



EUROPEAN COMMISSION
Competition DG

CASE AT.40461 – DE/DK Interconnector

(Only the English text is authentic)

ANTITRUST PROCEDURE
Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 07/12/2018

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COMMISSION DECISION

of 7.12.2018

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the
European Union and Article 54 of the EEA Agreement**

Case AT.40461 – DE/DK Interconnector

(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission decision of 19 March 2018² to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 19 March 2018,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,³

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

- (1) This Decision is addressed to TenneT TSO GmbH ("TenneT"), a German Transmission System Operator ("TSO") and concerns the significant limitation of the

¹ OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

² Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40461 — DE-DK Interconnector (OJ C 118, 4.4.2018, p. 20).

³ OJ C 118, 4.4.2018, p. 20–21.

commercial capacity on the electricity interconnector between Germany and West Denmark ("the DE-DK1 interconnector").

- (2) In its preliminary assessment of 19 March 2018, the Commission came to the preliminary conclusion that TenneT had significantly limited the commercial capacity on the DE-DK1 interconnector, which resulted in partitioning of the internal market and discrimination between network users based on their place of residence.⁴ In the preliminary assessment the Commission concluded that TenneT's behaviour was not objectively justified. Finally, in the preliminary assessment the Commission raised concerns as to the compatibility of TenneT's practices with Article 102 of the Treaty and Article 54 of the EEA Agreement.
- (3) While TenneT does not agree with the Commission's preliminary assessment, it has nevertheless offered commitments pursuant to Article 9(1) of Regulation (EC) No 1/2003, to meet the Commission's competition concerns. This Decision makes those commitments binding on TenneT.

2. THE UNDERTAKING CONCERNED

- (4) TenneT, a company based in Germany with its registered corporate headquarters located in Bayreuth, is a certified German TSO.⁵ TenneT owns and operates a high-voltage electricity network of 10 700 km covering an area of 140 000 km² in Germany. Distribution networks with lower voltage are connected to TenneT's network through transformer stations. TenneT is an indirect subsidiary of TenneT Holding B.V., a Dutch company wholly-owned by the Dutch Ministry of Finance.

3. PROCEDURAL STEPS

- (5) On 19 March 2018 the Commission initiated proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and adopted a preliminary assessment pursuant to in Article 9(1) of that Regulation which set out the Commission's competition concerns; these related to significant limitation of the commercial capacity on the DE-DK1 interconnector which resulted in the partitioning of the internal market and discrimination between network users based on their place of residence. This assessment was notified to TenneT on 19 March 2018.
- (6) TenneT submitted its comments on the Preliminary Assessment on 6 April 2018.
- (7) On 19 March 2018, TenneT submitted commitments ("the Initial Commitments") to the Commission in response to the Preliminary Assessment.
- (8) On 4 April 2018 a notice was published in *the Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003⁶, summarising the case and the Initial Commitments and inviting interested third parties to give their observations on the Initial Commitments within one month following publication.

⁴ The place of residence in this Decision should be understood as the place where the power plant is located.

⁵ The Commission opinion of 24 June 2015 pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10 Of Directive 2009/72/EC and the Decision of the German energy regulator (Bundesnetzagentur) BK6-12-047 of 3 August 2015.

⁶ Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40461 — DE-DK Interconnector (OJ C 118, 4.4.2018, p. 20).

- (9) 23 parties provided the Commission with their observations on the proposed commitments. The respondents included electricity producers; associations of energy traders, generators, retailers and distributors; transmission system operators and public authorities from various Member States.
- (10) On 16 May 2018 the Commission informed TenneT of the observations received from interested third parties following the publication of the notice. On 12 November 2018 TenneT submitted an amended proposal for commitments (“the Commitments”).
- (11) On 28 November 2018 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 29 November 2018 the Hearing Officer issued his final report.

4. FACTS OF THE CASE

- (12) The practices that are subject of this Decision concern TenneT’s significant limitation of the commercial capacity on the DE-DK1 interconnector in the southbound direction (that is to say, from West Denmark to Germany).

4.1. The German electric system

- (13) The German electricity transmission system is owned and operated by four TSOs including TenneT. Each of the four TSOs controls a different transmission system area which is separate from and not substitutable with each other. As shown in Figure 1, TenneT's transmission system spans from the border of Denmark to the Alps, and covers around 40 percent of the surface area of Germany, including Schleswig-Holstein where it is connected to the Danish system.

Figure 1: TenneT's network



Source: TenneT⁷

⁷ "Bestimmungen der Übertragungskapazität an auktionierten Grenzkuppelstellen der TenneT TSO GmbH", page 5. Annex 5.6-04 2 to TenneT's reply the request for information of 12 July 2016.

- (14) The German electricity transmission system is characterised by high flows of electricity from the North (where electricity production is increasingly located) to the South (where there is the most consumption).⁸ These flows create network congestion in certain areas during hours of high wind production in Northern Germany. In particular, TenneT manages a congested area in the Schleswig-Holstein region, close to the border with Denmark.⁹
- (15) The German wholesale electricity market is organised as a single bidding zone together with Luxembourg and Austria.¹⁰ A bidding zone is an area with a single price, in which market players (for example, electricity generators, consumers, traders) can trade volumes without consideration for physical network constraints.

4.2. The Danish electric system

- (16) EnDK owns and operates the electricity transmission network in Denmark. It is the sole TSO in Denmark.¹¹ The Danish wholesale electricity market is divided into two bidding zones: West Denmark (DK 1) and East Denmark (DK 2).
- (17) Most of the trading in the Danish wholesale electricity market takes place at the common Nordic power exchange, Nord Pool, which is owned and operated by the Nordic and Baltic TSOs. Whenever grid congestions occur, the Nord Pool area is divided into several price areas. The Danish average wholesale price tends to be higher than the Nordic prices but lower than the Continental European prices. As a result, Denmark tends to be a transit country for commercial flows of electricity between the neighbouring Nordic countries Sweden and Norway, and Germany.¹²

4.3. The DE-DK1 interconnector and its maximum commercial capacity

- (18) TenneT and EnDK are the two TSOs operating on each side of the DE-DK1 interconnector.
- (19) The DE-DK1 interconnector is composed of the following tie-lines:
- a double-circuit 380 kV overhead line between Kasso (in Denmark) and Jardelund (in Germany), commissioned in 1979;
 - a 220 kV overhead line between Kasso (in Denmark) and Flensburg (in Germany), commissioned in 1957;
 - a 220kV overhead line between Ensted (in Denmark) and Flensburg (in Germany), commissioned in 1957.¹³
- (20) The transmission capacity on the DE-DK1 interconnector made available to the market ("the commercial capacity") in each direction is determined in two steps. First, TenneT and EnDK individually calculate the maximum interconnection capacity for each direction based on their respective capacity calculation methodology. In the second step, the individual so-called Net Transfer Capacity,

⁸ TenneT's presentation of 11 November 2014 "Denmark West – Germany – Capacities for 2015", page 4. Annex 17.8-2 to TenneT's reply the request for information of 12 July 2016.

