



EUROPEAN COMMISSION

Brussels, 25.11.2011
C(2011) 8572 final

COMMISSION OPINION

of 25.11.2011

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC - France - Certification of TIGF**

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I. PROCEDURE

On 27 September 2011, the Commission received a notification from the French national regulatory authority, Commission de régulation de l'énergie (hereafter "CRE"), of a draft decision on the certification of the transmission system operator for gas Total Infrastructures Gaz France S.A. (hereafter "TIGF"), dated 15 September 2011.

Pursuant to Article 10 Directive 2009/73/EC¹ (hereafter "Gas Directive") and Article 3 Regulation (EC) No 715/2009² (hereafter "Gas 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 Directive 2009/73/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

Background

TIGF is one of the two transmission system operators for gas in France. In order to comply with the applicable rules on unbundling of transmission system operators, TIGF has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to TIGF under the French legislation transposing the Gas Directive.

Article 9 Gas Directive sets out rules on the unbundling of transmission systems and transmission system operators. Article 9(8)(b) therein provides that where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1, provided that the Member State concerned complies with the provisions of Chapter IV, establishing requirements for independent transmission operators (Articles 17 to 23 Gas Directive).

The CRE has analysed whether and to what extent TIGF complies with the unbundling rules of the ITO model as laid down in the French legislation transposing the Gas Directive. In its draft decision, the CRE has identified a number of measures which still remain to be taken in

¹ 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, OJ L 211/94 of 14.8.2009.

² 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, OJ L 211/36 of 14.8.2009.

order to ensure full compliance with the unbundling rules. The measures concerned have been summarized in point 7 of the CRE's draft decision.

III. COMMENTS

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

1. Choice of the ITO model

According to Article 9(8) Gas Directive, the ITO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a Vertically Integrated Undertaking ("VIU"). The Commission agrees with the CRE in the present case that the choice for the ITO model is legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

2. Definition of VIU

Article 2(20) Gas Directive provides for a definition of the concept of VIU. The definition of VIU is relevant for the application of a considerable number of unbundling provisions in the Gas Directive. In its draft decision, the CRE makes reference to the concept of VIU as defined in the French legislation transposing the Gas Directive. The Commission questions whether the definition in the French legislation is in compliance with the Gas Directive. The Commission notes that the definition of VIU in the French legislation, *inter alia*, seems to exclude categorically without apparent justification companies which are controlled by the VIU but are located outside the European Economic Area. Moreover, the definition of VIU in the French legislation seems to exclude without apparent justification distribution system operators controlled by the VIU. In the Commission's view, the definition of VIU in the French legislation appears inconsistent with Article 2(20) Gas Directive. The Commission considers that the CRE should apply in its final certification decision a definition of VIU which is in conformity with Article 2(20) Gas Directive.

3. Human resources

Article 17(1) *juncto* Article 17(2)(h) Gas Directive requires that the ITO shall be equipped with all necessary human, technical, physical and financial resources necessary for fulfilling its obligations under the Gas Directive. This includes personnel necessary for the activity of gas transmission and the performance of all corporate tasks, including legal services. Moreover, according to Article 17(1)(b) Gas Directive, personnel necessary for the activity of gas transmission shall be employed by the ITO. From the draft decision it appears that almost one third of the personnel of TIGF is formally still on the payroll of the VIU. This is a violation of Article 17(1)(b) Gas Directive. From the draft decision it appears furthermore that this situation will not be brought in line with the Gas Directive before [...]. The Commission considers this period unacceptably long and takes the view that full compliance should be achieved in the course of [...]. From the draft decision it furthermore appears that TIGF currently has a staff of 470 in total. Given that this seems a low number, the Commission invites the CRE to verify closely whether the essential functions of the ITO are properly staffed.

