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COMMISSION OPINION

of 25.9.2017

**pursuant to Article 3 (1) of Regulation No 715/2009 - Germany - Certification of OPAL
Gastransport GmbH & Co. KG**

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I. PROCEDURE

1. Exemption procedure

1. On 25 February 2009, the German Federal Network Agency (hereafter "BNetzA") took two decisions on the exemption of the Ostseepipeline-Anbindungsleitung ("OPAL") from third party access and tariff regulation in accordance with Article 22 of Directive 2003/55/EC.¹
2. In its decisions of 25 February 2009, as amended on 7 July 2009 upon request of the Commission, BNetzA exempted, subject to conditions, the entire capacity of the pipeline from the application of provisions of regulated third party access in accordance with Article 18 and tariff regulation in accordance with Article 25 (2), (3) and (4) of Directive 2003/55/EC ("the initial exemption decisions").² The decisions are applicable for a period of 22 years, beginning with the start of pipeline operations.
3. On 13 May 2016, BNetzA notified to the Commission a settlement agreement containing changes to one of the initial exemption decisions. The notified agreement maintains the exemption from general tariff regulation provisions for the previously exempted capacity. The exemption from third party access provisions in place since 2009 is, by contrast, reduced to 50 % of total capacity of the concerned ownership part of the OPAL pipeline. In essence, this reduction of the exemption's scope creates an obligation on OPAL Gastransport GmbH & Co.KG ("OGT"), the operator of the pipeline, to offer at least 50% of the transport capacity in auctions, in accordance with EU and German rules on third party access.
4. On 28 October 2016, the Commission approved³ in accordance with Article 36(9) of Directive 2009/73/EC the amendments to the exemption, subject to additional requirements, aimed at ensuring effective third party access for all market participants ("the revised exemption decision"). The requested amendments were implemented by a modified settlement agreement on 28 November 2016 ("the revised settlement agreement").
5. On 7 December 2016, PGNiG Supply & Trading GmbH introduced an action for annulment⁴ against the revised exemption decision before the General Court. PGNiG Supply & Trading GmbH introduced also an appeal at Oberlandesgericht Düsseldorf,

¹ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176, 15.7.2003, p. 57–78.

² BNetzA file reference BK7-08-009.

³ Commission Decision C(2016) 6950 final of 28 October 2016 on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC, https://ec.europa.eu/energy/sites/ener/files/documents/2016_opal_revision_decision_de.pdf.

⁴ Case T-849/16

Germany, against the revised settlement agreement⁵. On 21 December 2016, the revised exemption decision was also challenged by the Republic of Poland⁶. In all three proceedings, the parties submitted applications for interim measures⁷, requesting in particular the suspension of the revised exemption decision.

6. By orders of 23 December 2016, the President of the General Court granted a provisional stay of execution of the revised exemption decision until a definitive decision on the applications for a stay. On 30 December 2016, Oberlandesgericht Düsseldorf also issued a provisional order, suspending the application of the revised settlement agreement and the allocation of capacity on OPAL via daily, monthly or annual auctions until a final decision is adopted on the application for interim measures.
7. By orders of 21 July 2017, the President of the General Court rejected the applications⁸ for a stay of execution of the revised exemption decision and lifted the stay of execution ordered on 23 December 2016. On 27 July 2017, Oberlandesgericht Düsseldorf withdrew the suspension on the application of the revised settlement agreement and on the allocation of capacity on OPAL.

2. Certification procedure

8. On 28 February 2017, the Commission received a notification from BNetzA of a draft decision on the certification of OGT as a Transmission System Operator ("TSO") for gas.
9. The draft certification decision was submitted in view of paragraph 9 of the revised exemption decision, which provides as follows:

"The Commission requests BNetzA to notify a certification decision for OGT under the provisions of Directive 2009/73/EC and Article 3 Regulation 715/2009 no later than by 28 February 2017, assessing compliance with the unbundling rules in Directive 2003/55/EC and the exemption decision, as amended."
10. By letter of 28 April 2017, the Commission informed BNetzA that, as long as the revised exemption decision was suspended, the Commission considered the certification procedure was also suspended.
11. Following the lifting of the suspension by the President of the General Court, BNetzA resubmitted the draft decision on the certification of OGT to the Commission on 26 July 2017.
12. Pursuant to Article 3(1) Regulation (EC) No 715/2009⁹ ("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 the applicable legal requirements.

