



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 TenneT TSO 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/EC<sup>1</sup> (hereafter, "Electricity Directive"), of a draft decision on the certification of "TenneT TSO GmbH" (hereafter, "TenneT") 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

TenneT is a transmission system operator for electricity in Germany. It owns and operates a high-voltage electricity network of 10.700 km covering an area of 140.000 km<sup>2</sup>. Distribution networks with lower voltage are connected to the TenneT network through 121 transformer stations. TenneT is 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.

TenneT 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 under the German legislation transposing the Electricity Directive.

Bundesnetzagentur has come to the preliminary conclusion that TenneT does not comply with the requirements of the ownership unbundling model as laid down in the German legislation transposing the Electricity Directive and has therefore refused certification of TenneT in its draft decision. Bundesnetzagentur has submitted its draft decision to the Commission requesting 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. Refusal of certification for reasons of lack of financial resources

The German law transposing the Electricity Directive (hereafter, “EnWG”)<sup>3</sup>, more specifically § 8(2) S. 9 thereof, provides that ownership unbundled network operators have to ensure that they dispose of sufficient financial, physical, technical and human resources to fulfil their tasks provided for in Part 3 Sections 1 to 3 of the EnWG. One of the tasks of TSOs defined in the EnWG is the obligation to comply with requests for network connections in accordance with § 17(2a) EnWG<sup>4</sup>. Based on § 8(2) S. 9 *juncto* § 17(2a) EnWG, Bundesnetzagentur argues that TenneT cannot be certified as an ownership unbundled TSO, because it has not been able to satisfactorily demonstrate to Bundesnetzagentur that it has sufficient financial resources to satisfy all requested offshore connections to its grid.

Contrary to the unbundling provisions in Article 17 Electricity Directive concerning the independent transmission operator model (hereafter, "ITO"), Article 9 Electricity Directive does not require an ownership unbundled TSO to dispose of all financial resources necessary to fulfil its obligations as part of the unbundling requirements. The *ratio legis* for the inclusion of this requirement in Article 17 Electricity Directive is to guarantee the independence of the ITO in financial terms from the production and supply interests of the vertically integrated undertaking (hereafter, "VIU"). Without such a requirement, the VIU could continue to control the ITO, in particular in relation to investment decisions, by withholding the necessary funding in order to obstruct the building of new connections to the grid with a view to hindering its actual and potential competitors in production and supply. However, such concerns are not present in case of an ownership unbundled TSO, where there is no VIU which could undermine the TSO's independence.

Although from a market perspective, it is important that TSOs, irrespective of the unbundling model chosen, are well capitalised in order to be able to carry out the investments in the grid in accordance with the 10-year network development plan (hereafter, "TYNDP") and the priorities identified therein, withholding the certification for this reason cannot be justified on the basis of the provisions of the Electricity Directive related to the ownership unbundling model.

Moreover, in the current case it should be stressed that TenneT has carried out and continues to carry out major grid investments, both on- and offshore. TenneT has also provided information – as stated in the preliminary decision by Bundesnetzagentur – on the long-term financing of their investments through credit arrangements within the TenneT-Group and on the short-term liquidity which is provided through a cash-pooling system within the TenneT-Group.

The objective of the certification procedure is to ensure that the unbundling provisions of the Directive are properly complied with by the TSOs, and that as a result an effective separation of networks from activities of generation and supply is achieved. The involvement of the Commission in the certification procedure is meant to verify that the criteria of the Directive for the unbundling are interpreted and applied in a uniform manner across the EU.

The Commission considers that in the present case, the rules on ownership unbundling and certification of the Electricity Directive do not provide a justification for the conclusion that TenneT cannot be certified as an ownership unbundled TSO because of the fact that it would not have demonstrated to have sufficient financial resources to carry out the tasks laid down

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

<sup>4</sup> § 17(2a) EnWG provides for the network connection rules for offshore renewables installations. It obliges TSOs to put in place on demand of the operator of an offshore installation a connection to the technically and economically best suited connection point of the closest TSO on-shore.

in the EnWG, including satisfying all requested offshore connections to its grid. Therefore, the Commission invites Bundesnetzagentur to re-assess TenneT's application in accordance with the requirements of the Electricity Directive as set out above.

## **2. Assessment for compliance with the requirements in Article 9(1) Electricity Directive**

As a result of the refusal of the certification based on § 8(2) S. 9 *juncto* § 17(2a) EnWG, Bundesnetzagentur has not or not sufficiently addressed a number of other issues relevant for the assessment whether TenneT complies with the rules on ownership unbundling in Article 9 of the Electricity Directive. For example, the certification of TenneT TSO B.V. as an ownership unbundled TSO by the Dutch energy regulatory authority NMa should be included as a condition for the certification of TenneT. Furthermore, the fact that TenneT owns some of its assets only indirectly, e.g. through TenneT Offshore GmbH, a sister company of TenneT, requires a further assessment in light of the ownership unbundling rules, including in view of the possible participation of other investors in these assets. Also, it should be reviewed whether the CEO of TenneT has actually withdrawn from his functions in the supervisory boards of two supply companies. This list of issues is not exhaustive. Since there are no clear conclusions drawn in the draft decision as to whether TenneT complies with all the requirements for ownership unbundling under Article 9 of the Directive and/or what conditions would need to be imposed for compliance to be in place, the Commission is not in a position to comment on these issues in detail in the present opinion.

The Commission invites Bundesnetzagentur to examine the compliance of TenneT with the ownership unbundling requirements in accordance with Article 9 of the Directive in its final decision, addressing *inter alia* the issue referred to above.

## **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, 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*