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**COMMISSION OPINION**

**of 22.7.2019**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Articles 10(6), 11(6) and 29  
of Directive 2009/73/EC - Germany - Certification of Ferngas Netzgesellschaft mbH as  
combined transmission and distribution system operator**

(ONLY THE GERMAN TEXT IS AUTHENTIC)

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## I. PROCEDURE

On 29 May 2019 the Commission received a notification from the German national regulatory authority (hereafter, 'BNetzA') of a draft decision on the certification of Ferngas Netzgesellschaft mbH (hereafter, 'Ferngas') as an independent transmission operator (hereafter, 'ITO') encompassing the functions of a distribution system operator.

Pursuant to Articles 10 and 11 Directive 2009/73/EC<sup>1</sup> (hereafter "Gas Directive") and Article 3 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. Pursuant to Article 29 of the Gas Directive, the Directive allows for the operation of a combined transmission and distribution system operator, provided the requirements for the unbundling of transmission system operators are met with respect to the entire system operator.

## II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

### 1. APPLICABLE PROCEDURE

The draft decision certifies Ferngas pursuant to Article 4a EnWG, the equivalent of Article 10 of the Gas Directive under German national law. BnetzA did not assess the application of Article 4b EnWG, the equivalent of Article 11 of the Gas Directive.

### 2. THE VERTICALLY INTEGRATED UNDERTAKING

Ferngas is a subsidiary of FS Deutsche Gastransport Zwischenholding GmbH (hereafter 'FS Zwischenholding'), which in turn is owned to a 100 % by FS Deutsche Holding GmbH (hereafter 'FS Holding'). FS Holding is, via several holding entities in the Netherlands and Luxembourg, owned by First State Investments (hereafter 'FSI'). FSI is currently owned by the Commonwealth Bank of Australia, although a sale to the Japanese Mitsubishi UFJ Trust and Banking Corporation is ongoing.<sup>3</sup> As clarified by Ferngas by email of [REDACTED], the Commonwealth Bank of Australia, with seat in Australia, currently has ultimate and full

<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> <https://www.firststateinvestments.com/global/about-us/corporate-profile.html>.

control over Ferngas. Besides Ferngas, FSI has control over several entities active in the energy sector. These notably include the [REDACTED]

Ferngas is owner and operator of two distribution systems in and around the German regions of Thuringia (with a network length of approximately 1100 km) and northern Bavaria (with a length of approximately 2040 km).

Ferngas is also owner of the EGL 401 pipeline, a high pressure pipeline with approximately 250 km length. EGL 401 is currently used to provide approximately 4.4 GWh/h/a of natural gas to the downstream Thuringia distribution network operated by Ferngas, as well as to offer 3.3 GWh/h/a of firm transmission capacity between the GASPOOL and Netconnect Germany market areas at interconnection point Vitzeroda. EGL 401 has further network connection points which are however situated inside the GASPOOL market area. Whereas capacity at point Vitzeroda can be booked on the Prisma platform,<sup>4</sup> no booking by network users is possible at network points between different transmission systems inside the same market area.

Until 1 October 2018, EGL 401 was operated by Open Grid Europe GmbH (hereafter ‘OGE’). OGE ensured control of the pipeline based on a loan agreement with Ferngas. As Ferngas only operated distribution assets, no certification as a transmission operator was sought. As of 1 October 2018, the loan agreement is terminated. Ferngas is since then directly responsible for ownership and operation of the pipeline.

Arguing that the operation of EGL 401 consisted in the operation of a transmission system, Ferngas has requested on 31 July 2018 to be certified as a combined network operator under the independent transmission operator model. Ferngas provided additional information to BNetzA notably on [REDACTED]

According to the draft decision, the vertically integrated undertaking consists of the FSI group, thus including Ferngas and the mentioned activities in electricity markets of other Member States. BNetzA does not consider pure holding entities to form part of the vertically integrated undertaking.

Finally, the vertically integrated undertaking was already vertically integrated on 3 September 2009. In 2009, EGL 401 was owned to 50 % each by E.ON AG and VNG AG, which jointly owned Ferngas Thüringen-Sachsen GmbH. Both E.ON and VNG AG were vertically integrated undertakings at that time.

