



Brussels, 10.9.2020
C(2020) 6306 final

COMMISSION OPINION

of 10.9.2020

pursuant to Article 51(1) of Regulation (EU) 2019/943 and Article 52(6) of Directive (EU) 2019/944 – Germany – Certification of TenneT Offshore 1. Beteiligungsgesellschaft mbH and TenneT Offshore 9. Beteiligungsgesellschaft mbH as transmission system operators for electricity

(ONLY THE GERMAN VERSION IS AUTHENTIC)

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pursuant to Article 51(1) of Regulation (EU) 2019/943 and Article 52(6) of Directive (EU) 2019/944 – Germany – Certification of TenneT Offshore 1. Beteiligungsgesellschaft mbH and TenneT Offshore 9. Beteiligungsgesellschaft mbH as transmission system operators for electricity

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I. PROCEDURE

On 13 July 2020, the Commission received a notification from the regulatory authority in Germany, the Bundesnetzagentur (hereafter “BNetzA”), of preliminary decisions concerning the certification of TenneT Offshore 1. Beteiligungsgesellschaft mbH (hereafter “TenneT 1”)¹ and TenneT Offshore 9. Beteiligungsgesellschaft mbH (hereafter “TenneT 9”)² as transmission system operators for electricity (hereafter “TSO”).

TenneT 1 and TenneT 9 have previously been certified as transmission system operators under the ownership unbundling model. TenneT 1 has been certified by decision of 22 October 2013 as transmission system operator for the offshore wind connections BorWin1 and BorWin2. In support of its original certification, the European Commission delivered Opinion C(2013) 5631 of 29 August 2013. TenneT 9 has been certified by decision of 16 March 2016 as transmission system operator for the offshore wind connections HelWin2 and DolWin2. In support of its original certification, the European Commission delivered Opinion C(2016) 213 of 18 January 2016.

Pursuant to Article 51 of Regulation (EU) 2019/943³ (hereafter "Electricity Regulation") and Article 52 of Directive (EU) 2019/944⁴ (hereafter "Electricity Directive"), the Commission is required to examine the notified draft decisions and to deliver an opinion within two months to the relevant national regulatory authority as to their compatibility with Articles 43 and 52 of the Electricity Directive.

Whereas BNetzA issued two separate draft decisions, the ownership structure of both TSOs is identical. The present opinion thus addresses the certification of both TenneT 1 and TenneT 9.

II. DESCRIPTION OF THE NOTIFIED PRELIMINARY DECISIONS

TenneT 1 and 9 are both, indirectly, owned to 51 % by TenneT GmbH & Co. KG, which in turn is fully owned by TenneT Holding B.V., owned to 100 % by the Dutch state.

The other 49 % of TenneT 1 are owned by Diamond Germany 1. Transmission GmbH, 51 % of which were owned by Diamond Transmission Corporation Limited (DTC), a 100 %

¹ BNetzA file number: BK6-12-277

² BNetzA file number: BK6-15-045

³ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.6.2019, p. 54.

⁴ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019, p. 125.

subsidiary of the Mitsubishi Corporation (hereafter “MC”). The indirect ownership of MC was subject of a Commission Opinion of 2 March 2018⁵. The remaining 49 % of Diamond Germany 1. Transmission GmbH are owned by Chubu Electric Power & MUL Germany Transmission GmbH, 51 % of which are owned by Chubu Electric Power Co, Inc (hereafter “Chubu”) and 49 % are owned by Mitsubishi UFJ Lease & Finance Co. Ltd. (hereafter “MUL”), two Japanese undertakings. MUL is not part of the MC consortium, but MC holds a share of [REDACTED]

As regards TenneT 9, the other 49 % are owned by Diamond Germany 2. Transmission GmbH, which has an ownership structure identical to that of Diamond Germany 1. Transmission GmbH.

