



Brussels, **XXX**
[...] (2015) **XXX** draft

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 TenneT TSO GmbH**

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 TenneT TSO GmbH

I. PROCEDURE

On 28 April 2015, 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 "TenneT TSO GmbH" (hereafter, "TenneT") as a transmission system operator (hereafter, "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

TenneT is a transmission system operator for electricity in Germany. It owns and operates a high-voltage electricity network of 10.700 km covering an area of 140.000 km². Distribution networks with lower voltage are connected to the TenneT network through 121 transformer stations. TenneT is 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.

In early 2012, TenneT had applied for certification in accordance with the ownership unbundling model, referred to in Article 9(1) Electricity Directive. In assessing TenneT's application, Bundesnetzagentur came to the conclusion that TenneT did not comply with the requirements of the ownership unbundling model as laid down in the German legislation transposing the Electricity Directive. On that basis Bundesnetzagentur notified a draft decision to the Commission, to which the Commission reacted by issuing its Opinion of 10 September 2012.³ On 9 November 2012, Bundesnetzagentur issued its final decision whereby it refused certification to TenneT.

In its draft decision of 28 April 2015 Bundesnetzagentur concludes that the unbundling requirements are now met and that TenneT can be certified, subject to the condition that TenneT immediately complies with requests for connection to the high voltage/highest voltage grid (grid level 2) it is operating, if and in so far as the legal requirements for grid connection are met. On that basis, Bundesnetzagentur has notified its draft decision to the Commission for its opinion.

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 Commission's Opinion on BnetzA's draft certification decision for TenneT C(2012)6258 at https://ec.europa.eu/energy/sites/ener/files/documents/2012_029_de_en.pdf

III. COMMENTS

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

1. Refusal of certification for reasons of lack of financial resources

In its initial decision, notified to the Commission on 10 July 2012, Bundesnetzagentur argued that TenneT could not be certified as an ownership unbundled TSO, because it had not been able to satisfactorily demonstrate to Bundesnetzagentur that it has sufficient financial resources to satisfy all requested offshore connections to its grid. The German law transposing the Electricity Directive (hereafter, “EnWG”)⁴, more specifically § 8(2) S. 9 thereof, provides that ownership unbundled network operators have to ensure that they dispose of sufficient financial, physical, technical and human resources to fulfil their tasks provided for in Part 3 Sections 1 to 3 of the EnWG. One of the tasks of TSOs defined in the EnWG is the obligation to comply with requests for network connections in accordance with § 17(2a) EnWG⁵.

The Commission, in its opinion of 10 September 2012⁶ on the first draft decision of Bundesnetzagentur, disagreed with Bundesnetzagentur's assessment given that the provisions of the Electricity Directive regarding the ownership unbundling model do not explicitly require an ownership unbundled TSO to be equipped with sufficient human, technical, physical and financial resources (contrary to Article 17(1) Electricity Directive, where this is explicitly required for the ITO model). The Commission provided in its opinion further arguments why the certification of TenneT should not be refused on the grounds of it not having sufficient financial means to provide in particular for all offshore grid connections.

In its final decision, which was issued on 9 November 2012, Bundesnetzagentur took the Commission's opinion into consideration but disagreed with the assessment therein on the basis of the reasoning that checking the financial capability of an ownership unbundled TSO is a criterion required by the EnWG. Bundesnetzagentur thus denied certification for TenneT, which subsequently appealed the decision of Bundesnetzagentur.

It appears from the newly notified draft decision of 28 April 2015 that in January 2014 Bundesnetzagentur and TenneT have settled this appeal procedure, after which TenneT has updated and revised its application in July and December 2014. The new draft decision makes it clear that Bundesnetzagentur is now convinced that TenneT has sufficient financial means to carry out the necessary investments. The concerns that TenneT may not be able to finance necessary offshore connections have been taken away, in particular as a result of TenneT's building contracts for two of the connections in question (DolWin 3 and BorWin 3). As regards the remaining connection at issue (BorWin 4), Bundesnetzagentur accepts that the construction is no longer required, as all wind parks in question will be connected via other lines. At the same time Bundesnetzagentur underlines that it still disagrees with the Commission on the question whether or not requiring sufficient financial capabilities can be used as criterion for certification of ownership unbundled TSOs.

The Commission is therefore satisfied that TenneT meets the unbundling requirements laid down in the Electricity Directive. The Commission reiterates that this position is without prejudice to the view of the Commission as regards the compatibility with the Directive of the

⁴ Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

⁵ § 17(2a) EnWG provides for the network connection rules for offshore renewables installations. It obliges TSOs to put in place on demand of the operator of an offshore installation a connection to the technically and economically best suited connection point of the closest TSO on-shore.

⁶ Commission's Opinion on BnetzA's draft certification decision for TenneT C(2012)6258 at https://ec.europa.eu/energy/sites/ener/files/documents/2012_029_de_en.pdf

German legislation implementing ownership unbundling, which is an issue outside the scope of the present certification opinion.

2. Assessment of the requirements in Article 9(1) Electricity Directive

In its Opinion of 10 September 2012 on the first draft decision of Bundesnetzagentur, the Commission underlined various requirements for certification as an ownership unbundled TSO that had not been assessed sufficiently by Bundesnetzagentur.⁷ On the basis of the present notification, the Commission now finds these to be met.

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, 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

⁷

See page 4 of Commission's Opinion on BnetzA's draft certification decision for TenneT C(2012)6258, https://ec.europa.eu/energy/sites/ener/files/documents/2012_029_de_en.pdf