### **3. QUALIFICATION AS A TRANSMISSION SYSTEM OPERATOR**

BNetzA establishes that EGL 401 is, in the current state, a transmission pipeline. According to BNetzA, German law qualifies pipelines as a transmission system if they (i) have connection points crossing borders of states or market areas and in particular have the purpose of integrating major European import pipelines into the German system, (ii) integrate LNG facilities or gas production facilities into the German system or (iii) have connection points crossing borders of states or market areas at which shippers can book transport capacity. The

<sup>4</sup> <https://platform.prisma-capacity.eu/>.

draft decision finds this to be currently the case, as the bookable interconnection point Vitzeroda also serves the integration of major import pipelines. However, BNetzA makes the decision subject to a condition for Ferngas to inform BNetzA of any changes following the planned merger of the market areas in Germany as of 2021. BNetzA argues that, unless the network topology was to change before then, the status as transmission system operator was likely to be lost after the merger of market areas. The reason for this would be that after the planned merger of the GASPOOL and Netconnect Germany areas, EGL 401 would be a purely internal pipeline without bookable points. BNetzA considers that in this case, Ferngas could no longer be certified as a transmission system operator.

**4. CONDITIONS ATTACHED TO THE CERTIFICATION**

BNetzA decides in the draft decision to grant the certification under the independent transmission operator model subject to the following conditions:

- (a) [REDACTED]
- (b) [REDACTED]
- (c) BNetzA establishes that the Director of Ferngas as well as the three officers with statutory authority do not meet the independence requirements for a certification. [REDACTED]
- (d) Ferngas shall provide BNetzA with all appropriate information on the planned change of control to Mitsubishi UFJ Trust Banking Corporation.
- (e) Ferngas shall provide information on the new network topology at the latest six months before the planned merger of market areas.

**III. COMMENTS**

On the basis of the notification and the additional information provided by BNetzA the Commission has the following comments on the draft certification decision.

**1. THE APPLICATION OF ARTICLE 11 – CERTIFICATION IN RELATION TO THIRD COUNTRIES**

Article 11 Gas Directive determines that where certification is requested by a transmission system owner or transmission system operator that is controlled by a person or persons from a third country or third countries, the regulatory authority shall refuse certification if it has not been demonstrated that the entity concerned complies with the applicable unbundling requirements (Article 11(3)(a)), and/or that granting the certification would not put at risk the security of supply of the Member State and the EU (Article 11(3)(b)).

In the present case, the Commission understands that Ferngas is ultimately owned and controlled by the Commonwealth Bank of Australia, an Australian banking group, and that

the sale to Mitsubishi UFJ Trust Banking Corporation is imminent. The draft decision does not provide for an assessment whether Ferngas is controlled by a person or persons from third countries as set out in Article 11 (1) of the Gas Directive. However, the facts described in the notified draft decision and the further clarification received on 5 July by Ferngas bring the Commission to the conclusion that such an assessment would appear to have been required and that the reasoning for concluding that third country control exists or does not exist would need to be included in the draft certification decision.

The concept of ‘control’ as defined in Article 2(34) of the Electricity Directive and Article 2(36) of the Gas Directive is taken from the EU Merger Regulation<sup>5</sup>. Thus, in its interpretative note on the unbundling regime of the Third Energy Package<sup>6</sup> the Commission has underlined that the concept of control should be understood and assessed in accordance with the Merger Regulation and in particular with the Jurisdictional Notice<sup>7</sup>. The Merger Regulation is also applied by BNetzA in the draft decision. It is important to underline in this respect that Article 11 does not only apply in case of direct control of a transmission system operator by persons from third countries, but also covers all cases where indirect or ultimate control rests with such persons.

The need for such an assessment is independent of any concrete risk for security of supply which would need to have been previously identified. Whether or not such a risk exists can only be established in the course of the assessment. The Commission understands that, under German law, such assessment would also require the involvement of another government entity, the Bundesministerium für Wirtschaft und Energie. Thus, one cannot conclude from the absence of any express statement to this effect that BNetzA has come to the conclusion that there is no risk for security of supply.

In view of the above facts, the Commission takes the view that an assessment under Article 11 has to be carried out by BNetzA before granting certification. The revised draft decision including such assessment under Article 11 shall be notified to the Commission in accordance with Article 10(6) Gas Directive.

## **2. THE VERTICALLY INTEGRATED UNDERTAKING**

The Commission agrees with BNetzA that although FSI group is not active in gas production or supply, activities in electricity production and supply on one hand and gas transmission on the other hand are sufficient to constitute a vertically integrated undertaking. Article 9 (3) Gas Directive expressly sets out that for the purpose of Article 9 (1) b) of that Directive, the activity of electricity generation or supply shall be treated equally to the activity of gas production or supply. Thus, the Directive clearly excludes the possibility for ownership unbundled gas transmission system operators to exercise control over a transmission system and to at the same time exercise control or any right over an undertaking active in electricity generation or supply. The Commission agrees with BNetzA that this provision needs to be interpreted as applying not only in the case of ownership unbundled transmission system operators but also for unbundling in accordance with the ITO model. The purpose of Article 9 (8) of the Gas Directive which allows Member States to provide for the use of other

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<sup>5</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24/1, 29.1.2004 (hereinafter, "Merger Regulation"). See recital 13 Electricity Directive and recital 10 Gas Directive.