⁹ TenneT's reply to question 13 of the request for information of 12 July 2016.

¹⁰ Austria was part of the single German/Luxembourg bidding zone since 2002 until 30 September 2018.

¹¹ National Report 2016 of the Danish Energy Regulatory Authority ("DERA"), page 10.

¹² National Report 2016 of the Danish Energy Regulatory Authority ("DERA"), pages 23 and 24.

¹³ Annex 2 to TenneT's reply to the request for information of 12 July 2016.

"NTC"¹⁴ values calculated separately by TenneT and EnDK are compared and the lowest one of the two for each direction is retained as the commercial capacity.¹⁵ Hence, TenneT and EnDK each determine individually the maximum commercial capacities for both import into and export from their networks.

- (21) According to a document of TenneT dated 19 May 2015, the maximum capacity complying with safety standards on the DE-DK1 interconnector was 1 780 MW in the southbound direction (from West Denmark to Germany) and 1 500 MW in the northbound direction (from Germany to West Denmark) from 1 September 2012. Before that date the maximum capacity was 1 500 MW in the southbound direction and 950 MW in the northbound direction since 2 January 2007.¹⁶
- (22) On 21 December 2015 TenneT and EnDK posted an Urgent Market Message ("UMM") on Nord Pool's¹⁷ website under the category "*Outage or limitation: Planned limitation grid*" stating that due to "*loadflow conditions and wind infeed in the north of Germany*" southbound commercial capacity on the DE-DK1 interconnector may vary between 0 MW and 1 640 MW in the period from 1 January 2016 to 31 December 2016.¹⁸ The maximum commercial capacity of the DE-DK1 interconnector itself was therefore deemed to be 1 640 MW.
- (23) According to calculations performed by the Agency for the cooperation of Energy regulators ("ACER") in 2016, the maximum capacity on the DE-DK1 interconnector that can be made available to the market complying with safety standards ("the benchmark capacity") is 1 582 MW in both directions.¹⁹
- (24) For the purpose of this case in the Preliminary Assessment the Commission concluded that the maximum commercial capacity of the DE-DK1 interconnector compliant with safety standards amounted to at least 1 582 MW in the southbound direction.
- (25) The DE-DK1 interconnector alone accounts for 40% of the total transmission capacity between the Nordic countries and continental Europe.²⁰
- (26) TenneT and EnDK have come to an agreement to increase the capacity of the DE-DK 1 interconnector. That agreement involves the upgrading of the existing 220 kV

¹⁴ NTC stands for Net Transfer Capacity. It corresponds to the maximum commercial capacity that can be made available between two bidding zones compliant with operational safety standards in the two zones.

¹⁵ TenneT's and EnDK's replies to question 3 of the request for information of 12 July 2016. See also TenneT's comments on the Preliminary Assessment of 6 April 2018, pages 3-4.

¹⁶ Point 3.5 of "Bestimmungen der Übertragungskapazität an auktionierten Grenzkuppelstellen der TenneT TSO GmbH". Annex 5.6-04 2 to TenneT's reply the request for information of 12 July 2016.

See also TenneT's press release published on 13 July 2012 available at: <https://www.tennetso.de/site/en/press/releases/2012/increase-of-capacity-on-the-dk1-germany-interconnector>

See also EnDK's press release published on 13 July 2012 available at:

<https://en.energinet.dk/About-our-news/News/2017/04/25/Capacity-raised-on-electricity-connections-to-Germany>

¹⁷ Nord Pool is the electricity exchange of the Nordic and Baltic countries.

¹⁸ <http://umm.nordpoolspot.com/messages/75421>. See also TenneT's and EnDK's replies to question 9 of the request for information of 12 July 2016.

¹⁹ Annual report on the results of the monitoring the internal electricity and gas markets in 2016, Electricity wholesale markets volume, published by ACER in October 2017, Annex 1, Table 7 and Annex 2 for the description of the method used to calculate the benchmark capacity. Available at: https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20-%20ELECTRICITY.pdf

²⁰ "Optimal use of the transmission network: a regional approach", Eurelectric, June 2016, page 2.

line between Kasso and Dollern to 380 kV ("the East Coast Line ") and the construction of two new 380 kV lines between Brunsbüttel and the Danish border ("the West Coast Line "). According to TenneT, the commissioning of the East Coast Line is planned for 2020, while the commissioning of the West Coast Line is planned for 2022.²¹ Following the commissioning of these new lines, the maximum commercial capacity of the DE-DK1 interconnector compliant with safety standards will increase to 3 500 MW. More specifically, the maximum commercial capacity of the interconnector will increase to 2 500 MW following the commissioning of the East Coast Line and to 3 500 MW after the West Coast Line is commissioned.²²

4.4. TenneT's behaviour on the DE-DK1 interconnector

- (27) In order to calculate the commercial capacity to be made available on the DE-DK1 interconnector, TenneT uses a model based on historical datasets to forecast the flows of electricity on the different elements of which its network is composed (lines, transformers, etc.) for the different timeframes (annual, monthly, daily).²³
- (28) In this respect, weather conditions play an important role since they have a significant effect on both the load and the supply situations on TenneT's network given the growing significance of wind-based electricity production in Northern Germany.²⁴
- (29) As shown in a TenneT document (summarised in Table 1), when calculating the commercial capacity on the DE-DK1 interconnector TenneT establishes a strong link between the amount of commercial capacity made available and the level of wind production in Germany.²⁵ In particular, Table 1 shows that the commercial import capacity from West Denmark would normally be set at 0 when the German wind production exceeds 3 000 MW. In other words, TenneT limits the commercial capacity on the DE-DK1 interconnector when the domestic wind-based electricity production is high.

²¹ TenneT's and EnDK's replies to question 14 of the request for information of 12 July 2016.

²² TenneT's reply to question 3 in the email of 11 June 2018. See also EnDK's reply to question 14 of the request for information of 12 July 2016.

²³ TenneT's reply to question 3 of the request for information of 12 July 2016.

²⁴ TenneT's reply to question 3.a of the request for information of 12 July 2016.

²⁵ Annex 8.b to TenneT's reply to the request for information of 12 July 2016.

