



Brussels, **XXX**  
[...] (2013) **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 Thyssengas GmbH**

## 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 Thyssengas GmbH**

### I. PROCEDURE

On 6 December 2012, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/73/EC<sup>1</sup> (hereafter, "Gas Directive"), of a draft decision on the certification of Thyssengas GmbH (hereafter, "Thyssengas") as a Transmission System Operator (TSO) for gas.

Pursuant to Article 3(1) Regulation (EC) No 715/2009<sup>2</sup> (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

Thyssengas operates a 4.200 km long gas transmission network in the western part of Germany, with connections to Belgium, the Netherlands and Norway. Thyssengas was formerly part of the then vertically integrated energy undertaking RWE; in February 2011 it was sold to the Macquarie Group Limited (hereafter, "Macquarie"), an Australian investment bank. Direct mother company of Thyssengas is Thyssengas Service GmbH & Co. KG (hereafter, "Thyssengas Service"), which in turn is 100% owned by Macquarie.

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

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 belonged 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 Thyssengas complies with the unbundling rules of the ITO model as laid down in the EnWG. Bundesnetzagentur has come

---

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.

to the preliminary conclusion that Thyssengas complies with these requirements, provided that a number of conditions are fulfilled. The draft certification decision of Thyssengas is hence issued subject to the following conditions:

"(a) No later than six months after certification is granted, the applicant is obliged to ensure that it is given either direct or indirect ownership of the pipeline sections of Open Grid Europe GmbH whose capacities it uses and markets in accordance with the agreement of 14 February/23 February 2012 or that it is given such control over the property transferred to it that the applicant is comparable to being an owner, i.e. the agreements are designed such that the applicant is able to act de facto and de jure in a manner comparable to an owner.

(b) Provision of the service of ‘acquisition of rights and approval procedures’ to the applicant by Thyssengas Service GmbH & Co. KG under § 1 point 1.1 of the agreement of 29 February 2012 shall end at the latest six months after certification is granted.

(c) The agreement to transfer profits concluded between the applicant and Thyssengas Service GmbH & Co. KG shall end at the latest six months after certification is granted or must be approved by the applicant’s supervisory board.

(d) The list of business activities requiring approval in the rules of procedure of the applicant’s supervisory board shall be re-worded as follows: Point 3 ‘Business management committees’, point 6 ‘Joint undertakings’, point 11 ‘Agreements with close business undertakings’, point 12 ‘Business activities not falling under the “arm’s length principle”’ and point 21 ‘Submissions under supervisory law’ shall be repealed or shall be modified to make it clear that the supervisory board may only approve such business activities where the activities are not current business activities of the applicant under § 10b paragraph 2 of the Energy Industry Act (EnWG). Point 16 ‘Employment contracts’ and point 18 ‘Notice of termination given for operational and other reasons’ shall be modified to make it clear that the supervisory board only has competence and right of approval in these matters, and that such competence and right of approval in these matters are only possible, under § 10d paragraph 2 second sentence of the Energy Industry Act to the extent that the applicant’s business management is affected. Point 23 ‘Share capital’ and point 27 ‘Charges’ shall be modified to make it clear that a meeting of shareholders only has competence and right of approval, and that such competence and right of approval are only possible, to the extent that the supervisory board’s financial decision-making power under § 10d paragraph 2 second sentence of the Energy Industry Act is guaranteed.

(e) The applicant’s compliance officer is obliged to take part immediately in the monthly Business Review Meetings with representatives of Macquarie Infrastructure and Real Assets (Europe) Limited and the applicant’s supervisory board and board of management. The officer shall compile a record of the minutes and proceedings of the meeting and shall forward it to the Ruling Chamber immediately after each meeting."

Moreover, it is stipulated in the draft decision that the management of the sectors ‘Personnel/Communication’, ‘Network operation’ and ‘IT and Purchasing’ are subject to the requirements set out in § 10c paragraph 6 of the EnWG.

### **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 that in the present case the choice for the ITO model is legitimate, considering that the transmission system concerned did belong to a VIU on the relevant date.

## **2. Ownership of the network**

Article 17(1)(a) Gas Directive requires that the TSO owns the assets necessary for the activity of gas transmission, including the transmission system it operates. It appears from Bundesnetzagentur's draft decision that Thyssengas owns the largest part of the transmission system it operates, with the exception of a number of pipelines that it co-owns with other network operators.

### *Co-ownership ("Bruchteilsigentum")*

The Commission takes the view that under certain circumstances co-ownership ("Bruchteilsigentum") of a pipeline may be sufficient to comply with Article 17(1)(a) Gas Directive. However, if the co-owner of the pipeline does not have the same degree of independence from production and supply interests as the TSO which co-owns the pipeline and which seeks to be certified as an ITO, compliance with Article 17(1)(a) Gas Directive cannot be ensured.

