



Brussels, **XXX**
[...] (2013) **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 – Austria – Certification of Baumgarten-Oberkappel
Gasleitungsges.m.b.H**

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I. PROCEDURE

On 20 December 2012, the Commission received a notification from the Austrian national regulatory authority, Energie-Control Austria (hereafter, "E-Control"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of the transmission system operator (hereafter, "TSO") for gas "Baumgarten-Oberkappel Gasleitungsges.m.b.H" (hereafter "BOG"), on the basis of the application of BOG of 2 March 2012 in the version of the application of 12 October 2012.

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 Directive 2009/73/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

The certification application of BOG as a TSO concerns its operation of the West-Austria-Gasleitung (hereafter, "WAG"). WAG is a single pipeline which connects the Slovak network in the East with the Penta West and MEGAL pipelines in the West, two major pipeline systems entering Germany and finally France. The certification of BOG needs to be seen in the context of the Austrian gas market design where the Austrian TSO Gas Connect Austria GmbH (hereafter, "GCA") will be the Market Area manager for the Market Area East. The Market Area East is composed by pipelines which are operated by three different TSOs: BOG, Trans Austria Gasleitung GmbH and GCA. GCA will be the point of first contact and information concerning the single capacity platform. It will calculate models for available capacity, coordinate nomination schemes as well as the input of balancing gas and respective invoicing. Finally, GCA, as Market Area manager, will cooperate with the operator of the virtual trading point and will coordinate the development of the long-term investment plan for Austria.

GCA holds 51% of the shares in the TSO BOG, while the remaining shares are owned by GRTgaz Developpement SAS (hereafter "GRTgaz") which holds approximately 34% of the shares and E.ON Ruhrgas AG (hereafter "E.ON") which holds approximately 15% of the shares. GCA and GRTgaz have already been certified under the ITO model. GCA is not only a shareholder in BOG but currently also the legal owner of the WAG pipeline. In view of the certification of BOG as an ITO the transfer of the legal ownership of the WAG pipeline from GCA to BOG is foreseen.

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

In order to comply with the applicable rules on unbundling of TSOs, BOG has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to BOG under the Austrian 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) Gas Directive therein provides that where, on 3 September 2009, the transmission system belonged to a vertically integrated undertaking, 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).

E-Control has analysed whether and to what extent BOG complies with the unbundling rules of the ITO model as laid down in the Austrian legislation transposing the Gas Directive. In its preliminary decision, E-Control has identified an extensive number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. The preliminary decision of E-Control is hence a positive certification decision which is subject to the compliance with certain measures to be met by specific deadlines. Compliance with these measures is formulated as a condition of the positive decision. Therefore, the non-compliance with the conditions set in the preliminary decision would lead to the annulment of the certification decision. The preliminary certification decision of BOG contains the following conditions:

- (a) BOG shall implement an operating concept, transferring full responsibilities and powers to BOG in the manner set out in the application (Annex 8), by 30 June 2014.
- (b) [BUSINESS SECRET]
- (c) BOG shall ensure that from 1 July 2013 onwards the provisions of §114(1) of the 2011 Gas Industry Act (GWG 2011) regarding independence are complied with by all managers.
- (d) [BUSINESS SECRET]
- (e) BOG shall procure civil-law ownership of the West Austria Pipeline, as set out in Annex 2 of the application, by 1 July 2013.
- (f) [BUSINESS SECRET]
- (g) [BUSINESS SECRET].
- (h) [BUSINESS SECRET].
- (i) BOG shall maintain no Technical Service Agreements whatsoever with any of its shareholders as of 18 December 2013.
- (j) BOG shall, by 1 July 2013, draw up legally-valid Articles of Association, the contents of which shall correspond to Annex 18 of the application of 12 October 2012, and shall submit that agreement in its entirety to the regulatory authority.
- (k) [BUSINESS SECRET].
- (l) BOG shall, by 1 July 2013, draw up a legally-valid compliance programme, the contents of which shall correspond to Annex 23 of the application of 12 October 2012, and shall submit that programme to the regulatory authority for approval under §116(1) of the GWG 2011.

- (m) BOG shall, by 1 July 2013, employ a suitably-qualified and independent compliance officer, shall ensure that the provisions of §116 of the GWG 2011 are complied with, and shall submit the officer's mandate, terms of employment, proof of qualification, and a declaration that he or she fulfils the requirements of §116(2) and §114(1) – (3) of the GWG 2011 to the regulatory authority for approval under §116(2) and (6) of the GWG 2011.
- (n) BOG shall ensure that from 1 July 2013 onwards the provisions of §115(2) of the GWG 2011 regarding independence are complied with by a sufficient number of members of the supervisory board.

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 Vertically Integrated Undertaking (hereafter, "VIU"). The Commission agrees with E-Control 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. Set-up of the ITO model for BOG

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 being that the ITO runs the network independently 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.