Table 1: NTC Table for capacity at the DE-DK1 interconnector²⁶

Wind strength from	Wind strength to	Southbound capacity at DK-DE
0 MW	500 MW	950
501 MW	1000 MW	650
1001 MW	2000 MW	250
2001 MW	3000 MW	50
3001 MW	4000 MW	0
4001 MW	5000 MW	0
5001 MW	6000 MW	0
6001 MW	7000 MW	0
7001 MW	8000 MW	0
8001 MW	9000 MW	0
9001 MW	10000 MW	0

- (30) Data provided by TenneT²⁷ and EnDK²⁸ show that the commercial capacity on the DE-DK1 interconnector in the southbound direction was limited on average in 99% of the hours in the period 2011-2014 and 100% of the hours in the period 2015 - 30 June 2016.
- (31) TenneT was the TSO limiting the commercial capacity on the DE-DK1 interconnector in the southbound direction in the vast majority of the hours from 2011: 88% of the hours in the period 2011-2014 and 100% of the hours in the period 2015- 30 June 2016.²⁹
- (32) As a result, the annual average commercial capacity on the DE-DK1 interconnector in the southbound direction decreased from 1 497 MW in 2010 to 201 MW in the first half of 2016, that is to say, a decrease of more than 85%, as shown in Figure 2.

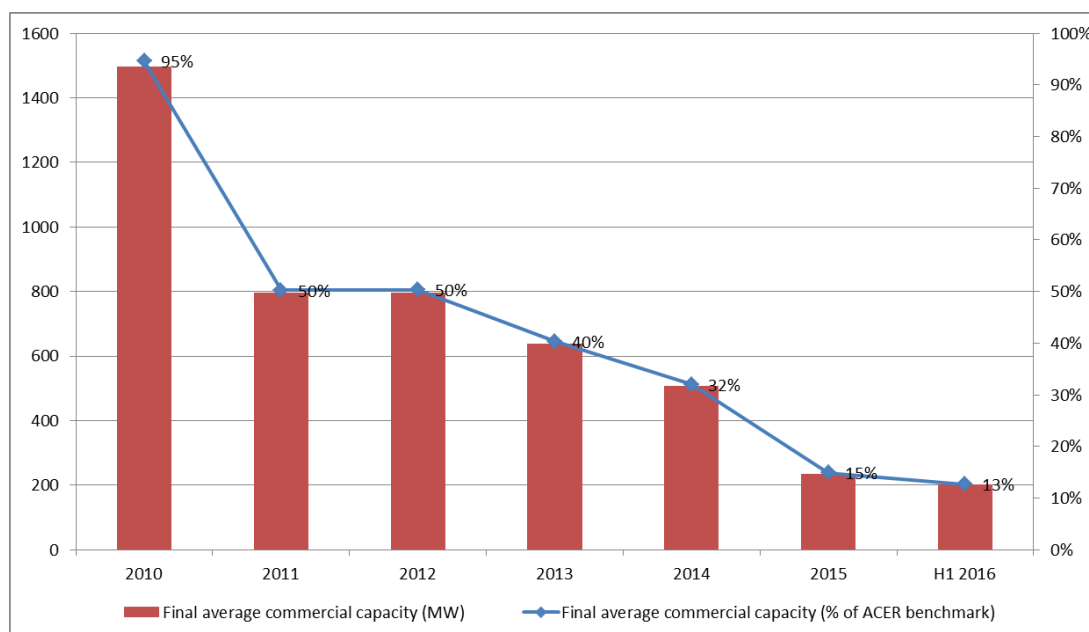
²⁶ Annex 8.b to TenneT's reply to the request for information of 12 July 2016.

²⁷ Annex 8.2 to TenneT's reply to the request for information of 12 July 2016.

²⁸ Annex to EnDK's reply to question 8 of the request for information of 12 July 2016.

²⁹ EnDK's reply to question 8 of the request for information of 12 July 2016.

Figure 2: Evolution of the annual average commercial capacity on the DE-DK1 interconnector in the southbound direction



Source: TenneT³⁰

- (33) In the first half of 2016, the annual average southbound commercial capacity on the DE-DK1 interconnector made available to the market was only 13% of the benchmark capacity as calculated by ACER, making it one of the most heavily curtailed interconnectors in the Union.³¹
- (34) On 14 June 2017 the Danish and the German authorities signed a "Joint Declaration" aiming to increase the commercial capacity made available on the DE-DK1 interconnector. Neither TenneT nor EnDK is a party to the Joint Declaration. Based on the declaration, the minimum available hourly capacity on the DE-DK1 interconnector is to be increased gradually from 400 MW in November 2017 to 1 100 MW in 2020. The "Joint Declaration" also states that the total costs for offering the minimum capacity cannot exceed EUR 40 million/year for the German side. Finally the "Joint Declaration" is not designed to create legal obligations.³²

4.5. Price differences between Germany and West Denmark

- (35) As shown in Figure 3, the annual average wholesale price in West Denmark (DK1) has generally been lower than in Germany (DE) since 2011, with the exception of 2013 when it was slightly higher.³³

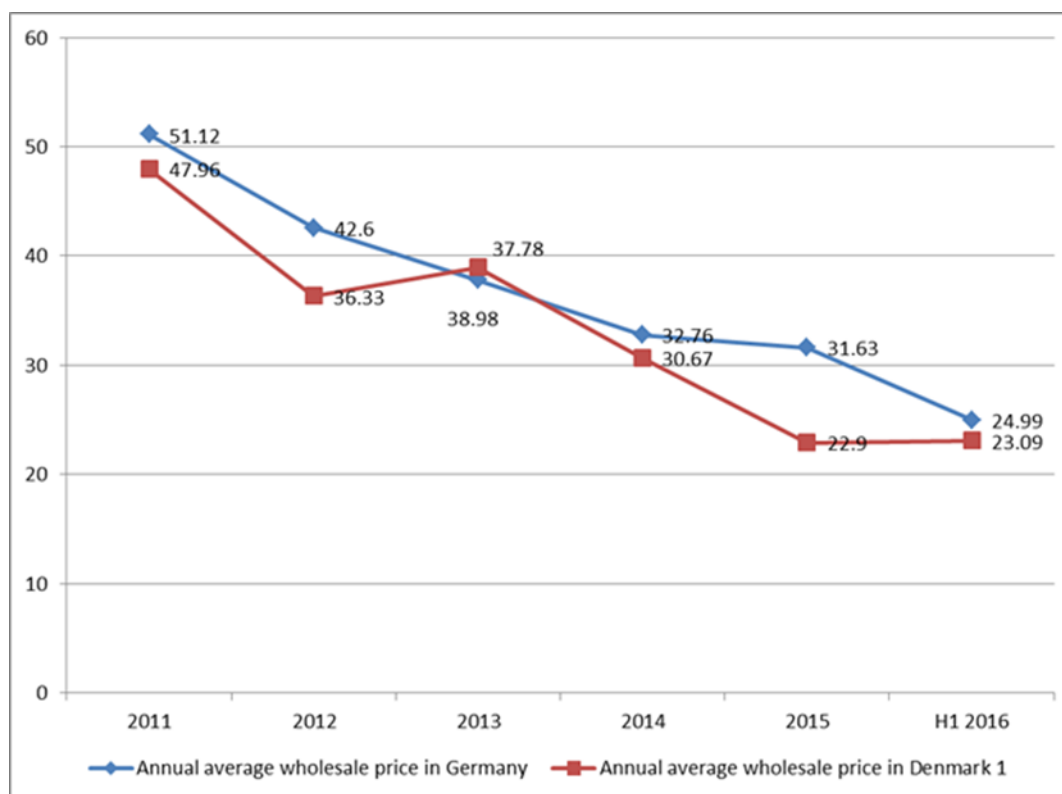
³⁰ Annex 8.2 to TenneT's reply to the request for information of 12 July 2016.

