



EUROPEAN COMMISSION

Brussels, **XXX**  
[...] (2012) **XXX** draft

**COMMISSION OPINION**

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Germany - Certification of jordgas Transport GmbH**

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### I. PROCEDURE

On 10 July 2012, the Commission received a notification from the German regulator for energy Bundesnetzagentur, in accordance with Article 10(6) of Directive 2009/73/EC<sup>1</sup> (hereafter, "Gas Directive"), of a draft decision on the certification of "jordgas Transport GmbH" (hereafter, "jordgas") as a transmission system operator (hereafter, "TSO") for gas.

Pursuant to Article 3(1) Regulation (EC) No 715/2009<sup>2</sup> (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 the Gas Directive.

### II. DESCRIPTION OF THE NOTIFIED DECISION

jordgas operates part of the Norddeutsche Erdgas Transversale (hereafter, "NETRA") pipeline system, which consists of a gas transmission pipeline of 408 kilometre in the North of Germany.

The direct owner of NETRA is NETRA GmbH & Co. KG (hereafter, "NETRA KG"), an asset company with limited staff of its own, which was set up by the companies that initially constructed the pipeline system. jordgas holds [BUSINESS SECRET] of the shares in NETRA KG; its partners Open Grid Europe (hereafter, "OGE") and Gasunie Deutschland Transport Services GmbH (hereafter, "GUD") hold [BUSINESS SECRET] and [BUSINESS SECRET] of the shares, respectively. Both OGE and GUD operate gas transmission systems in Germany, and are to be certified by Bundesnetzagentur as complying with the unbundling rules of the Gas Directive.

jordgas is a 100% daughter company of Statoil Deutschland GmbH, which in turn is a 100% daughter of Statoil ASA, a Norwegian company active amongst others in gas production and supply.

jordgas has applied for certification in accordance with the independent transmission operator (hereafter, "ITO") model. This choice is available to jordgas under the German legislation transposing the Gas Directive, i.e. the Energiewirtschaftsgesetz (hereafter "EnWG")<sup>3</sup>.

Bundesnetzagentur has come to the preliminary conclusion that jordgas complies with the requirements of the ITO model as laid down in the German legislation transposing the Gas

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<sup>1</sup> 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

<sup>2</sup> 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

<sup>3</sup> Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

Directive, subject to the condition that [BUSINESS SECRET]. Bundesnetzagentur has submitted its draft decision to the Commission requesting for an opinion.

### III. COMMENTS

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

#### 1. The 'pipe-in-pipe'-concept

Article 17 Gas Directive stipulates that the ITO shall be equipped with all human, technical, physical and financial resources necessary for fulfilling its obligations under the Gas Directive and carrying out the activity of gas transmission. In particular, assets that are necessary for the activity of gas transmission, including the transmission system, shall be owned by the transmission system operator. In its preliminary decision Bundesnetzagentur has assessed, under the rules laid down by the German implementing legislation, to what extent these requirements have been fulfilled.

As stated above, jordgas holds [BUSINESS SECRET] of the shares in NETRA KG. Together with OGE and GUD, jordgas has joint control over NETRA KG. This follows from the articles of association of NETRA KG, the composition of the management of NETRA KG and the Consortium Agreement between the partners which governs the relationship between the shareholders and which is the basis for the use of the capacities in NETRA. As such, jordgas can exert decisive influence over NETRA KG. At the same time neither of the shareholders can take decisions on their own whereby rights of the other partners would be infringed.

Besides having joint control over NETRA KG, which directly owns NETRA, jordgas also has rights of use and disposal over a part of NETRA equivalent to those of an owner (*Eigentümergeleiche Verfügungsbefugnis*). The NETRA pipeline has virtually been divided between jordgas, OGE and GUD as if there were three separate pipelines in the pipe ('pipe-in-pipe'). On the basis of the aforementioned Consortium Agreement all shareholders can ask from NETRA KG to be granted the right of 'beneficial use' for a certain percentage of the total available capacity of the pipeline. On the basis of the current 'Beneficial Use Agreement' jordgas is entitled to operate and commercially exploit [BUSINESS SECRET] of the capacities in NETRA.<sup>4</sup> jordgas is free to commercialise this part of the capacity. Similar beneficial use agreements exist between NETRA KG and OGE and GUD respectively. The freedom for jordgas to operate and manage the system only ends where it would affect the rights of the other shareholders. From its rights of use and disposal it also follows that jordgas can require from NETRA KG to make investments in the expansion of the system, as far as this is technically and economically feasible. The other partners, OGE and GUD are not entitled to refuse the investment asked for by jordgas. However, in case one or both of the other partners would not be interested in taking part in the investment, NETRA KG can be obliged to take measures so as to make sure these other partners are not affected by the execution of the works.

Bundesnetzagentur takes the view that the joint control which jordgas has over NETRA KG, the direct owner of NETRA, together with its rights of use and disposal equivalent to those of an owner (*Eigentümergeleiche Verfügungsbefugnis*) over a part of NETRA, leads to a result which can be considered equal to that of a property right. As a condition, the partners with which jordgas shares control over NETRA KG have to be TSOs which are to be certified as well.

