



Brussels, 11.10.2018  
C(2018) 6785 final

**COMMISSION OPINION**

**of 11.10.2018**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V. (as TSO for the interconnector between the Netherland and Denmark (COBRA))**

(only the English version is authentic)

# COMMISSION OPINION

of 11.10.2018

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V. (as TSO for the interconnector between the Netherland and Denmark (COBRA))**

(only the English version is authentic)

## I. PROCEDURE

On 16 August 2018 the Commission received a draft decision from the Dutch energy regulatory authority, Authority for Consumers and Markets (hereafter, "ACM") on the re-certification of TenneT TSO B.V. (hereafter "TenneT") as Transmission System Operator ("TSO") for electricity, in accordance with Article 10(6) of Directive 2009/72/EC<sup>1</sup> (hereafter, "Electricity Directive").

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 the owner and operator of the entire Dutch onshore electricity transmission grid. Moreover, it has been certified as the TSO for and will construct, own and operate the Dutch offshore grid. It also owns and operates the southern part of the subsea NorNed-cable, a 700 MW interconnector connecting the Netherlands to Norway, in conjunction with its Norwegian counterpart Statnett.

TenneT Holding, the mother company of TenneT, is also the owner of TenneT TSO GmbH, a German TSO certified through a separate certification procedure in Germany using the ownership unbundled model.

TenneT Holding through Nlink International B.V. holds also 50 % of the joint venture BritNed Development Ltd, the operator of the interconnector between the Netherlands and the United Kingdom, certified by ACM and by the British regulator, OFGEM.

TenneT Holding's shares are ultimately wholly-owned by the Dutch state.

---

<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.

TenneT Holding has a number of subsidiaries, active in the construction, operation and management of offshore networks in Germany; however the review of these group members falls outside the scope of the draft decision submitted by ACM.

The European Commission issued on 1 July 2013 an opinion on the draft certification decision of ACM with regard to the TSO TenneT (C(2013)4206) in respect of its operation of the Dutch onshore electricity grid and the southern half of the NorNed-cable (hereafter, "the 2013 opinion")<sup>3</sup>. TenneT was subsequently certified for the operation of that network by the ACM by a Decision of 18 December 2013<sup>4</sup>.

The European Commission issued on 22 June 2016 an opinion on the draft certification decision of ACM with regard to the TSO TenneT (C(2016) 3987) in respect of its operation of the Dutch offshore electricity grid (hereafter, "the 2016 opinion")<sup>5</sup>. TenneT was subsequently certified for the operation of that network by the ACM by a Decision of 13 Juli 2016<sup>6</sup>.

The present request for certification concerns and is limited to the operation of a planned interconnector also known as the COBRA cable. The COBRA cable is 700 MW DC interconnector between the Netherlands (Eemshaven) and Denmark (Endrup). TENNET will own and operate part of the COBRA cable as will also the Danish TSO, Energinet SOV.

TenneT has applied for certification in accordance with the ownership unbundling model. In particular, TenneT 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. ACM has analysed whether and to what extent TenneT complies with the requirements of the ownership unbundling model. In its draft decision, ACM found that TenneT complies with these requirements. On this basis, ACM submitted its draft 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 draft decision.

---

<sup>3</sup> Commission Opinion of 1.7.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V, C(2013)4206 final.

<sup>4</sup> Besluit Certificering TenneT TSO B.V. Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 10, derde lid, van de Elektriciteitswet 1998. Zaaknummer: 103883\_5; Beslisdatum 18-12-2013 <https://www.acm.nl/nl/publicaties/publicatie/12455/Besluit-certificering-TenneT-TSO-BV/>

<sup>5</sup> Commission Opinion of 22.6.2016 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V. (as TSO for the offshore grid).

<sup>6</sup> Besluit certificering TENNET TSO B.V. als netbeheerder van het net op zee. Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 10, derde lid, van de Elektriciteitswet 1998. Zaaknummer: 6.0230.53, Beslisdatum 13 Juli 2016. [https://www.acm.nl/sites/default/files/old\\_publication/publicaties/16048\\_besluit-certificering-tennet-netbeheerder-net-op-zee-2016-07-15.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/16048_besluit-certificering-tennet-netbeheerder-net-op-zee-2016-07-15.pdf)

## 1. SEPARATION WITHIN THE STATE – ARTICLE 9(6)

The Dutch legislator has chosen to transpose only the requirements for full unbundling ("ownership unbundling") for transmission system operators in the national legislation<sup>7</sup> and these requirements apply also to operators of interconnectors.