³¹ Annual report on the results of the monitoring the internal electricity and gas markets in 2016, Electricity wholesale markets volume, op.cit., Annex 1, Table 8.

³² In TenneT's comments on the Preliminary Assessment of 6 April 2018, page 9, TenneT argues that the Joint Declaration is binding on TenneT. However the Joint Declaration includes the following statement: "This Joint Declaration is not designed to create legal obligation". It also did not include any sanctions or enforcement mechanism. In any event for the purpose of this decision, the binding nature of the Joint Declaration does not have to be determined.

³³ It should be noted that annual averages only imperfectly reflect the hourly price differences between West Denmark and Germany which may be higher during some hours.

Figure 3: Evolution of the annual average wholesale prices in EUR/MWh in Germany (DE) and West Denmark (DK1) in the period 2011 – 30 June 2016



Source: TenneT³⁴

- (36) The significant limitation of the commercial capacity on the DE-DK1 interconnector in the southbound direction has contributed to the maintenance of the price difference between West Denmark and Germany by limiting trading possibilities between the two zones. As a consequence of that limitation of trading possibilities, relatively more expensive plants have been running in Germany to meet domestic demand, which in the absence of that limitation could have been supplied by less expensive power plants in Denmark.

4.6. The Regulatory framework for the calculation of interconnection capacity

- (37) Article 16(3) of Regulation (EC) No 714/2009 of the European Parliament and of the Council³⁵ imposes obligation to maximise interconnection capacity, requiring that "the maximum capacity of the interconnections and/or the transmission networks affecting cross-border flows shall be made available to market participants, complying with safety standards of secure network operation".
- (38) That principle is complemented by point 1.7 of Annex I to Regulation (EC) No 714/2009 which provides that "TSOs shall not limit interconnection capacity in order to solve congestion inside their own control area, save for the abovementioned reasons [cost effectiveness and minimisation of negative impacts on the internal market in electricity] and reasons of operational security".

³⁴ Annex 8.1 to TenneT's reply to the request for information of 12 July 2016.

³⁵ 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 L211, 14.8.2009, p.15).

- (39) The general principles mentioned in recitals (37) and (38) must be implemented by the TSOs in the methodologies they use to calculate commercial capacity made available on interconnectors. In accordance with Article 21(1)(b)(ii) of Commission Regulation (EU) 2015/1222³⁶, those methodologies have to include "rules for avoiding undue discrimination between internal and cross-zonal exchanges to ensure compliance with point 1.7 of Annex I to Regulation (EC) No 714/2009".

5. LEGAL ASSESSMENT

5.1. Relevant markets

- (40) In line with the Commission's notice on the definition of relevant market,³⁷ the Commission defines hereafter the relevant product and geographic markets.

5.1.1. Product market

- (41) TenneT's activity consists of managing and developing the electricity transmission grid (220-400 KV) in its control area, and the interconnectors therein.
- (42) A relevant product market comprises all those products and/or services that are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.
- (43) In line with previous Commission decisions, activities within the electricity sector can be divided into:
- (1) markets relating to electricity infrastructure;
 - (2) markets relating to the supply of electricity.

Electricity infrastructure

- (44) In line with Directive 2009/72/EC³⁸, the following two types of transport activities must be distinguished within the electricity transport market: (i) the transmission (via extra-high-voltage and high-voltage grids) of electricity and (ii) the distribution (via low voltage grids) of electricity. For the transmission of electricity, transmission systems operators operate and manage interconnected high-voltage grids, thus providing electricity transportation services to wholesale electricity suppliers as well as large industrial (final) customers.

Supply of electricity

- (45) In previous Commission decisions, generation and wholesale supply of electricity were found to constitute one single relevant product market.³⁹ Electricity exchanged on the wholesale market may originate from power stations within the relevant

³⁶ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, (OJ L 197, 25.7.2015, p. 24).

³⁷ Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p.5).

³⁸ Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 13.7.2009, p.55) Cf. also: COMP/M.5827 *Elia / IFM / 50Hertz*, of 10 May 2010. (OJ C 191, 15.7.2010, p. 3)

³⁹ COMP/M.5979 *KGHM / Tauron Wytwarzanie / JV*, of 23 July 2012 (OJ C 286, 22.9.2012, p. 7); COMP/M.6540 *Dong Energy Borkumriffgrund I Holdco / Boston Holding / Borkum Riffgrund I Offshore Windpark*, of 10 May 2012 (OJ C 236, 7.8.2012, p. 1) ; COMP/M.6225 *Molaris / Commerz Real / RWE / Amprion*, of 23 August 2011 (OJ C 365, 15.12.2011, p. 2) ; COMP/M.3696 *E.ON / MOL*, of 12 December 2005, para 211 (OJ L 253, 16.9.2006, p. 20).

geographic area or be physically imported from other geographic markets via interconnectors.

- (46) The view of the Commission is that the relevant product market are: (i) the market for the transmission of electricity and (ii) the market for the wholesale supply of electricity.

5.1.2. *Geographic market*

- (47) According to established case law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply of and demand for the relevant products or services. In this geographic area the conditions of competition are similar or sufficiently homogeneous and can be distinguished from neighbouring areas, in which the prevailing conditions of competition are appreciably different.⁴⁰

The transmission of electricity

- (48) In line with previous Commission decisions, the transmission of electricity is considered to be limited to each TSO's transmission network. Electricity supplied through a specific electricity transmission grid is not substitutable with that supplied through another transmission grid.⁴¹ The relevant geographic market is said to encompass both the relevant high-voltage grid and the interconnectors connected to that voltage level.⁴² The existence of a separate market for the transmission of electricity solely involving a 'cross-border flow'⁴³ has previously been considered (that is to say, the flow of electricity through interconnectors).⁴⁴ However, the Commission has established that the relevant TSO, as the owner of the national transmission grid, can in any case control the available capacity for the interconnector, regardless of whether a third party owns the interconnector.⁴⁵

The wholesale supply of electricity

- (49) For the wholesale supply of electricity the relevant geographic market is often considered national in scope⁴⁶. However the relevant geographic area may also

⁴⁰ Commission Notice on the definition of relevant market. See also judgment in *United Brands Company and United Brands Continental v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 44; judgment in *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 26.

