



Brussels, **XXX**  
[...] (2014) **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 BritNed Development Limited**

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### I. PROCEDURE

On 18 March 2014 the Commission received a preliminary decision from the Dutch regulatory authority (hereafter, 'ACM') on the certification of BritNed Development Limited (hereafter, 'BritNed') 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 decisions and deliver an opinion to the relevant national regulatory authorities as to their compatibility with Article 10(2) and Article 9 of the Electricity Directive.

### II. DESCRIPTION OF THE NOTIFIED DECISIONS

BritNed is the owner and operator of the high voltage direct current electricity interconnector between the Isle of Grain in the United Kingdom and Maasvlakte in the Netherlands. BritNed is a joint venture company by National Grid Holdings One plc (50%) and Tennet Holding B.V. (hereafter, "TenneT") (50%). Both owners are operators of transmission grids in Great Britain and the Netherlands respectively. BritNed is operated independently of the transmission systems in GB and the Netherlands.

BritNed has been granted an exemption for new interconnectors under Article 7 of Regulation (EC) No 1228/2003<sup>3</sup> (repealed and replaced by the Electricity Regulation as from 3 March 2011) which applies to all of the 1000MW capacity, in both directions, of the interconnector. The exemption was granted by the regulatory authorities in both the Netherlands and the UK for a period of 25 years from the start of the operations, meaning that it will continue until 31 March 2036 unless it is revoked earlier pursuant to criteria included in the exemption.

BritNed has applied for certification in the United Kingdom and in the Netherlands, in either case on the basis of the specific framework for exempted infrastructures that is laid down in the respective national implementing laws. In the United Kingdom, BritNed has been granted certification in July 2013 by the Gas and Electricity Market Authority (hereafter, 'Ofgem') following a procedure, during which the Commission provided its Opinion.<sup>4</sup> In the

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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.

<sup>3</sup> Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L 176/1 of 15.7.2003.

<sup>4</sup> Commission Opinion of 15.5.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the United Kingdom - Certification of BritNed Development

Netherlands, ACM, in its preliminary decision as notified to the Commission on 18 March 2014, reaches the same preliminary conclusion, namely that BritNed has sufficiently demonstrated that it complies with the relevant unbundling requirements under Dutch legislation transposing the Electricity Directive and that it therefore can be certified. ACM has submitted its draft decision to the Commission requesting an opinion.

### III. COMMENTS

According to Dutch implementing legislation regarding the certification of TSOs, applications by interconnectors that have been granted an exemption need to be assessed on the basis of the criteria laid down in the exemption, rather than on the basis of the regular ownership unbundling rules.

The criteria laid down in the exemption granted to BritNed can be categorized in three groups: criteria with regard to the allocation of capacity, to transparency requirements and to the independence of BritNed from its mother companies. In its preliminary certification decision ACM has assessed these criteria and has come to the conclusion that BritNed complies with all the relevant criteria and that certification can hence be granted in accordance with Dutch implementing legislation.

In its Opinion addressed to Ofgem with regard to BritNed of 15 May 2013, the Commission has taken the view that:

*'the rights that the exemption has granted to the investing parties need to be protected and that the investing parties concerned are entitled to continue to benefit from the exemption.'*<sup>5</sup> Recital (23) Electricity Regulation makes it clear that the exemption shall continue to apply until its expiry date, unless revoked on the basis of one of the included criteria. However, the mere fact that an exemption has been granted does not mean that as a rule unbundling rules do not apply at all. The Commission takes the view that these rules should be applied to the extent possible without undermining the exemption.

*In the present case the Commission notes that the exemption does not entail a derogation from unbundling requirements. However, the Commission also notes that the ownership and governance structure of BritNed prima facie appears such that no conflict with the full ownership unbundling model as laid down in Article 9 Electricity Directive would have been encountered, should BritNed have applied for certification under that regime. The Commission considers that on this basis, BritNed can be certified as a TSO compliant with the unbundling rules.'*<sup>6</sup>

This reasoning continues to apply in the present case. In addition, the Commission notes that the unbundling provisions of the Electricity Directive, in particular Article 9(5), encourage neighbouring certified TSOs to enter into joint ventures and develop cross-border transmission lines.

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Limited,

[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/certification/2013\\_062\\_uk\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2013_062_uk_en.pdf).

<sup>5</sup> See also Commission Opinion of 11.3.2013 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – the Netherlands and the United Kingdom - Certification of BBL Company VOF, C(2013)1526.

<sup>6</sup> Commission Opinion of 15.5.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the United Kingdom - Certification of BritNed Development Limited, page 3.

#### 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 BritNed, and when it does so, shall communicate its decision to the Commission.

The Commission's position on these particular notifications 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*