



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

COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10 of Directive
2009/73/EC - Germany - Certification of ONTRAS-VNG Gastransport GmbH**

COMMISSION OPINION

of XXX

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10 of Directive 2009/73/EC - Germany - Certification of ONTRAS-VNG Gastransport GmbH

I. PROCEDURE

On 05 October 2012, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of "ONTRAS-VNG Gastransport GmbH" (hereafter, "ONTRAS") as a Transmission System Operator (TSO) for gas.

Pursuant to Article 3(1) 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 the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

ONTRAS is a transmission system operator for gas in Germany. ONTRAS employs approximately 260 persons. ONTRAS is 100% owned by Verbundnetz Gas AG (hereafter, "VNG"). VNG itself is owned by electricity and gas supplier EWE (47,90%), VNG Verwaltungs- und Beteiligungsgesellschaft (25,79%), Wintershall Holding GmbH (15,79%), and GAZPROM Germania GmbH (10,52%). GAZPROM Germania is wholly owned by OOO GAZPROM export which in turn is wholly owned by OAO GAZPROM. ONTRAS operates a gas transmission network of approx. 7242 km in Germany including several cross-border points with Poland (Lasow, Gubin) and the Czech Republic (Deutschneudorf, Kamminke).

In order to comply with the applicable rules on unbundling of transmission system operators, ONTRAS has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to ONTRAS under the German legislation transposing the Gas Directive, i.e. the Energiewirtschaftsgesetz (hereafter, "EnWG")³.

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

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.

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

with the provisions of Chapter IV, establishing requirements for independent transmission operators (Articles 17 to 23 Gas Directive).

Bundesnetzagentur has analysed whether and to what extent ONTRAS complies with the unbundling rules of the ITO model as laid down in the EnWG. Bundesnetzagentur has come to the preliminary conclusion that ONTRAS complies with these, subject to the following conditions:

- "a) The applicant is prohibited from procuring the services of [BUSINESS SECRET] from the vertically-integrated energy distribution undertaking. The underlying contracts must, within 12 months of the certification being issued, either be terminated or the rights to exercise control over the vertically-integrated energy distribution undertaking must be [BUSINESS SECRET], by means of [BUSINESS SECRET] becoming incorporated into the applicant's company or being sold to a third party outside the company group.
- b) The applicant is prohibited from procuring the services of [BUSINESS SECRET] from the vertically-integrated energy distribution undertaking. The underlying contracts must, within six months of the certification being issued, either be terminated or the right to exercise control over the vertically-integrated energy distribution undertaking must be restricted, by means of [BUSINESS SECRET] becoming incorporated into the applicant's company or being sold to a third party outside the company group.
- c) The applicant must, within six months of the certification being issued, cease to provide [BUSINESS SECRET] services for [BUSINESS SECRET].
- d) The company 'ONTRAS – VNG Gastransport GmbH' must, within six months of certification being issued, be restructured in such a way that the 'VNG' part is dropped. Text or images featuring the 'VNG' part may no longer be used after this time.
- e) The profit-and-loss transfer contract concluded between the applicant and [BUSINESS SECRET] is to be approved by the applicant's supervisory board within six months of the issue of certification. The commitment in § 1, paragraph 2 of the profit-and-loss transfer contract linking the reservation of retained earnings to the [BUSINESS SECRET] is to be deleted [BUSINESS SECRET] within six months of the certification being issued.
- f) The applicant must ensure - in the context of the current liquidity management agreement [BUSINESS SECRET] – that it [the applicant] is immediately informed of exceptional circumstances that could affect [BUSINESS SECRET] economic capacity/performance.
- g) The applicant ceases, within six months of the certification being issued, to be bound to adhere to the VNG group's [BUSINESS SECRET]. If [BUSINESS SECRET] does not revoke this requirement, the applicant can simply declare that it no longer applies the corporate guidelines.
- h) In the context of the existing usage transfer agreement with the [BUSINESS SECRET], the applicant must charge for the usage transfer within six months of the certification being issued. [BUSINESS SECRET]
- i) [BUSINESS SECRET]
[BUSINESS SECRET]

[BUSINESS SECRET]

- j) The applicant shall appoint a new compliance officer at the latest six months after the certification is issued and present their remit or terms of employment for approval, or withdraw the mandate of the current compliance officer and re-submit their remit or terms of employment for approval."

Moreover it is stipulated in the draft decision that the following activities are subject to the provisions of Section 10c(6) of the Energy Industries Act: the respective management of the 'capacity and service management', 'legal and regulatory', 'commercial', 'processes and IT management', 'development/operations', 'asset management', 'network service' and 'technical security management' divisions are subject to the provisions of Section.