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<sup>4</sup> [BUSINESS SECRET]

The Commission agrees with the analysis of Bundesnetzagentur in the present case. The Commission notes that in cases as the present one, where the ownership of the transmission system assets is shared between two TSOs, where these TSOs have joint control over the transmission assets and where they have rights of use and disposal over a part of the transmission system that are equivalent to those of an owner and which allow them to operate their part and develop it independently and without being hindered, the certification of such TSOs should in principle not be withheld as regards compliance with Article 9(1)(a) of the Directive.

## **2. Sufficient personnel required to operate the network**

According to Article 17(1)(b) and (c) Gas Directive the ITO shall employ all personnel necessary for the activity of gas transmission including tasks related to the operation, maintenance and development of the network and the performance of all corporate tasks. In addition, the TSO shall not be able to lease personnel or procure services from the vertically integrated undertaking.

At present, jordgas employs [BUSINESS SECRET] people. It is the intention of jordgas to increase this number to [BUSINESS SECRET]. However, the Commission has serious doubts whether the envisaged number of staff is sufficient to ensure that jordgas can adequately fulfil its task as an ITO, even if certain tasks are outsourced. The Commission considers that where a TSO outsources a part of its tasks, it should always be able to effectively monitor and control whether these tasks are being carried out in a proper manner. For this, the ITO must employ a sufficient number of qualified personnel. The Commission invites Bundesnetzagentur to reassess in its final certification decision whether the proposed staff of [BUSINESS SECRET] employees can indeed be considered sufficient to reliably and securely operate jordgas' part of the NETRA pipeline.

## **3. Independence of management and staff**

According to Article 19(3) *juncto* Article 19(8) Gas Directive, the majority of the management of the ITO cannot have exercised any professional position or have had any responsibility or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders other than the TSO, for a period of three years before their appointment.

In its draft decision, Bundesnetzagentur makes reference to the German legislation implementing the Gas Directive, the EnWG, according to which the independence requirement referred to above should not apply to members of the management of the ITO who were appointed before 3 March 2012. The Commission questions whether the German implementing legislation is in compliance with the Gas Directive on this point, and underlines that it might in certain cases undermine the effective independence of the ITO. The Commission therefore invites Bundesnetzagentur to reassess in its final certification decision whether the majority of the management of jordgas in fact fulfils the independence criteria laid down in Article 19(3) Gas Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require in its final certification decision that the majority of the management of jordgas complies with the independence criteria laid down in Article 19(3) Gas Directive.

According to Article 19(5) Gas Directive, management and employees of the ITO shall hold no interest in any part of the VIU. In its draft decision, Bundesnetzagentur makes reference the German implementing legislation which requires that shares in the VIU which have been acquired by the management before 3 March 2012 must be sold, but only by 31 March 2016; for non-management staff no requirement applies to sell shares in the VIU. The Commission

questions whether the German implementing legislation is in compliance with the Gas Directive on this point, and notes that in certain cases it may undermine the effective independence of the ITO. The Commission invites Bundesnetzagentur to require in its final decision that the management sell any financial interests in the VIU as soon as possible, or as a minimum give them in the hands of an independent trustee. The Commission furthermore invites Bundesnetzagentur to ensure that the provisions of Article 19(5) Gas Directive are also complied with by the staff of jordgas which is not part of the management.

#### **4. Independence of the Supervisory Body**

According to Article 20(3) *juncto* 19(3) Electricity 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.

From Bundesnetzagentur's draft decision and documents submitted to support jordgas's request for certification it does not become clear whether or not this condition has been applied to the (single) independent member of jordgas's Supervisory Body. This member has undersigned a personal declaration, but it does not state that he was not employed by Statoil in the three years previous to his appointment as member of the Supervisory Body. Moreover, the personal declaration appears to exempt him from Article 19(5) Gas Directive.

With reference to the considerations in the previous chapter concerning Article 19(3) Gas Directive, the Commission invites Bundesnetzagentur to reassess in its final certification decision that the independent member of jordgas's Supervisory Body has in fact complied with the independence criteria of Article 19(3) Gas Directive in full. If this is not the case, the Commission invites Bundesnetzagentur to require jordgas in its final certification decision to comply with the independence criteria of Article 19(3) Gas Directive also in relation to its independent member of the Supervisory Board.

#### **5. Certification of OGE and GUD**

The Commission notes that the co-owners of the assets of NETRA in NETRA KG, OGE and GUD, are TSOs which have to date not been certified as complying with the unbundling rules of the Gas Directive. In the absence of certification, the independent operation of the pipeline is not guaranteed, considering that OGE and GUD carry out a number of tasks on behalf of jordgas, e.g. with regard to the technical operation of NETRA. The Commission invites Bundesnetzagentur to clarify in its final decision that the certification of jordgas is conditional upon the positive certification of OGE and GUD as unbundled TSOs.

### **IV. CONCLUSION**

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

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

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

*For the Commission*

*Member of the Commission*