The preliminary decisions concerning the certification of TenneT 1 and TenneT 9 notified by BNetzA have been triggered by MC selling its 51% share in Diamond Germany 1. Transmission GmbH and in Diamond Germany 2. Transmission GmbH to CI Artemis II HoldCo GmbH. This company is a 100% subsidiary of CI Artemis II HoldCo ApS which is in 100% ownership of CI Artemis II K/S, a special purpose fund (*Zweckvermögen*) under Danish law owned by limited partner (*Kommanditist*) PensionDenmark (hereafter “PD”) and general partner (*Komplementär*) CI Artemis II GP ApS. PD is a non-profit pension fund owned by labour unions and employers’ associations. CI Artemis II GP ApS is owned by Copenhagen Infrastructure Partners (hereafter “CIP”). CIP is a fund management company founded in 2012 and is owned by its senior partners⁶. The Commission understands that the remaining share of 49 % both in Diamond Germany 1. Transmission GmbH and in Diamond Germany 2. Transmission GmbH remains with Chubu Electric Power & MUL Germany Transmission GmbH.

CIP also administers CI Artemis II K/S, as well as other funds owned by PD. These funds have invested also in electricity generation assets:

- Snetterton: a 44.2 MW biomass power plant in England in which CIP has [REDACTED] share and which has a 15 years supply contract with a large European utility company.
- Brigg: a 40 MW biomass power plant in England in which CIP has [REDACTED] share.
- [REDACTED]
- Kent: a 28.7 MW biomass power plant in England in which CIP has [REDACTED] share.
- Beatrice: a 588 MW offshore wind farm in Scotland, officially opened in July 2019⁷, in which two funds controlled by CIP have a total share of [REDACTED] and whose electricity production is reimbursed via a contract with the UK government which ensures a stable income for the first 15 years of the windfarm’s operation.
- Veja Mate: a 402 MW offshore wind farm in the North Sea in which CIP invested [REDACTED] in form of a subordinated liability (*nachrangige Verbindlichkeit*).

Veja Mate is linked to the onshore grid by the BorWin2 line, which is owned by TenneT 1. The wind farm will benefit from regulated income for the first 20 years of its operations. All rights and licenses of the Veja Mate offshore wind farm are held by the project company Veja Mate Offshore Project GmbH (VM Offshore).

⁵ C(2018) 1435 final

⁶ <http://cippartners.dk/about/>

⁷ <https://www.beatricewind.com/>

CIP had invested another [REDACTED] in form of a subordinated liability [REDACTED]. However, it made use of the option to convert the subordinate liability into equity and then sold all its stakes in VM Offshore's equity. [REDACTED]

The remaining subordinate liability of [REDACTED] does not include an option to convert it into equity. However, it grants CIP reserve rights in pre-defined cases when its investment appears to be at risk: [REDACTED]

BNetzA considers it as highly unlikely that any of those cases will eventuate: The Veja Mate wind farm is already operational, hence there are no longer planning or construction risks, and it receives regulated income, therefore the risk of insolvency is negligible. [REDACTED]

BNetzA does not see the above mentioned investments into generation assets as a hindrance to the certification of TenneT 1 and TenneT 9, since CIP has, for several reasons, no ability and/or incentive to use the control of network assets to the benefit of generation assets in which CIP holds participations: The capacity of the generation assets connected by the controlled cables is low in relation to the total installed capacity of generation assets in Germany, hence possible influences on electricity prices would be marginal. The generation assets controlled by CIP in England and Scotland are relatively small compared to the total installed capacity in the United Kingdom and their revenues are determined by national support schemes.

BNetzA explains that, [REDACTED] BNetzA stresses that the majority shareholder TenneT Offshore GmbH would not allow the misuse of control over the cables to the benefit of CIP's generation assets, since TenneT TSO GmbH's liability to ensure functioning connections to the onshore network means that such misuses would create considerable economic risks for the TenneT group. In this context, BNetzA refers to the Commission Opinion of 18 August 2017 on the certification of TenneT Offshore DolWin3 Verwaltungs GmbH⁹ in which the Commission agreed that the TenneT group as majority shareholder would have no interest in taking considerable legal risk solely for the financial benefit of its co-shareholder CIP.

According to BNetzA, a further safeguard is [REDACTED]

⁸ [REDACTED]
⁹ [REDACTED] C(2017) 5771 final

Such infringements of German law would also not be tolerated by the TenneT consortium.

