



EUROPEAN COMMISSION

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

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 Gas Connect Austria GmbH**

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I. PROCEDURE

On 4 April 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 "Gas Connect Austria GmbH" (hereafter "GCA"), on the basis of the application of GCA of 9 February 2012. Upon request of the Commission E-Control provided further information regarding its draft decision on the certification of GCA.

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

GCA is a transmission system operator for gas in Austria. It currently owns all the Austrian high pressure pipelines (1900 km) and is the market area manager. The certification application of GCA only extends to 169.9 km of the Austrian high pressure pipelines, as the application request of GCA excludes the Trans-Austria-Gasleitung (TAG) and West-Austria-Gasleitung (WAG), which will be dealt with as separate certification requests. In its role as market area manager, GCA will be the point of first contact and information concerning the one capacity platform, calculate models for available capacity, coordinate nomination schemes, coordinate the input of balancing gas and respective invoicing, cooperate with the operator of the Virtual Trading Point and coordinate the development of the long-term investment plan for Austria.

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

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

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 GCA complies with the unbundling rules of the ITO model as laid down in the Austrian legislation transposing the Gas Directive. In its draft decision, E-Control has identified a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. The draft 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 draft decision would lead to the annulment of the certification decision. The draft certification decision of GCA contains the following conditions:

- (a) From 31 July 2012, GCA shall not receive any services from OMV Refining & Marketing GmbH.
- (b) No later than 31 December 2012, GCA shall have contractual independence in respect of all insurance contracts concerning it and shall receive no insurance-related services from OMV Gas & Power GmbH or from companies controlled by OMV Gas & Power GmbH.
- (c) No later than 31 July 2012, GCA shall possess a legally valid partnership agreement and legally valid standing orders for its management and for its supervisory body, the content of which shall comply with Annexes 11, 12 and 13.
- (d) By means of a contract with the person to be appointed as compliance officer, GCA shall ensure compliance with the provisions concerning independence set out in Section 116, Paragraph 2 in conjunction with Section 114, Paragraphs 1-3 of GWG 2011.
- (e) The deadlines laid down in points II.a to II.d may be exceeded by six months in exceptional cases, if the regulatory authority finds that the delay is attributable to circumstances beyond the control of GCA.

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 ("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. Corporate identity, communication and branding

According to Article 17(4) Gas Directive, the ITO must not, in its corporate identity, communication, branding or premises create confusion in respect of the separate identity of other parts of the VIU. This implies a general obligation to avoid any confusion for consumers between the ITO and the supply company. From the draft decision of E-Control it appears that GCA consistently adds to its official communication the words 'A Member of the

OMV Group'. Although the 'OMV Group', as a reference to the VIU to which GCA belongs, does not appear in the official name of the ITO, adding these words consistently in its official communication and in its general appearance creates confusion as to its independence from the VIU and is not in line with the Gas Directive. Therefore, the Commission considers that E-Control in its final certification decision should require GCA to desist from adding the words 'A Member of the OMV Group' in its public communication and appearance.

3. Management Board - independence

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 GCA is composed of two 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 applies 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) 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 GCA is composed of 5 members. Two of these members must comply with the strict rules on independence. From the draft decision of E-Control it does not become clear whether the two members of the Supervisory Body concerned fully comply with the above requirements on independence as two members of the Supervisory Body of GCA are employee representatives for which § 115 (2) of the Austrian Gas Act foresees that they are 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. In this assessment, E-control should in particular consider whether the fact that the employee

representatives concerned are also member of the Supervisory Body of the Gas Storage GmbH, which forms part of the OMV-group, could have a negative impact on their independence.

5. Compliance programme and compliance officer

According to Article 21(2) Gas Directive, the compliance officer of the ITO must fulfil requirements of independence similar to those which relate to the majority of members of the Management Board. E-Control states in its draft decision that since GCA's compliance officer has not yet been appointed it cannot assess whether the requirements of independence are met.

From the draft decision it appears that E-Control has requested GCA to provide evidence in due course that a compliance officer fulfilling the requirements of the Gas Directive has been appointed. The Commission supports this requirement and invites E-Control to either examine in the final decision the independence of the compliance officer or to insert in a date by which the condition laid down in II. (d) needs to be met.

6. 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 GCA, 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