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COMMISSION OPINION

of 30.11.2012

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC - The Czech Republic - Certification of Net4Gas**

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I. PROCEDURE

On 4 October 2012, the Commission received a notification from the Czech national regulatory authority, Energy Regulatory Office (hereafter "ERO"), of a draft decision on the certification of the transmission system operator for gas Net4Gas, s.r.o. (hereafter "Net4Gas"), dated 27 September 2012.

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

Net4Gas is the transmission system operator for gas in the Czech Republic. In order to comply with the applicable rules on unbundling of transmission system operators, Net4Gas has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to Net4Gas under the Czech 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 ("VIU"), 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).

ERO has analysed whether and to what extent Net4Gas complies with the unbundling rules of the ITO model as laid down in the Czech legislation transposing the Gas Directive. In its draft decision, ERO has come to the preliminary conclusion that Net4Gas complies with these requirements.

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.

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)(b) Gas Directive, the ITO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a VIU. The Commission agrees with ERO 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. Gazelle pipeline

The Commission notes that from the text of the draft decision of ERO, it does not become clear whether it also covers the operation of the Gazelle pipeline. The Commission recalls that on 1 December 2011 it has taken a decision on the exemption of the "Gazelle" interconnector from the rules on ownership unbundling within the meaning of Article 9 Gas Directive on the condition that the certification process of Net4Gas as an ITO would extend to the Gazelle pipeline. The aim is to ensure that the operation by Net4Gas of the Gazelle pipeline takes place under the independence requirements guaranteed by the ITO model.

The Commission's services sent a request for additional information to ERO on 31 October 2012, asking *inter alia* for confirmation that the current draft decision also covers the operation of the Gazelle pipeline. ERO confirmed by letter of 5 November 2012 that the current draft decision refers to the ITO in its entirety, and also covers the operation of the Gazelle pipeline. For reasons of legal certainty, the Commission requests ERO to specify in its final decision that the operation of the Gazelle pipeline is also covered by the certification decision, making an explicit reference to the Commission's exemption decision referred to above.

3. Contracts for services between the VIU and the ITO

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. In the draft decision, ERO has not demonstrated in the present case that the services which are provided to the ITO by other parts of the VIU, even if these services are as such strictly necessary for the operation of the transmission system, could not also be provided by other service providers which are not related to the VIU, now or in the foreseeable future. The Commission therefore considers that ERO should reassess these contracts for services in its final decision, in order to ensure full independence and autonomy of the ITO.

4. 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 part of the infrastructure of Net4Gas is physically connected to the infrastructure of other parts of the VIU, in particular of RWE Gas Storage, s.r.o., RWE GasNet, s.r.o, VCP Net, s.r.o, SMP Net,

s.r.o. and RWE Interni sluzbi, s.r.o. The connection would enable online exchange of certain operating data between Net4Gas and these operators.

The Commission is generally concerned about potential conflicts of interests and potential abuses related to the use of commercially sensitive data that could take place as long as IT systems of the ITO have not been clearly separated from those of other parts of the VIU. The Commission therefore invites ERO to examine whether the existing connections between the IT systems concerned could potentially give rise to discrimination and, if so, to determine in its final certification decision by when these IT systems shall be separated to reduce any risk of conflicts of interests and abuses, where this is the case.

5. Gas delivery between the transmission system and the distribution system

From the draft decision of ERO it appears that in order to flow gas from the transmission system of Net4Gas to the local distribution systems it is necessary, in certain specific cases, to make use of the existing storage infrastructure which is owned and operated by other parts of the VIU and which is physically placed between the transmission system and the distribution systems concerned. In these cases a direct connection between the transmission system and the distribution system is missing. ERO has raised the question whether these types of situations, which all differ from each other to a certain extent, are compatible with the unbundling requirements of the Gas Directive. The Commission's services sent a request to ERO to obtain more detailed factual information on the various types of situations referred to above, in order to be able to make an analysis. So far the Commission has not received the required clarifications, and therefore an assessment cannot be made in the context of the present opinion. The Commission invites ERO to clarify this matter before the final certification decision is taken.

6. 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 Net4Gas is composed of three members. At least two of these members must comply with the strict independence requirements as set out above. The proposed independent members must not have been employed by the VIU or by its controlling shareholder in the past three years. The minority of members of the Management Board must not have been employed by the VIU or by its controlling shareholders in the past 6 months, according to Article 19(8) Gas Directive. However, the draft decision of ERO does not contain sufficiently detailed information on the career background of the members of the Management Board in order for the Commission to assess whether the independence requirements are fulfilled. The Commission invites ERO to provide clarity on its assessment on these points for the three board members in its final certification decision in view of ensuring full compliance with Articles 19(3) and 19(8) Gas Directive.

7. Conclusion

Pursuant to Article 3 Gas Regulation, ERO shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Net4Gas, 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. ERO 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 for such a request should be given.

Done at Brussels, 30.11.2012

For the Commission
Günther OETTINGER
Member of the Commission