



EUROPEAN COMMISSION

Brussels, **XXX**
[...] (2012) **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 - Germany - Certification of GRTgaz Deutschland GmbH**

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I. PROCEDURE

On 10 July 2012, the Commission received a notification from the German national regulatory authority, Bundesnetzagentur, of a draft decision on the certification of the transmission system operator for gas GRTgaz Deutschland GmbH (hereafter "GRTgaz").

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

GRTgaz operates a part of the Mittel-Europäische-Gasleitungssystem (hereafter, "MEGAL"), a high pressure transmission pipeline which consists of MEGAL Nord, MEGAL Süd and the MEGAL Interconnector. The total length of the MEGAL system is 1127 kilometres. MEGAL Nord is the main part of the MEGAL system and consists of two parallel pipelines of around 450 kilometres each. It runs through Germany from the Czech border until the French border. MEGAL Süd consists of a 167 km pipeline and runs from the Austrian border in Northern direction up until the connection point to the MEGAL Interconnector, a 40 kilometre pipeline which connects MEGAL Süd to MEGAL Nord.

The direct owner of MEGAL Nord and MEGAL Süd is MEGAL [BUSINESS SECRET], an asset company [BUSINESS SECRET], which was set up by the companies that initially constructed the pipeline system. The ownership of MEGAL [BUSINESS SECRET] was transferred to GRTgaz, which currently owns 44% of the shares in MEGAL [BUSINESS SECRET], to Open Grid Europe GmbH (hereafter, "OGE"), which owns 51%, and to OMV Gas Germany GmbH (hereafter, "OMV"), which owns 5%. [BUSINESS SECRET].

GRTgaz is a 100% daughter company of GRTgaz Développement S.A.S., which in turn is a 100% daughter of GRTgaz S.A., the operator of a gas transmission system in France. GRTgaz S.A. was certified by the French regulatory authority on 26 January 2012 as complying with the unbundling rules under the Independent Transmission Operator (hereafter, "ITO") model. 75% of the shares in GRTgaz S.A. are owned by the French utility GDF SUEZ S.A., active amongst others in the field of production and supply of electricity and natural gas.

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.

OGE is a transmission system operator which operates the largest gas transmission system in Germany. OGE has not yet been certified as complying with the unbundling rules of the Gas Directive.

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

Bundesnetzagentur has analysed whether and to what extent GRTgaz complies with the unbundling rules of the ITO model as laid down in the German legislation transposing the Gas Directive. In its preliminary decision, Bundesnetzagentur has concluded that GRTgaz is certifiable as an ITO provided that it complies with the three following conditions, which are all aimed at ensuring true independence from the GDF-SUEZ group:

- “a) [BUSINESS SECRET]
- b) [BUSINESS SECRET]
- c) Any amendments to the certification decision of the French regulatory authority Commission de Régulation de l'Énergie concerning GRTgaz S.A. which are made after the adoption of this decision are to be reported immediately to the Ruling Chamber [of the Bundesnetzagentur].”

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision.

1. The “pipe-in-pipe”-concept

Article 17 Gas Directive stipulates that the ITO shall be equipped with all human, technical, physical and financial resources necessary for fulfilling its obligations under the Gas Directive and carrying out the activity of gas transmission. In particular, assets that are necessary for the activity of gas transmission, including the transmission system, shall be owned by the transmission system operator. In its preliminary decision Bundesnetzagentur has assessed, under the rules laid down by the EnWG, to what extent these requirements have been fulfilled.

As stated above, GRTgaz holds 44% of the shares in MEGAL [BUSINESS SECRET], the owner company of the MEGAL Nord and Süd pipelines tasked with *inter alia* the streamlining of costs of construction and maintenance and the making available of capacities in the pipeline to its shareholders. Together with OGE, GRTgaz jointly controls MEGAL [BUSINESS SECRET] through its shareholding.⁴ This follows from the articles of association of MEGAL KG, the composition of its management [BUSINESS SECRET]⁵. As such, GRTgaz can exert decisive influence over MEGAL KG. At the same time neither GRTgaz nor OGE as shareholders can take decisions on their own whereby rights of the other would be infringed.

