



Brussels, **XXX**
[...] (2012) **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 - Germany – Gastransport Nord GmbH**

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I. PROCEDURE

On 5 October 2012, the Commission received a notification from the German Federal Network Agency (hereafter, "Bundesnetzagentur"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), of a draft decision on the certification of "Gastransport Nord GmbH" (hereafter, "GTG Nord") as a Transmission System Operator (TSO) for gas.

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

GTG Nord is a transmission system operator for gas in Germany. It operates a gas transmission network of 320 km covering the north-western part of Lower Saxony in the North of Germany. GTG Nord currently employs approximately 40 persons and this number is expected to further increase. GTG is 100% owned by the vertically integrated energy utility EWE Energie AG, active in the generation and supply of electricity and the supply of natural gas. EWE Energie AG is in turn a 100% daughter of EWE AG, a holding company that furthermore has subsidiaries active in the telecommunications and IT sectors.

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

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.

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.

Bundesnetzagentur has analysed whether and to what extent GTG Nord complies with the unbundling rules of the ITO model as laid down in the EnWG. Bundesnetzagentur has come to the preliminary conclusion that GTG Nord complies with these requirements. The draft certification decision of GTG Nord is issued subject to the following four conditions, which seek to limit the influence of the VIU over the ITO:

- a) The applicant, GTG Nord, is prohibited from procuring the services of BTC AG, BTC IT-Services GmbH and EWE TEL GmbH from the vertically-integrated energy distribution undertaking. The underlying contracts must either be terminated by 31 December 2014 at the latest or the right to exercise control over the vertically-integrated energy distribution undertaking must be restricted, by means of BTC AG or BTC IT-Services GmbH and EWE TEL GmbH becoming incorporated into the applicant's company or being sold to a third party outside the company.
- b) The Bundesnetzagentur is, within six months of the certification being issued, to be informed of the fixed charges for the services 'registration of load pattern measurement', 'network monitoring outside of normal working hours' and 'gross gas measurements'. This information must also include which categories of costs are to be subsumed under each respective service.
- c) The applicant must, within six months of the certification being issued, amend the profit-and-loss transfer contract it concluded with EWE AG to the effect that the reservation of retained earnings in § 1(2) of the profit-and-loss transfer contract as well as the clause stating that the retained earnings are to be sold at the request of EWE AG become subject to the control of the supervisory board under § 10d(2), second sentence, of the EnWG. The ruling chamber is to be sent proof of the supervisory board's consent to the profit-and-loss transfer contract under § 10d(2), second sentence of the Energy Industries Act within six months of the certification being issued.
- d) Within six months of the certification being issued, the applicant must amend the information and documentation requirements in the cash pool agreement along with their normal market conditions as follows:
 - (i) The existing cash pool agreement must be amended such that the information requirements for the applicant and EWE AG are made symmetrical. This applies to both the immediate and unsolicited transfer of information and to the type of the information to be sent.
 - (ii) The applicant must ensure - in the context of the current cash pool agreement with EWE AG – that it is immediately informed of unusual circumstances that could affect EWE AG's economic capacity.
 - (iii) The ruling chamber must be shown the interest conditions agreed between EWE AG and the Oldenburgische Landesbank, or at least the ruling chamber must be shown the offers from other banks which show the interest conditions that the applicant could contract on the market.

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. 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.

From the draft decision of BNetzA it appears that GTG Nord receives extensive IT-services from other parts of the VIU. In its draft decision Bundesnetzagentur has included the condition that either the contracts for these services must be terminated and another provider must be contracted, or that the service providers concerned are incorporated by GTG Nord. For both options a transitional period until 31 December 2014 has been given.

The Commission agrees with Bundesnetzagentur that under the ITO-model these services must not be provided to the ITO by other parts of the VIU. However, the Commission questions whether more than two years are necessary to complete the required reorganisation of the services concerned. Given the importance of the services concerned for the operation of the ITO, the Commission requests Bundesnetzagentur to re-assess whether the IT-services can reasonably be separated from the VIU by an earlier date than by the end of 2014, and to require from GTG Nord a detailed roadmap, as well as effective transitory measures to reduce any risk of conflicts of interests and abuses awaiting complete separation.

3. 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. As mentioned here above under 2, Bundesnetzagentur has required GTG Nord to complete the separation of its IT system from the system used by the VIU. However, from Bundesnetzagentur's draft decision it appears that GTG Nord 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 GTG Nord can continue to employ the same external IT contractors provided that these contractors ensure that specific employees are designated to exclusively advise GTG Nord.

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 GTG Nord, 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 invites Bundesnetzagentur to either require in its final certification decision that GTG Nord 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.

4. 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 GTG Nord 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 GTG Nord.

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 GTG Nord, must require that GTG Nord contracts with an auditing company which is different from the one employed by the VIU or any part thereof.

5. Independence of management and staff

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 transposing legislation which requires that shares in the VIU which have been acquired by the management of GTG Nord before 3 March 2012 must be sold, but only by 31 March 2016. For non-management staff no requirement to sell shares in the VIU applies. The Commission questions whether the German transposing legislation is in compliance with the Gas Directive and notes that in certain cases this 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 GTG Nord which are not part of the management.

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 GTG Nord, 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