

## Ofgem's<sup>1</sup> final decision and analysis on BritNed Development Limited's ("BritNed's") application for certification

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This document sets out Ofgem's final decision on BritNed's compliance with the requirements of the Third Package<sup>2</sup> for transmission system operators ("TSOs") to be certified in accordance with implementing legislation in Great Britain ("GB").

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### 1. Certification Decision

1.1. Having taken utmost account of the European Commission's (the "Commission's") opinion on our preliminary certification decision on BritNed<sup>3</sup>, Ofgem concludes that the fifth certification ground set out in section 10E of the Electricity Act 1989 (the "Electricity Act") applies and that BritNed should therefore be certified on that ground and should be designated as a TSO.

### 2. GB Legislation – Transposition of Directives 2009/72 and 2009/73

2.1. In GB the grounds for certification set out in the Electricity Directive have been transposed through the Electricity and Gas (Internal Markets) Regulations 2011 (the "Regulations") which insert new sections 10A to 10O into the Electricity Act. Section 10E of the Electricity Act sets out five grounds on which a TSO can be certified. BritNed has applied on the fifth ground set out in section 10E(7).

### 3. The Applicant

3.1. BritNed ("the Applicant") is the owner and operator of the high voltage direct current electricity interconnector between the Isle of Grain in GB and Maasvlakte in the Netherlands. BritNed is a joint venture company owned in equal shares by National Grid Holdings One plc and Tennet Holding B.V. and is funded and operated on a commercial basis, independently of the transmission systems in GB and the Netherlands. BritNed holds an Electricity Interconnector Licence granted by the Authority on 11 July 2007 under Section 6(1)(e) of the Electricity Act.

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<sup>1</sup>The Gas and Electricity Markets Authority (the "Authority"). In this document, the terms "Authority", "Ofgem", "we" and "us" are used interchangeably.

<sup>2</sup> The term "Third Package" refers to 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 ('Electricity Directive'); 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 ('Electricity Regulation'); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('Gas Directive'); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 ('Gas Regulation'); and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

<sup>3</sup> In accordance with Article 3(2) of the Electricity Regulation.

3.2. This document provides a summary of the analysis of the information submitted by BritNed to the Authority and the Commission for the purpose of assessing the Applicant's compliance with the fifth certification ground set out in section 10E(7) of the Electricity Act and its certification on that ground. The fifth certification ground has two limbs: that the applicant holds a licence under section 6(1)(e) of the Electricity Act and, that in accordance with the conditions of that licence, it has been granted an exemption under Article 7 of Regulation (EC) No. 1228/2003 (a "Second Package Exemption") and remains entitled to the benefit of it.

## 4. Summary of Ofgem analysis

### First limb: The applicant holds a licence under section 6(1)(e) of the Electricity Act

4.1. On 11 July 2007 the Authority granted BritNed an Electricity Interconnector Licence under section 6(1)(e) of the Electricity Act ("BritNed's Electricity Interconnector Licence"). As at the date of this decision, BritNed continues to hold its Electricity Interconnector Licence under section 6(1)(e) of the Electricity Act.

### Second limb: Remaining entitled to the benefit of an exemption in accordance with the conditions of its licence under Article 7 of the Second Electricity Regulation

#### Existence of an exemption

4.2. Ofgem granted BritNed an exemption order in July 2007 suspending standard licence conditions 9, 10 and 11 of BritNed's Electricity Interconnector Licence from operation for 25 years from the date on which the BritNed interconnector commenced commercial operation (the "initial exemption")<sup>4</sup>. On 15 November 2007, the Authority amended the initial exemption consistent with a request from the Commission<sup>5</sup> ("the amended exemption").

4.3. Pursuant to the powers under standard licence condition 12 of the Electricity Interconnector Licence, standard licence condition 9 (use of revenues), standard licence condition 10 (charging methodology to apply to third party access to the licensee's interconnector) and standard licence condition 11 (requirement to offer terms for access to the licensee's interconnector) were suspended from operation in BritNed's licence<sup>6</sup>.

4.4. The amended exemption covers all of BritNed's current interconnector capacity and is for a duration of 25 years from the date BritNed's interconnector commenced commercial operation (i.e. from 1 April 2011<sup>7</sup>). The amended exemption therefore expires on 31 March 2036.

