] (2012) **XXX** draft

COMMISSION OPINION

of XXX

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10 of Directive
2009/72/EC - Germany - Certification of Amprion GmbH**

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I. PROCEDURE

On 10 July 2012, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of "Amprion GmbH" (hereafter, "Amprion") as a Transmission System Operator (TSO) for electricity.

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 the Electricity Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

Amprion is a transmission system operator for electricity in Germany. It owns and operates a high-voltage electricity network of 11 254 kilometers, covering an area of 73 079 km². Amprion is owned for 25.1% by RWE AG, a company active in production, generation and supply of electricity and gas, and for 74.9% by M31 Beteiligungsgesellschaft mbh & Co. Energie KG, a joint venture of numerous institutional investors. Amprion employs approximately 900 persons.

In order to comply with the applicable rules on unbundling of transmission system operators, Amprion has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Electricity Directive. This choice is available to Amprion under the German legislation transposing the Electricity Directive, i.e. the Energiewirtschaftsgesetz (hereafter "EnWG")³.

Article 9 Electricity Directive sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8)(b) therein provides that where on 3 September 2009 the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1, provided that the Member State concerned complies with the provisions of Chapter V, establishing requirements for independent transmission operators (Articles 17 to 23 Electricity Directive).

Bundesnetzagentur has analysed whether and to what extent Amprion complies with the unbundling rules of the ITO model as laid down in the German legislation transposing the Electricity Directive. Bundesnetzagentur has come to the preliminary conclusion that

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.

³ Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

Amprion complies with these requirements. The draft certification decision of Amprion is issued subject to the following conditions:

- (a) That the applicant shall without delay grant requests for connection to the maximum voltage/high voltage transformation level (grid level 2) when there is a legal requirement for granting the connection.
- (b) That the applicant no longer uses any services after 31.10.2012 from RWE Rhein-Ruhr AG or another undertaking associated with the RWE group of companies in connection with the supply and purchase of electricity and gas as a payment in kind for employees of the applicant.
- (c) That the applicant shall no longer use any services after 31.12.2012 from an undertaking associated with the RWE group of companies, except for services related to training cooperation with RWE Deutschland AG, settlement and administration of occupational pensions by RWE Service GmbH and access to historical data of the RWE group of companies.
- (d) That the applicant shall terminate the training cooperation with RWE Deutschland AG by 30.12.2016 at the latest.
- (e) That the applicant shall inform the ruling chamber in writing of progress in terminating the services referred to in point 2(d) for the first time on 30.12.2012 and every six months thereafter, referring in particular to any delays in relation to the timetable in the application.
- (f) That the applicant shall by 31.12.2012 at the latest cease the joint use of office and business space and access control systems, with undertakings associated with the RWE group of companies at the applicant's head offices at 44139 Dortmund, Rheinlanddamm 24.
- (g) That the applicant shall provide evidence to the ruling chamber of the implementation of the measures referred to in points 2(b) to 2(d) and 2(f) at the end of the periods referred to in those points.

III. COMMENTS

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

1. Choice of the ITO model

According to Article 9(8) Electricity Directive, the ITO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a Vertically Integrated Undertaking (hereafter, "VIU"). The Commission agrees with Bundesnetzagentur in the present case that the choice for the ITO model is legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

2. Contracts for services provided to the ITO by other parts of the VIU

Article 17(1)(c) Electricity Directive provides for specific rules on the contracting of services between other parts of the VIU and the ITO. As the ITO should be autonomous and not dependent on other parts of the VIU, the contracting of services to the ITO by any other part of the VIU is prohibited by the Electricity Directive. As a preliminary remark the Commission considers that in view of the general prohibition of services provided to the ITO by other parts of the VIU, derogation could only be envisaged in exceptional circumstances. Such derogation should be construed narrowly and should not go beyond what is strictly

necessary to protect overriding interests, such as the security and the reliability of the transmission system. Only in exceptional cases, where the services concerned are strictly necessary to protect overriding interests as referred to above, and where no other service provider except for the VIU could provide these services to the ITO, could a derogation possibly be considered justified. Such derogation should also in principle be of a transitional nature, limited in time. In addition, it should be ensured that transactions between other parts of the VIU and the ITO occur at arm's length in order to avoid cross subsidisation.

