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**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**

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### I. PROCEDURE

On 20 March 2013 the Commission received a preliminary decision from the British regulatory authority (hereafter, "Ofgem") 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> which applies to all of the 1000MW capacity, in both directions, of the interconnector. The exemption was granted by the regulatory authorities in both countries 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. The exemption does not concern third party access.

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, the regulatory authority's assessment consists of a compliance test, a criterion of which concerns the question whether or not the applicant holds an exemption under Article 7 of Regulation (EC) No 1228/2003 and remains entitled to that. In its preliminary decision Ofgem concludes that BritNed satisfies this test and that it can be granted certification.

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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

### III. COMMENTS

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

BritNed's exemption for new interconnectors was granted on the basis of Article 7 Regulation (EC) No 1228/2003. Regulation (EC) No 1228/2003 was repealed and replaced by the Electricity Regulation as from 3 March 2011. Recital (23) Electricity Regulation reads as follows:

*Investments in major new infrastructure should be promoted strongly while ensuring the proper functioning of the internal market in electricity. (...)Exemptions granted under Regulation (EC) No 1228/2003 continue to apply until the scheduled expiry date as decided in the granted exemption decision.*

In November 2007, Ofgem and the Dutch Ministry of Economic Affairs granted BritNed similar exemption decisions, amending initial exemption decisions on the basis of comments by the Commission. The resulting final decisions exempt BritNed from *inter alia* the rules on revenues resulting from the allocation of interconnection capacity as well as a number of closely connected provisions in national legislation. It is important to note that in the present case the owners of BritNed are two unbundled transmission system operators.<sup>4</sup> The Commission considered this to be relevant in its assessment of the exemption decisions of the national regulatory authorities, noting in particular that neither of the owners of the BritNed interconnector has interests in supply activities.<sup>5</sup> BritNed offers 100% of its capacity to the market via a combination of non-discriminatory and transparent explicit and implicit auctions. The exemption can hence be seen as a means to ensure the risk-reward balance of the investment and is not an exemption from third party access conditions.<sup>6</sup>

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>7</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. As a final remark the Commission notes that, should the Dutch regulatory authority in its process of certification of either BritNed or TenneT conclude that

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<sup>4</sup> However, it has to be noted that at present TenneT has not been certified as compliant with the ownership unbundling rules yet by the Dutch regulatory authority. National Grid was certified by Ofgem following the Commission Opinion on Ofgem's draft certification decisions for National Grid - C(2012)2735.

<sup>5</sup> [http://ec.europa.eu/energy/infrastructure/exemptions/doc/doc/electricity/2007\\_britned\\_decision\\_en.pdf](http://ec.europa.eu/energy/infrastructure/exemptions/doc/doc/electricity/2007_britned_decision_en.pdf)

<sup>6</sup> This also implies that existing and future (secondary) legislation on i.a. capacity allocation and congestion management is applicable to BritNed.

<sup>7</sup> See 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

either party does not comply with the unbundling requirements, the present certification should be subject to re-assessment.

#### **IV. CONCLUSION**

Pursuant to Article 3(2) of the Electricity Regulation, Ofgem 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. Ofgem 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, 15.5.2013

*For the Commission*  
*Günther OETTINGER*  
*Member of the Commission*

