



Brussels, **XXX**
[...] (2014) **XXX** draft

COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10 of Directive
2009/73/EC - Poland – GAZ-SYSTEM S.A.**

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I. PROCEDURE

On 28 May 2014, the Commission received a notification from the Polish regulatory authority for energy, Energy Regulatory Office (hereafter, "ERO"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), on the certification of the gas transmission system operator (hereafter, "TSO") GAZ-SYSTEM S.A. (hereafter, "Gaz-System").

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 the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

Gaz-System is the transmission system operator for the entire Polish gas transmission grid. It is also the owner of the gas transmission system in Poland, with the important exception of the Polish section of the Yamal pipeline, which is subject to a separate certification procedure. Gaz-System is the exclusive holder of the gas transmission licence valid until 31 December 2030 for the whole system. In 2010, Gaz-System was appointed by ERO as the only TSO for gas on the territory of Poland as it also operates the Yamal pipeline.

Gaz-System is a fully state-owned company and has applied for certification under the ownership unbundling model. In particular, Gaz-System intends to make use of the possibility provided for in Article 9(6) Gas Directive to implement the ownership unbundling model by means of separate public bodies within the State.

ERO has come to the preliminary conclusion that Gaz-System has sufficiently demonstrated that it complies with the requirements of the ownership unbundling model as laid down in the Polish legislation transposing the Gas Directive and that it therefore can be certified. ERO has submitted its draft decision to the Commission requesting an opinion.

III. COMMENTS

1. Ownership of the transmission system

Article 9(1)(a) Gas Directive requires that in the ownership unbundling model each undertaking that owns a transmission system also acts as its operator. Gaz-System is 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 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.

owner of the entire Polish transmission grid³ with the exception of the Polish section of the Yamal pipeline owned by EuRoPol GAZ S.A. The current certification procedure does not cover the operation of the Yamal pipeline, which will be subject to a separate certification procedure. With this caveat, the Commission concludes that the requirement that Gaz-System owns the transmission system on which it acts a transmission system operator is met.

2. Separation within the State

Article 9(6) Gas Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of the rules on ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and should be able to control generation and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the rules on ownership unbundling. The public bodies concerned must be truly separate. In these cases, it must be demonstrated that the requirements of ownership unbundling of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with. This has to be assessed on a case-by-case basis.⁴

The State Treasury holds 100% of the shares in Gaz-System. Under secondary regulation⁵, it is the Minister of Treasury that exercises the rights attached to property rights of the State Treasury, unless otherwise provided in separate regulations. The latter is the case with Gaz-system, as it is the Ministry of Economy that is authorised to manage the state's participation in Gaz-System⁶. It is the Commission's understanding that the transfer of the management of Gaz-System from the Ministry of Treasury to the Ministry of Economy took place in September 2013, after an amendment in the Polish Energy Law that implemented the Third energy package.

The draft decision as notified by ERO addresses in detail the criteria related to the separation within the State. The Ministry of Economy does not exercise control or rights in companies producing or trading electricity or gas, apart from the limited activities in the generation and trade of electricity in the coal mining sector which are analysed in more detail below. The Ministry of Treasury owns and manages the Polish State's majority participations in a number of companies active in generation and/or supply of gas and electricity (including the gas incumbent PGNiG and four main electricity producers: PGE, Energa, ENEA and Tauron). Therefore there is a need to assess how the separation within the State is guaranteed under the Polish law and the facts at issue.

ERO considers that there is a sufficient degree of separation between the Ministry of Economy and the Ministry of Treasury on the basis of the Polish Constitution and the legal order of the country which ensure autonomous ministerial responsibility. Although both Ministers are members of the same body, namely the Council of Ministers, they are independent from each other and their tasks are clearly defined in statutory law and in detailed sectoral regulations which delineate the competences of each Ministry. The role of the Prime Minister in giving orders to ministers is limited by the Act on the Council of Ministers that does not give the Prime Minister the power to issue binding orders in matters handled by the entities controlled by various Ministers. Therefore, ERO concludes that the separation within

³ According to the information provided, transfer of all transmission assets from PGNiG (Polish gas incumbent) to Gaz-System was concluded in 2011.

⁴ The Unbundling regime, Commission staff working document, 22 January 2010, p. 10.

⁵ Act on Rules for Exercising Powers of the State Treasury

⁶ The same holds for the Polish Electricity TSO PSE.

the State is guaranteed. The Commission has agreed with this conclusion in its Opinion concerning the electricity TSO, PSE⁷. As the circumstances are the same in the case of Gaz-System, the Commission's assessment remains the same.

The Commission however notes that, even though the Ministry of Economy does not exercise control over entities active in the gas sector, the Articles of Association of PGNiG⁸ envisage that the Minister of Economy is consulted by the Minister of Treasury as regards the candidate for the position of one member of the Supervisory Board of PGNiG⁹. ERO claims that it ultimately remains the responsibility of the Ministry of Treasury to decide on the final composition of the Supervisory Board of PGNiG and that the consultation of one member of the Supervisory Board does not confer control to the Ministry of Economy over PGNiG. Nevertheless, the Commission deems it necessary to avoid such links between the Ministries so as to ensure complete separation between public bodies. Therefore invites ERO to recommend relevant measures to ensure that there are no such links.

