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COMMISSION

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COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10 of Directive
2009/72/EC - Germany - Certification of TransnetBW GmbH**

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I. PROCEDURE

On 12 December 2012, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of "TransnetBW GmbH" (hereafter, "TransnetBW") as a Transmission System Operator (TSO) for electricity.

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (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

TransnetBW is a transmission system operator (TSO) for electricity in Germany. It owns and operates a 380 kV and 220 kV voltage electricity networks of 1704.5 kilometres, covering an area of 34600 km². TransnetBW is owned for 86.88% by Energie Baden-Württemberg AG (hereafter EnBW), a company active in production, generation and supply of electricity and gas, and for 13.12% by Neckarwerke Stuttgart GmbH, a daughter company of EnBW.

In order to comply with the applicable rules on unbundling of transmission system operators, TransnetBW has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Electricity Directive. This choice is available to TransnetBW under the German legislation transposing the Electricity Directive, i.e. the Energiewirtschaftsgesetz (hereafter "EnWG")³.

Article 9 Electricity Directive sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8)(b) therein provides that where on 3 September 2009 the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1, provided that the Member State concerned complies with the provisions of Chapter V, establishing requirements for independent transmission operators (Articles 17 to 23 Electricity Directive).

Bundesnetzagentur has analysed whether and to what extent TransnetBW complies with the unbundling rules of the ITO model as laid down in the German legislation transposing the Electricity Directive. Bundesnetzagentur has come to the preliminary conclusion that

¹ 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.

² 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.

³ Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

TransnetBW complies with these requirements. The draft certification decision of TransnetBW is issued subject to the following conditions:

- (a) after 31 December 2013 the applicant does not obtain any services from [REDACTED] or from another firm belonging to the EnBW Group in connection with information technology for office communication;
- (b) after 31 December 2013 the applicant does not obtain any services in connection with the central accounting service and after 31 December 2013 does not obtain any services in connection with the hard-copy archive or tax advice from [REDACTED] or from another firm belonging to the EnBW Group;
- (c) after 31 December 2012 the applicant does not obtain any services from [REDACTED] or from another firm belonging to the EnBW Group in connection with auditing;
- (d) after 31 December 2013 the applicant does not obtain any services from [REDACTED] or from another firm belonging to the EnBW Group in connection with operating monitoring points;
- (e) after 31 December 2012 the applicant does not obtain any services in the field of the industrial medicine service and after 31 December 2013 any services in the field of personnel accounts from firms belonging to the EnBW Group;
- (f) after 31 December 2012 the applicant does not obtain any services in the field of storage and logistics from [REDACTED] or from another firm belonging to the EnBW Group;
- (g) in the field of network service the applicant does not obtain any services for:
 - (1) project management and project monitoring after 31 March 2013;
 - (2) maintenance, measurement technology, special maintenance or use of the oil laboratory after 31 December 2012;
 - (3) documentation system and archives, SAP accounting cycles and system PM, operating resources database as well as operation and maintenance of the long-range transport network after 31 December 2013;from [REDACTED] or another firm belonging to the EnBW Group;
- (h) after 31 December 2012 the applicant no longer obtains any services for implementing occupational safety from [REDACTED] or from another firm belonging to the EnBW Group;
- (i) the applicant informs the ruling chamber in writing every three months, and for the first time on XX.XX.XXXX, of progress in ending the above-mentioned service relations and points out in particular any delays compared to the timetables set out in the application;
- (j) with the exception of the above-mentioned services, the applicant does not obtain any services whatsoever from firms belonging to the EnBW Group;
- (k) the applicant complies without delay with requests for connection to its transformer level maximum/high voltage (network level 2), if and in so far as the legal requirements for granting connection have been met;
- (l) from 1 January 2014 at the latest the applicant refrains from seconding any staff to firms belonging to the EnBW Group;

- (m) from 31 December 2013 at the latest, in relation to application systems for information technology and information technology infrastructure located on the business premises or at the offices of the applicant or of a firm belonging to the EnBW Group, the applicant does not work together with consultants or external contractors who at the same time are working for a firm belonging to the EnBW Group;
- (n) from 1 January 2013 at the latest the applicant offers all services provided for one or more firms belonging to the EnBW Group generally on corresponding terms; this applies in particular to making available data on network load and drawing up network analyses for distribution network operators in the applicant's regulatory zone;
- (o) the applicant refrains from informing EnBW AG or another firm belonging to the EnBW Group about the applicant's activities in the area of representing interests to policymakers, unless that information is made generally available in the same way;
- (p) the applicant gives notice of termination of the agreement of 26 November 2007/3 December 2007 with [REDACTED] [REDACTED] [REDACTED] (Annex 15.1.3.22 to the application) without delay and at the latest with effect from the end of 31 December 2013;
- (q) at the latest from 1 January 2014 the applicant refrains from leasing maximum voltage operating resources from [REDACTED]