BNetzA is therefore minded to certify TenneT 1 and TenneT 9, but to replace the existing conditions by the following ones:

- Their management (*Geschäftsführung*) shall not include persons which are also members of a board or other body legally representing an entity which CIP directly or indirectly controls and which is performing any of the functions of generation or supply.
- Before the above mentioned 15 year contract between the Beatrice wind farm and the UK government ends, TenneT 1 and TenneT 9 shall provide BNetzA with information about the subsequent regime (*Verrechnungsmodell*).

BNetzA reserves the right to revoke the certifications.

On this basis, BNetzA submitted its preliminary decisions to the Commission requesting an opinion.

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the preliminary decisions.

1. Background to the Commission assessment

Article 43(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 TSO or over a transmission system. Article 43(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. The objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs.

The Commission considers that the means with which the legislator intended to pursue the objective of removing any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs is to provide for a structural solution to the problem that owners of electricity or gas infrastructure may use their control over this infrastructure (constituting a natural monopoly or an “essential facility”) to favour their own generation or supply business. The unbundling regime pursuant to EU legislation is meant to prevent such practices and replaces the previous regime of relying exclusively on behavioural measures (reporting, ex post control including fines) by a structural separation between generation/supply and transport infrastructure which excludes the possibility to use the infrastructure to influence competition.

Nevertheless, the objective and purpose of the EU unbundling rules should be kept in mind in the certification of TSOs. As explained in the Staff Working Paper *Ownership Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors* (SWP (2013) 177), a certification of a TSO should not be refused in cases where it can be clearly demonstrated that there is no incentive and 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 and therefore prohibiting person(s)

from investing in a TSO would be disproportionate. The Staff Working Paper assumed that such cases would mainly relate to globally active holding companies owning, *inter alia*, a TSO or to financial investors whose investment strategy typically involves investments in both renewable energy generation assets and grid transmission infrastructure with a view to benefiting from regulated income.

One example mentioned in the Staff Working Paper is a case where the holding company of an electricity TSO also controls generation interests on another continent. Other examples concern electricity TSOs which also own smaller generation assets in other countries, e.g. a waste incinerator or a combined heat and power plant mainly providing heat to a district heating system which also produce electricity and which operate in a regulated system.

2. Generation interests of minority shareholders of TenneT 1 and TenneT 9

In the context of the certification procedure for Diamond Transmission Partners Walney Extension Limited as TSO in the United Kingdom which was subject of a Commission Opinion of 5 December 2019¹⁰, the following generation interests of Chubu were identified:

- [REDACTED]
- [REDACTED]

BNetzA should therefore consider if additional conditions to the certifications of TenneT 1 and TenneT 9 are required to address possible conflicts of interest of Chubu with regard to controlling interests in energy production and supply activities. This would not be the case if the participation of Chubu is to be considered as purely passive participations, i.e. not involving in particular the rights listed in Article 43(2) of the Electricity Directive, [REDACTED].

3. Generation interests of CIP

As outlined above, CIP holds a number of participations in undertakings active in electricity generation and supply.

The potential impact of holding those participations on compliance with the unbundling requirements has been analysed in the Commission's Opinion of 18 August 2017 on the certification of TenneT Offshore DolWin3 Verwaltungs GmbH¹¹. At the time, the Commission concluded that the generation interests held by CIP did not constitute a reason to refuse the certification of TenneT Offshore DolWin3.

In the present case, the Commission agrees with BNetzA that CIP's interests in biomass power plants in England do not result in sufficient incentives to use influence over TenneT 1 and TenneT 9 in a way so as to favour the proceeds of the electricity generated in these plants due to the small size and the geographic distance. Such projects are within the scope of projects provided as examples in the Staff Working Paper.

The situation as regards CIP's participation in the Beatrice wind farm is also not of major concern due to the geographical distance, at least for as long as there is no interconnected system between different wind parks in distant areas of the North Sea, and for as long as it benefits from a fixed revenue stream which is independent from electricity market prices. The

¹⁰ C(2019) 8845 final

¹¹ C(2017) 5771 final

Commission welcomes the condition set by BNetzA that TenneT 1 and TenneT 9 shall provide information on the subsequent regime before the 15 year period in which the Beatrice wind farm receives regulated income ends.

