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[...] (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 - Germany - Certification of TenneT Offshore 1. Beteiligungsgesellschaft mbH**

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### I. PROCEDURE

On 4 July 2013, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/72/EC<sup>1</sup> (hereafter, "Electricity Directive"), of a draft decision on the certification of "TenneT Offshore 1. Beteiligungsgesellschaft mbH" (hereafter, "TenneT Offshore") as a transmission system operator (hereafter, "TSO") for electricity.

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 Offshore is the owner and operator of the 400 MW BorWin1 and 800 MW BorWin2 cable connecting offshore wind parks in the North Sea to the German onshore grid.

TenneT Offshore 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 are held by a company called Diamond Germany 1. Transmission GmbH which is ultimately owned by the Japanese Mitsubishi Corporation (hereafter, "Mitsubishi").

TenneT Offshore 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 under the German legislation transposing the Electricity Directive.

Bundesnetzagentur has come to the preliminary conclusion that TenneT Offshore complies with the requirements of the ownership unbundling model as laid down in the German legislation transposing the Electricity Directive. Bundesnetzagentur has submitted its draft decision to the Commission requesting an opinion.

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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.

### III. COMMENTS

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

#### Generation interests of Mitsubishi

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.

Mitsubishi, directly or through various subsidiaries, holds participations in electricity undertakings involved in the production of renewable energy. In its Opinion on UK offshore electricity TSO 'Blue Transmission Walney 1 limited', which is also partly owned by Mitsubishi, the Commission concluded that *'notwithstanding the interests of persons controlling [Walney], it is clear that there is no incentive for [Barclays and Mitsubishi] to influence the decision making in this TSO with the intention to favour its generation, production and/or supply interests to the detriment of other network users.'* Therefore, the Commission considered that *'a refusal of certification would run counter to the principle of proportionality given the fact that the interests of the persons controlling the TSO do not lead to a situation the unbundling rules seek to prevent.'*<sup>3</sup>

From the preliminary decision of Bundesnetzagentur it appears that Mitsubishi currently holds relevant participations in two additional wind farms, both located in the Dutch part of the North Sea. The Commission considers that the Dutch and German electricity market are well-integrated and that hence there is a potential for control or rights over a transmission grid in Germany being exercised to favour generation interests in the Netherlands. Therefore, the participation of Mitsubishi in Dutch offshore wind farms must be subject to an appropriate analysis.

Firstly, Mitsubishi undertook to grant the project developer of the 120 MW 'Prinses Amalia' wind farm, Dutch energy production and supply undertaking Eneco, a [BUSINESS SECRET] loan. As a mere lender, Mitsubishi is not sensitive for the selling price of the electricity generated by the wind farm and does not share in its profits. Mitsubishi also does not have direct rights with regard to the day-to-day operations. It does however have veto-rights related to certain important decisions potentially affecting the value of the project significantly, aimed at securing its investment. [BUSINESS SECRET]. Moreover, as elaborated below, the ability of Mitsubishi to do so is strictly limited on the basis of the division of competences with regard to the operation of TenneT Offshore. The Commission hence agrees with Bundesnetzagentur that the nature of Mitsubishi's participation and rights with regard to the Prinses Amalia wind farm in combination with its level of influence over TenneT Offshore are not such to prevent the certification of TenneT Offshore.

The second participation of Mitsubishi is in the yet-to-be-built 130 MW 'Q10' wind farm to be managed by a Board under the joint control of Mitsubishi and Eneco, whereby Eneco will

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<sup>3</sup> Commission Opinion C(2013) 979 of 15.2.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – United Kingdom –Blue Transmission Walney 1 limited;  
[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/certification/2012\\_054\\_uk\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2012_054_uk_en.pdf)

carry out the day-to-day operation. This wind farm is expected to become operational mid-2015. The relevant question to be answered in this context is whether or not Mitsubishi has the incentive and ability to use its influence over TenneT Offshore in a way so as to favour the proceeds of the electricity generated by the Q10 wind farm.

In its preliminary decision, Bundesnetzagentur considers that this risk is absent for the following reasons. Firstly, given the fact that TenneT Offshore consists of two offshore cables only, the only way in which Mitsubishi could influence its power over TenneT Offshore 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. The Dutch market is coupled with the German market, which generally would mean a higher price in the Netherlands as well and hence increased profits for the electricity produced by the Q10 wind farm. Bundesnetzagentur however assesses that this impact would be marginal due to the fact that the amount of generation capacities of the cables is minor in comparison to the entire generation capacity on the German market. Moreover, by creating such a situation Mitsubishi would infringe the liability regime for interruptions, the fines associated with which far outweigh the potential gains. The Commission agrees with Bundesnetzagentur that it can be concluded that an incentive for Mitsubishi to use its powers over TenneT Offshore in a discriminatory fashion is unlikely to exist. The Commission however underlines that this situation could change in the future as the North Sea Offshore Grid becomes reality and Mitsubishi's generation activities are directly linked to the lines it jointly operates. At that stage a re-assessment of the incentive to influence is necessary.

Also the ability for Mitsubishi to influence the independent network operation is limited. The power Mitsubishi has over TenneT Offshore is confined to rights related to the protection of the value of its investment. The day-to-day operation of the lines lies in practice with TenneT TSO GmbH, the onshore TSO, on the basis of service contracts with TenneT Offshore which are overseen by its management. The management of TenneT Offshore consists of two persons, [BUSINESS SECRET]. Bundesnetzagentur has attached a condition to its preliminary certification decision establishing that the person representing Mitsubishi cannot carry out another function within the Mitsubishi Corporation; a condition that is in practice already adhered to. The division between TenneT TSO GmbH and TenneT Offshore indirectly creates a distance between Mitsubishi and the actual operation of the cables. From the preliminary decision however, it remains unclear to what extent the Mitsubishi manager is informed of sensitive information regarding the operation of TenneT Offshore that could be passed on to Mitsubishi before being made public to other network users.

The Commission calls upon Bundesnetzagentur to clarify whether or not sensitive information concerning TenneT Offshore, for example with regard to the day-to-day operation or scheduled and non-scheduled outages, could be passed on to Mitsubishi, and to ensure that appropriate safeguards are put in place to prevent this from occurring. The Commission also invites Bundesnetzagentur to continue monitoring the case after the adoption of the certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment in respect of the existing generation interests of Mitsubishi. The Commission invites Bundesnetzagentur to include a condition in its final certification decision which requires TenneT Offshore to regularly report to it on the relevant circumstances in this respect. Subject to this, the Commission accepts the view put forward by Bundesnetzagentur that both the incentive and the ability of Mitsubishi to influence its rights with regard to TenneT offshore at present do not represent a realistic outcome.

#### IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, Bundesnetzagentur shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of TenneT Offshore, 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. Bundesnetzagentur 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*  
*Günther OETTINGER*  
*Member of the Commission*