⁵ Case VI-3 Kart 1203/16 [V].

⁶ Case T-883/16

⁷ Proceedings T-849/16 R and T-883/16 R respectively and Case VI-3 Kart 1203/16 [V].

⁸ In proceedings T-849/16 R, T-883/16 R and T-130/17 R. The latter case corresponds to another application for interim measures submitted by PGNiG SA on 31 March 2017.

⁹ 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.

II. DESCRIPTION OF THE NOTIFIED DECISION

13. Current ownership of OPAL belongs to a co-ownership association ("*Bruchteilsgemeinschaft*") between the W&G Transport Holding GmbH ("W&G", formerly Wingas GmbH & Co. KG, 80% co-ownership share) and Lubmin-Brandov Gastransport GmbH ("LBGT", 20% co-ownership share, owned and controlled by Uniper Global Commodities SE). 99.9% of W&G is owned by WIGA Transport Beteiligungs-GmbH & Co.KG, which in turn is owned to 50.02 % by Wintershall Holding GmbH, subsidiary of BASF SE, and to 49.98% by Gazprom Germania GmbH, subsidiary of OOO GAZPROM export. OOO GAZPROM export is fully owned by PAO GAZPROM ("Gazprom"). The remaining 0.1% in W&G shares are held by W&G Beteiligungs-GmbH & Co.KG, owned to 100% by WIBG GmbH, in turn owned to 100% by Gazprom Germania GmbH.
14. By contract of 30 September 2011, with additions of 11 March 2015, OGT has leased the co-ownership share of W&G in OPAL. LBGT has entrusted the operation of the 20% ownership share in the pipeline to OGT by operatorship agreement of 1 October 2012. OGT has in turn entrusted GASCADE Gastransport GmbH ("GASCADE") with the technical operation of the pipeline via a service agreement.
15. In the draft certification decision, BNetzA has decided to certify OGT as TSO on the basis of Directive 2003/55/EC.
16. On substance, BNetzA applies the requirements for TSOs set out in Directive 2003/55/EC. Additional requirements from Directive 2009/73/EC are found not to apply. BNetzA finds that the requirements stemming from Directive 2003/55/EC are met by OGT and thus decides to grant the certification.

III. LEGAL FRAMEWORK

17. As indicated above, the legal basis for the certification of OGT is the revised exemption decision, which in its paragraph 9 provides as follows:

"The Commission requests BNetzA to notify a certification decision for OGT under the provisions of Directive 2009/73/EC and Article 3 Regulation 715/2009 [...], assessing compliance with the unbundling rules in Directive 2003/55/EC and the exemption decision, as amended."
18. Prior to adoption of the revised exemption decision, OGT was subject to the BNetzA decision of 25 February 2009, as amended on 7 July 2009. This decision, which was issued on the basis of Article 22 Directive 2003/55/EC, exempted OGT from third party access and tariff regulation. No exemption from unbundling provisions was granted, as Directive 2003/55/EC did not provide for any possibility for exemption from the unbundling requirements contained therein. When Directive 2009/73/EC entered into force, it provided explicitly in its recital 35 that exemptions granted under Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted exemption decision. The Commission has interpreted this to mean that the subsequently introduced unbundling rules set out in Directive 2009/73/EC should not be applied where this would put into question an existing exemption granted pursuant to Article 22 of Directive 2003/55/EC.

