



Brussels, **XXX**
[...] (2015) **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 - Bulgaria - Bulgartransgaz**

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I. PROCEDURE

On 26 February 2015 the Commission received a notification from the Bulgarian regulatory authority SEWRC (hereafter, 'SEWRC') of a draft decision on the certification of Bulgartransgaz EAD (hereafter, 'Bulgartransgaz') as transmission system operator (hereafter, 'TSO') for gas, in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter "Gas Directive").

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.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

Bulgartransgaz owns and operates all transmission infrastructure in Bulgaria and is responsible for carrying out the gas transport both inside Bulgaria and through Bulgaria to neighbouring markets. Historically the transmission network for domestic supply was operated separately from that of the pipelines used for cross-border flows, but a process of physical and commercial integration is ongoing based on a single regulatory framework applicable to all the transmission infrastructure operated by Bulgartransgaz. It appears from SEWRC's draft decision that the integration process is not fully completed yet. The draft decision nevertheless covers the certification of Bulgartransgaz as operator of all transmission infrastructure.

Bulgartransgaz is 100% owned by the Bulgarian Energy Holding EAD (hereafter, 'BEH'), which in turn is owned by the Bulgarian State through the Ministry of Economy, Energy and Tourism. BEH also owns Bulgargaz EAD, which is licensed for public supply of gas. As such, Bulgartransgaz is part of a vertically integrated undertaking (hereafter, 'VIU').

In order to comply with the applicable rules on unbundling of transmission system operators, Bulgartransgaz has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to Bulgartransgaz under the Bulgarian legislation transposing the Gas Directive.

SEWRC has analysed whether and to what extent Bulgartransgaz complies with the unbundling rules of the ITO model. SEWRC has come to the preliminary conclusion that Bulgartransgaz complies with these requirements. On this basis, SEWRC has submitted its draft 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 notification and the additional information provided by SEWRC the Commission has the following comments on the draft decision.

1. Loans from the ITO to the VIU

Article 18(6) Gas Directive requires that any commercial and financial relations between the VIU and the ITO, including loans from the ITO to the VIU, shall comply with market conditions. The same article obliges the ITO to keep detailed records of such relations and make them available to the NRA at request. In accordance with Article 41(5)(e) financial agreements between the TSO and the VIU are to be approved by the NRA.

From the draft decision of SEWRC it appears that Bulgartransgaz has several outstanding loans to BEH, the latest one concluded in October 2014, with a considerable value. In its preliminary decision, SEWRC underlines that it assessed the conditions according to which Bulgartransgaz intended to lend to BEH prior to the loans being concluded and that it has subsequently given approval for their conclusion on the basis of an assessment that the loans were compliant with market conditions and that there was no risk of Bulgartransgaz not meeting its investment obligations for lack of funding.

The Commission agrees with the procedural approach taken by SEWRC and has no reason to doubt the conclusions of SEWRC's assessment. Nevertheless, the Commission is of the opinion that the amount that is lent by Bulgartransgaz to BEH should not further increase. Even if the Gas Directive does not forbid loans to be granted by the ITO to the VIU, such loans could create a financial incentive on the part of the ITO to favour the VIU over other network users, because it has an interest in receiving back the money lent, including an interest. The Commission notes that if the conditions are market based, it is preferable that the VIU acquires its capital on the market. Moreover, the Commission notes that under the ITO model decisions by the ITO on matters with a cost above a certain threshold (in casu, 0.05% of the book value of the ITO) are referred to the Supervisory Body. The majority of the members of the Supervisory Body represents the VIU, which means that in practice the VIU has an important say on loans granted to it by the ITO.

2. Stability in the management of the ITO

Articles 19 and 20 of the Gas Directive contain independence requirements related to the management of the ITO and to half minus one members of the Supervisory Body of the ITO. In its preliminary decision, SEWRC has assessed in detail the extent to which the relevant members of the Management Board and the Supervisory Board comply with those criteria applicable to them on the basis of CVs as well as signed declarations of independence.

It is a source of concern for the Commission that in the final months of 2014 both the entire Supervisory Board and, shortly thereafter, the entire Management Board of Bulgartransgaz were dismissed. The reason for the early dismissal mentioned by SEWRC in its preliminary decision has been the need to step up investments in the interconnectors and the modernization of the Chiren storage. SEWRC approved the dismissal.

Whilst procedurally the course of events appears to have taken place in accordance with the legal requirements, the Commission wishes to stress the importance of stability in the management of the ITO, precisely in times in which important infrastructure developments have to take place. The Commission underlines that in order for the ITO Model to be fully effective in ensuring independent network operation the members of, in particular the Management Board, need to have full discretion in operating the network with the best interests of the TSO at heart and not those of the VIU. The Commission therefore encourages

SEWRC to take these considerations into account in assessing any future early dismissals of board members.

3. Third Party Access

Article 17(2) Gas Directive determines that the ITO needs to be responsible for carrying out all TSO tasks. It is important that the ITO is independent in carrying out these tasks. One of the core tasks of the TSO is to ensure non-discriminatory third party access. In this context, SEWRC has assessed the rules related to access to the networks of Bulgartransgaz.

It appears from the draft decision of SEWRC that these draft Rules for using the ITO's gas transmission networks, as submitted for approval to SEWRC on 22 April 2013, make the allocation of capacity for transmission on the ITO's transmission network for the purpose of domestic supply in Bulgaria, conditional on first obtaining the corresponding exit capacity from the neighbouring Romanian transmission system. The Commission notes however that at present this corresponding capacity is fully booked by Bulgargaz. As a result, a situation exists in which it is the VIU who can de facto determine who can access the ITO's transmission network and who cannot, namely by deciding on granting shippers access to the neighbouring network.

The Commission notes that it appears from SEWRC's draft decision that the amendment of the draft Rules is ongoing. The Commission urges SEWRC to ensure that the final Rules require no proof from potential shippers as regards a valid supply contract and/or proof of contracted capacities in the networks of neighbouring TSOs. This is needed to guarantee that the VIU will not maintain, through its control over the capacity on the neighbouring network, any influence over the access of potential shippers to the ITO's transmission system.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, SEWRC shall take utmost account of the above comments of 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's opinion is notably without prejudice to Commission procedures under European competition rules.

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