In the draft decision, Bundesnetzagentur lists a number of services which are still provided to Amprion by other parts of the RWE-group or have been provided by other parts of the RWE-group at the time of application. The majority of these services will be cancelled at the latest by 31 December 2012 and Bundesnetzagentur also includes a condition in this respect. However, for some specific services Bundesnetzagentur allows either for a longer transitional period or even for an indefinite prolongation. The Commission considers that Bundesnetzagentur has not clearly demonstrated that all these services, which are provided to the ITO by other parts of the VIU, are strictly necessary to protect the overriding interests referred to above. Neither has Bundesnetzagentur assessed whether the services concerned, even if strictly necessary as such, could also be provided by other service providers not related to the VIU, now or in the foreseeable future.

As regards accounting and management of employee pension schemes of Amprion, it follows from the draft decision that these are currently provided by RWE Service GmbH. Bundesnetzagentur argues that it is practically and economically not feasible to request a transfer of these tasks to Amprion. The Commission considers that for these services, Bundesnetzagentur should reassess in its final decision the compliance with the principles referred to above with a view to ensuring the independence and autonomy of the ITO.

As regards the archiving of legacy data ("*Altdatenarchivierung*") from the RWE-group, Bundesnetzagentur considers that a separation is not possible, but that Amprion has its own access rights which cannot be used by the companies of the RWE-group. The Commission invites Bundesnetzagentur to verify in this respect whether indeed adequate measures have been taken to avoid any abuse in the handling of these legacy data.

Furthermore, Bundesnetzagentur accepts in its draft decision a transitional period until 31 December 2016 for the cooperation on professional training with companies of the RWE-group. The Commission questions the necessity of such a long transitional period and invites Bundesnetzagentur to assess whether such cooperation could not be carried out with other companies than with those which form part of the VIU.

Finally, Amprion is renting office space as well as storage facilities from other parts of the VIU. Bundesnetzagentur concludes that this is done at conditions which are compliant with market conditions and therefore appropriate. In this regard the Commission also invites Bundesnetzagentur to assess whether such rental contracts cannot be concluded with other companies than with those which form part of the VIU.

3. IT consultants and contractors

According to Article 17(5) Electricity Directive TSOs shall not use the same consultants or external contractors for IT systems or equipment as any other part of the VIU. In its draft decision, Bundesnetzagentur has required Amprion to complete the separation of its IT system from the system used by the VIU. However, from Bundesnetzagentur's draft decision it appears that Amprion will continue to use services from external IT contractors who also provide services to the VIU. With reference to the EnWG, Bundesnetzagentur states in its draft decision that the VIU and Amprion can continue to employ the same external IT

contractors provided that these contractors ensure that specific employees are designated to exclusively advise Amprion.

The Commission questions whether the above approach can ensure the required level of independence of the ITO in IT related operations as required by Article 17(5) Electricity Directive. The Commission considers that only in exceptional cases, where no other external contractor except for the one that also provides services to the VIU could provide such services to Amprion, could a derogation to the prohibition of Article 17(5) Electricity Directive be considered justified. Such derogation should in that case also be of a transitional nature, limited in time, and accompanied by measures to effectively ensure that any conflicts of interests and abuses are avoided. The Commission invites Bundesnetzagentur to either require in its final certification decision that Amprion and the VIU do not employ the same external IT consultants or to assess whether the situation justifies a derogation on the basis of the aforementioned criteria.

4. Independent auditing

According to Article 17(6) Electricity Directive, the accounts of the TSO shall be audited by an auditor other than the one auditing the VIU or any part thereof. From Bundesnetzagentur's draft decision it appears that Amprion and the VIU would continue to employ the same auditing company after certification. Bundesnetzagentur has argued that employing the same auditing company can comply with the unbundling requirement as long as it is ensured that the natural persons auditing the VIU are different from the ones auditing Amprion.

