



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 Nowega**

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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 "Nowega GmbH" (hereafter "Nowega").

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

Nowega was founded on 1 September 2005 as Erdgas Münster Transport GmbH & Co. KG. On 20 February 2012 its name was changed into Nowega GmbH. Nowega operates a high-pressure natural gas pipeline of 700 km in the North of Germany. It is fully owned by Erdgas Münster GmbH, which in turn is owned by the companies BEB Erdgas und Erdöl GmbH (25.46%), ExxonMobil Gas Marketing Deutschland GmbH (19.89%), GDF SUEZ E & P Deutschland GmbH (20.21%), RWE Dea AG (9.00%) and Wintershall Holding GmbH (25.46%).

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

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.

measures concerned have been summarized in point 1 of the draft decision of Bundesnetzagentur. Compliance with these measures is formulated as a condition for a positive final certification decision. These conditions are:

- a) The provision of services to the applicant by Erdgas Münster GmbH shall be terminated by 30 June 2013 at the latest. In a derogation to that provision, the provision of the services in relation to cathodic protection and the assumption of responsibility as technical coordinator for system operation [...] to the applicant by Erdgas Münster GmbH shall be terminated by 30 June 2014 at the latest.
- b) The IT separation is to be completed in full by 1 September 2012.
- c) The existing control- and profit-transfer agreement is to be transformed into a profit-transfer agreement only, or terminated at the latest six months after the certification is issued.
- d) The applicant shall appoint a new compliance officer at the latest six months after the certification is issued and present its remit or terms of employment for approval, or withdraw the mandate of the current compliance officer and re-submit its remit or terms of employment for approval.

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 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. Personnel required to operate the network

According to Article 17(1)(b) and (c) Gas Directive the ITO shall employ all personnel necessary for the activity of gas transmission including tasks related to the operation, maintenance and development of the network. In addition, the TSO shall not be able to lease personnel or procure services from the vertically integrated undertaking.

In its draft decision Bundesnetzagentur required all services provided by the VIU to Nowega to be terminated by 30 June 2013, except for services in relation to cathodic protection ("*kathodischen Korrosionsschutz*") and the assumption of responsibility as technical coordinator for system operation ("*Wahrnehmung der Verantwortung als technische Führungskraft für den Netzbetrieb*"), for which a transitional period until 30 June 2014 was granted. In its application to Bundesnetzagentur, Nowega has argued that a shortage of specialists with the required expertise on the job market prevented it from filling up the posts concerned on time. Nowega has also argued that hiring the specialists in these areas who are currently employed with the VIU, would prevent the VIU itself from complying with its legal and/or operational requirements governing the VIU's business.

Based on the information received, the Commission is not convinced that it is appropriate to grant Nowega a transitional period until 30 June 2014 to employ the required experts, especially in relation to the assumption of responsibility as technical coordinator for system operation, which is a key function to ensure network operation. The Commission invites

Bundesnetzagentur to reassess in its final certification decision whether it can be ensured that all services which are currently provided by the VIU to Nowega are terminated by 30 June 2013 at the latest. In this respect the Commission considers that if employing the required specialists by 30 June 2013 were only possible by redeploying staff from the VIU to Nowega, and if this were to result in the VIU not being able to comply with its legal and/or operational requirements governing the VIU's business, Bundesnetzagentur should also assess whether Nowega could lease the required personnel or render the necessary services to the VIU for a limited period of time.

In addition, the Commission has doubts whether the envisaged number of staff (16 employees) is sufficient to ensure that Nowega can adequately fulfil its task as an ITO, i.e. to operate, maintain and develop a secure, reliable and efficient transmission system spanning 700 km, even if it may outsource certain activities. The Commission invites Bundesnetzagentur to reassess in its final certification decision whether the proposed staff of 16 employees can indeed be considered sufficient to reliably and securely operate Nowega's network.

3. Services provided to the ITO by other parts of the VIU

As referred to above, Article 17(1)(c) Gas Directive provides for specific rules on the contracting of services between other parts of the VIU and the ITO. As the ITO should be autonomous and not dependent on other parts of the VIU, contracting of services to the ITO by any other part of the VIU is prohibited by the Gas Directive.

As a preliminary remark the Commission considers that in view of the general prohibition of services provided to the ITO by other parts of the VIU, a derogation could only be envisaged in exceptional circumstances. Such derogation should be construed narrowly and should not go beyond what is strictly necessary to protect overriding interests, such as the security and the reliability of the transmission system. Only in exceptional cases, where the services concerned are strictly necessary to protect overriding interests as referred to above, and where no other service provider except for the VIU could provide these services to the ITO, could a derogation possibly be considered justified. Such derogation should also in principle be of a transitional nature, limited in time. In addition, it should be ensured that transactions between other parts of the VIU and the ITO occur at arm's length in order to avoid cross subsidisation.

From the draft decision it appears that some elements of the telecommunication, data transmission and operational control infrastructure are owned by the VIU while other elements of the same infrastructure are owned by Nowega. In the draft decision it is argued that for technical and operational security reasons this infrastructure cannot be divided and has to be operated in one. The terms of the usage of the infrastructure between the VIU and Nowega are agreed in a mutual service provision agreement. According to the agreement, Nowega is provided access to the telecommunication and operational control infrastructure owned by the VIU.

The Commission considers that in order to avoid that the VIU provides services to Nowega, Bundesnetzagentur is invited to assess in its final decision the possibility of transferring to Nowega the ownership of the telecommunication and operational control infrastructure which are currently owned by the VIU. As a result, Nowega would be able to assume full control over the referred infrastructure and, if necessary, could provide telecommunication and operational control related services to the VIU, provided that the services comply with the requirements of Article 17(1)(c) Gas Directive. Similarly, Bundesnetzagentur is invited to consider in its final certification decision whether telecommunication and operational control related services required by Nowega could be provided by service providers not related to the VIU, now or in the foreseeable future.

4. IT consultants and contractors

According to Article 17(5) Gas Directive the TSO 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 Nowega to complete the separation of its IT system from the system used by the VIU. However, from Bundesnetzagentur's draft decision it appears that Nowega 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 Nowega can continue to employ the same external IT contractors provided that these contractors ensure that specific employees are designated to exclusively advise Nowega.

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 Nowega, could a derogation to the prohibition of Article 17(5) Gas Directive 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 therefore invites Bundesnetzagentur to either require in its final certification decision that Nowega 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.

5. 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 Nowega 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 Nowega.

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 Nowega, should require that Nowega chooses an auditing company which is different from the one employed by the VIU or any part thereof.

6. Independence of management

According to Article 19(3) 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 Nowega 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 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 applies to sell shares in the VIU. 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 encourages Bundesnetzagentur to ensure that the provisions of Article 19(5) Gas Directive are also complied with by the employees of Nowega which are not part of the management.

7. 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 Nowega's request for certification it does not become clear whether or not this condition has been applied to the independent members of Nowega's Supervisory Body. 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 Nowega's Supervisory Body 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 Nowega 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 Nowega, 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