



Brussels, **XXX**
[...] (2013) **XXX** draft

COMMISSION OPINION

of **XXX**

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.

COMMISSION OPINION

of **XXX**

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.

I. PROCEDURE

On 3 May 2013 the Commission received a preliminary decision from the Dutch regulatory authority (hereafter, "ACM") on the 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/EC¹ (hereafter, "Electricity Directive").

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

TenneT is the owner and operator of the entire Dutch onshore electricity transmission grid. It also co-owns and co-operates with its Norwegian counterpart Statnett the subsea NorNed-cable, a 700 MW interconnector connecting the Netherlands to Norway. The request for certification hence also includes the southern half of the NorNed-cable. TenneT Holding, the mother company of TenneT, is also the owner of TenneT Germany, a German TSO following a separate certification procedure in Germany. TenneT's shares are ultimately wholly owned by the Dutch state.

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 preliminary decision, ACM found that TenneT complies with these requirements. On this basis, ACM 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 draft decision.

1. 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

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.

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 of the Directive are enshrined in national law and are duly complied with. This has to be assessed on a case-by-case basis.

Article 9(1)(b)(i) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over an undertaking performing any of the functions of production 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 production or supply.

From the preliminary decision it appears that TenneT is ultimately fully owned by the Dutch State. The ownership of TenneT is administered by the Dutch Minister of Finance. The Dutch State is also a shareholder in two companies active in the generation and/or supply of gas: Energie Beheer Nederland (hereafter, "EBN") (90%), active in the exploration and exploitation of oil and gas, and GasTerra (10%), the exclusive vendor of gas produced from the Groningen field. These participations are managed by the Ministry of Economic Affairs (hereafter, "MEA"). It is worth noting that EBN is also a 40% shareholder in GasTerra.

In its Opinion on Danish TSO Energinet.dk, the Commission considered 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 Directive³. 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 Gas Directive 2009/73/EC. The State's participations in gas undertakings are hence relevant for the assessment of TenneT's compliance with the ownership unbundling rules.

In its preliminary 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. 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 Ministry of Finance cannot give instructions to MEA or vice versa. The same applies to the Prime Minister. Moreover, the separation of competences applies throughout the entire organization of a Ministry including to each individual public official.

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

³ 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

separation between the Ministry of Finance and MEA that is sufficient to comply with Article 9(6) Electricity Directive.

The Commission is however concerned about a number of explicit tasks and competences that MEA has with regard to TenneT on the basis of the Dutch Electricity Act. These tasks and competences include the need for MEA-approval of the bylaws of TenneT, the need for MEA-approval of special investments and the need for MEA-approval in appointing members of TenneT's supervisory body.

The Commission notes that complying with the ownership unbundling model within the state does not only imply compliance with Article 9(6) Electricity Directive, but also with the Article 9(1)(b), (c) and (d) Electricity Directive. This means *inter alia* that the competences of MEA, insofar as its power over GasTerra and/or EBN amounts to control, with regard to TenneT may not amount to any right within the meaning of Article 9(1) and (2) Electricity Directive. Moreover, the Commission recalls 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 tasks demonstrates that the separation of the two public bodies, although ensured in structure, in practice can be called into question.

From the preliminary decision of ACM and communication between ACM and TenneT annexed to it, it appears that there are a number of reasons and justifications for the fact that these powers have been assigned to MEA. In addition, there are guarantees that safeguard the independent operation by TenneT of its grid. It is brought forward that the competences concerned relate to MEA's general responsibility for Dutch energy policy and that they are in no way related to MEA's participations in EBN and GasTerra.

With regard to the power of MEA to approve the bylaws of TenneT, it appears from the legislative history of the relevant article in the Dutch Electricity Act, that this task is meant exclusively 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 activities that groups to which a TSO belongs do not undertake activities that affect either the independent operation of their network or its financial viability, the Commission notes that this clear objective does not appear from the text of the Electricity Act which does not explicitly restrict the scope to be confined to serve this end.

The power of MEA to approve special investments of TenneT by way of establishing their necessity is, according to the legislative history of the relevant provisions in the Electricity Act, first and foremost a means to give up front certainty to TenneT with regard to its possibility to recoup efficiently made investment costs through inclusion of the investment in its regulated asset base, whereby ACM assesses the efficiency of the investment. The particular focus of MEA in its assessment on the necessity of the investment is on the impacts the investment will have on security of supply as well as on its costs and benefits. The Commission notes that in any case whereby a person holding interests in gas production and supply at the same time has a decisive say in whether or not important investments in electricity transmission infrastructure can go ahead or not, the incentive may arise to abuse the control over the investments in the TSO with a view to favour the generation or supply interests. This is a general principle not confined to the Electricity Act. Although the Commission agrees that the legislative history of the Electricity Act clearly indicates that the relevant provisions are principally aimed at ensuring security of supply and facilitating permitting procedures and are thus meant to ensure that investment can go ahead – rather than being prevented – it is unclear on the basis of the legal text of the provision itself, whether in

practice it is conceivable that a situation occurs in which the apparent conflict of interest can result in negative effects on the independent development of the network.

The Commission therefore invites ACM, before taking its final certification decision, to assess in detail the way in which MEA can carry out these two tasks and whether or not that gives rise to the incentive and the ability for MEA to influence the decision making in the transmission system operator in order to favour MEA's generation and supply interests to the detriment of other network users. Only in case where ACM's assessment concludes that such an incentive and ability are clearly absent can compliance with the ownership unbundling requirements in Article 9 Electricity Directive be considered to be achieved.

The Commission notes in regard to the need for TenneT to obtain approval from MEA for the appointment of members of its supervisory body, that an amendment to the Electricity Act is foreseen which will result in the cancellation of the relevant provision. The Commission considers this competence not to be reconcilable with the requirements of Article 9 Electricity Directive and invites ACM to monitor the adoption of the proposed legislation in order to ensure that this task is eliminated and to include the possibility in the final decision to reconsider the certification should the amendment not be adopted.

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 they do 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,

For the Commission

Member of the Commission