<sup>6</sup> [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/sec\\_2011\\_1095.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/sec_2011_1095.pdf), see also Article 2 (36) Gas Directive.

<sup>7</sup> Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

unbundling models (ITO and ISO) is not to enable direct ownership of electricity generation assets by the transmission system operator, or to accept problematic incentives possibly resulting from the ownership of electricity generation assets by gas transmission system operators. Rather, the provision aims at ensuring sufficient independence of the system operator by additional rules aiming at an internal separation within the vertically integrated undertaking. Limiting this separation to activities in the gas or the electricity sector would thus clearly result in weaker unbundling, which was not the objective of the legislator.

However, as expressed in a number of Commission opinions, the Commission does not agree with the assessment of BNetzA, based on German law, that entities within the FSI group, even if they are pure holding entities, do not constitute part of the vertically integrated undertaking. To avoid any risk of circumvention, the vertically integrated undertaking needs to include the entire group of undertakings which are vertically integrated via a line of control, even if just one of these undertakings is active in the energy sector. The Commission recognizes the effort by BNetzA to achieve a similar outcome by applying substantive unbundling requirements also to entities which are not considered to form part of the vertically integrated undertaking under German law. This approach is certainly capable of reducing the risks inherent in the narrow interpretation of the vertically integrated undertaking, but is not capable of fully resolving those risks. Notably, the approach chosen by BNetzA requires to analyse and justify for each individual requirement whether this needs to be applied also to pure holding entities or entities not active in the energy sector, which can reduce transparency and coherence of the unbundling framework. Therefore, the Commission invites BNetzA to ensure the full application of the provisions of Chapter IV of the Gas Directive in relation to all entities of the FSI group.

### **3. QUALIFICATION AS A TRANSMISSION SYSTEM OPERATOR**

The Commission agrees with the assessment of BNetzA that EGL 401 constitutes a transmission system. However, it would like to underline that the definition of “transmission” activities set out in the Gas Directive (Article 2 point (3)) does not require the presence of a bookable point. Under the Gas Directive, any “transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply” constitutes transmission. Under Article 2(4) of the Directive, a transmission system operator is a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of gas. While a part of the gas flows on EGL 401 leads towards local distribution networks, there is no indication that these flows are in itself merely a distribution activity in order to deliver gas to specific final customers. In any event a significant share of the flows originates from linking the GASPOOL and Netconnect Germany transmission networks, confirming the classification as a transmission pipeline.

However, it is important to highlight that the requirements applicable to transmission system operators under the Gas Directive cannot be made subject to additional conditions which would result in a more limited scope of application. In particular, it would be of grave concern if operators of high-pressure pipelines internal to market areas and without bookable points would no longer be subject to unbundling requirements. While part of the discrimination risk which unbundling aims to prevent certainly is linked to bookable points, this is not true for all

risks addressed by the unbundling rules. In particular, relevant information which could be used by market parties to distort competition is still available to such operators, and network operators without bookable points could still take decisions with discriminatory effect e.g. on network development and maintenance. Against this background, it is crucial that all transmission pipelines are operated by operators subject to the unbundling rules, whether those pipelines contain bookable points or not.

**4. CONDITIONS IMPOSED BY BNETZA**

The Commission welcomes the fact that BNetzA has made the certification subject to certain conditions.

The Commission agrees that the possibility for financial investors in ownership unbundled transmission system operators to hold purely passive minority shares under certain circumstances cannot be applied as regards participations in generation or supply undertakings directly held by a transmission system operator. [REDACTED]

[REDACTED]

**5. SEPARATE AUDITING**

The Commission calls upon BNetzA to reassess whether the requirement for separate auditing of a transmission system operator and other parts of the vertically integrated undertaking can be met by charging different auditors within the same auditing firm. Article 17 (6) of the Gas Directive provides that an auditor other than the one auditing the vertically integrated undertaking shall audit the accounts of the transmission system operator. The German version of the Directive (“Die Rechnungslegung von Fernleitungsnetzbetreibern ist von anderen Wirtschaftsprüfern als denen, die die Rechnungsprüfung beim vertikal integrierten Unternehmen oder bei dessen Unternehmensteilen vornehmen, zu prüfen.“) uses the plural speaking of auditors, which indicates that the entire group of auditors should be held separate. Furthermore, as it is usual practice in auditing firms that a number of employees participate in the auditing, it would not be sufficient that the auditor legally responsible for the confirmation would be different. At the very least it would thus be required to ensure that the auditing firm also uses completely separate teams.

**IV. CONCLUSION**

Pursuant to Article 3(2) Gas Regulation, BNetzA shall take utmost account of the above comments of 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. BNetzA 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, 22.7.2019

*For the Commission*

[...]

*Member of the Commission*

