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**COMMISSION OPINION**

**of 22.6.2016**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V. (as TSO for the offshore grid)**

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### I. PROCEDURE

On 28 April 2016 the Commission received a draft decision from the Dutch energy regulatory authority, Authority for Consumers and Markets (hereafter, "ACM") on the certification of TenneT TSO B.V. (hereafter "TenneT") 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 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 the owner and operator of the entire Dutch onshore electricity transmission grid. It also co-owns and co-operates with its Norwegian counterpart Statnett the subsea NorNed-cable, a 700 MW interconnector connecting the Netherlands to Norway.

TenneT Holding, the mother company of TenneT, is also the owner of TenneT TSO GmbH, a German TSO certified through a separate certification procedure in Germany. TenneT Holding through Nlink International B.V. holds also 50 % of the joint venture BritNed Development Ltd, the operator of the interconnector between the Netherlands and the United Kingdom, certified by ACM and by the British regulator. TenneT Holding's shares are ultimately wholly owned by the Dutch state.

TenneT Holding has a number of subsidiaries, active in the construction, operation and management of offshore networks in Germany; however the review of these group members falls outside the scope of the draft decision provided by ACM.

The European Commission issued on 1 July 2013 an opinion on the draft certification decision of ACM with regard to the TSO TenneT (C(2013)4206) in respect of its operation of the Dutch onshore electricity grid and the southern half of the NorNed-cable (hereafter, "the

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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.

2013 opinion")<sup>3</sup>. TenneT was subsequently certified for the operation of that network by the ACM by a Decision of 18 December 2013<sup>4</sup>.

The present request for certification concerns the operation of a planned offshore network which is intended for transporting electricity from one or more offshore wind farms to the national high-voltage onshore grid<sup>5</sup>. The construction of this offshore grid has not started yet. According to the information provided by ACM, after TenneT has been appointed as the operator of the offshore grid, it will be in charge of constructing and eventually will own the said offshore grid connecting offshore wind farms in the Dutch EEZ to the onshore grid. In accordance with the request, the present draft decision by ACM concerns exclusively the certification for the said planned offshore grid. The description of the planned network is provided by TenneT in Annexes I(1), I(2a) and I(2b) of the certification request and comprises the planned offshore transmission network "Borssele" (planned start of construction in January 2017) and the planned offshore transmission network "Hollandse Kust Zuid"(planned start of construction in January 2019).

TenneT has applied for certification in accordance with the ownership unbundling model. In particular, TenneT intends to make use of the possibility provided for in Article 9(6) Electricity Directive to implement the ownership unbundling model by means of separate public bodies within the State. ACM has analysed whether and to what extent TenneT complies with the requirements of the ownership unbundling model. In its draft decision, ACM found that TenneT complies with these requirements. On this basis, ACM submitted its draft decision to the Commission requesting for an opinion.

### III. COMMENTS

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

#### 1. SEPARATION WITHIN THE STATE – ARTICLE 9(6)

The Dutch legislator has chosen to transpose only the requirements for full unbundling ("ownership unbundling") for transmission system operators in the national legislation<sup>6</sup> and these requirements apply also to operators of offshore networks.

Article 9(6) Electricity Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and may thus control generation and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the rules on ownership unbundling. In these cases, it must be demonstrated that the requirements of

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<sup>3</sup> Commission Opinion of 1.7.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V, C(2013)4206 final.

<sup>4</sup> Besluit Certificering TenneT TSO B.V. Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 10, derde lid, van de Elektriciteitswet 1998. Zaaknummer: 103883\_5; Beslisdatum 18-12-2013 <https://www.acm.nl/nl/publicaties/publicatie/12455/Besluit-certificering-TenneT-TSO-BV/>

<sup>5</sup> § 2 of the draft decision.

<sup>6</sup> § 16 of the draft decision.

ownership unbundling of Article 9 Electricity Directive as enshrined in national law are duly complied with.

Article 9(1)(b)(i) Electricity Directive prohibits the same person or persons by the public bodies in question from directly or indirectly exercising control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercising control or exercising any right over a transmission system operator or over a transmission system. 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.

From the draft decision it follows that TenneT is ultimately fully owned by the Dutch State<sup>7</sup>. The ownership of TenneT is administered by the Dutch Minister of Finance<sup>8</sup>. The Dutch State is also a shareholder in two companies active in the production and/or supply of gas: Energie Beheer Nederland (hereafter, "EBN") (100% interest), active in the exploration, exploitation and trade in oil and gas and therefore an important partner for oil and gas companies in the Netherlands, and GasTerra (10% interest), a company trading natural gas and operating internationally. These participations are managed by the Ministry of Economic Affairs (hereafter, "MEA"). It is worth noting that EBN is also a 40% shareholder in GasTerra.