Article 9(6) Electricity Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and may thus 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. In these cases, it must be demonstrated that the requirements of ownership unbundling of Article 9 Electricity Directive as enshrined in national law are duly complied with.

Article 9(1)(b)(i) Electricity Directive prohibits the same person or persons by the public bodies in question 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 or over a transmission system. Article 9(1)(b)(ii) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator 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.

From the draft decision it follows that TenneT is ultimately fully owned by the Dutch State<sup>8</sup>. The ownership of TenneT is administered by the Dutch Minister of Finance<sup>9</sup>. The Dutch State is also a shareholder in two companies active in the production and/or supply of gas: Energie Beheer Nederland (hereafter, "EBN") (100% interest), active in the exploration, exploitation and trade in oil and gas and therefore an important partner for oil and gas companies in the Netherlands, and GasTerra (10% interest), a company trading natural gas and operating internationally. These participations are managed by the Ministry of Economic Affairs and Climate (hereafter, "MEAC"). It is worth noting that EBN is also a 40% shareholder in GasTerra.

In its opinion on Danish TSO Energinet.dk, as well as in its 2013 opinion on TenneT and other certification opinions, the Commission considered that two separate Ministries controlling, on the one hand transmission of electricity and gas, and on the other hand activities of generation, production 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<sup>10</sup>. Article 9(3) Electricity Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of generation, production and supply within the meaning of Gas Directive 2009/73/EC. The Dutch State's participations in gas undertakings are hence relevant for the assessment of TenneT's compliance with the ownership unbundling rules.

---

<sup>7</sup> § 15 of the draft decision.

<sup>8</sup> §75 of the draft decision.

<sup>9</sup> §76 of the draft decision.

<sup>10</sup> 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), C(2012) 88 final Commission Opinion of 1.7.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V, C(2013)4206 final.

In its draft decision ACM has undertaken an in-depth evaluation of the degree of separation between the two Ministries concerned, focusing primarily on the principle of ministerial responsibility as enshrined in Dutch constitutional law<sup>11</sup>. According to the Dutch constitution Ministers have separate tasks for which they are personally and politically responsible. This includes independent decision-making powers over State participations for which a Ministry manages the State's shareholdings. The Prime Minister is responsible only for areas that are not covered by the Ministries. This also implies that the MEAC cannot give instructions to Ministry of Finance (or vice versa). The same applies to the Prime Minister. Moreover, the separation of competences applies throughout the entire organisation of a Ministry, meaning that individual public official working for the Ministry of Finance cannot take instructions from the MEAC (without permission of its Minister) and vice versa.

The Commission agrees with ACM's conclusion on this point that, on the basis of the elements described above, the structural separation of competences provides for a degree of separation between the Ministry of Finance and MEAC that is sufficient to comply with the requirements of Article 9(6) Electricity Directive.

## **2. REMAINING COMPETENCES FOR THE MEAC**

The Commission notes that while the Dutch Minister of Finance governs and owns TenneT, the MEAC retains certain competences relating to TenneT. Since MEAC also owns shares in EBN and GasTerra, it must be guaranteed that no conflict with the provisions of Article 9(1)(b), (c) and (d) and 9(2) Electricity Directive arises.

In its opinions of 2013 and 2016, the European Commission has expressed concerns about a number of tasks and competences that MEAC has with regard to TenneT on the basis of the Dutch Electricity Act 1998 (hereafter, " Electricity Act "). These tasks and competences included the need for MEAC-approval of the bylaws of TenneT and the need for MEAC-approval of special investments and the need for MEAC-approval in appointing members of TenneT's supervisory body.

The Commission recalls in this context that the reason for the obligation to strictly separate the public bodies is to ensure independence with regard to transmission on the one hand and generation and supply on the other. The existence of the competences for the MEAC relating to TenneT demonstrates that the separation of the two public bodies, although ensured in structure, may in practice be called into question.

The above concerns of the Commission may also be relevant in the context of the current certification of TenneT, concerning the operation of the interconnector at issue.

The Commission therefore assesses below whether these concerns could be considered resolved.

