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COMMISSION OPINION

of 2.3.2018

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 and TenneT Offshore 9. Beteiligungsgesellschaft mbH

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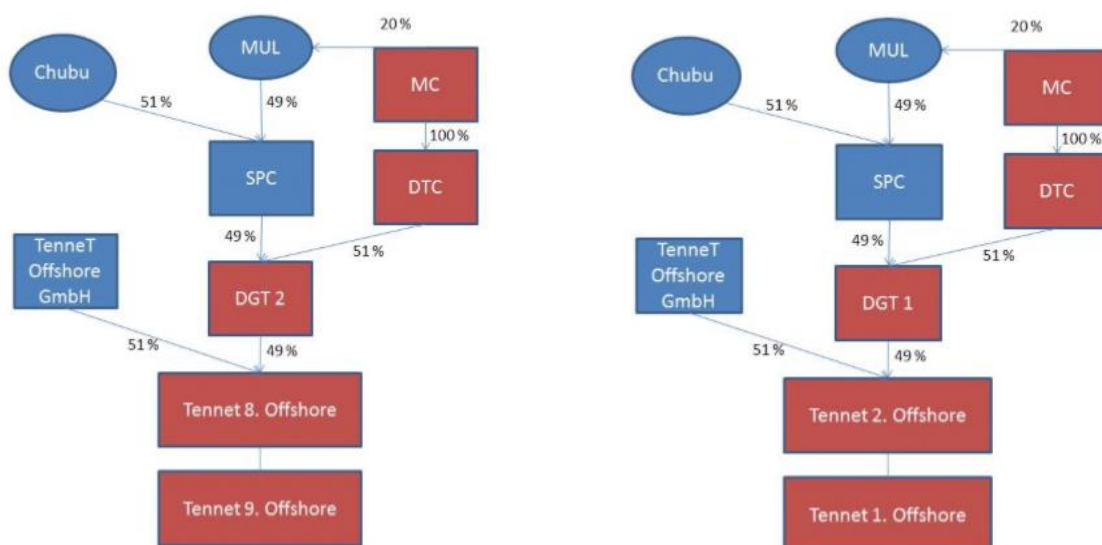
I. PROCEDURE

TenneT Offshore 1. Beteiligungsgesellschaft mbH (hereafter “TenneT 1”) and TenneT Offshore 9. Beteiligungsgesellschaft mbH (hereafter “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.

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 by the Dutch state.

The other 49 % of TenneT 1 are owned by Diamond Germany 1. Transmission GmbH, 51 % of which are owned by Diamond Transmission Corporation Limited (DTC), a 100 % subsidiary of Mitsubishi Corporation (hereafter “MC”). 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 and 49 % are owned by MUL, two Japanese undertakings. Finally, MC owns 20 % of MUL.

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.



TenneT 1 and TenneT 9 are under joint control of MC and TenneT GmbH & Co. KG. ■■■■■

[REDACTED]

Both certification decisions were subject to conditions in view of MC's activities in the energy sector, notably a number of participations in renewable electricity generation installations. In order to ensure sufficient regulatory oversight with respect to a diverse investment portfolio which was subject to change over time, MC was required to regularly report on its activities in the electricity and gas sector.

On 5 January 2018, the Commission received a notification from the national regulatory authority in Germany, Bundesnetzagentur (hereafter "BNetzA"), of two preliminary decisions concerning the conditional withdrawal of the certifications of TenneT 1 and of TenneT 9 as transmission system operators for electricity respectively (hereafter "the draft decisions").

By letter of 23 January 2018, MC provided its position on the draft decisions to the European Commission.

Pursuant to Article 3 of Regulation (EC) No 714/2009¹ (hereafter "Electricity Regulation") and Article 10 of Directive 2009/72/EC² (hereafter, "Electricity Directive"), 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 Directive 2009/72/EC. This procedure is also applicable where a national regulatory authority intends to reject an application for certification.³ Whereas BNetzA issued two separate draft decisions, the ownership structure and legal questions underlying both procedures are identical. The present opinion thus addresses the certification of both TenneT 1 and TenneT 9.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

BNetzA has reopened the certification procedure in view of concerns that the requirements for an ownership unbundled transmission system operator under Article 9 of the Electricity Directive and the respective national provisions are no longer respected. The draft decisions assess three different concerns as regards the unbundling requirements:

- (i) MC has, in a joint investment with [REDACTED] where each group holds 50 % of the respective shares, created two new undertakings.