4. Tasks of the ITO

According to the Gas Directive, the ITO is required to carry out the activity of gas transmission, including all the tasks of a TSO under Article 13 as well as a number of additional tasks listed in Article 17(2). For these tasks the ITO has to be autonomous. However, the draft decision does not make clear whether TIGF has indeed been entrusted with all these relevant tasks. The Commission considers that the CRE should clarify in its final certification decision how it has verified whether TIGF has been entrusted with all relevant tasks.

5. Contracts for services between the VIU and the ITO

A. Services provided to the ITO by other parts of the VIU

Article 17(1)(c) Gas Directive provides for specific rules on the contracting of services between other parts of the VIU and the ITO. As the ITO should be autonomous and not dependent on other parts of the VIU, contracting of services to the ITO by any other part of the VIU is prohibited by the Gas Directive. As a preliminary remark the Commission considers that in view of the general prohibition of services provided to the ITO by other parts of the VIU, a derogation could only be envisaged in exceptional circumstances. Such derogation should be construed narrowly and should not go beyond what is strictly necessary to protect overriding interests, such as the security and the reliability of the transmission system. Only in exceptional cases, where the services concerned are strictly necessary to protect overriding interests as referred to above, and where no other service provider except for the VIU could provide these services to the ITO could a derogation possibly be considered justified. Such derogation should also in principle be of a transitional nature, limited in time. In addition it should be ensured that transactions between other parts of the VIU and the ITO occur at arms length in order to avoid cross subsidisation. In the draft decision the CRE has not clearly demonstrated that all the services which are provided to the ITO by other parts of the VIU in the present case are strictly necessary to protect the overriding interests referred to above. Neither has the CRE demonstrated whether the services concerned, even if strictly necessary as such, could also be provided by other service providers not related to the VIU, now or in the foreseeable future. The Commission considers that in the present case contracts for services provided to the ITO by other parts of the VIU, such as, by way of example, those for IT services, for fiscal advice services, for treasury services and for vocational training should be assessed in accordance with the principles referred to above. This list is not exhaustive.

B. Services provided by the ITO to other parts of the VIU

Article 17(1)(c) Gas Directive allows in specific circumstances for the provision of services by the ITO to other parts of the VIU, in particular if there is no discrimination of other system users, if there is no restriction of competition in generation or supply and if the regulatory authority has approved the provision of the services concerned. The CRE refers in its draft decision to a significant number of contracts for services provided by the ITO to other parts of the VIU. The Commission takes the view that in the analysis of the contracts concerned, the CRE should assess, in situations where a functioning market for the services concerned cannot be identified, whether the terms of the service contract can be considered cost reflective so as to ensure that there is no undue cross subsidization. This analysis has not always been made in the draft decision. The Commission considers that the CRE should consistently make such analysis and take its outcome into account in the final certification decision.

6. Corporate identity, communication and branding

According to Article 17(4) Gas Directive, the ITO must not, in its corporate identity, communication or branding create confusion in respect of the separate identity of other parts of the VIU. This implies a general obligation to avoid any confusion for consumers between the TSO and the supply company. From the draft decision it appears that the official company name of TIGF is "Total Infrastructures Gaz France SA". The word "Total" in the company name of the ITO is a direct reference to the VIU, and is therefore incompatible with the Gas Directive. The Commission takes the view that the CRE should require an amendment of the company name in its final certification decision.

7. Separation of IT systems

Article 17(5) Gas Directive prescribes that the ITO shall not share IT systems or equipment with any part of the VIU, nor use the same consultants or external contractors for IT systems or equipment, and security access systems. From the draft decision it appears that TIGF will not be able to comply with this requirement before the end of 2014. From the draft decision it even appears that after 2014 a number of IT systems of the ITO will continue to be shared with the VIU, on the basis of a service agreement between the VIU and the ITO. The Commission is concerned about the potential conflicts of interests and abuses that could take place as long as IT systems have not been separated. The Commission is furthermore concerned about the very long period which is needed to bring the IT systems of the ITO in conformity with the requirement of the Directive, and the absence of a detailed roadmap towards complete separation. Moreover, the Commission refers to its general considerations here above on the very limited possibilities under the Gas Directive to have contracts for services provided to the ITO by other parts of the VIU, underlining that these considerations apply equally to IT services. The Commission invites the CRE to examine whether the IT systems of TIGF can reasonably be separated by an earlier date than by the end of 2014, and to require from TIGF a detailed roadmap as well as effective transitory measures to reduce any risk of conflicts of interests and abuses pending complete separation.