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 (hereafter, "VIU"). The Commission agrees with Bundesnetzagentur 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 as '*a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform 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*'. The definition of VIU is relevant for the application of a considerable number of provisions of the ITO model. In its draft decision, Bundesnetzagentur makes reference to the concept of VIU as defined in the EnWG. The Commission questions whether the definition in the German legislation is in compliance with the Gas Directive. The Commission notes that the definition of VIU in the EnWG, inter alia, seems to exclude categorically without apparent justification companies which are controlled by the VIU but are located outside the EU.

In particular, the Commission questions the interpretation of Bundesnetzagentur that VNG and its daughter companies, including VNG Gasspeicher GmbH, are the only relevant entities to be considered as part of the VIU, while EWE, Wintershall Holding GmbH, OAO GAZPROM and VNG Verwaltungs- und Beteiligungsgesellschaft, as well as their mother companies and their daughter companies, engaged in gas and electricity production, supply and trade, are excluded from the definition of the VIU. As regards EWE, the Commission notes that this company is active in the generation and supply of electricity, operation of electricity networks, as well as supply and storage of gas. As regards Wintershall Holding GmbH, the Commission notes that this company is involved in production and trading of gas and regarding VNG Verwaltungs- und Beteiligungsgesellschaft, that the company is involved, among other activities, in supply of gas for communal companies. As regards OAO GAZPROM, the fact that the company 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 the Gas Directive does not foresee any specific geographical restriction in the definition of the term 'VIU'.

The Commission notes that Bundesnetzagentur in its draft decision did not consider the links of ONTRAS with EWE, Wintershall Holding GmbH, OAO GAZPROM and VNG Verwaltungs- und Beteiligungsgesellschaft and their mother and daughter companies, engaged in gas and electricity production and supply, as relevant for the assessment of the independence of ONTRAS as transmission system operator. The Commission invites Bundesnetzagentur to analyse these links in its final decision as well, in order to be able to ensure full compliance of ONTRAS with the independence requirements of the ITO model.

3. Ownership of the network

Article 17(1)(a) Gas Directive requires that the TSO owns the assets necessary for the activity of gas transmission, including the transmission system it operates. It appears from Bundesnetzagentur's draft decision that ONTRAS owns the largest part of the transmission system it operates, except for certain access pipelines for which ONTRAS is co-owner ("Bruchteilsseigentum").

Bundesnetzagentur explains in its draft decision that co-ownership implies in the present case that ONTRAS, as co-owner, is free to operate and commercially exploit the percentage of the capacities it owns in the different access pipelines. The freedom of ONTRAS to operate and manage its part only ends where it would affect the rights of the other party and therefore ONTRAS can operate the network as if it would be the sole owner.

The Commission has taken the view that under certain circumstances co-ownership of a pipeline may be sufficient to comply with Article 17(1)(a) Gas Directive. However, if the co-owner of the pipeline does not have the same degree of independence from production and supply interests as the TSO which co-owns the pipeline and which seeks to be certified as an ITO, compliance with Article 17(1)(a) Gas Directive cannot be ensured. The draft decision does not specify which pipelines are co-owned by ONTRAS, and who is the co-owner apart from ONTRAS. Also, no analysis has been made in the draft decision whether the co-owners of these pipelines are as independent from production and supply interests as certified TSOs. The Commission therefore invites Bundesnetzagentur to analyse in its final decision for each case of co-ownership whether the requirement of independence is respected by all co-owners. In cases where this cannot be demonstrated, the Commission invites Bundesnetzagentur to ensure in its final decision that the ownership of these access pipelines is altered in such a way that only independent TSOs have (co-)ownership of these pipelines.

4. Contracts for 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. The Commission agrees with the conclusion of Bundesnetzagentur in its draft decision that ONTRAS shall be prohibited from procuring the IT services concerning support systems for management and allocation of capacity of the pipeline from [BUSINESS SECRET]. However, the Commission is of the view that the termination period of 12 months in respect of the provision of the IT services to ONTRAS is too long. The Commission invites Bundesnetzagentur to assess whether the period for terminating these IT services to ONTRAS cannot be reduced to six months from the date of the final certification decision.