⁴¹ COMP/M.6225 *Molaris / Commerz Real / RWE / Amprion*, of 23 August 2011 (OJ C 365, 15.12.2011, p. 2) ; COMP/39.351 *Swedish Interconnectors*, of 14 April 2010 (OJ C 142, 1.6.2010, p. 28); COMP/M.5707 *Tennet / E.ON*, of 4 February 2010 (OJ C 60, 11.3.2010, p. 1).

⁴² COMP/M.5827 *Elia / IFM / 50Hertz*, of 10 May 2010; COMP/39.351 *Swedish Interconnectors*, of 14 April 2010; COMP/M.5512 *Electrabel / E.on*, of 16 October 2009 (OJ C 281, 21.11.2009, p. 6).

⁴³ Within the meaning of Article 2(1)(b) of 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, 14.8.2009, p. 15–35. cf. COMP/39.351 *Swedish Interconnectors*, of 14 April 2010.

⁴⁴ COMP/39.351 *Swedish Interconnectors*, of 14 April 2010; COMP/M.5154 *CASC JV*, of 14 August 2008 (OJ C 270, 25.10.2008, p. 15) ; COMP/M.4922 *EMCC*, of 22 August 2008 (OJ C 288, 11.11.2008, p. 1).

⁴⁵ COMP/39.351 *Swedish Interconnectors*, of 14 April 2010.

⁴⁶ COMP/M.5979 *KGHM / Tauron Wytwarzanie / JV*, of 23 July 2012; COMP/M.6540 *Dong Energy Borkumriffgrund I Holdco / Boston Holding / Borkum Riffgrund I Offshore Windpark*, of 10 May 2012; COMP/M.6225 *Molaris / Commerz Real / RWE / Amprion*, of 23 August 2011; COMP/M.5519 *E.on / Electrabel Acquired Assets*, of 13 October 2009 (OJ C 268, 10.11.2009, p. 18).

depend on bidding zone configuration reflecting network constraints which could inhibit the free flow of electricity. As regards Denmark, in past Commission decisions, due to constraints in interconnection capacities, the relevant geographic market was split into two regional markets: West and East Denmark, which correspond to the two Danish bidding zones⁴⁷. As regards Germany, since there currently is no limitation to the trading possibilities between Germany and Luxembourg (as they constitute a single bidding zone) those Member States could be considered to constitute a single geographic market. Until 30 September 2018 Austria was also part of the single bidding zone together with Germany and Luxembourg; therefore, for the purpose of this case, until 30 September 2018, Austria was part of the relevant geographic market.

5.1.3. Conclusion on the relevant markets

- (50) Against this background, the view of the Commission is that for the purpose of this case the relevant markets are: (i) the wholesale supply of electricity in West Denmark, and the wholesale supply of electricity in Germany, Luxembourg and Austria (until 30 September 2018) and (ii) the transmission of electricity on TenneT's network including the DE-DK1 interconnector connected to it.

5.2. Undertaking

- (51) According to established case-law, the subject of Union competition rules is the 'undertaking', defined in the case law as '*economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis*'.⁴⁸
- (52) There is no doubt that TenneT is engaged in economic activities. TenneT offers the services of electricity transmission on its high-voltage transmission network against a fee. Therefore, it is concluded that TenneT is an undertaking for the purposes of Article 102 of the Treaty.

5.3. Dominance

- (53) According to settled case law, dominance is '*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*'.⁴⁹
- (54) Electricity transport infrastructure, including the transmission network, constitutes a natural monopoly. TenneT has been operating the electricity network it owns on an exclusive basis.⁵⁰ It therefore has a monopoly position on the market for the transmission of electricity on its network.
- (55) The preliminary assessment of the Commission is that TenneT may be dominant within the meaning of Article 102 of the Treaty on the market for the transmission of electricity on its network, including the DE-DK1 interconnector connected to it.

⁴⁷ COMP/M.3268 *Sydkraft / Grøninge*, of 30 October 2003 (OJ C 297, 9.12.2003, p. 22); COMP/M.3868 *DONG/Elsam/Energi E2*, of 14 March 2006.

⁴⁸ Judgment in *Viho Europe BV v Commission*, C-73/95 P, ECLI:EU:C:1996:405, paragraph 50 OJ L 133, 25.5.2007, p. 24).

⁴⁹ Judgment in *United Brands Company and United Brands Continental v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 65.

⁵⁰ BNetzA certification decision concerning TenneT dated 3 August 2015 (BK6-12-047).

5.4. Abuse of the dominant position

- (56) The Court of Justice has held that an abuse of a dominant position is prohibited under Article 102 of the Treaty ‘*regardless of the means and procedure by which it is achieved*’, and ‘*irrespective of any fault*’.⁵¹ Article 102 of the Treaty is aimed not only at practices that may cause prejudice to consumers directly, but also at those that are detrimental to them through their impact on an effective competition structure.⁵²
- (57) According to consistent case law, the list of abusive practices contained in Article 102 of the Treaty is not exhaustive.⁵³
- (58) Moreover, according to well established case-law, market behaviour by a dominant undertaking which partitions markets along national borders or makes the interpenetration of national markets more difficult is regarded as anticompetitive and in breach of Article 102 of the Treaty and Article 54 of the EEA Agreement.⁵⁴
- (59) Further, Article 102 of the Treaty prohibits, among other things, any discrimination on the part of an undertaking in a dominant position, irrespective of whether such discrimination is linked to nationality.⁵⁵
- (60) TenneT gives priority access to its network to domestic electricity production, in particular during the hours when the domestic wind-based electricity production is high, by limiting access of the electricity coming from West Denmark via the DE-DK1 interconnector (see recitals (29)-(31)). This has been implemented by significantly limiting the commercial capacity of the DE-DK1 interconnector (see recitals (32)-(33)). In the preliminary assessment the Commission concluded that that behaviour may have resulted in partitioning of the internal market and discrimination between network users based on their place of residence in breach of Article 102 of the Treaty and Article 54 of the EEA Agreement.⁵⁶
- (61) Moreover, Article 18 of the Treaty enshrines the general principle of Union law that any discrimination on grounds of nationality is to be prohibited.
- (62) The regulatory framework for the calculation of interconnection capacity also imposes an obligation on TSOs to ensure the free flow of electricity(see recitals (37)-(39)). Under the sectoral rules TenneT is obliged to provide the maximum capacity of the interconnector complying with safety standards and in particular it must not limit interconnection capacity as a means of solving congestion within its own control area.