### **The need for MEAC approval of the bylaws of TenneT**

With regard to the power of MEAC to approve the bylaws of TenneT, it appears from the legislative history of the relevant article in the Electricity Act that the purpose of this power was to ensure that other (commercial) activities employed by the holding company of TenneT, TenneT Holding, do not interfere negatively with the independent operation of the network. Whilst the Commission agrees that it is important that groups to which a TSO belongs do not undertake activities that affect either the independent operation of the network or the TSO's financial viability, the Commission notes that this objective is not reflected in the scope of this provision.

---

<sup>11</sup> §84 of the draft decision.

In its draft decision as notified now, the ACM notes<sup>12</sup> that an amendment of the Electricity Act has removed the requirement for the MEAC to approve modifications of the by-laws with effect from 1 July 2018. The Commission understands this amendment to be contained in the "Wet van 19 april 2018 tot wijziging van de Elektriciteitswet 1998 en van de Gaswet (voortgang energietransitie)".

Therefore, the Commission considers that the concerns previously expressed on this point have been resolved.

### **The need for MEAC-approval of special investments**

The Commission stresses, as noted above, that complying with the ownership unbundling model within the State requires full compliance with Article 9(1)(b), (c) and (d) Electricity Directive. This means *inter alia* that the competences of MEAC with regard to TenneT must not amount to "control" or "any right" over TenneT as a TSO pursuant to the meaning of Article 9(1) and (2) Electricity Directive<sup>13</sup>.

In its 2013 opinion, the European Commission raised concerns in relation to the MEAC's power to evaluate the necessity and approve special investments of TSOs. According to Article 20e §1 of the Dutch Electricity Act, an operator of the national grid (TSO) had to announce its intention to make certain investments in the construction or expansion of the network to the MEAC (Article 20e §1 of the Electricity Act)<sup>14</sup>. Pursuant to Article 20e §3 of the Electricity Act, the MEAC has the right to evaluate the "necessity" of the respective investments. Absent the MEAC's approval of the "necessity" of the investment, TenneT cannot recover the investment costs through its tariffs<sup>15</sup>. This means in practice that the MEA has a *de facto* veto right on certain investment decisions and that certain intended investments may not be realised.

As already expressed in the 2013 opinion, the Commission does not consider such a *de facto* veto right compatible with the requirement of separation of public bodies pursuant to Article 9(6) Electricity Directive.

In the draft decision at hand, the ACM notes<sup>16</sup> that an amendment of the Electricity Act will abrogate Article 20(e) with effect from 1 January 2019. The Commission understands this amendment to be contained in the "Wet van 19 april 2018 tot wijziging van de Elektriciteitswet 1998 en van de Gaswet (voortgang energietransitie)".

Therefore the Commission considers that the concerns previously expressed on this point will be resolved once the aforementioned amendment has entered into force.

### **3. OWNERSHIP OF THE NETWORK**

According to the Article 9(1)(a) Electricity Directive, Member States shall ensure that each undertaking which owns a transmission system, acts as a transmission system operator.

---

<sup>12</sup> See § 92

<sup>13</sup> See Article 9(1)(b)(i) Electricity Directive: "*The same person or persons are (not) entitled directly or indirectly to exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly to exercise control or any right over a transmission system operator or over a transmission system.*"

<sup>14</sup> The article uses the term of "special" (bijzondere) investments, without further defining the criteria of thresholds of what can be considered a "particular" investment. The recitals (memorie van toelichting) to the original legislative proposal only clarify that smaller investments such as grid connections do not fall under the notion of special investments, but does not provide for any further criteria (<https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/visphupx3kzu>).

<sup>15</sup> See Article 20e §4.

<sup>16</sup> See § 92

Therefore, in order to be certified, a TSO must be an owner of the transmission system which it operates.

ACM notes in this respect that the COBRA cable will be a cross-border cable connecting the Netherlands and Denmark. TenneT will operate and own the southern part of the COBRA cable, whereas Energinet, the Danish TSO, owns and operates the northern part. The Commission therefore considers that the requirement of Article 9(1)(a) Electricity Directive is fulfilled.

#### **IV. CONCLUSION**

Pursuant to Article 3(2) of the Electricity Regulation, ACM 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. ACM 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, 11.10.2018

*For the Commission*  
*Miguel ARIAS CAÑETE*  
*Member of the Commission*