#### Entitlement to continue to benefit from the amended exemption

4.5. Recital 23 of the Electricity Regulation provides that "[e]xemptions granted under Regulation (EC) No 1228/2003 continue to apply until the scheduled expiry date as decided in the granted exemption decision". This is noted on page 6 of the Commission Staff Working Paper on The Unbundling Regime dated 22 January 2010<sup>8</sup>, where it states that "[e]xemptions for new infrastructure that have already been granted pursuant to ... Article

<sup>4</sup> I.e. from 1 April 2011.

<sup>5</sup> In accordance with Article 7(5) of the Regulation (EC) No. 1228/2003

<sup>6</sup> <http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/TPAccess/Documents1/BritNed%20amended%20exemption%20order.pdf>

<sup>7</sup> <http://www.BritNed.com/BritNed/News%20overview/Live%20today>

<sup>8</sup> Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in Electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas:

[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/2010\\_01\\_21\\_the\\_unbundling\\_regime.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf).

*7 of Regulation (EC) 2003/1228 continue to apply until the expiry date stipulated in the exemption decision, also after entry into force of the... Electricity Regulation (... recital 23 Electricity Regulation). Unless provided otherwise in the exemption decisions themselves, such exemptions must not be altered by application of the provisions on new infrastructure set out in ... Article 17 Electricity Regulation".*

4.6. The Authority confirms that at the date of this decision it is not taking steps to revoke the amended exemption.

4.7. Accordingly, as the amended exemption as this has not expired, has not been revoked and is not subject to revocation action, BritNed remains entitled to the benefit of the amended exemption.

### Conclusion

4.8. In light of the above, BritNed satisfies the test set out in respect of the fifth certification ground and Ofgem's final decision is that: **BritNed is certified under the fifth certification ground set out in the Electricity Act until midnight on 31 March 2036**, after which date BritNed's certification will expire and BritNed will need to apply for and comply with the full ownership unbundling requirements of the Third Package (as transposed into the Electricity Act) and be certified as such, which will require an application by BritNed. We note that BritNed acknowledges this in its application.

4.9. We note that BritNed must comply with the relevant provisions of each network code that becomes an Annex of the Electricity Regulation. This means that BritNed must comply with each network code to the extent that they do not undermine BritNed's amended exemption. Once BritNed's amended exemption expires, BritNed will be required to comply with the entirety of the network codes set out in the Annexes of the Electricity Regulation.

## **5. European Commission Opinion**

5.1. Pursuant to Article 3(2) of the Electricity Regulation Ofgem is required to take "utmost account" of the Commission's opinion in reaching its final certification decisions. We summarise below how we have taken "utmost account" of the Commission's opinion of Ofgem's preliminary certification decision in relation to BritNed. The Commission's opinion is published on the Commission's website and can be viewed at:  
[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/certification/2013\\_062\\_uk\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2013_062_uk_en.pdf)

5.2. The Commission agrees with the Authority's view that BritNed is entitled to continue to benefit from the amended exemption.

5.3. The Commission notes that the amended exemption "*is not an exemption from third party access conditions*" and that this means "*that existing and future (secondary) legislation on i.a. capacity allocation and congestion management is applicable to BritNed*". As set out at paragraph 4.9 above, we agree with the Commission's conclusion on the applicability of network codes.

5.4. The Commission notes that even though BritNed benefits from a Second Package Exemption, the unbundling rules set out in the Electricity Directive "*should be applied to the extent possible without undermining the exemption*". In this regard the Commission makes observations about BritNed's ownership and governance arrangements, which suggest that these are compatible with the principles of ownership unbundling, namely:

- (i) That *"in the present case the owners of BritNed are two unbundled [TSOs] ... [and] neither of the owners of the BritNed interconnector has interests in supply activities"*.
- (ii) *"BritNed offers 100% of its capacity to the market via a combination of non-discriminatory and transparent explicit and implicit auctions [and] can hence be seen as a means to ensure the risk-reward balance of the investment."*
- (iii) *"that the ownership and governance structure of BritNed prima facie appears such that no conflict with the full ownership unbundling model as laid down in Article 9 Electricity Directive would have been encountered"*.
- (iv) *"BritNed can be certified as a TSO compliant with the unbundling rules."*

We therefore consider it appropriate to certify BritNed under the fifth certification ground set out in the Electricity Act.

5.5. The Commission notes that if the Dutch regulatory authority finds that during its certification processes for BritNed and TenneT, either party does not comply with the unbundling requirements, then the present certification should be reassessed. The Authority considers that this re-assessment is possible under section 10I of the Electricity Act and in light of condition C5 of our final decision.