First, EnspireME GmbH is currently constructing a battery storage facility using lithium-ion-technology in Schleswig-Holstein, in the north of Germany, with a planned power capacity of 48 MW and a planned storage capacity of more than 50 MWh.

Second, [REDACTED] intends to market the battery

¹ 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.

² 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.

³ See Commission Opinion on BnetzA's draft certification decision for TenneT TSO GmbH of 6 September 2012, C(2012)6258 029-2012-DE.

storage capacity on the balancing market, as frequency containment reserve. On the basis of a planned [REDACTED] tolling agreement, [REDACTED] would pay a fixed price per MW to the storage owner, EnspireME GmbH.

In addition to revenues from the tolling agreement, the battery storage has been awarded subsidies from European Regional Development Fund resources by the Land of Schleswig-Holstein⁴ for a pilot project. Under this pilot project, 13 MWh of capacity are for the project duration to be made available free of charge until the year 2024 to wind generators. [REDACTED]
[REDACTED]

The activities of EnspireME GmbH and [REDACTED] are jointly referred to as “Project BESS”.

- (ii) The investment portfolio of MC in renewable energy generation has changed since the certification, as a result of MC selling certain investments and acquiring other participations.
- (iii) In December 2016, MC has acquired a participation in [REDACTED] [REDACTED] (hereafter [REDACTED]), based in [REDACTED] is active in electricity trade. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

In the draft decisions, BNetzA raises concerns in particular as regards Project BESS. Whereas BNetzA does not expressly conclude on the impact of changes to the renewable investment portfolio, the Commission understands that, in view of BNetzA, these changes in isolation would not have required withdrawal of the certification as transmission system operator. As regards [REDACTED], BNetzA concludes that while the trade activities had initially put into question the respect of the unbundling requirements, the commitments given by MC were, in the absence of project BESS, still sufficient to maintain the certification.

In the draft decisions, BNetzA concludes however, that at least taken together with the activities in generation and electricity trading, Project BESS has as a consequence that Tennet 1 and TenneT 9 no longer comply with the requirements of the ownership unbundling model, as laid down in the German legislation transposing the Electricity Directive. BNetzA thus finds the activities of MC to be incompatible with the requirements under § 8 Energiewirtschaftsgesetz, which transposes the requirements for ownership unbundling under Article 9 of the Electricity Directive.

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

⁴ http://www.schleswig-holstein.de/DE/Landesregierung/V/Presse/PI/2017/0417/MELUR_170406_EnspireME_Start.html

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision. As a preliminary comment, the Commission recalls the fact that the Electricity Directive does not specify any "de minimis" or other thresholds in the definitions of generation or supply in Article 2(1) and Article 2(19) respectively.

However, the Commission considers that the objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any conflict of interest between generators/producers, suppliers and 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), it would not be in line with this objective if certification of a TSO were to 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. It is therefore necessary to assess whether a risk for discrimination could be excluded in the present case.

1. Generation and supply interests linked to MC

Existing and future participations of MC in renewable generation installations

As regards recent changes to the MC renewable energies investments in the EU, the draft decisions provide only a limited assessment. According to the draft decisions, the following main changes have occurred since the certification of TenneT 9:

- MC has sold its participation [REDACTED]
- MC has acquired a share of [REDACTED];
- MC has concrete plans to [REDACTED].

The Commission would like to highlight the following elements:

The projects [REDACTED] were of limited size and at a considerable distance to the German market. Any impact on prices in Germany or the network situation in the north of Germany and thus the demand in certain system services was in consequence rather limited.

Concrete, planned acquisitions in existing projects may be taken into consideration in certification procedures. However, where planned projects would result in a refusal of certification, a *conditional* refusal, which only applies if the project is ultimately realised, could be considered. Particularly for projects which still have to participate in tenders, a direct refusal of certification based on the mere possibility of future realisation may be considered disproportionate. On the basis of the information contained in the draft decision, it is difficult to conclude whether the interest or ability of MC to discriminate would significantly change if the projects were realised. In particular, the income structure of the planned wind parks is not provided. Taking into account the increased reliance on market revenues of new wind projects, [REDACTED] it cannot be excluded that the incentive or ability to discriminate is significantly higher than for traditional renewable investments which

rely on feed-in tariffs rather than wholesale market prices of electricity. If certification is granted by BNetzA and the projects are realised, further analysis may thus be required. This is particularly true [REDACTED]

[REDACTED]. This analysis could be based on the already existing reporting requirements for MC.

