



EUROPEAN COMMISSION

Brussels, **XXX**  
[...] (2012) **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 50 Hertz Transmission GmbH**

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### I. PROCEDURE

On 10 July 2012, 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 "50 Hertz Transmission GmbH" (hereafter, "50 Hertz") as a Transmission System Operator (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 Electricity Directive.

### II. DESCRIPTION OF THE NOTIFIED DECISION

50 Hertz is a transmission system operator for electricity in Germany. It owns and operates a high-voltage electricity network of 9.750 km covering an area of approximately 109.000 km<sup>2</sup>, including the Bundesländer Hamburg, Mecklenburg-Vorpommern, Schleswig-Holstein, Berlin, Brandenburg, Sachsen-Anhalt, Thüringen and Sachsen.

50 Hertz is ultimately owned and jointly controlled – through a complex corporate structure – by the Belgian electricity TSO Elia System Operator (hereafter, "Elia") (60%) and the infrastructure fund Industry Funds Management Global Infrastructure Fund (hereafter, "IFM Global Infrastructure Fund") (40%).

50 Hertz has applied for certification in accordance with the ownership unbundling model, referred to in Article 9(1) Electricity Directive. This choice is available to 50 Hertz under the German legislation transposing the Electricity Directive.

Bundesnetzagentur has come to the preliminary conclusion that 50 Hertz complies with the requirements of the ownership unbundling model as laid down in the German legislation transposing the Electricity Directive and therefore proposes to certify 50 Hertz as an unbundled TSO. The draft certification decision of 50 Hertz is issued subject to conditions, and reads as follows:

- "1. [...]
2. Certification is granted on the following conditions:

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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.

- (a) that the applicant shall without delay grant requests for connection to the maximum voltage/high voltage transformation level (grid level 2) when and if the legal requirements for granting connection exist;
- (b) that the members of the applicant's supervisory board shall refrain from any form of activity in the supervisory board or in bodies legally representing the undertaking relating to the functions of generating, producing or supplying energy to customers.

3. The applicant is required to implement the measure referred to in point 2(b) above within four weeks of receiving this decision.

4. At the end of the period referred to in point 3 above the applicant must provide evidence to the ruling chamber of the implementation of the measure referred to in point 2(b) above.

5. [...]"

### **III. COMMENTS**

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

#### **1. Ownership of the network**

Article 9(1)(a) Electricity Directive requires that the TSO must own the transmission system it operates.

It appears from Bundesnetzagentur's draft decision that 50 Hertz does not own directly the network connection to the offshore wind park Baltic I, but that this connection is owned by 50 Hertz Offshore GmbH, a 100% daughter company of 50 Hertz.

The Commission notes that it follows from the draft decision that 50 Hertz fully controls this daughter company, and that, apart from ownership of the offshore grid connections, there are no other activities in the daughter company concerned. Under these circumstances, which do not refer to any limitation or weakening of the control which 50 Hertz can exercise over its subsidiary, the Commission agrees with Bundesnetzagentur that this situation does not form an obstacle to certification.

#### **2. Exercise of control and rights in the applicant**

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 generation or supply.

It follows from the draft decision that IFM Global Infrastructure Fund, one of the controlling shareholders of 50 Hertz, also has certain participations in generation activities, in particular in the United States, in Australia, but also in the EU. It must be examined whether and to what extent these participations form an obstacle to certification.

In the context of the assessment of the participations of IFM Global Infrastructure Fund, the Commission recalls that the objective of the unbundling rules is to ensure equal treatment by TSOs of the users of their network. Without an effective separation of networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination not only in the operation of the network, but also in the incentives to invest adequately in the networks. Any system for unbundling should therefore be effective in removing any conflicts of interest between producers, suppliers and TSOs, in order to create

incentives for the necessary investments and guarantee access of new market entrants under a transparent and efficient regulatory regime<sup>3</sup>.

In its preliminary decision, Bundesnetzagentur has carried out an assessment aimed at verifying whether or not in the present case, based on the facts at hand, an incentive for the IFM Global Infrastructure Fund can be identified to favour the participations it has in generation or supply activities or to use its participation in 50 Hertz to discriminate against actual or potential users of the 50 Hertz network, and to what extent these participations in generation or supply activities form an obstacle to certification of 50 Hertz as complying with the ownership unbundling model.