Besides having joint control over MEGAL KG, which directly owns MEGAL Nord and MEGAL Süd, GRTgaz also has rights of use and disposal over a part of the MEGAL pipeline

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.

⁴ [BUSINESS SECRET]

⁵ [BUSINESS SECRET].

system equivalent to those of an owner (*Eigentümergeleiche Verfügungsbefugnis*). The MEGAL Nord and Süd pipelines have been virtually divided between GRTgaz and OGE as if there were two separate pipelines in the pipes ('pipe-in-pipe'). [BUSINESS SECRET]. GRTgaz is free to commercialise this part of the capacity. [BUSINESS SECRET].

Bundesnetzagentur takes the view that the joint control which GRTgaz has over MEGAL KG, which directly owns MEGAL Nord and MEGAL Süd, together with its rights of use and disposal over a part of the MEGAL pipeline system equivalent to those of an owner (*Eigentümergeleiche Verfügungsbefugnis*), leads to a result which can be considered equal to that of a property right. As a condition, the partner with which it shares control over MEGAL KG must be a TSO which is to be certified as well. According to Bundesnetzagentur, the assessment does not change as far as the MEGAL Interconnector is concerned, considering the relatively small size of the pipeline [BUSINESS SECRET] km as part of a system of 1127 km) together with the fact that the rights and powers of GRTgaz over the MEGAL Interconnector, via a permanent right of beneficial use, are essentially equivalent to the ones GRTgaz already has over MEGAL Nord and Süd.

The Commission agrees with the analysis of Bundesnetzagentur in the present case. The Commission notes that in cases as the present one, where the ownership of the transmission system assets is shared between two TSOs, where these TSOs have joint control over the transmission assets and where they have rights of use and disposal over a part of the transmission system that are equivalent to those of an owner and which allow them to operate their part and develop it independently and without being hindered, the certification of such TSOs should in principle not be withheld as regards compliance with Article 9(1)(a) of the Directive.

2. Separation of IT systems

Article 17(5) Gas Directive prescribes, *inter alia*, 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.

[BUSINESS SECRET]. The Commission is concerned about the potential conflicts of interests and abuses related to the use of commercially sensitive data that could take place as long as IT systems have not been separated. The Commission is furthermore concerned about the duration of the period which is proposed to bring the IT systems in conformity with the requirement of the Directive. The Commission invites Bundesnetzagentur to examine whether the IT systems of GRTgaz can reasonably be separated by an earlier date than [BUSINESS SECRET], and to require from GRTgaz a detailed roadmap, as well as effective transitory measures to reduce any risk of conflicts of interests and abuses pending complete separation.

[BUSINESS SECRET] employees of GRTgaz still have access to the intranet of GDF Suez. In view of the above considerations, the Commission invites Bundesnetzagentur to ensure that interim measures are taken to remove the possibility for employees of GRTgaz to enter the intranet of GDF Suez.

3. Independence of management and staff

According to Article 19(3), *juncto* Article 19(8) Gas Directive, the majority of management staff 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 implementing 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 implementing 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 GRTgaz in fact fulfils the independence criteria laid down in Article 19(3) Gas Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require in its final certification decision that the majority of the management of GRTgaz complies with the independence criteria laid down in Article 19(3) Gas Directive.

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 makes reference the German implementing 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; for non-management staff no requirement applies to sell shares in the VIU. The Commission questions whether the German implementing legislation is in compliance with the Gas Directive on this point, 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 staff of GRTgaz which is not part of the management.

4. Certification of OGE

The Commission notes that the co-owner of the assets of MEGAL, OGE, has to date not been certified. [BUSINESS SECRET]. In the absence of certification, the independent operation of MEGAL is not guaranteed. The Commission invites Bundesnetzagentur to clarify in its final decision that the certification of GRTgaz is conditional upon the positive certification of OGE as an unbundled TSO.

IV. CONCLUSION

Pursuant to Article 3 Gas Regulation, Bundesnetzagentur shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of GRTgaz, 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. Bundesnetzagentur is invited to inform the Commission within five working days following receipt whether and why 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.

Done at Brussels,

For the Commission

Member of the Commission