On the other hand, the already [REDACTED] would, if certification were to be granted, merit further analysis. [REDACTED]

Participation in project BESS

The draft decisions are particularly based on concerns of BNetzA regarding project BESS. In this respect, the Commission would like to highlight the following elements:

The Commission agrees with BNetzA that electricity storage is, at least as regards larger storage installations which can be used for a multitude of activities including balancing services, congestion management and sale of electricity on wholesale markets, to be treated as generation under Article 9 of the Electricity Directive. Storage can be used to sell the very same services and be active on the same markets as classic electricity generation facilities. The Electricity Directive does not, in its current form, provide for a specific separate framework on storage ownership, and storage thus needs to fall into one of the existing categories, depending on its use (generation when feeding electricity into the network, consumption when charging the battery by drawing electricity from the network). Major electricity storage assets are, both as regards investment cost and market impact, at least comparable to small power generation modules. They can be used to sell electricity on wholesale markets or provide system services in particular to transmission system operators. Thus, a general exclusion of storage facilities from the scope of Article 9 of the Electricity Directive would create the very same structural risks based on the incentive and the ability of the transmission system operator to discriminate in favour of his other investments, which the unbundling rules aim to prevent. This understanding of the Commission is also reflected in recent legislative proposals for a recast of the Electricity Directive⁵, where ownership of storage facilities by system operators is only allowed under strict requirements which always include approval by the national regulatory authority.

While storage is thus as a starting point to be treated as a generation activity, the specific properties of storage investments can be taken into account in the impact test. Storage can be used under many different business models. Where no concrete model is reliably defined, all reasonably possible uses need to be taken into account for the assessment. If only one or some of these uses are problematic from an unbundling perspective, it could be considered to exclude only these uses. Such an approach however needs to be applied with care: the ownership unbundling model generally relies on a structural separation of generation and transmission assets, which is from an enforcement perspective generally preferable to mere behavioral safeguards. Thus, limiting the use of a storage facility to only some of its possible functions in order to avoid the ability or incentive for discrimination is generally only sufficient where such a separation can be clear, reliable, and easily enforceable. This being

⁵ See Article 54 of COM(2016) 864 final of 30 November 2016, 2016/0380(COD).

said, it would, in view of the Commission, merit further analysis whether the tolling agreement between EnspireME GmbH [REDACTED] would enable such a clear separation in the present case. To the extent that the income of EnspireME GmbH depends only on the existence of a tolling agreement with a fixed EUR/MW price, the ability for TenneT 1 and 9 to increase revenues from the MC storage activities appears to be relatively limited. If no incentive or ability to discriminate exists as regards EnspireME GmbH, this could be reflected in the certification decision and the conditions imposed on MC therein.

Furthermore, the specific activities of transmission system operators can be taken into account in assessing whether Project BESS creates the ability and incentive to discriminate. If and to the extent that it can be ensured that [REDACTED] is not active on the wholesale electricity markets or in congestion management, but only provides frequency containment reserve, the relevant question is whether certain actions by TenneT 1 and 9, such as an interruption of the offshore cables, would have a significant impact on frequency containment reserve payments. In this respect, the Commission agrees with BNetzA that wind generators are in principle capable of providing (at least downward) frequency containment reserve, be it as individual generation facilities or as part of larger pools. This risk cannot be excluded by simply claiming that for the time being, the generation facilities in question do not achieve prequalification. Foreseeable policy or technology changes, such as the increased possibility for renewable generation facilities to participate in balancing markets, can be taken into account in investment decisions. They can thus have financial and market impact also prior to being fully implemented. On the other hand, it is important to note that TenneT 1 and 9 are not active in procuring balancing services. They thus have a much more limited ability to discriminate on the balancing services markets than transmission system operators operating a larger network, which are the typical model assumed under Article 9 of the Electricity Directive. The participation only on one side of the market, as provider of balancing services, considerably reduces the risk of discrimination compared to the situation of other transmission system operators.

