



Brussels, 23.8.2013
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COMMISSION OPINION

of 23.8.2013

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC - Slovak Republic - Certification of Eustream, a.s.**

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I. PROCEDURE

On 26 June 2013, the Commission received a notification from the Slovak national regulatory authority for energy (hereafter, "URSO"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a preliminary decision on the certification of Eustream, a.s. (hereafter, "Eustream") as a Transmission System Operator (hereafter, TSO) for gas.

Pursuant to Article 3(1) Regulation (EC) No 715/2009² (hereafter, "Gas Regulation") the Commission is required to examine the notified preliminary 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

Eustream is the owner and operator of the high pressure gas transmission system in Slovakia. The system has an approximate annual capacity of 73 bcm and used not only to distribute gas in Slovakia but importantly also to transport Russian gas to other Member States of the European Union.

Eustream is fully owned by Slovak incumbent gas company Slovenský plynárenský priemysel, a.s. (hereafter, "SPP"), active in the trade and supply of natural gas. SPP in turn is for 51% owned by the Slovak National Property Fund which is part of the Slovakian State, and for 49% by Czech group Energeticky a Prumyslový Holding (EPH) which acquired its stake in January 2013 and is active in the trade and supply of gas and electricity.

Eustream has applied for certification in accordance with the Independent Transmission Operator-model (hereafter, "ITO-model"). This choice is available to Eustream under the Slovak legislation transposing the Gas Directive.

URSO has analysed whether and to what extent Eustream complies with the requirements of the ITO-model as laid down in the Slovak legislation transposing the Gas Directive. In its preliminary decision, URSO found that Eustream complies with the requirements of the ITO-model. On this basis, URSO submitted its preliminary decision to the Commission requesting for an opinion.

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 preliminary decision.

1. Sufficient financial resources

Article 18(1)b Gas Directive stipulates that, without prejudice to the powers of the Supervisory Body under Article 20, the ITO shall have the power to raise money on the capital market in particular through borrowing and capital increase. The *ratio legis* of this requirement is to guarantee the independence of the ITO in financial terms from the production and supply interests of the vertically integrated undertaking (hereafter, "VIU"). Without such a requirement, the VIU could continue to control the ITO, in particular in relation to investment decisions, by withholding the necessary funding in order to obstruct the building of new connections to the grid.

Although it appears from URSO's preliminary decision that Eustream is equipped with sufficient resources to operate, maintain and develop its network, it has not been assessed whether Eustream also has the possibility to independently raise capital on the capital market. Moreover, when it comes to investments, URSO mentions that in order to determine a sufficient quantity of capital a five year network development plan has been developed. It remains however unclear how and by whom this plan is developed, how often it is updated or amended and how it relates to the European-wide ten year network development plan. The Commission invites URSO to clarify the investment framework in its final decision in order to ensure that Eustream is sufficiently independent from its mother company in deciding on the necessary investments for developing and maintaining the grid.

2. Separation of premises

According to Article 17(5) Gas Directive, the TSO shall not share, *inter alia*, the physical premises and security access systems with any part of the VIU. Although the preliminary decision of URSO is not clear on the factual situation, it appears that Eustream's offices are situated in a building where there are also offices of SPP. The preliminary decision states that the Slovak legal framework determines that separation of premises means that the premises are protected against unauthorised access. It has however not been assessed how this requirement is in practice adhered to. The Commission invites URSO to undertake a more in-depth analysis into the factual separation of premises between Eustream and SPP in order to ensure that sensitive information cannot be accessed by the latter and that no confusion exists as to the separate identities of ITO and VIU.

3. Independence of management and Supervisory Body

Article 19 and 20 Gas Directive set out the various independence requirements for members of the Supervisory Body of the TSO, its management and the staff directly reporting to the management. In its preliminary decision URSO considers the independence criteria to be fulfilled by the employees to which they apply. However, it appears from the preliminary decision and the background documents notified to the Commission that next to the Supervisory Commission of Eustream, serving as the Supervisory Body in the sense of the Gas Directive, there is another body with supervisory duties called 'Supervisory Board'. It is unclear what the duties and powers of this body are. Moreover, it appears that URSO has not assessed the independence of its members.

The Commission urges URSO to investigate to what extent the tasks of the Supervisory Board of Eustream overlap or interfere with those of the management of Eustream and those of its Supervisory Commission. If it appears that the Supervisory Board has powers related to the transmission system similar to those of the management or the Supervisory Commission the

Commission considers that these tasks should either be transferred to the management or the Supervisory Commission or, at the very least, it should be ensured that the members of the Supervisory Board are at least as independent as the members of the management or the Supervisory Commission depending on the nature of their tasks. In the same vein, the rights of the compliance officer with regard to the management and the Supervisory Commission shall be extended and have regard to the Supervisory Board.

4. Tasks of the transmission system operator

According to Article 17(1) Gas Directive, the ITO shall be equipped with all human, technical, physical and financial resources necessary for fulfilling its obligations under 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 Gas Directive, as well as a number of additional tasks listed in Article 17(2) Gas Directive. The main idea of the ITO-model is that the ITO runs the network independently from the VIU by carrying out the activities enumerated in Article 17(1) Gas Directive and being fully responsible for all tasks enumerated in Article 17(2) Gas Directive.

The Commission notes that in its preliminary decision URSO thoroughly assesses the sufficiency of Eustream's resources and the outsourcing of certain tasks. However, URSO has not assessed whether Eustream actually carries out all of the transmission activities listed in Article 13 Gas Directive and Article 17(2) Gas Directive. The Commission therefore invites URSO to carry out such an assessment in its final decision in order to ensure that Eustream is fully responsible for all the transmission activities ensuring full independence from the VIU. Moreover, the Commission recalls that Article 18(5) Gas Directive requires the ITO to carry out its tasks in a non-discriminatory way and obliges it to not restrict, distort or prevent competition in production or supply. The Commission invites URSO to assess, in particular, the way in which Eustream carries out the task of granting and managing third party access, as mentioned in Article 17(2)c Gas Directive, in the light of Article 18(5) Gas Directive. This is also relevant with regard to the availability of virtual reverse flow on the Slovak-Ukrainian interconnection point Veľké Kapušany. The Commission urges URSO to withhold a final certification decision until it is convinced that Eustream carries out all its tasks in accordance with the ITO-rules. The Commission services are ready to assist URSO in carrying out its assessment.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, URSO shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Eustream, 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. This Opinion contains the Commission's assessment of URSO's preliminary certification decision which examines whether the legal requirements related to the ITO-model are properly implemented. This Opinion is not an appraisal of the functioning of Eustream and is hence without prejudice to any position the Commission may take with regard to Eustream.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. URSO 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, 23.8.2013

*For the Commission
Connie HEDEGAARD
Member of the Commission*