⁵¹ Judgment in *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 170.

⁵² Judgment in *Europemballage and Continental Can v Commission*, C-6/72, ECLI:EU:C:1973:22, paragraph 26; judgment in *British Airways*, C-95/04 P, ECLI:EU:C:2007:166, paragraphs 106-107; judgment in *France Télécom Wanadoo*, C-202/07 P, ECLI:EU:C:2009:214, paragraph 104.

⁵³ Judgment in *British Airways*, ECLI:EU:C:2007:166, paragraph 57.

⁵⁴ Judgment in *United Brands Company and United Brands Continental v Commission*, Case 27/76, ECLI:EU:C:1978:22, paragraph 233-234; judgment in *GlaxoSmithKline Services Unlimited v Commission*, C-501, 513, 515, 519/06, ECLI:EU:C:2009:610, paragraph 61; COMP/38.662 *GDF/ENI*, of 26 October 2004, paragraphs 67-69.

⁵⁵ Judgment in *Portugal v Commission*, C-163/99, ECLI:EU:C:2001:189, paragraph 46.

⁵⁶ Judgment in *Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Commission*, T-139/98, ECLI:EU:T:2001:272, paragraphs 92-99; judgment in *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission*, T-7/82, ECLI:EU:C:1983:52, paragraphs 53-56.

- (63) Based on the Commission's preliminary assessment, the "Joint Declaration" between the German and Danish authorities (see recital (34)) is not sufficient to remove the Commission's concerns. First, the minimum hourly capacity to be released to the market on the DE-DK1 interconnector remains limited (up to 1 100 MW). Second, the capacity is to be made available in a step-wise approach providing the 1 100 MW capacity to the market only in 2020. Third, the capacity to be made available to the market is subject to a cost-cap, which has the effect of limiting the capacity to be offered once certain pre-agreed costs are exceeded. Fourth, the "Joint Declaration" is of a non-binding nature.⁵⁷ Against this background, based on the Commission preliminary assessment, the "Joint Declaration" is therefore unlikely to put an end to the suspected infringement.

5.5. The conduct is capable of having anticompetitive effects

- (64) In its preliminary assessment, the Commission concluded that TenneT's behaviour of limiting commercial capacity on the DE-DK1 interconnector is capable of having anticompetitive effects.
- (65) First, the limitation of trading possibilities on the DE-DK1 interconnector means that electricity generators in Western Denmark and more generally in the Nordic countries are at a competitive disadvantage compared to those in Germany. They are therefore prevented from reaping the benefits of the internal market by exporting electricity to the German, Luxembourg and Austrian (until 30 September 2018) bidding zone when this would be in their interest.
- (66) Second, TenneT's behaviour contributes to the maintenance of price differences between the German, Luxembourg and Austrian (until 30 September 2018) bidding zone and West Denmark in an artificial manner, which could have resulted in higher prices for electricity consumers in the first area. In the long term, distorted electricity prices provide the market with distorted signals and thereby lead to inefficient investment both in generation and transmission capacity. Overall TenneT's behaviour therefore undermines the Union's efforts to achieve an integrated internal electricity market.

5.6. No valid objective justification

- (67) TenneT has not put forward any valid objective justification for its behaviour. TenneT has stated that during hours of high wind-based electricity production allowing additional electricity flow via interconnectors to an already congested network could endanger the network safety. However, based on the Commission's analysis, TenneT has various other means at its disposal to manage the congestion on its network, including, for example, counter-trade and re-dispatch. Those measures can relieve network congestion without limiting commercial import capacity. The fact that counter-trade and re-dispatch are costly remedial measures does not alter this finding. Indeed TenneT, like any other TSO, cannot resort to behaviour which contravenes Union competition rules and impedes the functioning of the internal electricity market on the basis that it would otherwise have to incur extra-costs.

⁵⁷ See footnote 32.

5.7. Substantial part of the internal market and effect on trade between Member States

- (68) Article 102 of the Treaty prohibits any abuse of a dominant position within the internal market or in a substantial part of it insofar as it may affect trade between Member States.
- (69) The General Court has ruled that if the relevant geographic market corresponds to the territory of a Member State, it can be regarded as constituting a substantial part of the internal market.⁵⁸ In *Merci Convenzionali Porto di Genova*,⁵⁹ the decisive criteria were considered to be the volume of traffic in the Port of Genoa, and that port's importance in relation to maritime import and export operations as a whole in the Member State concerned.
- (70) An abuse of a dominant position affects trade between Member States when it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States.⁶⁰
- (71) Union law covers any agreement or any practice that is capable of constituting a threat to freedom of trade between Member States in a manner that might harm the attainment of the objectives of a single market, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market.⁶¹
- (72) As noted in recital (4), TenneT's network is 10 700 km long and covers 40% of the German territory, making it one of the largest transmission networks in the Union. The preliminary assessment of the Commission is therefore that the market for electricity transmission on TenneT's network is of such importance that it constitutes a substantial part of the internal market.⁶² Furthermore the DE-DK1 interconnector accounts for a significant share of the total interconnection capacity between the Nordic countries and Continental Europe (see recital (25)).
- (73) The Commission therefore concluded in its preliminary assessment that TenneT's behaviour since at least 2011 is capable of affecting trade of electricity between West Denmark, and Germany, Luxembourg and Austria (until 30 September 2018), by hindering wholesale suppliers of electricity produced in West Denmark from competing on the wholesale supply markets in Germany, Luxembourg and Austria (until 30 September 2018).

5.8. Duration of the suspected infringement

- (74) The suspected infringement started at the latest in 2011 and is likely to be still on-going. As set out in recital (63) the Joint Declaration has not terminated the suspected infringement.

⁵⁸ Judgment in *Irish Sugar v Commission*, EU:T:1999:246, paragraph 99.

⁵⁹ Judgment in *Merci convenzionali porto di Genova SpA v Sidergica Gabrielli SpA*, C-179/90 EU:C:1991:464, paragraph 15.

⁶⁰ See judgment in *Bagnasco and Others*, C-215/96, EU:C:1999:12, paragraph 47.

⁶¹ Judgment in *Hugin Kassaregister and Hugin Cash Registers v Commission*, C-22/78, ECLI:EU:C:1979:138, paragraph 17; judgment in *Ambulanz Glöckner*, C-475/99, ECLI:EU:C:2001:577, paragraph 47; judgment in *Dalmine v Commission*, C-407/04, ECLI:EU:C:2007:53, paragraph 89.

⁶² Judgment in *Ambulanz Glockner*, C-475/99, ECLI:EU:C:2001:577, paragraph 38.