5. Separation of branding

According to Article 17(4) Gas Directive, the TSO shall not *inter alia*, in its corporate identity, communication and branding, create confusion in respect of the separate identity of the vertically integrated undertaking. The Commission notes that Bundesnetzagentur in the

draft decision obliges ONTRAS to stop using the acronym "VNG" in its communication and branding. The Commission shares the assessment of the Bundesnetzagentur. However the Commission considers that a period of 6 months after the final certification decision to comply with the condition of Article 17(4) Gas Directive is too long. Therefore, the Commission invites Bundesnetzagentur to re-assess the duration of the transitional period concerned in its final certification decision.

6. IT consultants and contractors

According to Article 17(5) Gas Directive TSOs shall not use the same consultants or external contractors for IT systems or equipment as any other part of the VIU. In its draft decision, Bundesnetzagentur has required ONTRAS to complete the separation of its IT system from the system used by the VIU. However, from Bundesnetzagentur's draft decision it appears that ONTRAS will continue to use services from external IT contractors who also provide services to the VIU. With reference to the EnWG, Bundesnetzagentur states in its draft decision that the VIU and ONTRAS can continue to employ the same external IT contractors provided that these contractors ensure that specific employees are designated, in specific organisational entities, to exclusively advise ONTRAS.

The Commission questions whether the above approach can ensure the required level of independence of the ITO in IT related operations as required by Article 17(5) Gas Directive. The Commission considers that only in exceptional cases, where no other external contractor except for the one that also provides services to the VIU could provide such services to ONTRAS, could derogation to the prohibition of Article 17(5) Gas Directive be considered justified. Such derogation should in that case also be of a transitional nature, limited in time, and accompanied by measures to effectively ensure that any conflicts of interests and abuses are avoided. The Commission invites Bundesnetzagentur to either require in its final certification decision that ONTRAS and the VIU do not employ the same external IT consultants or to assess whether the situation justifies derogation on the basis of the aforementioned criteria.

7. Independent auditing

According to Article 17(6) Gas Directive, the accounts of the TSO shall be audited by an auditor other than the one auditing the VIU or any part thereof. From Bundesnetzagentur's draft decision it appears that ONTRAS and the VIU would continue to employ the same auditing company after certification. Bundesnetzagentur has argued that employing the same auditing company can comply with the unbundling requirement as long as it is ensured that the natural persons auditing the VIU are different from the ones auditing ONTRAS.

The Commission considers, in view of Article 17(6) Gas Directive, that Bundesnetzagentur, in order to avoid any conflicts of interests and to ensure an effective separation between the VIU and ONTRAS, should require that ONTRAS chooses an auditing company which is different from the one employed by the VIU or any part thereof.

8. Independence of the TSO

Article 18(1)(a) Gas Directive provides that the TSO shall have effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the transmission system. Bundesnetzagentur explains why the application of VNG's corporate guidelines to ONTRAS, the so called [BUSINESS SECRET], is not in line with the unbundling provisions of the EnWG transposing this requirement. The Commission supports this analysis, but considers that a transitional period of 6 months from the date of the final certification decision is too long. The Commission invites

Bundesnetzagentur to assess whether a termination of the application of these corporate guidelines at a shorter notice would not be possible.

9. Independence of management

According to Article 19(3) *juncto* Article 19(8) Gas Directive, the majority of the management 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 transposing 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 transposing 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 ONTRAS in fact fulfils the independence criteria laid down in Article 19(3) Gas Directive in full, also if their appointment predates 3 March 2012, while taking into account that also companies such as EWE, Wintershall Holding GmbH, OAO GAZPROM and VNG Verwaltungs- und Beteiligungsgesellschaft, as well as their mother companies and their daughter companies engaged in gas and electricity production and supply, are to be included in the scope of the VIU.

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 confirms that both management and employees still hold shares in the VIU. Bundesnetzagentur makes in this respect reference to the German transposing 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, while for non-management staff no requirement to sell shares in the VIU applies. The Commission questions whether the German transposing legislation is in compliance with the Gas Directive 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 their 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 employees of ONTRAS which are not part of the management.

10. Independence of the Supervisory Body

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.

From the draft decision of Bundesnetzagentur it does not become clear whether or not this condition has been complied with by the independent member of the Supervisory Body of ONTRAS i.e. Mr. Bjoern Kaiser. With reference to the considerations in the previous section concerning Article 19(3) Gas Directive, the Commission invites Bundesnetzagentur to reassess in its final certification decision whether the independent member of the Supervisory Body of ONTRAS has in fact complied with the independence criteria of Article 19(3) Gas Directive in full, also if his appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require ONTRAS in its final certification decision

to comply with the independence criteria of Article 19(3) Gas Directive also in relation to the independent member of the Supervisory Board.

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 ONTRAS, 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