19. Already in its certification opinion on the Nabucco pipeline,¹⁰ the Commission has however noted that this does not mean that projects exempted under Article 22 of Directive 2003/55/EC are not to be subject to any unbundling rules at all. Certain unbundling rules still have to be complied with, in particular the rules on legal and functional unbundling, as derived from Directive 2003/55/EC and any other relevant rules, as specified in the applicable exemption decisions. The requirements under Directive 2003/55/EC were already applicable at the time of the initial exemption decision, and while recital 35 of Directive 2009/73/EC ensures protection of the long-term framework set out in the exemption decision, it does not have the purpose of reducing requirements which already resulted from the existing regulatory framework.
20. Furthermore, as also stated in the Nabucco opinion, the Commission considers that, where infrastructure was only partially exempted under Article 22 of Directive 2003/55/EC, the unbundling rules of Directive 2009/73/EC are in principle applicable to the non-exempted parts of the capacity, unless this is not possible without undermining the purpose of the exemption.
21. Thus, OGT remains subject to the requirements on TSOs set out in Directive 2003/55/EC as well as those included in the exemption decision.
22. The initial exemption decision provides an additional condition similar to the one in the Nabucco certification. Paragraph 1 e) of the notified national exemption decision provides as follows:

"The following provision is to be integrated in the articles of association of the applicant until the entry into operation of the OPAL: "The business management acts independently in all ongoing system operation questions and shall decide within the approved financing plan independently on the construction or the restructuring of the OPAL. With the exception of legal supervision any power of the company or the shareholders to issue instructions to the business management is thereby limited." The corresponding amendment of the articles of association is to be proven to the Ruling Chamber."
23. The legal framework for BNetzA's assessment does not include whether the control of OGT by Gazprom, a person from a third country, puts at risk the security of energy supply of the Member State and the Union. Such an assessment pursuant to Article 11 of Directive 2009/73/EC would not be in line with recital 35 Directive 2009/73/EC as Gazprom maintained the same shareholding in OGT as at the time the initial exemption was granted. In such a situation, application of Article 11 to an already exempted infrastructure would risk undermining the economic model upon which the exemption was based. Furthermore, such an assessment is not required by Directive 2003/55/EC.

IV. COMMENTS

1. The relevant vertically integrated undertaking

24. In order to verify the respect of unbundling requirements, it is necessary to first determine the scope of the vertically integrated undertaking ("VIU") to which these requirements are to be applied. In its draft decision, BNetzA finds the VIU to include on the one hand the Wintershall group and on the other hand the Gazprom export

¹⁰ Opinion C(2012)9575, 045-2012-AT of 11 December 2012, https://ec.europa.eu/energy/sites/ener/files/documents/2012_045_at_en.pdf.

group. In doing so, BNetzA excludes the respective mother companies BASF SE and Gazprom from the scope of the VIU.

25. Pursuant to Article 2 point 20 Directive 2003/55/EC, a VIU is a natural gas undertaking or a group of undertakings whose mutual relationships are defined in Article 3(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings and where the undertaking/group concerned is performing at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas.
26. It follows from this definition that (i) the VIU has to be active in gas transmission, distribution, LNG or storage activities on the one hand and in production or supply of natural gas on the other hand and (ii) the parts of the VIU having these activities need to be linked by control. BNetzA adds another criterion stemming from German law, requiring the activity of the undertaking to take place inside the EU.
27. While the definition of VIU is not identical in Directive 2003/55/EC and in Directive 2009/73/EC, both definitions differ only in so far as Directive 2009/73/EC no longer refers to Council Regulation (EEC) No 4064/89 of 21 December 1989 but instead relies on the general definition of control under competition law. Previous opinions of the Commission on the interpretation of the VIU under Directive 2009/73/EC are thus also relevant for the interpretation of Directive 2003/55/EC.
28. Already in its certification opinion for GASCADE,¹¹ the Commission questioned whether the definition in the German legislation is in compliance with EU law. The Commission notes that the definition of VIU as applied by BNetzA, *inter alia*, seems to exclude categorically without apparent justification companies which are controlled by the VIU but are located outside the EU. The Commission reiterated its concerns in its opinion on the certification of NEL.¹²
29. The definition of the VIU encompasses the entire economic unit or group structure to which the TSO belongs. If the scope of the VIU were limited to those companies of the group that directly carry out activities related to production or supply of gas, or carry out activities within the EU, the unbundling rules could be circumvented easily by creating additional subsidiaries within a given group that do not carry out these activities, or only operate outside the EU, but that are merely used to influence the TSO in ways contrary to unbundling requirements.
30. The Commission notes that although BASF SE may itself not have interests in influencing the decision-making of OGT in a way so as to favour its own interests, it does have that incentive as a co-owner of the Wintershall group. The Commission therefore underlines once more that the entire BASF group and all the companies under its control form part of the VIU and cannot exercise influence over OGT in a way that runs counter to the applicable rules.
31. As regards GAZPROM, the fact that the company itself does not carry out energy functions within the EU, but does so through its subsidiary OOO GAZPROM export, is not relevant for establishing the scope of the VIU, as neither Directive 2003/55/EC

