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COMMISSION OPINION

of 2.7.2020

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC – Finland – Certification of Gasgrid Finland Oy**

(ONLY THE FINNISH VERSION IS AUTHENTIC)

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I. PROCEDURE

On 4 May 2020, the Commission received a notification from the Finnish national regulatory authority for energy, Energy Market Authority (hereafter, "EMA"), in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive"), on a draft decision concerning the certification of "Gasgrid Finland Oy" (hereafter, "Gasgrid") as a transmission system operator ("TSO") for gas.

Pursuant to Article 3(1) of Regulation (EC) No 715/2009² (hereafter, the "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

Gasgrid operates the Finnish gas transmission system consisting of high and low pressure onshore transmission pipelines. In addition, the transmission network includes the "Balticconnector" gas interconnector between Finland and Estonia owned by Baltic Connector Oy (a subsidiary of Gasgrid) and Elering AS (transmission system operator in Estonia).

Until the end of 2019, the Finnish transmission system was owned and operated by the vertically integrated state-owned gas undertaking Gasum Oy.

Gasgrid was established as a separate TSO through a partial demerger from Gasum Oy which became effective in January 2020.

Gasgrid is a state-owned company. The Ministry of Finance of Finland holds 100% of all shares (directly and indirectly through the holding company Suomen Kaasuverkko Oy) and has sole control over the Gasgrid.

Gasgrid has applied for certification in accordance with the ownership unbundling model. In particular, Gasgrid 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. This choice is available to Gasgrid under the Finnish legislation transposing the 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.

In its draft decision, EMA has examined whether Gasgrid fulfils the requirements of ownership unbundling pursuant to Article 9 of Gas Directive. Further to this assessment, EMA has decided that Gasgrid is in compliance with the legal requirements regarding the unbundling provisions. However, as a condition to the certification, EMA requires that the ownership of “Balticconnector” gas interconnector shall be transferred to Gasgrid immediately after the reporting obligations of Baltic Connector Oy towards the European Commission are fulfilled.

III. COMMENTS

On the basis of the information contained in the draft certification decision, as notified on 4 May 2020, the Commission has the following comments.

1. Exercise of control and rights in Gasgrid

Article 9(1)(b)(i) of Gas Directive prohibits the same person or persons from directly or indirectly exercising control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercising control or exercising any right over a transmission system operator or over a transmission system. Article 9(1)(b)(ii) of Gas Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply. Article 9(1)(c) of 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(6) of 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.

Together, these articles constitute the legal background against which the participations of the persons holding participations in Gasgrid need to be analysed.

The State of Finland as a shareholder

The State of Finland holds 100% of the shares (directly and indirectly through the holding company Suomen Kaasuverkko Oy) and has sole control over Gasgrid. The State also has majority and minority shareholdings in various companies that engage in the production and/or supply of electricity and gas.

The Ministry of Finance is responsible for carrying out the State's functions as a shareholder (including through the holding company Suomen Kaasuverkko Oy) of Gasgrid whilst the Prime Minister's Office performs this task for other State participations including those in the state-owned gas and electricity companies. The autonomy of the Ministry of Finance in carrying out its tasks vis-à-vis Gasgrid is ensured through three legal acts: Government Resolution on the State ownership policy (13 May 2016), Decree on the Ministry of Finance (610/2003) and State Shareholdings and Ownership Steering Act (1368/2007, as amended,

‘Act on Ownership Steering’). Based on the latter, the Ministry of Finance is responsible for the corporate governance, the processes and the resolution of those matters linked to the State's ownership. None of the other agencies, institutions, funds, companies and other institutions of the government that are controlled by the Ministry of Finance are involved in generation, production or supply of gas or electricity, apart from the legal obligations related to the system responsibility that Fingrid Oy (the Finnish transmission system operator for electricity) has under the Finnish Electricity Market Act (588/2013).

The Commission is satisfied that the separation between the Ministry of Finance and the Prime Minister's Office is sufficiently safeguarded by the aforementioned legal acts which ensure the required autonomy for the Ministry of Finance in its decision making regarding Fingrid. In particular, the principle of ministerial autonomy ensures that the Prime Minister cannot give instructions to the Ministry of Finance as regards the activities of Gasgrid and that the Ministry of Finance has an independent power of decision in this respect.

2. Ownership of Balticconnector

Article 9(1)(a) of the Gas Directives determines that in the ownership unbundling model each undertaking which owns a transmission system acts as a transmission system operator.

At present Balticconnector pipeline is owned by Baltic Connector Oy, a subsidiary of Gasgrid over which Gasgrid Finland exercises direct control. The control over the “Balticconnector” gas interconnector is carried out through a lease arrangement concluded between Baltic Connector Oy and Gasum Oy on 9 December 2019.

EMA has evaluated whether the control over Balticconnector through a lease agreement with Baltic Connector Oy fulfills the requirement of ownership over the transmission system pursuant to Article 9(1)(a). Gasgrid indirectly holds 100% of all outstanding shares and has sole control over Baltic Connector Oy through a fully owned holding company. Thus, Gasgrid exercises sole operational control over Balticconnector for the part of the interconnector that is owned by Baltic Connect Oy. According to EMA, the purpose of the requirement to own the transmission system is thereby fulfilled and thus the current ownership structure should not be considered as a barrier to the certification. However, EMA has obliged Gasgrid to transfer the ownership of Balticconnector (for the part of the interconnector that is owned by Baltic Connect Oy) to Gasgrid immediately once the reporting obligations of Baltic Connector Oy towards the European Commission are accomplished.

The Commission takes note of the condition imposed by EMA regarding the transfer the ownership of Balticconnector to Gasgrid. In view of this condition, the question as to whether the requirement of Article 9(1)(a) is satisfied by Gasgrid’s ownership of Baltic Connector Oy can remain open.

IV. CONCLUSION

Pursuant to Article 3(2) of the Gas Regulation, EMA shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Gasgrid, 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-a-vis national regulatory authorities on any other notified draft measures concerning certification or vis-a-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. EMA 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, 2.7.2020

For the Commission
Kadri SIMSON
Member of the Commission