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[...] (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 - Certification of GASCADE Gastransport 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/EC<sup>1</sup> (hereafter, "Gas Directive"), of a draft decision on the certification of "GASCADE Gastransport GmbH" (hereafter, "GASCADE") 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

GASCADE is a transmission system operator for gas in Germany. GASCADE operates a gas transmission network of approx. 2300 km in Germany and employs approximately 300 persons. GASCADE is wholly owned by W&G Beteiligungs-GmbH & Co.KG (hereafter, "W&G"). W&G is on the one hand partially owned by Wintershall Erdgas Beteiligungs-GmbH (50,02%), which is owned by Wintershall Holding GmbH, company which is owned for [BUSINESS SECRET] directly by BASF [BUSINESS SECRET] and for [BUSINESS SECRET] by BASF [BUSINESS SECRET]. On the other hand, W&G is partially owned by GAZPROM Germania GmbH (49,98%), whose only shareholder is OOO GAZPROM export which in turn is owned by OAO GAZPROM. W&G also is the sole owner of OPAL NEL TRANSPORT GmbH of 1. WINGAS Projektgesellschaft mbH, as well as of WINGAS GmbH, which has several daughter companies active in the areas of gas trading, supply and storage.

In order to comply with the applicable rules on unbundling of transmission system operators, GASCADE has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to GASCADE 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 belongs to a vertically integrated undertaking a Member State

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<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.

may decide not to apply paragraph 1, provided that the Member State concerned complies with the provisions of Chapter V, establishing requirements for independent transmission operators (Articles 17 to 23 Gas Directive).

Bundesnetzagentur has analysed whether and to what extent GASCADE complies with the unbundling rules of the ITO model as laid down in the EnWG. Bundesnetzagentur has come to the preliminary conclusion that GASCADE complies with these requirements, provided that a number of conditions are fulfilled. The draft certification decision of GASCADE is issued subject to the following conditions:

- "a) The IT separation is to be completed in full by 1 January 2013 at the latest.
- b) The physical separation is to be completed in full by 1 January 2013 at the latest.
- c) The profit-and-loss transfer contract concluded between the applicant and W&G Beteiligungs-GmbH & Co. KG is to be approved by the applicant's supervisory board no later than six months after the issue of certification. The commitment in § 1, paragraph 2 of the profit-and-loss transfer contract linking the reservation of retained earnings to the consent of the W&G Beteiligungs GmbH & Co. KG is to be deleted within six months of the certification being issued.
- d) [BUSINESS SECRET]
- e) The applicant's obligation to adhere to the BASF corporate guidelines shall cease within six months of the certification being issued. If BASF SE does not revoke this obligation, the applicant can simply declare that it no longer applies the corporate guidelines.
- f) [BUSINESS SECRET]
- g) The applicant must, within six months of the certification being issued, amend the standard employment contract and the management agreements to reflect the non-application of the BASF corporate guidelines.
- h) The applicant must, within six months of the certification being issued, discontinue the granting of [BUSINESS SECRET] under the [BUSINESS SECRET] to the applicant's management. The applicant must ensure that the affected persons in the company management sell [BUSINESS SECRET] by 31 March 2016.
- i) The applicant must, within six months of the certification being issued, delete the clause in the company management's contracts which links the compensation of the company management to the economic performance of the BASF group.
- j) The applicant must, within six months of the certification being issued, amend the 'guideline on the unbundling of the transport network' and the standard employment contract in such a way that the applicant is both part of the vertically-integrated energy distribution undertaking of the Wintershall Group and part of the vertically-integrated energy distribution undertaking of the GAZPROM export group."

Moreover, it is stipulated in the draft decision that the following activities are subject to the provisions of Section 10c(6) EnWG: "the management of the divisions [BUSINESS SECRET]."

### 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. Definition of VIU**

Article 2(20) Gas Directive provides for a definition of the concept of VIU as '*a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas*'. The definition of VIU is relevant for the application of a considerable number of provisions of the ITO model. In its draft decision, Bundesnetzagentur makes reference to the concept of VIU as defined in the EnWG. The Commission questions whether the definition in the German legislation is in compliance with the Gas Directive. The Commission notes that the definition of VIU in the EnWG, inter alia, seems to exclude categorically without apparent justification companies which are controlled by the VIU but are located outside the EU.

In view of the above, the Commission questions the fact that BASF SE and OAO GAZPROM are excluded from the definition of VIU in the present case. As regards BASF SE, the Commission notes that this company is – although to a limited extent – active in the generation and distribution of electricity. The fact that BASF SE uses this electricity largely for its own consumption does not change the fact that it is active in the generation of electricity, which includes it in the definition of VIU. As regards OAO GAZPROM, the fact that the company itself does not carry out energy functions within the EU, but does so through its subsidiary OOO GAZPROM export, is not relevant for establishing the scope of the VIU either, as the Gas Directive does not foresee a specific geographical restriction in the definition of the term 'VIU'. The Commission therefore invites Bundesnetzagentur to clarify in its final decision that the relevant companies or groups of companies to be considered as part of the VIU include in any event BASF SE and OAO GAZPROM.

## **3. 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 GASCADE owns the largest part of the transmission system it operates, except for [BUSINESS SECRET] access pipelines ("Anschlussleitung") where GASCADE is co-owner. [BUSINESS SECRET].

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, none of the [BUSINESS SECRET] co-owners are independent from production and supply interests [BUSINESS SECRET]. The Commission therefore invites the Bundesnetzagentur to ensure in its final decision by means of including a condition that the ownership of these access pipelines is altered in such a way that only one or more TSOs have (co-)ownership of these pipelines.