¹¹ Opinion C(2012)9106 040-2012-DE of 3 December 2012, https://ec.europa.eu/energy/sites/ener/files/documents/2012_040_de_de.pdf.

¹² Commission's Opinion on BNetzA's draft certification decisions for NEL, Gasunie Ostsee and Fluxys C(2013) 7019 083-2013-DE, 084-2013-DE, 085-2013-DE of 18 October 2013, https://ec.europa.eu/energy/sites/ener/files/documents/2013_083_084_085_de_de.pdf.

nor Directive 2009/73/EC foresee a specific geographical restriction in the definition of the term 'VIU'. The Commission considers it clear from the wording of the definitions in the Directives that the concept of a VIU covers also companies established outside the EU. This is moreover evident from the recitals of the Directives which indicate that "fully effective separation of network activities from supply and production activities should apply throughout the Community to both Community and non-Community undertakings".¹³

32. In its draft certification decision, BNetzA recognises that a narrow definition of the concept of VIU could enable a circumvention of the unbundling rules. The Commission welcomes the fact that BNetzA sees the possibility for a wider interpretation of the provisions on operational unbundling in order to prevent any such circumvention attempt. However, such a wider interpretation, which would for instance require the TSO's Compliance Officer to take into consideration the behaviour of entities outside the VIU, does not achieve clarity and legal certainty as to the scope of control. Applying provisions which literally apply only to the VIU to entities also outside of the VIU is furthermore of limited relevance if the broad interpretation of the VIU definition, outlined above, in line with the wording of both Directive 2003/55/EC and Directive 2009/73/EC, is applied.
33. Finally, as regards the ownership of Uniper Global Commodities SE, part of the Uniper group, relating to 20 % of the pipeline, Lubmin-Brandov Gastransport GmbH is established as transmission system operator. While Lubmin-Brandov Gastransport GmbH delegates the technical operation of the pipeline to OGT, this does not create by itself a link of control of the Uniper group over OGT. There is thus no indication that OGT forms part of the Uniper VIU.
34. The Commission therefore invites BNetzA to clarify in its final decision that the relevant companies or groups of companies to be considered as part of the VIU include in any event BASF SE and OAO GAZPROM.

2. Control over transmission assets and effective decision-making

35. As detailed in paragraph 14 of the present opinion, OGT has leased the co-ownership share of W&G in OPAL and concluded an operatorship agreement with LBGT. OGT has in turn entrusted GASCADE with the technical operation of the pipeline under a service agreement.
36. Article 9(1) Directive 2003/55/EC requires the transmission system operator to be independent in at least its legal form, organisation and decision-making. Pursuant to Article 9(2) lit c) Directive 2003/55/EC, the TSO shall have effective decision-making rights with respect to assets necessary to operate, maintain or develop the network. This requires effective control over the transmission assets but not, as clarified by Article 9(1), separation of asset ownership.
37. As regards the applicability of the unbundling rules of Directive 2009/73/EC to the non-exempted part of the capacity,¹⁴ it should first of all be noted that under the initial exemption decision, OGT was subject to a full exemption under Article 22 Directive 2003/55/EC. The revised exemption decision contains substantive requirements which aim at ensuring effective third party access, drastically reducing the potential for abusive conduct by the VIU. In particular, the decision provides requirements for the products to be offered, the auction procedure to be followed,

¹³ Recital 21 of Directive 2009/73/EC.