As mentioned above, the Ministry of Economy does not control any undertakings active in the gas sector. However, some entities controlled by the Ministry of Economy carry out some limited activities in the generation and trade of electricity. This is the case for four companies¹⁰ active in the field of coal production in coal mines that also, on the side, produce electricity for their own use and sell limited volumes of it through local, isolated distribution systems. This issue has already been extensively addressed in the Commission's Opinion regarding the certification of PSE and does not require further re-assessment in the present Opinion as the legal and factual circumstances are the same. The Commission also notes the additional argument provided by ERO that none of these four entities are active in the gas sector and none is connected to the gas transmission network and, therefore, Gaz-System cannot favour or discriminate these undertakings vis-à-vis other transmission network users. However, as already requested in the Commission's opinion on PSE's certification, the Commission deems it important that ERO continues to monitor and ensure that the activities of the four companies concerned remain confined to the isolated areas in which they operate today.

According to the draft decision, also Gaz-System itself does not exercise control or rights over energy companies involved in the production or supply of gas or electricity. The Commission however notes that Gaz-System is the owner of the company Polskie LNG S.A. (hereinafter, "PLNG"), which is in charge of the construction of the liquefied natural gas terminal in Świnoujście. ERO claims that this fact is irrelevant for the assessment of the unbundling criteria as PLNG is not active in the production or supply of gas. The role of Gaz-System is, according to ERO, based on the provisions of a special law¹¹ underpinning the investments in the terminal, limited to carrying out the investments necessary for the proper functioning of the terminal and coordination of the investment implementation process. The special law only regulates issues related to the construction of the terminal and does not refer to the period when the construction is completed and the terminal is commissioned. In particular, the special law does not cover issues related to the terminal's capacity allocation, utilization and

⁷ Commission's Opinion on URE's draft certification decision for PSE S.A, C(2014) 2471, 09/04/2014.

⁸ PGNiG's Articles of Association, para 35.1, available at: <http://www.pgnig.pl/pgnig/10199/10362>

⁹ The Supervisory Board consists of five to nine members, appointed by the General Meeting.

¹⁰ These are: Spółka Restrukturyzacji Kopalń S.A. in Bytom, Katowicki Holding Węglowy S.A. in Katowice, Kompania Węglowa S.A. in Katowice and Jastrzębska Spółka Węglowa S.A. in Jastrzębie Zdrój.

¹¹ Act of 24 April 2009 on Investments Related to Świnoujście LNG Regasification Terminal, Journal of Laws of 2009, No. 84, item 700, as amended.

management of the installation, which will be subject to generally applicable rules, notably the Polish Energy Law.

The Commission however takes the view that the ownership of PLNG by Gaz-System has potential implications for the assessment of the separation within the state criteria, because, under the provisions of the special law, it is the Ministry of Treasury (responsible for the supervision of PGNiG) and not the Ministry of Economy that supervises the activities related to the preparation and the completion of the LNG terminal. In this respect, ERO argues that, based on Article 3 of the special law, the role of the Ministry of Treasury is limited to supervision of the preparation and the completion of the terminal within the envisaged time schedule. Under the provisions of the special law, Gaz-System only has to report regularly to the Ministry of Treasury on the implementation of the investments related to the terminal.

The Commission agrees with ERO that given that the reporting obligation is the only obligation imposed upon Gaz-System by the Ministry of Treasury and given the fact that the Ministry of Treasury's supervision is limited to the construction period only, this does not negatively impact the independence of Gaz-System and the Ministry of Economy in operating the transmission network. The Commission however encourages ERO to closely monitor the development of the legal and factual situation, in particular, as it is envisaged that PLNG will later on also be the operator of the LNG terminal in Świnoujście. In this respect, the Commission considers the link between Gaz-System and the Ministry of Treasury should be terminated upon entry into operation of the terminal and, just as the other activities of Gaz-System, fall under the sole supervision of the Ministry of Economy.

3. Independence of the Supervisory/Management board

Article 9(1)(c) Gas Directive prohibits the same person to appoint members of the supervisory board, the administrative board, or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply. Article 9(1)(d) Gas Directive prohibits the same person to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.

ERO confirms that none of the members of either the Supervisory Board or the Management Board in Gaz-System perform any similar functions in undertakings involved in the generation and supply of electricity or gas. ERO also concludes that none of the members of either the Supervisory Board or the Management Board can exercise control over an undertaking performing any functions of production or supply.

However, two of Gaz-System's board members (one in the Management Board and one in the Supervisory Board) own shares in PGNiG, the gas incumbent. ERO claims that this does not constitute an obstacle to certification. The Commission agrees that having this type of shareholdings by board members is not explicitly prohibited under Article 9 Gas Directive. Nevertheless, the Commission considers it recommendable to ensure that, as part of the code of conduct applicable to board members, appropriate measures are in place to avoid any conflict of interest or perceptions thereof for Board Members and relevant staff of Gaz-System.

IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, ERO shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Gaz-System, 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. ERO 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