



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 bayernets GmbH**

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I. PROCEDURE

On 10 July 2012, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of the Transmission System Operator for gas "bayernets GmbH" (hereafter, "bayernets").

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

The company bayernets was founded on 1 January 2007. It operates 1313 kilometres of high pressure gas transmission pipelines in Bavaria. The network is spread over an area of 36 000 km² and it is linked to 43 gas distribution networks. bayernets is a 100% daughter company of Bayerngas GmbH (hereafter, "Bayerngas"), a company active in gas supply and gas storage.

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

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 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).

Bundesnetzagentur has analysed whether and to what extent bayernets complies with the unbundling rules of the ITO model as laid down in German legislation transposing the Gas Directive. In its draft decision, Bundesnetzagentur has identified a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules.

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 1228/2003, OJ L 211/36 of 14.8.2009.

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.

Compliance with these measures is formulated as a condition for a positive final certification decision. These conditions are:

- a) The transfer to the applicant of the ownership of the system shall take place [...] in August 2012 at the latest.
- b) The list of fees in Annex B to the contract for the provision of services by the applicant to Bayerngas GmbH ('ITO-BG') is to be amended, at the latest six months after the issuing of the certification, by setting out standard calculation units, standard staff-cost rates and a standard definition and detailed breakdown of calculation units. The annex intended for third party information named 'Service charges (basis for calculation)' is also to be amended to this end. The amended annexes are to be presented to the Ruling Chamber without delay.
- c) The IT separation from Bayerngas GmbH is to be completed by 31 December 2012 at the latest.
- d) The physical separation of premises from Bayerngas GmbH is to be completed by 31 December 2012 at the latest.
- e) The credit agreements (framework credit agreement and conditions) between the applicant and Bayerngas GmbH are to be presented to the Ruling Chamber at the latest six months after the issue of certification.
- f) Contractual provisions which provide for a right of first refusal for Bayerngas GmbH in the case of capital increases or the uptake of loans by the applicant are to be rescinded. Their termination in the form of contract amendment or cancellation shall be demonstrated to the Ruling Chamber at the latest six months after the issue of certification.
- g) The composition of the management of the legal and human resources centre shall be compliant with the provisions of Section 10c of the EnWG at the latest six months after the issuing of the certification.

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 (hereafter, "VIU"). The Commission agrees with Bundesnetzagentur 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. IT consultants and contractors

According to Article 17(5) Gas Directive TSOs shall not use the same consultants or external contractors for IT systems or equipment as any other part of the VIU. In its draft decision, Bundesnetzagentur has required bayernets to complete the separation of its IT system from the system used by the VIU. However, from Bundesnetzagentur's draft decision it appears that bayernets will continue to use services from external IT contractors who also provide services to the VIU. With reference to the EnWG, Bundesnetzagentur states in its draft decision that the VIU and bayernets can continue to employ the same external IT contractors provided that these contractors ensure that specific employees are designated to exclusively advise bayernets.

The Commission questions whether the above approach can ensure the required level of independence of the ITO in IT related operations as required by Article 17(5) Gas Directive. The Commission considers that only in exceptional cases, where no other external contractor, except for the one that also provides services to the VIU, could provide such services to bayernets, derogation to the prohibition of Article 17(5) Gas Directive could be considered justified. Such derogation should in that case also be of a transitional nature, limited in time, and accompanied by measures to effectively ensure that any conflicts of interests and abuses are avoided. The Commission invites Bundesnetzagentur to either require in its final certification decision that bayernets and the VIU do not employ the same external IT consultants or to assess whether the situation justifies a derogation on the basis of the aforementioned criteria.

3. Independent auditing

According to Article 17(6) Gas Directive, the accounts of the TSO shall be audited by an auditor other than the one auditing the VIU or any part thereof. From Bundesnetzagentur's draft decision it appears that bayernets and the VIU would continue to employ the same auditing company after certification. Bundesnetzagentur has argued that employing the same auditing company can comply with the unbundling requirement as long as it is ensured that the natural persons auditing the VIU are different from the ones auditing bayernets.

The Commission considers, in view of Article 17(6) Gas Directive, that Bundesnetzagentur, in order to avoid any conflicts of interests and to ensure an effective separation between the VIU and bayernets, should require that bayernets chooses an auditing company which is different from the one employed by the VIU or any part thereof.

4. Independence of management

According to Article 19(3) *juncto* Article 19(8) Gas Directive, the majority of the management 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 bayernets 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 bayernets 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 to 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, while for non-management staff no requirement to sell shares in the VIU applies. The Commission questions whether the German implementing legislation is in compliance with the Gas Directive 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 employees of bayernets which are not part of the management.

5. Independence of the Supervisory Body

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.

From Bundesnetzagentur's draft decision and documents submitted to support the request of bayernets for certification it appears that this condition has not been applied to the independent members of the Supervisory Body of bayernets who have been appointed before 3 March 2012. With reference to the considerations in the previous section concerning Article 19(3) Gas Directive, the Commission invites Bundesnetzagentur to reassess in its final certification decision that the independent members of the Supervisory Body of bayernets have in fact complied with the independence criteria of 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 bayernets in its final certification decision to comply with the independence criteria of Article 19(3) Gas Directive also in relation to its independent members of the Supervisory Board.

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 bayernets, 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 herein to be confidential. Bundesnetzagentur 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