In the present case, the Commission notes that Bundesnetzagentur, in its preliminary decision, has not assessed the independence of Aggerenergie GmbH, which according to that decision co-owns transmission infrastructure together with Thyssengas. The Commission considers that in cases whereby the co-owner of the pipeline is not a TSO that will be certified as compliant with the unbundling requirements, the independent operation of the pipeline section concerned is not guaranteed, as conflicts of interest may arise and result in the favouring of certain network users over, and to the detriment of, others. The Commission invites Bundesnetzagentur to ensure in its final decision that the ownership of the relevant assets is re-organized in such a way that only one or more independent TSOs share their ownership.

### *Contract for the transfer of use ("Nutzungsüberlassungsvertrag")*

In its preliminary decision Bundesnetzagentur furthermore notes that in the case of a certain pipeline section and associated measure and control system, which is co-owned by Thyssengas and Open Grid Europe GmbH (hereafter, "OGE"), Thyssengas operates a larger proportion than its share in the ownership of the assets. Thyssengas uses these additional capacities, formally owned by OGE, on the basis of a contract for the transfer of use ("Nutzungsüberlassungsvertrag") with OGE. However, with respect to these capacities, it does not have powers equal to those of an owner, especially when it comes to the capability to decide over the investment in and extension of the pipeline section. The Commission agrees with Bundesnetzagentur that Thyssengas must be obliged to bring the situation in line with the unbundling requirements within six months after certification either by reinforcing the contract for the transfer of use or by acquiring the appropriate share of the assets.

## **3. Contracts for services provided to the ITO by other parts of the VIU**

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.

It follows from the preliminary decision that, on the basis of a service agreement, Thyssengas Service, the direct mother company of Thyssengas, provides certain services to Thyssengas regarding *inter alia* the legal and administrative handling of licencing and permitting procedures with regard to routes, planning and land acquisition as well as the drafting of feasibility studies of projects. The Commission agrees with Bundesnetzagentur that Thyssengas Service is part of the VIU, that its activities are hence subject to the prohibition of Article 17(1)(c) Gas Directive and that they are therefore to be ceased within six months from the date of the final certification decision. The Commission furthermore agrees that the aforementioned services are to be carried out by the TSO itself as the assessment and decisions regarding investments and infrastructure projects constitute a core task of a TSO and should be taken without being potentially influenced by undertakings with supply or production interests.

#### **4. Independence of the TSO**

Article 18(1)(a) Gas Directive provides that the ITO shall have effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain and develop the transmission system. According to Article 18(4) therein, the overall management structure and corporate statutes of the TSO should ensure its effective independence. In particular, any other part of the vertically integrated undertaking is not allowed to influence, directly or indirectly, the competitive behaviour of the ITO in relation to the day-to-day activities and management of the network, and in relation to activities of the ITO for the preparation of the ten-year network development plan (Article 18(4) Gas Directive).

In this context, so-called monthly Business Review meetings are rightly identified by Bundesnetzagentur in its draft decision as incompatible with the unbundling rules. At these monthly meetings, the management and personnel of the ITO are to notify and inform, *inter alia*, representatives from Macquarie and the Supervisory Body on matters such as the financial situation but potentially, although the draft decision is not explicit on this point, also the 'current affairs' of the ITO. In its preliminary decision Bundesnetzagentur proposes that the compliance officer should have the right to attend such meetings. The Commission notes that the compliance officer, on the basis of Article 21(8) Gas Directive, already has the right to attend all meetings whereby the management of the ITO or the Supervisory Body are present. The Commission furthermore notes that according to the same Article the compliance officer has an obligation to attend meetings that address matters central to the independent operation of the transmission system, such as on rules for third party access or investment projects.

Moreover, the Commission is of the opinion that matters concerning the day-to-day operation of the transmission system, and in addition to that also activities related to investments in the network and the preparation of the ten-year network development plan, should not be the subject of regular meetings between the ITO and the VIU, as this would prejudice the independence requirements envisaged in Article 18. The Commission considers that the appropriate forum for meetings between the ITO and the VIU is the Supervisory Body. Article 20 Gas Directive provides that the decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day-to-day activities of the ITO and management of the network, as well as those related to activities necessary for the preparation of the ten-year network development plan.

The Commission invites Bundesnetzagentur to clarify whether these topics fall within the scope of the Business Review meetings, and if this is the case, strengthen its condition by

prohibiting these topics from being the subject of regular discussion in the context of the Business Review meetings.

## **5. Certification of OGE**

The Commission notes that the co-owner of certain assets that form part of the Thyssengas-network, namely OGE, has to date not been certified. In the absence of certification, the independent operation of these pipelines is not guaranteed. The Commission invites Bundesnetzagentur to clarify in its final decision that the certification of Thyssengas is conditional upon the positive certification of OGE as unbundled TSO.

## **IV. CONCLUSION**

Pursuant to Article 3(2) Gas Regulation, Bundesnetzagentur shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Thyssengas, 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. 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*