In the present case, service contracts between BOG and GCA exist and define a number of tasks that are outsourced to and performed by GCA on behalf of BOG. The service contracts include dispatching (including the respective IT-systems) and operation and maintenance services. The operation and maintenance contract foresees that all decisions in respect of the operation and maintenance of the pipeline system shall be taken by BOG. The execution of these decisions, meaning all hands-on measures necessary for the operation and maintenance of the pipeline system, shall be performed by GCA under the supervision of BOG. In addition GCA in its role as market area manager is responsible for coordinating the development of the long-term investment plan for Austria, including the WAG pipeline.

The Commission notes that the fact that BOG is outsourcing tasks to GCA is as such not incompatible with the ITO-model. The Commission agrees with E-Control that in corporate law terms GCA remains part of the VIU. However, the specific circumstance that GCA is a certified ITO and therefore is recognized to have addressed in a structural manner the conflict of interest related to the supply activities of OMV, must be taken into account when assessing the relationship between GCA and BOG with regard to compliance with Article 17(1)(c) Gas Directive. To the extent that all rights in BOG held by the OMV group are exercised by an ITO (i.e. GCA), which is properly ring-fenced from the rest of the VIU, GCA as certified ITO should not be considered as ordinary "other part" of the VIU under Article 17(1)(c) Gas Directive. Where the service provider is itself a certified ITO it diminishes the possibilities for

a conflict of interest to arise. Still, assessment will be needed to ensure that those transactions occur on market based conditions so as to ensure that the remuneration is reasonable and reflects the actual costs incurred.

However, to be certified as an ITO, BOG must have all the necessary resources to ensure that it can adequately fulfil its tasks as an ITO independently. In the present case, the Commission observes that key functions are not exercised by BOG. De facto, the operation of WAG is split over BOG and GCA. The influence of GCA over the WAG is reinforced by the fact that GCA as market area manager plays a key role in the planning of new investments relating to the WAG. The Commission also takes note that BOG currently employs a very limited number of staff only [BUSINESS SECRET]. The duplication of staff functions between BOG and GCA may also lead to inefficient costs which are not desirable from a regulatory perspective.

On this basis, the Commission considers that BOG cannot be certified in the present setting as ITO operating WAG. The Commission is not convinced that it is appropriate to grant BOG a transitional period until 31 December 2015 to exercise the operation and maintenance and the dispatching of the grid by itself.

3. Management Board - independence

According to Article 19(1) Gas Directive decisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office of the persons responsible for the management of the TSO shall be taken by the Supervisory Board of the TSO appointed in accordance with Article 20 Gas Directive. E-Control states in the preliminary opinion that the two seconded managers of GRTgaz and EON have been appointed by GRTgaz and EON. The Commission observes that such secondment to the management board of BOG instead of appointment by its Supervisory Body is not in line with the Gas Directive.

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 BOG is composed of three members. The Commission has not been able to verify whether the proposed independent members have been employed by the VIU or by its controlling shareholder in the past three years, or not. The draft decision of E-Control does not contain sufficiently detailed information on this point as § 114 (1) Nr.2 of the Austrian Gas Act foresees that the independence requirements laid down in Article 19 (3) of the Gas Directive only apply to appointments made after the 3 March 2012. The Commission takes the view that restricting the application of the requirements set out in Article 19 (3) Gas Directive to appointments made after 3 March 2012 appears inconsistent with the Gas Directive and, in the context of certification, does not allow for an assessment by E-Control as to whether the conditions of Article 19(3) are indeed fulfilled. Therefore, the Commission invites E-Control to assess in the final certification decision the independence of the members of the Management Board in view of Article 19 (3) Gas Directive, taking into consideration the above.

4. Supervisory Body - independence

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. According to Article 20(3) *juncto* 19(4) Gas Directive, the independent members of the Supervisory Body of the ITO cannot have any other professional position or responsibility, interest or business relationship, directly or indirectly, with any other part of the vertically integrated undertaking. Furthermore, according to Article 20(3) *juncto* 19(5) Gas Directive the independent members of the Supervisory Body of the ITO cannot hold an interest in or receive any financial benefit, directly or indirectly, from any part of the VIU other than the ITO.

The Supervisory Body of BOG is composed of eight members. At least three of these members must comply with the strict rules on independence. In its preliminary decision E-control comes to the conclusion that EON controls BOG and therefore is part of the VIU as they have the right to nominate one of the three managing directors of BOG.

In the first place, as indicated above, the Commission observes that it is not in line with Article 19 (1) Gas Directive that EON has the right to nominate a managing director of BOG.

Secondly, the Commission notes that from the draft decision of E-Control it does not become clear whether three members of the Supervisory Body concerned fully comply with the above requirements on independence. This is due to the circumstance that two members of the Supervisory Body of BOG are employee representatives, for which § 115 (2) of the Austrian Gas Act foresees to be considered *per legem* as independent members of the Supervisory Body. The Commission takes the view that considering a member of the Supervisory Body *per legem* as a member fulfilling the independence requirements of Article 20(3) Gas Directive appears inconsistent with the Gas Directive and, in the context of certification, prevents an assessment by E-Control as to whether the requirements of Article 20(3) are actually in place. Therefore, the Commission invites E-Control to assess in the final certification decision the independence of the members of the Supervisory Board in view of Article 20(3) Gas Directive.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, E-Control shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of BOG, 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. E-Control 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,

For the Commission

Member of the Commission