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COMMISSION OPINION

of 5.5.2017

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 DolWin3 Verwaltungs GmbH

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I. PROCEDURE

On 8 March, the Commission received a notification from the German regulatory authority Bundesnetzagentur (hereafter "BNetzA"), in accordance with Article 10(6) of Directive 2009/72/EC (hereafter "Electricity Directive"), of a draft decision on the certification of TenneT Offshore DolWin3 Verwaltungs GmbH (hereafter "TenneT Offshore DolWin3") 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 DolWin3 is the owner and operator of the DolWin3 cable connecting offshore wind parks in the North Sea to the German onshore grid.

TenneT Offshore DolWin3 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 DolWin3 are held indirectly by a Danish limited partnership, a single purpose fund, "CI Artemis", managed by Copenhagen Infrastructure Partners K/S ("CIP") and with PensionDenmark Pensionsforsikringsaktieselskab, a Danish pension fund ("PD") as its sole limited partner.

CI Artemis holds this participation via its 100% subsidiary CI Artemis HoldCo A/S, Copenhagen/Denmark.

PD also holds shares in two other funds which are managed by CIP.

TenneT Offshore DolWin3 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 DolWin3 under the German legislation transposing the Electricity Directive.

BNetzA has come to the preliminary conclusion that, subject to one condition, TenneT Offshore DolWin3 complies with the requirements of the ownership unbundling model as laid down in the German legislation transposing the Electricity Directive.

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

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.

III. COMMENTS

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

CIP'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.

PD is the sole limited partner in the fund CI Artemis, which indirectly holds 49% of the shares in TenneT Offshore DolWin3. In addition, PD holds shares in two other funds (CI I and CI II) which hold investments in electricity generation within the EU. All three funds are managed by CIP.

The investments by funds managed by CIP concern the following plants: [BUSINESS SECRET] of Snetterton biomass plant (UK) with a generation capacity of 44.2 MW; [BUSINESS SECRET] of Brigg biomass plant (UK) with a generation capacity of 44.2 MW; [BUSINESS SECRET] in the project promoter of Beatrice offshore wind farm (UK) with a planned generation capacity of 588 MW; [BUSINESS SECRET] of BRITE biomass plant (UK) with a planned generation capacity of 39.3 MW; and [BUSINESS SECRET] of Kent biomass plant (UK) with a generation capacity of 27.8 MW.

With regard to the Beatrice offshore project, as the project with the highest generation capacity among CIP's investments, BNetzA notes that an investment contract was concluded with the UK government which sets a fixed unit price for a duration of [BUSINESS SECRET].

CIP has also invested [BUSINESS SECRET] of [BUSINESS SECRET] and acquired a share representing around [BUSINESS SECRET] of the total share capital in Veja Mate, a planned offshore wind farm in the North Sea, which will have up to 80 plants with a total capacity of 402 MW.

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 Commission Staff Working Document: "*Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors*"², 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 CIP's participations in various undertakings involved in the production of electricity give rise to a conflict of interest in the operation of TenneT Offshore DolWin3.

² SWD(2013) 177 final

The relevant question to be answered in this context is whether or not CIP has the incentive and ability to use its influence over TenneT Offshore DolWin3 in a way so as to favour the proceeds of the electricity generated by the above-mentioned electricity generation plants.

BNetzA's assessment

BNetzA considers a number of elements which limit the incentive and/or the ability of CIP in general to use its influence over TenneT Offshore DolWin3 in a way so as to favour the proceeds of above-mentioned electricity generation plants.

Firstly, given the fact that TenneT Offshore DolWin3 consists of one offshore cable only, the only way in which CIP could influence its power over TenneT Offshore DolWin3 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.

BNetzA, however, considers that the commercial impact of such interruption would be marginal due to the fact that the generation capacities linked to the cable are minor in comparison to the entire generation capacity on the German market.

Moreover, by creating such a situation CIP would trigger the liability regime for interruptions and potentially incur fines would likely outweigh any hypothetical gains.

Secondly, BNetzA also notes that TenneT Holding B.V., the majority shareholder of TenneT Offshore DolWin3 would have no interest in conducting such actions in order to increase the revenues of its co-shareholder. The daily management of TenneT Offshore DolWin3 is carried out by TenneT TSO GmbH, an ownership-unbundled TSO and part of the TenneT group. This reduces the ability of CIP to influence the operation of TenneT Offshore DolWin3 to the benefits of its generation interests and limits CIP's access to confidential information.