In its opinion on Danish TSO Energinet.dk, as well as in its 2013 opinion on TenneT and other certification opinions, the Commission considered that two separate Ministries controlling, on the one hand transmission of electricity and gas, and on the other hand activities of generation, production and supply of electricity and gas, can under certain circumstances constitute bodies with a sufficient degree of separation as required by Article 9(6) Electricity Directive<sup>9</sup>. Article 9(3) Electricity Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of generation, production and supply within the meaning of Gas Directive 2009/73/EC. The Dutch State's participations in gas undertakings are hence relevant for the assessment of TenneT's compliance with the ownership unbundling rules.

In its draft decision ACM has undertaken an in-depth evaluation of the degree of separation between the two Ministries concerned, focusing primarily on the principle of ministerial responsibility as enshrined in Dutch constitutional law<sup>10</sup>. According to the Dutch constitution Ministers have separate tasks for which they are personally and politically responsible. This includes independent decision-making powers over State participations for which a Ministry manages the State's shareholdings. The Prime Minister is responsible only for areas that are not covered by the Ministries. This also implies that the Ministry of Finance cannot give instructions to MEA or vice versa. The same applies to the Prime Minister. Moreover, the separation of competences applies throughout the entire organisation of a Ministry including each individual public official.

The Commission agrees with ACM's conclusion on this point that, on the basis of the elements described above, the structural separation of competences provides for a degree of

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<sup>7</sup> §75 of the draft decision.

<sup>8</sup> §76 of the draft decision.

<sup>9</sup> Commission Opinion of 9.1.2012 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC - Denmark - Certification of Energinet.dk (electricity), C(2012) 88 final  
Commission Opinion of 1.7.2013 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – the Netherlands - Certification of TenneT TSO B.V., C(2013)4206 final.

<sup>10</sup> §84 of the draft decision.

separation between the Ministry of Finance and MEA that is sufficient to comply with the requirements of Article 9(6) Electricity Directive.

## **2. REMAINING COMPETENCES FOR THE MEA**

The Commission notes that while the Dutch Minister of Finance owns TenneT, the MEA retains certain competences relating to TenneT. Since MEA also owns shares in EBN and GasTerra, it must be guaranteed that no conflict with the provisions of Article 9(1)(b), (c) and (d) and 9(2) Electricity Directive arises. The Commission recalls in this context that the reason for the obligation to strictly separate the public bodies is to ensure independence with regard to transmission on the one hand and generation and supply on the other. The existence of the competences for the MEA relating to TenneT demonstrates that the separation of the two public bodies, although ensured in structure, may in practice be called into question.

In this respect, in its 2013 opinion the European Commission has expressed concerns about a number of explicit tasks and competences that MEA has with regard to TenneT on the basis of the Dutch Electricity Act 1998 (hereafter, " Electricity Act "). These tasks and competences included the need for MEA-approval of the bylaws of TenneT, the need for MEA-approval of special investments and the need for MEA-approval in appointing members of TenneT's supervisory body.

The above concerns of the Commission may also be relevant in the context of the current certification of TenneT, concerning the operation of the offshore network at issue.

The Commission therefore assesses below whether these concerns could be considered resolved.

### **The need for MEA-approval in appointing members of TenneT's supervisory body**

In its 2013 opinion, the Commission raised concerns regarding the need for MEA-approval in appointing members of TenneT supervisory body. According to Article 9(1)(c) Electricity Directive the same person or persons cannot be entitled to appoint members of the supervisory board of a transmission system operator and directly or indirectly exercise control or exercise any right over an undertaking performing any of the functions of generation or supply.

In its draft decision ACM notes that the necessary legal adjustments have been made and that the power in the case of the appointment of the members of the Supervisory Board has been eliminated<sup>11</sup>. The Commission notes that the respective amendments have been made in Article 11a § 4 of the Electricity Act and are in force as of 25 January 2014<sup>12</sup>. Therefore the Commission's previous concerns on this point have been resolved.

### **The need for MEA-approval of the bylaws of TenneT**

With regard to the power of MEA to approve the bylaws of TenneT, it appears from the legislative history of the relevant article in the Electricity Act that the purpose of this power was to ensure that other (commercial) activities employed by the holding company of TenneT, TenneT Holding, do not interfere negatively with the independent operation of the network. Whilst the Commission agrees that it is important that groups to which a TSO belongs do not undertake activities that affect either the independent operation of the network or the TSO's financial viability, the Commission notes that this objective is not reflected in the scope of this provision.