8. Separation of auditors

According to 17(6) Gas Directive, auditors of the ITO may not be the same as the auditors of other parts of the VIU. However, from the draft decision it appears that the auditor of the ITO is working in an auditing firm which is also the auditor of other parts of the VIU. The Commission supports the CRE in requiring the ITO to ensure that the auditing company which audits the ITO cannot be the same as those which audit other parts of the VIU.

9. Power to raise money on the capital market

Article 18 Gas Directive stipulates, without prejudice to the powers of the Supervisory Body under Article 20, that the ITO shall have the power to raise money on the capital market in particular through borrowing and capital increase. From the draft decision it appears that the ITO has concluded a contract for the provision of treasury services to be provided by the VIU. From the draft decision it remains unclear to what extent this contract might restrict the right of the ITO to raise money on the capital market on its own terms, set independently from the VIU. In any event, the contract for treasury services concerned does not seem to comply with Article 17(1)(c) Gas Directive, as it is a service contract to the ITO from an other part of the VIU to the ITO. Reference is made to the general statements made above on contracts for services provided to the ITO by other parts of the VIU. The Commission considers that the

CRE should reassess whether the contract for treasury services concerned is acceptable in its final certification decision, with a view to ensuring that the autonomy of the ITO is respected.

10. Management Board - Powers

Chapter IV of the Gas Directive provides for a detailed division of powers between the various bodies of the ITO, including between the Management Board and the Supervisory Body. The CRE correctly takes the view that the Supervisory Body is in charge of taking the decisions that may have a significant impact on the value of the assets of the shareholders of the ITO. However, the Supervisory Body cannot interfere with the day-to-day activities of the ITO and the management of the network, or with the preparation of the 10 Year Network Development Plan and its submission to the CRE. These powers lie exclusively with the Management Board. From the draft decision it appears that the statutes of TIGF need to be amended to correctly reflect this division of powers and competences. The Commission supports the CRE's request for TIGF to revise its statutes in order to correct the situation.

11. Management Board - independence

According to Article 19(3) Gas Directive, the majority of members of the Management Board cannot have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. The Management Board of TIGF is composed of three members. At least two of these members must comply with the strict independence requirements as set out in the Gas Directive. The Commission notes that these provisions on independence cannot be circumvented by an arrangement which would allow in the present case the minority member to block or even overrule decisions by the independent majority. It is however not clear from the draft decision whether decisions in the Management Board will be taken by simple majority vote, and whether all Board Members have equal voting rights in all cases. The Commission invites the CRE to clarify its assessment on this point in the final certification decision.

From the draft decision it appears that all three members of the Management Board, including those proposed as independent, still maintain financial interests in the VIU. The Commission takes the view that the CRE should require that these members sell these financial interests, or as a minimum give them in the hands of an independent trustee. The Commission considers it necessary that the CRE strengthens its initial position on this, which appears to provide for a recommendation in this respect, but not a binding requirement.

Article 19(5) Gas Directive stipulates that the remuneration of members of the Management Board shall not depend on activities or results of the VIU other than those of the ITO. From the draft decision it appears that this requirement is not complied with presently. However, TIGF has committed itself to revising its remuneration policy for the three Management Board members concerned by 1 January 2012. The Commission encourages the CRE to verify whether the situation has been corrected before adopting the final certification decision.

According to Article 19(8) Gas Directive, also persons directly reporting to the Management Board on matters related to the operation, maintenance or development of the network must comply with strict independence rules. The Commission notes that it is not clear from the draft decision to what extent this requirement has been fulfilled, as the draft decision does not contain detailed information on this. The Commission invites the CRE to clarify its assessment on this point in the final certification decision.