Finally, BNetzA notes that CIP is legally prohibited from privileging any of the three funds in question to the detriment of the others.

BNetzA considers additional elements in relation to the individual generation interests of CIP.

As regards the investments in the Snetterton, Brigg, BRITE and Kent plants, BNetzA notes that their generation capacities are limited in relation to the respective national markets, and the plants situated farther away from the German market.

As regards the investment in the Beatrice offshore wind farm, it is considered that the long-term fixed unit price agreed on in the investment contract with the UK government means that the operation of TenneT Offshore DolWin3 will have no influence on the revenue generated by this investment.

Finally, as regards the investment in the planned Veja Mate offshore wind farm, BnetzA notes that while Veja Mate and the wind farms connected by the DolWin3 cable are located in close proximity, there is no direct interface as Veja Mate is connected via the BorWin2 cable.

On this basis, BnetzA concluded that CIP's shareholdings in generation capacities do not preclude a certification arguing that the risk of abusing the network benefits appears to be rather limited.

Commission assessment

The Commission agrees in principle with the above assessment provided by BNetzA as regards the limited financial incentive to interrupt the DolWin3 cable and the deterrent effect of potential fines for such actions. More importantly, the day-to-day management by TenneT TSO GmbH effectively limits CIP's ability to influence the operation of TenneT Offshore

DolWin3 in a discriminatory manner. The Commission agrees with BNetzA's view that TenneT Holding B.V., the majority shareholder of TenneT Offshore DolWin3, would have no interest in taking considerable legal risk solely for the financial benefit of its co-shareholder.

The Commission also concurs with BNetzA's view that given the limited generation capacities of the Snetterton, Brigg, BRITE and Kent plants, their geographical distance from the German market, and the limited impact of the DolWin3 cable on market prices in Germany, the investments do not create sufficient incentives to use influence over TenneT Offshore DolWin3 in a way so as to favour the proceeds of the electricity generated in these plants.

As regards the investment in the Beatrice offshore wind farm, it is considered that the long-term fixed unit price agreed on in the investment contract with the British government implies that the operation of TenneT Offshore DolWin3 will have limited influence on the revenue generated by this investment. However, given the substantial generation capacity, the Commission considers that BNetzA should reassess the situation once this investment contract expires. Moreover, the Commission suggests that, despite the existence of a fixed unit price, in its decision BNetzA should set an additional condition according to which BNetzA will have to review the certification decision once significant progress is made on the planned North Sea Offshore Grid³ so that CIP's generation activities would be linked to the same offshore grid as the offshore wind parks that DolWin3 cable connects, raising concerns about potential future conflict of interests.

With regard to the Veja Mate wind farm, BNetzA relies on the fact that there is no physical link with the wind farms connected via DolWin3. The Commission underlines that similarly to the Beatrice case, this situation could change in the future if the planned North Sea Offshore Grid is completed and CIP's generation activities are directly linked to DolWin3. At that stage, a re-assessment of CIP's incentive to use its influence over TenneT Offshore DolWin3 would seem necessary. The Commission thus calls upon BNetzA to render compulsory the re-assessment of its decision when significant progress is made on the North Sea Offshore Grid so that CIP's generation activities would be linked to the same offshore grid as the offshore wind parks that DolWin3 cable connects.

Subject to these caveats, the Commission accepts the view put forward by BNetzA that at present there does not appear to be an incentive or ability of CIP to influence TenneT Offshore DolWin3 towards a discriminatory behaviour.

Therefore, the Commission considers that in the present case the generation interests of CIP do not constitute a reason to refuse the certification of TenneT Offshore DolWin3.

Other comments

BNetzA has imposed as a condition in its preliminary certification decision that the management of TenneT Offshore DolWin3 shall not include board members or legal representatives of undertakings directly or indirectly controlled by CIP, which are active in generation or supply of energy. BNetzA notes that TenneT Offshore DolWin3 currently fulfils this condition. The Commission supports the inclusion of this condition.

³ See North Seas Energy Cooperation and the Political Declaration signed by 10 countries in June 2016, <<https://ec.europa.eu/energy/en/topics/infrastructure/north-seas-energy-cooperation>>

IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, BNetzA shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of TenneT Offshore Do1Win3, 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. BNetzA 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, 5.5.2017

For the Commission
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Member of the Commission