¹⁴ See paragraph **Error! Reference source not found.**

matching entry capacities to be ensured, tariffs to be applied and flow commitments to be provided. Notified costs for partly regulated capacities are reviewed by BNetzA, as established in Section 2.7.2 of the draft certification decision. Against this background, the revised exemption decision provides sufficient guarantees that the capacity subject to regulated third party access is marketed independently from any production or supply interests of the shareholders of the pipeline. On the other hand, applying ownership unbundling to the non-exempted part of the pipeline would seriously undermine the initial exemption obtained under Article 22 of Directive 2003/55/EC.

38. The requirements of Directive 2003/55/EC as regards ownership of the assets can in principle be fulfilled through the lease of the requested assets by OGT. The notified lease agreement (annexes 2a and 2b of the notification) ensures that OGT as the TSO is responsible for maintenance and has the right to modify or upgrade the assets. The agreement does not contain limitations as to the use of the assets, with the exception that it prohibits a transfer of the lease as a whole to a third party. Therefore, in principle, the lease agreement sufficiently ensures effective decision-making rights as regards the transmission assets.
39. The Commission would however wish to underline that effective and independent decision-making on the basis of lease agreements requires those agreements to be sufficiently long and to be prolonged sufficiently in advance of their expiry in order to ensure full ability of the TSO to rely on the lease agreement at all times. Given the practice of long-term capacity bookings for gas transmission pipelines, very short lease agreements could be problematic in relation to a TSO's decision-making powers. By way of example, the lease agreement, which had been running until 31 December 2016 has been prolonged only on 1 January 2017 and is now valid until 31 December 2018. Such late prolongations for relatively short periods can have a negative impact on the effective decision-making powers of the TSO. The Commission calls upon BNetzA to verify that prolongations of the agreement are agreed sufficiently in advance and for sufficiently long periods to ensure effective control of the TSO over the assets.
40. As regards the actual technical operation of the pipeline, OGT has contractually entrusted a large part of its tasks to GASCADE (operatorship agreement, annexes 14a to 14d). The transfer of certain operational tasks can be an efficient solution to operate a pipeline, in particular where this pipeline is linked to a larger integrated network. In order to ensure effective decision-making rights of the respective TSO, it has to be ascertained that the TSO in question maintains full control over and responsibility for operating the pipeline. This means that the TSO has to be able to direct and supervise the system operator entrusted with the specific tasks. Furthermore, to ensure the delegation does not endanger effective unbundling, the entity to which tasks are delegated has to be subject to the same (or stricter) unbundling requirements as the delegating TSO.
41. In the case of OGT, very significant tasks have been delegated to GASCADE, requiring an estimated 28.8 posts per year to fulfil. These tasks are of technical nature (such as dispatching or maintenance) but also of administrative nature (such as legal or financial administration). Furthermore, OGT makes use of offices in a joint building with GASCADE and uses IT systems operated by GASCADE. By comparison, OGT directly employs eight people for asset management, controlling and finance, administration and reporting, capacity management and regulation, as well as in management. While this indicates clearly an extensive delegation of

responsibilities, it also shows that OGT has, compared to the service provider GASCADE, a non-negligible workforce which in principle can be capable of controlling and directing the service provider. The most recent amendment of the notified service agreement also expressly foresees that OGT can request GASCADE to provide information and is entitled to direct GASCADE in executing its tasks. This express provision, together with a minimum team of own employees, ensures that the delegation as such does not prevent OGT from having effective decision-making rights as required by Directive 2003/55/EC.