12. Supervisory Body – powers

Chapter IV of the Gas Directive provides for a detailed division of powers between the various bodies of the ITO, including between the Management Board and the Supervisory Body. The draft statutes of TIGF appear to require prior authorisation by the Supervisory Body for certain decisions of the Management Board relating to loans, credits, and sale and purchase of assets, above a certain threshold. These thresholds are to be defined in the statutes. The Commission underlines that thresholds should not be set at a too low level as this could undermine the autonomy of the Management Board enshrined in the Gas Directive. The Commission has doubts whether these thresholds allow the ITO to be autonomous and hence asks the CRE to establish an appropriate level of these thresholds.

Moreover, the draft statutes of TIGF appear to require that the Supervisory Body when taking decisions on the budget, the financing policy and the creation of legal entities, must have a favourable vote of the majority of members of the Supervisory Board as well as of the majority of members appointed by the General Assembly of shareholders. The same rule of double majority appears to apply to decisions above a certain threshold concerning the sale or purchase of assets, and the establishment of securities or guarantees of any nature. The Commission notes that the corresponding levels of the thresholds in the draft statutes appear to be low (€2 million for decisions on sale and purchase of assets, and also for decisions on establishing securities and guarantees) and risk undermining the autonomy of the Management Board of the ITO in favour of the Supervisory Body and the General Assembly of shareholders. The Commission invites the CRE to reassess in its final decision whether these thresholds need to be increased significantly.

13. Supervisory Body - independence

According to Article 20(3) *juncto* 19(3) Gas Directive, the independent members of the Supervisory Body cannot have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. The Supervisory Body of TIGF is composed of eight members. In total three members of the Supervisory Body must comply with the strict rules on independence of the Gas Directive. From the draft decision of the CRE it appears that one member has been employed by the VIU until the end of 2009. The Commission agrees with the CRE that under these conditions the member concerned cannot qualify as an independent member of the Supervisory Body, and that TIGF has to take action to remedy the situation.

According to Article 20(3) *juncto* 19(5) Gas Directive the independent members of the Supervisory Body cannot hold an interest in or receive any financial benefit, directly or indirectly, from any part of the VIU other than the ITO. From the draft decision it appears that one independent member of the Supervisory Body might still have financial interests in the VIU. The Commission takes the view that the CRE should require in its final certification decision that this member, where relevant, sells these financial interests, or as a minimum gives them in the hands of an independent trustee.

14. Compliance officer – independence

According to Article 21(2) Gas Directive, the compliance officer of the ITO must fulfil the similar requirements of independence which relate to the majority of members of the Management Board. The Commission has not been able to verify whether [...], as proposed

compliance officer of the ITO, complies with these requirements of independence. In particular the draft decision does not clarify whether [...] has had, or still has, certain financial interests in the VIU. The Commission invites the CRE to clarify its assessment on this point in the final certification decision.

15. Conclusion

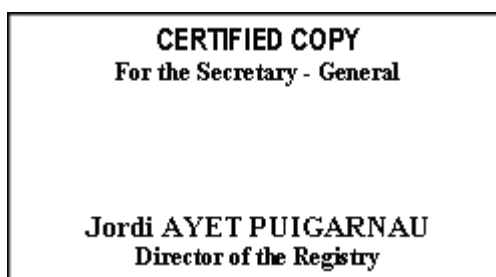
Pursuant to Article 3 Gas Regulation, the CRE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of TIGF, and when it does so, shall communicate this decision to the Commission.

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, on the compatibility of any national implementing measure with EU law.

The Commission will publish this document on its website. The Commission does not consider the information contained therein to be confidential. The CRE 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 publication³. Reasons for such a request should be given.

Done at Brussels, 25.11.2011

For the Commission
Günther OETTINGER
Member of the Commission



³ Your request should be sent by email to [to be completed]