The Commission considers, in view of Article 17(6) Electricity Directive, that Bundesnetzagentur, in order to avoid any conflicts of interests and to ensure an effective separation between the VIU and Amprion, should require that Amprion chooses an auditing company which is different from the one employed by the VIU or any part thereof.

5. Separation of premises

According to Article 17(5) Electricity Directive, the ITO shall not share the physical premises and security access systems with any part of the VIU. Amprion is currently still using the same premises as other parts of the VIU, but intends to separate the premises and the security access systems by 31 December 2012. However, it does not become sufficiently clear from the draft decision whether the envisaged separation will be effective, and will be able to remove any confusion in respect of the separate identities of the ITO and the VIU. The Commission invites Bundesnetzagentur to set clear criteria for separation in its final decision in order to ensure an effective separation of the premises concerned.

6. Supervisory Body – powers

Chapter V of the Electricity Directive provides for a detailed division of powers between the various bodies of the ITO, including between the Management Board and the Supervisory Body. According to the statutes of Amprion, prior authorisation by the Supervisory Body is required for every financing agreement exceeding the value of € 1 Mio or which is outside the usual course of business and which is not already part of the approved financing plan. The Commission underlines that thresholds should not be set at a too low level as this could undermine the autonomy of the Management Board as enshrined in the Electricity Directive. The Commission considers it necessary that Bundesnetzagentur reassesses whether the levels of the thresholds as referred to in the statutes are appropriate. In any event, these thresholds should not apply to decisions related to the preparation and implementation of the 10 Year Network Development Plan, as this is an exclusive competence of the Management Board.

7. Independence of management

According to Article 19(3) *juncto* Article 19(8) Electricity Directive, the majority of the management cannot have exercised any professional position or have had any responsibility or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders other than the TSO, for a period of three years before their appointment.

In its draft decision, Bundesnetzagentur makes reference to the German legislation implementing the Electricity Directive, the EnWG, according to which the independence requirement referred to above should not apply to members of the management of the ITO who were appointed before 3 March 2012. The Commission questions whether the German implementing legislation is in compliance with the Electricity Directive on this point and underlines that it might in certain cases undermine the effective independence of the ITO. The Commission therefore invites Bundesnetzagentur to reassess in its final certification decision whether the majority of the management of Amprion in fact fulfils the independence criteria laid down in Article 19(3) Electricity Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require in its final certification decision that the majority of the management of Amprion complies with the independence criteria laid down in Article 19(3) Electricity Directive.

According to Article 19(5) Electricity Directive, management and employees of the ITO shall hold no interest in any part of the VIU. In its draft decision, Bundesnetzagentur makes reference to the German implementing legislation which requires that shares in the VIU which have been acquired by the management before 3 March 2012 must be sold, but only by 31 March 2016, while for non-management staff no requirement applies to sell shares in the VIU. The Commission questions whether the German implementing legislation is in compliance with the Electricity Directive, and notes that in certain cases it may undermine the effective independence of the ITO. The Commission invites Bundesnetzagentur to require in its final decision that the management sell their financial interests in the VIU as soon as possible, or as a minimum give them in the hands of an independent trustee. The Commission furthermore invites Bundesnetzagentur to ensure that the provisions of Article 19(5) Electricity Directive are also complied with by the employees of Amprion which are not part of the management.

8. Independence of the Supervisory Body

According to Article 20(3) *juncto* 19(3) Electricity Directive, the independent members of the Supervisory Body cannot have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment.

From Bundesnetzagentur's draft decision and documents submitted to support Amprion's request for certification it does not become clear whether or not this condition has been applied to the independent members of Amprion's Supervisory Body. With reference to the considerations in the previous section concerning Article 19(3) Electricity Directive, the Commission invites Bundesnetzagentur to reassess in its final certification decision that the independent members of Amprion's Supervisory Body have in fact complied with the independence criteria of Article 19(3) Electricity Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require Amprion in its final certification decision to comply with the independence criteria of Article 19(3) Electricity Directive also in relation to its independent members of the Supervisory Board.

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 Amprion, 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,

For the Commission

Member of the Commission