III. COMMENTS

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

1. Choice of the ITO model

According to Article 9(8) Electricity Directive, the ITO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a Vertically Integrated Undertaking (hereafter, "VIU"). The Commission agrees with Bundesnetzagentur in the present case that the choice for the ITO model is legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

2. IT consultants and contractors

According to Article 17(5) Electricity Directive TSOs shall not use the same consultants or external contractors for IT systems or equipment as any other part of the VIU. In its draft decision, Bundesnetzagentur has required TransnetBW to complete the separation of its IT system from the system used by the VIU. From Bundesnetzagentur's draft decision it appears that TransnetBW will continue to use services from external IT contractors. It has not been however specified in the draft decision whether the external contractors provide also services to the VIU.

The Commission questions whether the above approach can ensure the required level of independence of the ITO in IT related operations as required by Article 17(5) Electricity Directive. The Commission considers that only in exceptional cases, where no other external contractor except for the one that also provides services to the VIU could provide such services to TransnetBW, could a derogation to the prohibition of Article 17(5) Electricity Directive be considered justified. Such derogation should in that case also be of a transitional nature, limited in time, and accompanied by measures to effectively ensure that any conflicts of interests and abuses are avoided. The Commission invites Bundesnetzagentur to either

require in its final certification decision that TransnetBW and the VIU do not employ the same external IT consultants or to assess whether the situation justifies a derogation on the basis of the aforementioned criteria.

3. Separation of premises

According to Article 17(5) Electricity Directive, the ITO shall not share the physical premises and security access systems with any part of the VIU. TransnetBW is currently still using the same premises as other parts of the VIU, but intends to separate the premises and the security access systems by 1 March 2013. However, it does not become sufficiently clear from the draft decision whether the envisaged separation will be effective e.g. what will happen in case there will be further delays in construction works on the site of the new location. The Commission invites Bundesnetzagentur to set clear criteria for separation in its final decision and to actively monitor the developments in order to ensure an effective separation of the premises concerned by the deadline of 1 March 2013.

4. Independence of management

According to Article 19(3) *juncto* Article 19(8) Electricity Directive, the majority of the management cannot have exercised any professional position or have had any responsibility or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders other than the TSO, for a period of three years before their appointment.

In its draft decision, Bundesnetzagentur makes reference to the German legislation implementing the Electricity Directive, the EnWG, according to which the independence requirement referred to above should not apply to members of the management of the ITO who were appointed before 3 March 2012. The Commission questions whether the German implementing legislation is in compliance with the Electricity Directive on this point and underlines that it might in certain cases undermine the effective independence of the ITO. The Commission therefore invites Bundesnetzagentur to reassess in its final certification decision whether the majority of the management of TransnetBW in fact fulfils the independence criteria laid down in Article 19(3) Electricity Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require in its final certification decision that the majority of the management of TransnetBW complies with the independence criteria laid down in Article 19(3) Electricity Directive.

According to Article 19(5) Electricity Directive, management and employees of the ITO shall hold no interest in any part of the VIU. In its draft decision, Bundesnetzagentur makes reference to the German implementing legislation which requires that shares in the VIU which have been acquired by the management before 3 March 2012 must be sold, but only by 31 March 2016, while for non-management staff no requirement applies to sell shares in the VIU. The Commission questions whether the German implementing legislation is in compliance with the Electricity Directive, and notes that in certain cases it may undermine the effective independence of the ITO. The Commission invites Bundesnetzagentur to require in its final decision that the management sell their financial interests in the VIU as soon as possible, or as a minimum give them in the hands of an independent trustee. The Commission furthermore invites Bundesnetzagentur to ensure that the provisions of Article 19(5) Electricity Directive are also complied with by the employees of TransnetBW which are not part of the management.

5. Independence of the Supervisory Body

According to Article 20(3) *juncto* 19(3) Electricity Directive, the independent members of the Supervisory Body cannot have exercised any professional position or have had any

responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment.

From Bundesnetzagentur's draft decision and documents submitted to support TransnetBW's request for certification it does not become clear whether or not this condition has been applied to the independent members of TransnetBW's Supervisory Body i.e. to the representants of the employees. The Commission invites Bundesnetzagentur to reassess in its final certification decision that the independent members of TransnetBW's Supervisory Body have in fact complied with the independence criteria of Article 19(3) Electricity Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require TransnetBW in its final certification decision to comply with the independence criteria of Article 19(3) Electricity Directive also in relation to its independent members of the Supervisory Board.

6. Deadlines for conditions

The Commission notes that the Bundesnetzagentur in its preliminary decision has set conditions, as mentioned in part II, for which the deadlines already lapsed. The Commission requests Bundesnetzagentur to assess in its final decision whether the relevant conditions have been fulfilled and amend its final decision accordingly.

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 TransnetBW, 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