6. THE COMMITMENTS

6.1. Proposed Initial Commitments

- (75) In order to address the Commission's competition concerns, on 19 March 2018 TenneT tabled the Initial Commitments, the key elements of which are set out in recitals (76) to (80).
- (76) TenneT would make available to the market the maximum capacity on the DE-DK1 interconnector, complying with safety standards for secure network operation. In any event TenneT would provide a minimum guaranteed hourly capacity of 1 300 MW on the DE-DK1 interconnector. The level of 1 300 MW would be reached following an implementation phase of up to six months. TenneT would increase the minimum guaranteed hourly capacity to 900 MW on 1 January 2019 and subsequently increase the minimum guaranteed hourly capacity in five monthly steps of 80 MW. In order to maximise available capacities, TenneT would use countertrading and re-dispatch.
- (77) TenneT could only reduce the minimum guaranteed hourly capacity in two narrowly defined exceptional circumstances, namely either the outage of specific critical grid elements, as listed in an annex to the Initial Commitments ("exemption one"), or an emergency situation caused by (i) insufficient countertrading or re-dispatch capacity or (ii) a request for assistance by one or more other network operators to maintain security of supply ("exemption two").
- (78) Under both categories of exceptional circumstances if the capacity offered was below the minimum guaranteed hourly capacity, the limitation would not exceed what was strictly necessary for TenneT to ensure security of supply. Furthermore in case of outage of a critical grid element, TenneT would, in any event, offer an hourly capacity of at least 500 MW ("the minimum guaranteed hourly capacity under exemption one").
- (79) The duration of the Initial Commitments would be nine years from the date of notification of the Commission's decision pursuant to Article 9 of Regulation (EC) No 1/2003.
- (80) TenneT would also appoint a trustee that would monitor its compliance with the Commitments ("the Monitoring Trustee"). The Monitoring Trustee would supervise the implementation of the Initial Commitments and prepare reports to the Commission on TenneT's compliance with those Commitment and, in particular, any reasons for and the scope of reductions of the minimum guaranteed hourly capacity. TenneT would provide the necessary information and assistance to the Monitoring Trustee to facilitate preparation of those reports.

6.2. Commission Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003

- (81) In response to the publication on 4 April 2018 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003⁶³ the Commission received 23 responses from interested third parties. The respondents generally welcomed the Initial Commitments, which they believed would address the concerns expressed by the Commission. The main comments concerned the following points:
- (a) The need to increase the minimum guaranteed hourly capacity proportionally with the scheduled capacity expansion of the DE-DK1 interconnector during

⁶³ Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40461 — DE-DK Interconnector.

the commitment period. The respondents to the market test pointed out that two important grid reinforcement projects (namely, the East and West Coast Lines projects) have already been decided and are planned to be commissioned in 2020 and 2022⁶⁴, respectively.

- (b) The scope of the exemptions from providing the minimum guaranteed hourly capacity. As regards the first exemption (allowing TenneT to reduce the minimum guaranteed hourly capacity in case of an outage of a critical line), the respondents suggested that any of the lines listed in the Initial Commitments should be removed if it loses its indispensable character following the grid reinforcement projects in Germany. Some respondents also stated that the minimum guaranteed hourly capacity under exemption one should be increased following the expansion of the DE-DK1 interconnector. As regards the second exemption (allowing TenneT to reduce the minimum guaranteed hourly capacity in case of insufficient countertrading or re-dispatch potential), the respondents suggested that its scope should be further reduced. In particular, the respondents to the market test pointed out that lack of countertrading or re-dispatch potential should refer to technical, not economical lack of potential and only concern situations where such lack of potential exists just before the day-ahead market opens.
 - (c) The need to clarify that TenneT cannot limit transmission capacity on other German interconnectors as a consequence of providing the minimum guaranteed hourly capacity on the DE-DK1 interconnector.
 - (d) The fact that the minimum guaranteed hourly capacity should be provided to the market in its entirety and not used by TSOs for balancing energy.
- (82) In addition to those comments, two respondents indicated that splitting the German bidding zone would be a better solution than providing a minimum guaranteed hourly capacity and three respondents stated that the minimum guaranteed hourly capacity should be higher than proposed by TenneT (1 300 MW).
- (83) As regards the comment that splitting the German bidding zone would be a more effective solution, it should be recalled that in the context of a procedure under Article 9 of Regulation (EC) No 1/2003, the Commission's task is confined to verifying that commitments proposed by the parties address the concerns identified and that the parties have not offered less onerous commitments that also address those concerns adequately.⁶⁵ As explained in recitals (92) to (100), the Final Commitments are appropriate to remove the competition concerns identified by the Commission in the preliminary assessment. It is not for the Commission to determine whether other commitments exist which could also remove its competition concerns.
- (84) As regards the comment that the minimum guaranteed hourly capacity of 1 300 MW should be higher than proposed by TenneT, it should first be noted that the respondents significantly varied between themselves as to what the minimum guaranteed hourly capacity should be. The Commission takes the view that the minimum guaranteed hourly capacity should be set at a level maximising the commercial capacity offered to the market while at the same time providing TenneT with a sufficient margin of manoeuvre to ensure the secure operation of its network.

⁶⁴ Although some respondents pointed out that the West coast line will be finalised in 2021, TenneT explained that, according to the current planning, the West Coast line will be commissioned in 2022.

⁶⁵ Case C-441/07 P Commission v Alrosa, ECLI:EU:C:2010:377, paragraph 41.

In this latter respect, when determining the extent of the margin of manoeuvre, one has to take into account that TenneT will guarantee a minimum hourly capacity for every trading hour. In view of the foregoing the Commission considers that a minimum guaranteed hourly capacity of 1 300 MW - to be compared with interconnector's capacity assessed at 1 582 MW by ACER - strikes the right balance between the two above-mentioned objectives.