42. GASCADE belongs to the same VIU as OGT, but is not subject to an exemption decision. GASCADE has been certified as ITO and is thus subject to stricter unbundling requirements than OGT. Against this background, the delegation of tasks to GASCADE does not endanger the capability of independent effective decision-making by OGT required under Article 9 (2) lit c) Directive 2003/55/EC.
43. This being said, the above-mentioned most recent amendment of the notified service agreement, dated 14 December 2016, was notified only in draft form. While the notification refers to final signing of this agreement being imminent, the Commission calls upon BNetzA to verify in its final decision whether such amendment was indeed agreed upon.

3. Legal form, independence of management, compliance programme

44. OGT is independent in its legal form, in line with the requirements under Article 9 (1) Directive 2003/55/EC.
45. In line with the requirements under Article 9 (2) lit a) Directive 2003/55/EC, the management of OGT is directly employed by OGT and does not participate in company structures of the VIU directly or indirectly responsible for production, distribution or supply of natural gas. Paragraph 9a of the OGT association agreement (annex 11 to the notification) stipulates that the management of OGT decides independently on all day-to-day operations including, in the margins of the approved financial plan, on restructuring or network expansion for OPAL. This expressly limits the right of the shareholders to give instructions to OGT.
46. OGT has set up a compliance programme, appointing the compliance officer of GASCADE as compliance officer for OGT. The compliance officer is not subject to instructions in its function. The compliance programme (annex 18 to the notification) contains provisions on non-discrimination, on the protection of confidential information (including a concrete list of what BNetzA considers to be sensitive information) and the obligation for all employees to cooperate with the compliance officer. The compliance officer shall annually report to BNetzA. The compliance programme thus fulfils the requirements of Article 9 (2) lit d) Directive 2003/55/EC.
47. OGT has declared in the notification that "subject to the provisions in the association agreement and future decisions of the shareholder meeting", OGT is independent from the VIU. The Commission agrees with the BNetzA assessment that independence cannot be made subject to the goodwill of the shareholders. To the contrary, independence relies upon being able to take decisions independent from, including contrary to, the will of the shareholders. Thus, the Commission asks BNetzA to ensure in its final decision that OGT adapts its declaration. This will also

ensure the compatibility with the requirement as set out in paragraph 1 e) of the notified national exemption decision.¹⁵

4. Unbundling of accounts

48. OGT is pursuant to Article 17 Directive 2003/55/EC obliged to maintain annual accounts in accordance with the requirements of accounts for limited liability companies, with separate accounts for each of their activities in transmission, distribution, storage and LNG, with a view to avoiding cross-subsidisation, discrimination, and distortion of competition.

49. OGT, a limited liability company under German law, submitted annual accounts for the years 2013-2015. In 2013, the annual account differentiated between "results from the transmission business" and "other typical business", the latter representing less than 5 % of revenues in 2013 (and less than 1 % in 2012). The same applied to 2014. As of 2015, OGT applies Paragraph 6b EnWG, on which basis it concludes all of its activities to fall into the "transmission business" category. BNetzA has confirmed OGT to fulfil this requirement. The Commission finds no indication that this requirement has not been properly assessed and respected.

5. Requirements of the exemption decision

50. As said in paragraph 21 of the present opinion, the initial exemption decision provides an additional condition similar to the one in the Nabucco certification as regards the independence of the TSO. The provision of paragraph 1 e) of the notified national exemption decision (which is maintained under the revised exemption decision) is integrated as Article 9a in the OGT association agreement (annex 11 to the notification) and the condition in the initial exemption decision is thus respected.

IV. CONCLUSION

51. Pursuant to Article 3(2) Gas Regulation, BNetzA shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of OGT, and when it does so, shall communicate this decision to the Commission.

52. The Commission's position on this particular notification is without prejudice to any position it may take vis-à-vis national regulatory authorities on any other notified draft measures concerning certification, or vis-à-vis national authorities responsible for the transposition of EU legislation as regards the compatibility of any national implementing measure with EU law.

¹⁵ See paragraph 21.

53. The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. BNetzA is invited to inform the Commission within five working days following receipt whether it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication. Reasons should be given for any such request.

Done at Brussels, 25.9.2017

For the Commission
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