



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 – the Netherlands - Certification of Gas Transport Services B.V.

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I. PROCEDURE

On 3 May 2013 the Commission received a preliminary decision from the Dutch regulatory authority (hereafter, "ACM") on the certification of Gas Transport Services B.V. (hereafter "GTS") as Transmission System Operator (TSO) for gas, in accordance with Article 10(6) of Directive 2009/73/EC¹ (hereafter, "Gas Directive").

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 DECISIONS

GTS is the operator of the entire Dutch onshore gas transmission grid. It is a daughter company of the infrastructure-only gas company Gasunie N.V.. Gasunie N.V. has been unbundled and separated from GasTerra B.V. (hereafter, "GasTerra"), active in the trade and supply of natural gas, in 2005. Both Gasunie and GasTerra are state-owned companies, but controlled by different Ministries.

GTS has applied for certification in accordance with the ownership unbundling model. In particular GTS 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. ACM has analysed whether and to what extent GTS complies with the requirements of the ownership unbundling model. In its preliminary decision, ACM found that GTS is set to comply with the requirements of the ownership unbundling model. On this basis, ACM submitted its preliminary decision to the Commission requesting for an opinion.

III. COMMENTS

On the basis of the present notifications the Commission has the following comments on the draft decisions.

1. 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

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

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 of the Directive are enshrined in national law and are duly complied with. This has to be assessed on a case-by-case basis.

Article 9(1)(b)(i) 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) 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(3) Gas Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of production and supply within the meaning of Electricity Directive 2009/72/EC.

From the preliminary decision it appears that GTS is ultimately fully owned by the Dutch State. The ownership of GTS is administered by the Dutch Minister of Finance. The Dutch State is also a shareholder in two companies active in the generation and/or supply of gas: Energie Beheer Nederland (hereafter, "EBN") (90%), active in the exploration and exploitation of oil and gas, and GasTerra (10%), the exclusive vendor of gas produced from the Groningen field. These participations are managed by the Ministry of Economic Affairs (hereafter, "MEA"). It is worth noting that EBN is also a 40% shareholder in GasTerra.

In its Opinion on Danish TSO Energinet.dk, the Commission considered that two separate Ministries controlling, on the one hand transmission of electricity and gas, and on the other hand activities of production, generation and supply of electricity and gas, can under certain circumstances constitute bodies with a sufficient degree of separation as required by Article 9(6) Gas Directive.³

In its preliminary decision ACM has undertaken an in-depth evaluation of the degree of separation between the two Ministries concerned, focusing primarily on the principle of ministerial responsibility as enshrined in Dutch constitutional law. According to the Dutch constitution Ministers have separate tasks for which they are personally and politically responsible. This includes independent decision-making powers over State participations for which a Ministry manages the State's shareholdings. The Prime Minister is responsible only for areas that are not covered by the Ministries. This also implies that the Ministry of Finance cannot give instructions to MEA or vice versa. The same applies to the Prime Minister. Moreover, the separation of competences applies throughout the entire organization of a Ministry including to each individual public official employed by the Ministries concerned.

The Commission agrees with ACM's conclusion on this point that, on the basis of the elements described above, the structural separation of competences provides for a degree of separation between the Ministry of Finance and MEA that is sufficient to comply with Article 9(6) Gas Directive.

³ Commission Opinion of 9.1.2012 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Denmark - Certification of Energinet.dk (gas), C(2012) 88 final

The Commission is however concerned about a number of explicit tasks and competences that MEA has with regard to GTS on the basis of the Dutch Gas Act. These competences include the power of approval of the bylaws of GTS and the power of approval of special investments.

The Commission notes that complying with the ownership unbundling model within the state does not only imply compliance with Article 9(6), but also with the Article 9(1)(b), (c) and (d). This means *inter alia* that the competences of MEA, insofar as its power over GasTerra and/or EBN amounts to control, with regard to GTS may not amount to any right within the meaning of Article 9(1) and (2) Gas Directive. Moreover, the Commission recalls that the reason for the obligation to strictly separate the public bodies is to ensure independence with regard to transmission on the one hand and generation and supply on the other. The existence of the tasks demonstrates that the separation of the two public bodies, although ensured in structure, can in practice be called into question.

From the preliminary decision of ACM and the appendices to it concerning requests of information from GTS, it appears that there are a number of reasons and justifications for the fact that MEA is the body carrying out these tasks. It is put forward that the competences relate to MEA's general responsibility for Dutch energy policy, which include responsibility for security of energy supply in the Netherlands and the economic use of indigenous natural resources under the so-called small fields policy. GTS performs a number of tasks in that context.

With regard to the power of MEA to approve the bylaws of GTS, it appears from the legislative history of the relevant article in the Dutch Gas Act, that this task is meant exclusively to ensure that other (commercial) activities employed by the holding company of GTS, Gasunie, do not interfere negatively with the independent operation of the network. Whilst the Commission agrees that it is important that activities that groups to which a TSO belongs do not undertake activities that affect either the independent operation of the network or its financial viability, the Commission notes that this clear objective does not appear from the text of the Gas Act which does not explicitly restrict the scope to this end. The Commission moreover questions whether MEA, which has direct and indirect participations in GasTerra, is the appropriate person to which such a task should be assigned, given that it is aimed at ensuring the financial and operational independence of GTS.

The power of MEA to approve special investments of GTS by way of establishing their necessity is, according to the legislative history of the relevant provisions in the Gas Act, first and foremost a means to give upfront certainty to GTS with regard to its possibility to recoup efficiently made investment costs through inclusion of the investment in its regulated asset base, whereby ACM assesses the efficiency of the investment. The particular focus of MEA in its assessment on the necessity of the investment is on the impacts the investment will have on security of supply as well as on its costs and benefits. The Commission notes that in any case whereby a person holding interests in gas production and supply at the same time has a decisive say in whether or not important investments in gas transmission infrastructure can go ahead or not, the incentive arises to abuse the control over the investments in the TSO with a view to favour the generation or supply interests, *in casu* by keeping potential competitors out of the market through preventing investments from taking place. This is a general principle not confined to the Gas Act. Although the legislative history of the Gas Act clearly indicates that the relevant provisions are principally aimed at ensuring security of supply and facilitating permitting procedures and are thus meant to ensure that investment can go ahead – rather than being prevented – it is unclear on the basis of the legal text of the provision itself, whether in practice it is conceivable that a situation could occur in which the apparent conflict of interest can result in negative effects on the independent development of the network.

The Commission therefore invites ACM, before taking its final certification decision, to assess in detail the way in which MEA can carry out these two tasks and whether or not that gives rise to the incentive and the ability for MEA to influence the decision making in the transmission system operator in order to favour MEA's generation and supply interests to the detriment of other network users. Only in case where ACM's assessment concludes that such an incentive and ability are clearly absent can compliance with the ownership unbundling requirements in Article 9 Gas Directive be considered to be achieved.

IV. CONCLUSION

Pursuant to Article 3(2) of the Gas Regulation, ACM shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of GTS, and when they do 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. ACM 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