## **4. IT consultants and contractors**

According to Article 17(5) Gas Directive, the TSO shall not use the same consultants or external contractors for IT systems or equipment as any other part of the VIU. In its draft decision, Bundesnetzagentur has required GASCADE to complete the separation of its IT system from the system used by the VIU by 1 January 2013. However, from Bundesnetzagentur's draft decision it appears that GASCADE 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 GASCADE can continue to employ the same external IT contractors provided that these contractors ensure that specific employees are designated to exclusively advise GASCADE.

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 GASCADE, 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 interest and abuses are avoided. The Commission invites Bundesnetzagentur to either require in its final certification decision that GASCADE 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.

#### **5. 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 draft decision that companies of the BASF-group, i.e. BASF IT Services GmbH and BASF IT Services Holding GmbH, provide certain IT-services to GASCADE. The Commission considers that Bundesnetzagentur has not sufficiently demonstrated that these services, even if they are as such strictly necessary for the operation of the transmission system, could not also be provided by other service providers which are not related to the VIU, now or in the foreseeable future. The Commission therefore considers that Bundesnetzagentur should reassess these contracts for services in its final decision, in order to ensure full independence and autonomy of the ITO.

#### **6. Separation of premises**

According to Article 17(5) Gas Directive, the TSO shall not share, *inter alia*, the physical premises and security access systems with any part of the VIU. GASCADE is currently still using the same premises as other parts of the VIU, but intends to separate the premises and the security access systems by 31 December 2012 and April 2013, respectively. However, the dispatching centre, as well as the data processing centre, will remain in the same building where also the offices of the VIU are located. From the draft decision it does not become sufficiently clear whether the envisaged separation of the dispatching centre and the data processing centre will be effective, and will be able to remove any confusion in respect of the separate identities of the ITO and the VIU. The Commission considers that in the present case a more rigorous separation of premises is required than currently envisaged, and invites Bundesnetzagentur to strengthen the requirements in its final decision in order to ensure an effective separation in accordance with Article 17(5) Gas Directive.

#### **7. 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 GASCADE 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 GASCADE.

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 GASCADE, should require that GASCADE chooses an auditing company which is different from the one employed by the VIU or any part thereof.

## **8. Management Board – powers**

Chapter IV of the Gas Directive provides for a detailed division of powers between the various bodies of the ITO, including between the Management Board and the Supervisory Body. According to the articles of association of GASCADE, prior authorisation by the Supervisory Body is needed for a number of decisions, e.g. the buying and selling of shareholdings or the change of shares in a company. In addition, the Supervisory Body can decide to make other transactions subject to its prior authorisation. Although the articles of association also state that the prior authorisation of the Supervisory Body is not needed if the transaction is part of the day-to-day business, the Commission underlines that it must be clear that all transactions related to the day-to-day business and the preparation of the ten year network development plan may not be subject to the prior authorisation of the Supervisory Body. The Commission therefore considers it necessary that Bundesnetzagentur reassesses whether the articles of association are in line with the provisions of the ITO model, or whether they need to be adapted in order to unconditionally confirm the powers of the Management Board as regards the day-to-day business of the TSO and the preparation of the ten-year network development plan, without any requirement to seek or obtain the approval of the Supervisory Body.

## **9. Independence of the TSO**

Article 18(1)(a) Gas Directive provides that the TSO shall have effective decision-making rights, independent from the vertically integrated undertaking. In its draft decision, Bundesnetzagentur explains why the application of BASF's corporate guidelines to GASCADE is not in line with the unbundling provisions of the EnWG. The Commission agrees with this analysis, but considers however, that a transitional period of 6 months from the date of the final certification decision is too long. The Commission invites Bundesnetzagentur to reassess whether a termination of the application of BASF's corporate guidelines at a shorter notice would not be possible. The same observation applies to the standard employment contract and the management agreements of BASF which are currently applied by GASCADE as well. The Commission invites Bundesnetzagentur to assess whether these contracts and agreements cannot be adapted earlier than 6 months after the date of the final certification decision.

## **10. Independence of management**

According to Article 19(5) Gas Directive, management and employees of the ITO shall [BUSINESS SECRET], directly or indirectly, [BUSINESS SECRET].

In its draft decision, Bundesnetzagentur points out that the [BUSINESS SECRET] of the management of GASCADE still includes the possibility to receive share options, which [BUSINESS SECRET] of GASCADE's management [BUSINESS SECRET]. Bundesnetzagentur also makes reference to the German transposing legislation which requires

that [BUSINESS SECRET], which have been acquired by the management before 3 March 2012 must be sold, but only by 31 March 2016, while 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 it may undermine the effective independence of the ITO. The Commission invites Bundesnetzagentur to require in its final decision that the possibility for the management [BUSINESS SECRET] stops to exist immediately at the date of the final certification decision, and that the management sell their [BUSINESS SECRET] 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 GASCADE which are not part of the management.

In addition, as the remuneration of GASCADE's management, i.e. [BUSINESS SECRET], Bundesnetzagentur rightly states that this is not in compliance with the unbundling provisions of the EnWG transposing Article 19(5) Gas Directive. The Commission also agrees with Bundesnetzagentur's conclusion that the management agreements have to be changed in this regard, i.e. that the provisions [BUSINESS SECRET] of GASCADE's management to the [BUSINESS SECRET] have to be deleted from the contracts. However, Bundesnetzagentur allows GASCADE 6 months to achieve this. The Commission considers this period too long and believes that this adaptation should be a precondition for a positive certification decision. Therefore, Bundesnetzagentur is invited to assess whether these agreements could not be adapted by the date of certification already.

#### 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 GASCADE, 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*