Bundesnetzagentur has analysed the participations IFM Global Infrastructure Fund has in generation and supply activities in the United States and in Australia. Bundesnetzagentur concluded that in view of the absence of any interface between the electricity systems of the United States and Australia, on the one hand, and of Germany, on the other hand, the participations of IFM Global Infrastructure Fund in the United States and in Australia do not give rise to any conflicts of interest and are therefore not of such nature as to prevent certification of 50 Hertz in the present case.

Based on the information in the draft decision the Commission agrees with the above assessment of Bundesnetzagentur. The Commission refers in this respect to its opinion concerning the certification of National Grid Electricity Transmission plc, National Grid Gas plc, and National Grid Interconnector Ltd as TSOs in the United Kingdom where it made a similar assessment relating to generation activities in the United States<sup>4</sup>.

Bundesnetzagentur also examined the participation IFM Global Infrastructure Fund has in generation and supply activities in the EU. In particular, IFM Global Infrastructure Fund has a non-controlling participation of [BUSINESS SECRET] in the Polish company Dalkia Polska. It appears from the draft decision that this company, through various local district heating plants and networks, is a supplier of heat on the regulated district heating market in Poland. However, as a by-product to the production of heat, Dalkia Polska also generates electricity, albeit limited in relative terms<sup>5</sup>. Decisions concerning the operation of the different plants of Dalkia Polska are taken on the basis of the heating needs of the consumers connected to the district heating network and not on the basis of needs of electricity generation<sup>6</sup>. In practice, Dalkia Polska is a price taker on the Polish electricity market and does not have any influence on the electricity price. In its draft decision Bundesnetzagentur analysed in detail whether in the circumstances of the present case any incentive could be identified for IFM Global Infrastructure Fund to influence the decision making in 50 Hertz as a TSO in Germany in order to favour the generation interests it has in Dalkia Polska or to discriminate against actual or potential competitors. Bundesnetzagentur came to the conclusion that in the present case no such incentive could be identified, and that as a consequence the participation of IFM Global Infrastructure Fund in Dalkia Polska does not form an obstacle to the certification of 50 Hertz as an ownership unbundled TSO.

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<sup>3</sup> See i.a. recital 9, 11 and 12 Electricity Directive.

<sup>4</sup> See Commission opinion of 19 April 2012 on the certification of National Grid Electricity Transmission (009 - 2012 - UK), National Grid Gas (010 - 2012 - UK), and National Grid Interconnector Ltd (011 - 2012 - UK), published on the DG Energy website

<sup>5</sup> The total installed capacity for heat production [BUSINESS SECRET] is almost 6 times higher than the total capacity for the generation of electricity in the different plants [BUSINESS SECRET]. Also, the value of IFM Global Infrastructure Fund's participation in the TSO is almost [BUSINESS SECRET] times higher than the value of its participation in the electricity generation activities of Dalkia Polska.

<sup>6</sup> The installed electricity generation capacity represented [BUSINESS SECRET] of the total installed capacity in Poland, and resulted in [BUSINESS SECRET] of the electricity sold on the Polish market in 2011.

Based on the information in the draft decision, the Commission has no reason to question the assessment of Bundesnetzagentur in the present case and agrees to its conclusion. The Commission invites Bundesnetzagentur, however, to continue monitoring the case also after the adoption of the certification decision in order to satisfy itself that no new facts and circumstances emerge which would justify a change of its assessment and to include a condition in its final certification decision which requires 50 Hertz to regularly report to Bundesnetzagentur on the relevant circumstances.

### **3. Certification of Elia**

Bundesnetzagentur does not address in its draft decision the requirement that for 50 Hertz to be certified as an unbundled TSO, also Elia, the Belgian TSO which has joint control over 50 Hertz, should be certified by the Belgian regulatory authority, CREG. The Commission invites Bundesnetzagentur to include a condition in its final certification decision which requires 50 Hertz to submit to it the certification decision to be issued by CREG concerning Elia.

## **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 50 Hertz, 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*

*Member of the Commission*