Finally, the "wind coupling" project currently relies exclusively on public subsidies. To the understanding of the Commission, no revenues from the sale of electricity are created for MC, as the use of the storage facility is (within the limits of the pilot project) free of charge for wind generators. If this understanding is correct, and no other financial advantages are created for MC depending on the use or lack thereof of the wind coupling service offered by project BESS, the pilot project does not appear to create a significant incentive for discrimination. It should be noted, however, that any future prolongation of the project involving such financial advantages and thus generating revenues e.g. in periods of overproduction, could create incentives for MC as regards the operation of its offshore cables.

2. Electricity trading

The draft decisions find that on the basis of commitments by MC, the trading activities of [REDACTED] are not by themselves sufficient to establish the risk of discrimination.

In this respect, the Commission would like to highlight the following elements:

Electricity trading activities can create incentives to increase or decrease price differences between different market areas. Transmission system operators have in general a large variety

of possibilities to influence such price differences. Electricity trading is thus in general incompatible with the activity of a transmission system operator.

This concern is, however, lower in case of transmission system operators responsible exclusively for offshore connections to wind generation, as the means at their disposal to impact price differences are considerably reduced.

Any remaining impact would be biggest in the areas closest to the offshore connection in question. [REDACTED]

3. Application of the impact test

The wording of Article 9 does not provide for any derogation from the interdiction for ownership unbundled transmission system operators to be active in electricity generation. Any reduction of this interdiction by way of interpretation thus needs to be strictly limited in scope. As a consequence, any such interpretation needs to take into account the structural nature of the separation as laid out under Article 9. Behavioral limitations can achieve similar results only exceptionally, and then only if they are very clear and easily enforceable.

In applying the impact test, different case groups have been established under the practice of the Commission where a strict literal interpretation of Article 9 would be disproportionate. Relevant factors in this regard include the reduced impact of generation facilities receiving feed-in tariffs⁶ and the operation of offshore cables connecting a limited number of renewable generation facilities⁷. Such conclusions relied primarily on the specific characteristics of the transmission systems in question and their operation, as well as on the fact that there is no direct interface between the generation interests and the said transmission systems. The Commission notes that these considerations appear also to be relevant in the present case.

The application of the test is however not limited to these groups. Where it can be shown that also in other situations, no incentive and ability to discriminate exist, a more limited interpretation of the requirements of the ownership unbundling model can be considered.

In the present case, BNetzA has made the withdrawal of the certification subject to the condition [REDACTED]

[REDACTED]. As regards MC's participation in EnspireME GmbH and in view of the aforementioned considerations with regard to its revenue model for project BESS, BNetzA could reconsider whether prevention of the incentive and ability to discriminate could be achieved with similar certainty also by use of other structural conditions. This could in particular include the obligation for MC to sell only its participation in [REDACTED] but not in EnspireME GmbH, as long as the revenue model for EnspireME GmbH remains sufficiently independent of electricity market developments.

However, the wide range of MC activities in the electricity sector needs to be seen in its entirety to determine whether any incentive or ability to discriminate can be excluded with sufficient certainty in the present case. Even where individual projects would, by themselves, be compatible with a certification (possibly under conditions), a high number of such activities can make regulatory oversight and enforcement under the ownership unbundling model extremely complex and intransparent. Such a result would then be incompatible with the principle of structural separation generally called for under the ownership unbundling

⁶ Cf. Commission Opinion (2016) 27 final.

⁷ Cf. Commission Opinions (2013)979 and (2013)2030.

model. This does not exclude more limited conditions such as selling only the participation in [REDACTED] to be sufficient in the present case, but is an important consideration particularly when analyzing new activities taken up in the future.

4. Ongoing monitoring

The Commission recalls the obligation set out in Article 10(4) of the Electricity Directive for national regulatory authorities to monitor the continuing compliance of TSOs with the unbundling requirements of Article 9 Electricity Directive.

Should BNetzA decide to renew certification of TenneT 1 and 9, the Commission invites BNetzA to continue monitoring the case 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 respect of the above-mentioned generation interests of MC.

IV. CONCLUSION

Pursuant to Article 3 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* national regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* national 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, 2.3.2018

For the Commission
Maroš ŠEFČOVIČ
Vice-President