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<sup>11</sup> § 92 of the draft decision.

<sup>12</sup> Wet van 2 juli 1998, houdende regels met betrekking tot de productie, het transport en de levering van elektriciteit (Elektriciteitswet 1998) <http://wetten.overheid.nl/BWBR0009755/2016-04-01>.

In its draft decision, ACM indicates that this power will be abandoned in a future law. That is expected to be adopted by the end of 2016. A corresponding proposal for an amendment to the Electricity Act was made on 14 April 2016<sup>13</sup>. There is an ongoing consultation on this amendment, which is expected to last till 12 May 2016<sup>14</sup>. The Commission asks ACM to verify in its final decision whether these amendments have been adopted and if this is not the case, to make the final certification conditional on such entry into force.

### **The need for MEA-approval of special investments**

The Commission stresses, as noted above, that complying with the ownership unbundling model within the state requires full compliance with Article 9(1)(b), (c) and (d) Electricity Directive. This means *inter alia* that the competences of MEA with regard to TenneT must not amount to "control" or "any right" over TenneT as a TSO pursuant to the meaning of Article 9(1) and (2) Electricity Directive<sup>15</sup>.

In its 2013 opinion, the European Commission raised concerns in relation to the MEA's power to evaluate the necessity and approve special investments of TSOs. Indeed, according to Article 20e §1 of the Dutch Electricity Act, an operator of the national grid (TSO) has to announce its intention to make certain investments in the construction or expansion of the network to the Minister of Economic Affairs (Article 20e §1 of the Electricity Act)<sup>16</sup>. Pursuant to Article 20e §3 of the Electricity Act, the MEA has the right to evaluate the "necessity" of the respective investments. Absent the MEA's approval of the "necessity" of the investment, TenneT cannot recover the investment costs through its tariffs<sup>17</sup>. This means in practice that the MEA has a *de facto* veto right on certain investment decisions and that certain intended investments may not be realised.

As already expressed with 2013 Opinion Commission does in principal not consider such a *de facto* veto right compatible with EU law.

In its final Certification Decision of 18 December 2013 (§101)<sup>18</sup>, ACM stated that the MEA had agreed to take steps for amending the relevant law to address this issue. In an email sent on 13 May 2016, ACM provided additional information on the plans to abolish the powers of the Minister of Economic Affairs related to investment decisions by the TSO. In particular, ACM provided the Commission a draft bill for amendment to Article 20e Electricity Act<sup>19</sup>. However, no legislative amendment has been adopted or proposed to date. Therefore the Commission considers that its concerns in relation to this power of the MEA have not been solved yet and remain pertinent also with regard to the present request for certification.

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<sup>13</sup> § 92 of the draft decision.

<sup>14</sup> Wetsvoorstel Voortgang Energietransitie <https://www.internetconsultatie.nl/voortgangenergietransitie>

<sup>15</sup> See Article 9(1)(b)(i) Electricity Directive: *"The same person or persons are (not) entitled directly or indirectly to exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly to exercise control or any right over a transmission system operator or over a transmission system."*

<sup>16</sup> The article uses the term of "special" (bijzondere) investments, without further defining the criteria of thresholds of what can be considered a "particular" investment. The recitals (memorie van toelichting) to the original legislative proposal only clarify that smaller investments such as grid connections do not fall under the notion of special investments, but does not provide for any further criteria (<https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/visphupx3kzu>).

<sup>17</sup> See Article 20e §4.

<sup>18</sup> Besluit Certificering TenneT TSO B.V. Besluit van de Autoriteit Consument en Markt als bedoeld in artikel 10, derde lid, van de Elektriciteitswet 1998. Zaaknummer: 103883\_5; Beslisdatum 18-12-2013 <https://www.acm.nl/nl/publicaties/publicatie/12455/Besluit-certificering-TenneT-TSO-BV/>.

<sup>19</sup> Article I letters R and S of the provided draft bill.

In its present draft decision, ACM provides two arguments regarding this issue<sup>20</sup>.

First, ACM refers to set of rules which would mitigate the potential impact of MEA's competences regarding investments. They refer notably to rules concerning non-discrimination (Articles 23 §2 and 24 §3 of the Electricity Act), to the possibility of dispute resolution between network users and TenneT by ACM in case of violation of these rules (Article 51 of the Electricity Act), and to compliance rules (lined out in the Article 11b §1 of the Electricity Act<sup>21</sup>).