6.3. The Final Commitments

- (85) In response to the comments received in response to the Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, TenneT modified the Initial Commitments and submitted a revised proposal on 12 November 2018 ("the Commitments"). The main changes made by TenneT in the Commitments, as compared with the Initial Commitments, are summarized in recitals (86)-(90).
- (86) If both the East and West Coast Lines are commissioned prior to 1 January 2025 (which is the most likely scenario), the minimum guaranteed hourly capacity will be increased by constant annual steps until it reaches 75% of the expanded interconnector's maximum commercial capacity as described in recital (26) on 1 January 2026 at the latest. The exact annual figures of the minimum guaranteed hourly capacity to be reached each year following the expansion of the DE-DK1 interconnector are set out in Annex 1 to the Commitments. If, due to unforeseen events, the new lines are commissioned after 2024, the minimum guaranteed hourly capacity will be increased at once to 75% of the expanded interconnector's capacity on 1 January of the year following their commissioning.
- (87) As regards the scope of the first exemption (allowing TenneT to reduce the minimum guaranteed hourly capacity in case of an outage of one of the critical lines), TenneT explained that, as specified in Annex 2 to the Commitments, one of the critical lines will be removed from that Annex by mid-2019. However none of the other critical lines listed in Annex 2 will lose its indispensable character following the planned reinforcement of the German grid. Amongst those lines, four constitute the interconnector itself. The other four lines are located in Schleswig-Holstein (namely the West and the East Coast Lines) where, even following the planned reinforcement projects), the grid will not be sufficiently meshed. On that basis redirection of electricity in case of the outage of one of the four critical lines located in Schleswig-Holstein and listed in Annex 2 will not be possible. However, in order to take into account the effect of the commissioning of the East and West Coast Lines, TenneT offered to increase the minimum guaranteed hourly capacity under exemption one. The increased value will be determined by TenneT after the commissioning of the new lines and reviewed by the Monitoring Trustee. The Monitoring Trustee will prepare a written report for the Commission with an opinion on the appropriateness of the increased value determined by TenneT.
- (88) As regards the scope of the second exemption (allowing TenneT to reduce the minimum guaranteed hourly capacity in case of insufficient countertrading or re-dispatch potential), the Commitments clarify that this exemption can only apply in case of a technical lack of countertrading or re-dispatch potential, thereby ruling out the possibility to use it on the basis of economic considerations. Furthermore this exemption is limited to situations where such a technical lack exists during the

validation period of the cross-border capacity, that is to say, just before the spot markets open, as foreseen in the regulatory framework.⁶⁶

- (89) The Commitments clarify that they will have no adverse effect on the calculation and availability of cross-zonal capacity on other borders to which TenneT is an adjacent TSO.
- (90) Finally, the Commitments clarify that, in line with Commission Regulation (EU) 2017/2195⁶⁷, a share of the minimum guaranteed hourly capacity may be reserved for exchanging balancing capacity in order to ensure secure network operation. No reservation of the minimum guaranteed hourly capacity is envisaged for balancing energy.

7. ASSESSMENT OF THE COMMITMENTS

7.1. Principles

- (91) In the context of Article 9 of Regulation (EC) No 1/2003, the Commission must ensure that the proposed commitments address its competition concerns and that the undertakings concerned have not offered less onerous commitments that would also address those concerns adequately.⁶⁸ When carrying out that assessment, the Commission must take into consideration the interests of third parties.⁶⁹]

7.2. Effectiveness and proportionality of the Final Commitments

- (92) The Commitments address the Commission's concerns by ensuring that the maximum capacity of the DE-DK1 interconnector, taking into account legitimate reasons of secure network operation, will be offered to the market. The minimum guaranteed hourly capacity of 1 300 MW will act as a safeguard constituting a significant improvement compared to the current situation and providing market participants with predictability on the capacity available for trading. The two exemptions to the minimum guaranteed hourly capacity are narrowly defined and limited in scope. Third parties who responded to the Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 very much welcomed the quick and substantial increase of the commercial capacity on the DE-DK1 interconnector that will result from the Commitments. They also welcomed the fact that the Commitments will provide a high predictability regarding the minimum capacity that will be available for every trading hour.
- (93) The Commitments also ensure that the minimum guaranteed hourly capacity, including the minimum guaranteed hourly capacity under exemption one, will be increased in the future to take into account the planned expansion of the DE-DK1 interconnector's capacity.
- (94) TenneT intends to ensure the availability of the minimum guaranteed hourly capacity primarily by using countertrading with Denmark based on an agreement with EnDK. The Commitments therefore not only define the goal that TenneT has to reach, but they also indicate how TenneT intends to reach that goal, which renders the Commitments more robust. In this context, it is important to note that the

⁶⁶ Articles 26 and 30 of Regulation (EU) 2015/1222

⁶⁷ See Article 38 (1) and (2) of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (OJ L 312, 28.11.2017, p. 6).

⁶⁸ Case C-441/07 P Commission v Alrosa, paragraph 41.

⁶⁹ Case C-441/07 P Commission v Alrosa, paragraph 41.

Commitments specify that the costs incurred by TenneT in providing the minimum guaranteed hourly capacity will not be subject to any limitation.

- (95) Finally, a Monitoring Trustee will supervise the implementation of the Commitments.
- (96) It should also be noted that, in line with the general principles of law, TenneT has to comply both with the Commitments offered and with the applicable legislation and regulatory obligations at Union and national level. On that basis, if the applicable legislation or regulatory obligations impose more stringent requirements than the Commitments, now or in the future, TenneT has to comply with those more stringent rules. No part of the Commitments should be viewed as a derogation or an exemption from any more stringent rules that might be imposed by the applicable legislation or regulatory obligations at Union or national level.
- (97) TenneT has not offered any less onerous commitments in response to the preliminary assessment that also address the Commission's concerns adequately.⁷⁰
- (98) The Commission has taken into consideration the interests of third parties, including those of the interested third parties who responded to the Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003. To the extent that they related to the objections presented to TenneT in the preliminary assessment and were proportionate, those comments were discussed with TenneT and are reflected in the Commitments.
- (99) Overall the Commitments address the comments received during the market test. The minimum guaranteed hourly capacity, as well as the minimum guaranteed hourly capacity, under exemption one take into consideration the planned expansion of the DE-DK1 interconnector following the commissioning of the East and West Coast Lines. The scope of the second exemption to the minimum guaranteed hourly capacity has been narrowed down to ensure that it can be used only in case of lack of technical availability of countertrade or re-dispatch during the validation period of the cross-border capacity, that is to say, just before for the spot markets open. Finally any reservation of the minimum guaranteed hourly capacity for ensuring safety of the TenneT network will not exceed what is currently permitted under the regulatory framework.
- (100) In view of the foregoing, the Commission considers that the Commitments effectively remove its competition concerns and comply with the principle of proportionality.

8. CONCLUSION

- (101) By adopting this Decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the Commitments, offered by TenneT to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the Commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article

⁷⁰ This also concerns the period following 30 September 2018 (see recital (49)).

27(4) of Regulation (EC) No 1/2003. In the light of the Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

- (102) The Commission retains full discretion to investigate and open proceedings under Article 102 of the Treaty and Article 54 of the EEA Agreement as regards practices that are not the subject of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The Commitments set out in the Annex shall be binding on TenneT TSO GmbH and any legal entity directly or indirectly controlled by it for a period of nine years from the date of notification of this Decision.

Article 2

It is hereby concluded that there are no longer grounds for action in this case. The proceedings in this case shall therefore be brought to an end.

Article 3

This Decision is addressed to:

TenneT TSO GmbH, Bernecker Straße 70,
95448 Bayreuth
Germany

Done at Brussels, 7.12.2018

For the Commission
Margrethe VESTAGER
Member of the Commission