As regards the participation in Veja Mate, the Commission notes that the situation has changed significantly compared to the certification of TenneT Offshore DolWin3, since CIP now holds participations in both the TSO TenneT 1 and the Veja Mate windfarm connected by the system operated by TenneT 1. In its Opinion of 18 August 2017 on the certification of TenneT Offshore DolWin3 Verwaltungs GmbH, the Commission stressed that “with regard to the Veja Mate windfarm, BNetzA relies on the fact that there is no physical link with the wind farms connected via DolWin3”. This attenuating factor is hence no longer present. Moreover, CIP would exercise control over a TSO which not only connects the Veja Mate wind farm to the onshore grid, but also other, potentially competing, windfarms.

In contrast to the situation when the Commission issued its Opinion of 18 August 2017, CIP now only holds one subordinated liability (*nachrangige Verbindlichkeit*) which cannot be converted into an equity share. In the understanding of the Commission, offshore windfarms like Veja Mate operate under a regulated revenue scheme which does not provide a fixed feed-in tariff, but ensures a minimum price, and hence could profit financially from higher electricity prices. Nonetheless, since CIP is not participating in sharing Veja Mate’s profits nor has an interest anymore in increasing the value of its subordinated liability for the purpose of converting it into equity and then selling it, it now solely has (unless the reserve rights are triggered) a passive financial participation: CIP’s financial interest is limited to ensuring the payment of interest and the repayment of the subordinate liability. It should therefore not have a genuine incentive to influence the operator of the directly connecting cable towards discriminating in favour of the Veja Mate wind farm to the detriment of the other connected wind farms.

However, this subordinated liability involves considerable reserve powers in case CIP’s investment is at risk. [REDACTED]

[REDACTED] This would then no longer be in line with Article 43(1) and (2) of the Electricity Directive, especially as far as TenneT 1 is concerned.

[REDACTED] which would no longer be in line with Article 43(1) and (2) of the Electricity Directive, [REDACTED]

[REDACTED] The Commission considers that this should be addressed in the ongoing monitoring of the unbundling after certification.

Finally, the Commission welcomes the condition that directors (*Geschäftsführung*) of TenneT 1 and TenneT 9 shall not as well have positions in entities performing any of the functions of generation or supply. However, this condition should not be limited to CIP and its subsidiaries, but is of general application and hence should also include Chubu and MC.

4. Ongoing monitoring

The Commission recalls the obligation set out in Article 52(4) of the Electricity Directive for national regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of Article 43 Electricity Directive.

Should BNetzA decide to certify TenneT 1 and TenneT 9, the Commission invites BNetzA to continue monitoring the cases also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment.

In this context, the Commission takes note that BNetzA reserves the right to revoke the certifications and hence that a review of the certifications in case of relevant changes to the offshore network structure can be done in any case and therefore no respective condition needs to be included in the certification decisions. The Commission is of the opinion that such a review would be necessary if, as result of continued integration of offshore grids in the North Sea¹², CIP's generation interests (beyond purely passive participations) would get directly linked to BorWin1, BorWin2, HelWin2 or DolWin2.

Also in the absence of changes to the network structure, such a review could become necessary if CIP or other shareholders of TenneT1 and TenneT 9 acquire significant additional generation assets or a situation of a purely passive participation is changing to the extent that the requirements under Article 43(2) of the Electricity Directive are no longer met. This concerns especially the reserve rights of CIP related to its investment in VM Offshore. The Commission therefore urges BNetzA to review the certification of TenneT 1 and TenneT 9

IV. CONCLUSION

Pursuant to Article 51 Electricity Regulation, BNetzA shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of TenneT 1 and TenneT 9, and when it does so, shall communicate its decisions to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* Member State regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* Member State authorities responsible for the transposition of EU legislation, on 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 therein to be confidential. BNetzA is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 10.9.2020

For the Commission
Kadri SIMSON
Member of the Commission

¹² Cf. https://ec.europa.eu/energy/topics/infrastructure/high-level-groups/north-seas-energy-cooperation_en