The Commission cannot follow this reasoning as the rules on non-discrimination and the compliance rules prescribed by the national legislation, referred to by ACM in the draft decision, cannot be considered as a sufficient safeguard that TenneT's investment decisions are not influenced by MEA's competences. Article 9(1)(b)(i) Electricity Directive provides for a clear and unconditional prohibition to exercise control or any right in a TSO. The existence of non-discrimination or compliance rules do therefore not remove the concerns with respect to the compatibility of MEA's influence over investment decisions with Article 9(1)(b)(i) Electricity Directive.

Second, in ACM's view the need for MEA-approval of special investments does not imply that the Minister exercises control ('zeggenschap') over TenneT<sup>22</sup>.

In this context, it is important to note that a TSO's main business concerns the operation and the development of its network, which regularly involves the need to take investment decisions. Absent a detailed specification of the exact threshold for the MEA's approval rights, it cannot be excluded that the MEA can determine investment decisions taken in the course of TenneT's regular business as a TSO, which would be a strong argument for assuming that MEA controls TenneT<sup>23</sup>.

In any event, MEA's *de facto* veto right for certain investment decision constitutes a "right" over a TSO within the meaning of Article 9(1)(b)(i) Electricity Directive. While veto rights on investments are not explicitly mentioned in Article 9(2) Electricity Directive, the list of rights in this article is not exhaustive ("any right"). Since veto rights on investments concern the core business of a TSO, the MEA's veto right in Article 20e Electricity Act can have similarly harmful effect on the independence of a TSO as the rights expressly mentioned in Article 9(2)(b) Electricity Directive.

In view of the above, the Commission considers that the MEA's *de facto* veto power in relation to investments by TeneT presents an obstacle to compliance with the unbundling requirements and does therefore not meet the criteria for certification. The Commission also notes that it raises serious concerns as to its compatibility with EU law. Therefore, given the

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<sup>20</sup> In its correspondence with the European Commission, as in an email from 12 May 2016, ACM took the view that the power to approve major investment applies only to the onshore TSO ("landelijk netbeheerder"). However from the wording of Article 20e §3, in connection with Article 1 §1 (j) and Article 10 §1 of the Electricity Act, it is not evident that investments into the offshore transmission system are excluded from the requirement of approval by the Minister of Economic Affairs ("netbeheerder van het landelijk hoogspanningsnet").

<sup>21</sup> §91 of the draft decision.

<sup>22</sup> §92 of the draft decision.

<sup>23</sup> The powers of the MEA regarding the influence on the conduct of the TSO have to be interpreted in the light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertaking (2008/C 95/01). (See in particular section 3.2). Here, rights as regards the investment policy of an undertaking are considered an important element in assessing whether or not there is control over its activities, which needs to be assessed also against the specific business of the company concerned.

delay to the planned amendments of the Dutch Electricity Act which would resolve this concern, Commission urges ACM to either refuse the certification or render it conditional upon the abolishment of the MEA's power within a reasonable timeframe to be set by ACM.

### 3. OWNERSHIP OF THE NETWORK

According to the Article 9(1)(a) Electricity Directive, Member States shall ensure that each undertaking which owns a transmission system, acts as a transmission system operator. Therefore a TSO must be an owner of the transmission system to be certified. This rule is transposed in the Article 10 §4 of the Electricity Act. *Stricto sensu* the infrastructure in question, i.e. the planned offshore grid, does not exist yet as required under Article 9(1)(a) of the Electricity Directive.

ACM notes that, under the national legislation, in particular Article III of the Electricity Act 1998 Amendment Act (timely realization of the objectives of Energy Agreement)<sup>24</sup>, ACM can take the decision on the certification of the TSO to operate an offshore network, even before the offshore network is completed, provided that this TSO has taken the preparatory steps necessary for the preparation of the construction, which includes requesting permits necessary for this purpose<sup>25</sup>. The ACM deems it necessary to use these powers as the national law is formulated in such a way, that an offshore system operator must be appointed before the offshore electricity grid is set up<sup>26</sup>. ACM considers that TenneT has demonstrated that it has requested several permits necessary for the establishment of the offshore network.

In the Commission's view, the certification of TenneT is possible, if the TSO is an owner of the network after the construction is completed. The Commission therefore asks ACM to make the final certification decision conditional on the ownership over the offshore grid.

### IV. CONCLUSION

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

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<sup>24</sup> Wijzigingswet Elektriciteitswet 1998 (tijdig realiseren doelstellingen Energieakkoord), geldend van 01-04-2016 <http://wetten.overheid.nl/BWBR0037771/2016-04-01>.

<sup>25</sup> § 33 of the draft decision.

<sup>26</sup> § 99 of the draft decision.



The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. ACM 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, 22.6.2016

*For the Commission*  
*Miguel ARIAS CAÑETE*  
*Member of the Commission*

