



EUROPEAN COMMISSION

Brussels, 6.12.2011  
C(2011) 8984 final

**COMMISSION OPINION**

**of 6.12.2011**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of  
Directive 2009/73/EC - Hungary - Certification of FGSZ**

only Hungarian text authentic

## COMMISSION OPINION

of 6.12.2011

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Hungary - Certification of FGSZ**

only Hungarian text authentic

### I. PROCEDURE

On 6 October 2011, the Commission received a notification from the Hungarian national regulatory authority, Hungarian Energy Office (hereafter "HEO"), in accordance with Article 10(6) Directive 2009/73/EC<sup>1</sup> (hereafter "Gas Directive"), of a draft decision on the certification of the transmission system operator for gas "FGSZ Földgázszállító Zártkör•en M•köd• Részvénytársaság" (hereafter "FGSZ"), dated 30 September 2011.

Pursuant to Article 3(1) of Regulation (EC) No 715/2009<sup>2</sup> (hereafter "Gas Regulation") the Commission should examine the notified decision and deliver an opinion to the relevant national regulatory authority as to its compatibility with Article 10(2) and Article 9 of Directive 2009/73/EC.

### II. DESCRIPTION OF THE NOTIFIED DECISION

#### Background

FGSZ is the transmission system operator for natural gas in Hungary. It owns and operates 5,577 Km of high pressure pipeline and related operational, metering and IT equipment. In 2010 it employed on average 766 employees and transported 18.68 bcm gas to both Hungarian and foreign customers. In order to comply with the applicable rules on unbundling of transmission system operators, FGSZ has chosen the Independent Transmission Operator (ITO) model, referred to in Article 9(8)(b) Gas Directive. This choice is available to FGSZ under the Hungarian legislation transposing the Gas Directive.

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

---

<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 1228/2003, OJ L 211/36 of 14.8.2009.

with the provisions of Chapter IV, establishing requirements for independent transmission operators (Articles 17 to 23 Gas Directive).

HEO has analysed whether and to what extent FGSZ complies with the unbundling rules of the ITO model as laid down in the Hungarian legislation transposing the Gas Directive. In its draft decision, HEO has identified a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. The measures concerned have been summarized in paragraphs II.-IV of the draft decision of HEO. Compliance with these measures is formulated as a condition for a positive final certification decision.

These conditions are:

- FGSZ shall, within 20 days of lifting the suspension of the certification procedure, provide evidence to HEO that its contracts with the vertically integrated undertaking except the ones referred to in Article 18(7) of the Gas Directive have been terminated, and that it will not use services of the vertically integrated undertaking as from 3 March 2012.
- FGSZ shall, within 20 days of lifting the suspension of the certification procedure, provide evidence to HEO that it uses consultants or contractors for its security access systems other than the ones used by the vertically integrated undertaking.
- FGSZ shall, within 20 days of lifting the suspension of the certification procedure, provide evidence to HEO that it is audited by an auditor other than the ones used by the vertically integrated undertaking.
- FGSZ shall, within 20 days of lifting the suspension of the certification procedure, provide evidence to HEO that a compliance officer fulfilling the requirements of the Gas Directive has been appointed and submit supporting documents.

In order to be able to take utmost account of the opinion of the Commission, HEO has formally suspended its certification procedure until it receives the Commission's opinion.

### **III. COMMENTS**

On the basis of the present notification the Commission has the following comments on the draft decision.

- **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 ('VIU'). The Commission agrees with HEO 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.

- **Tasks of the ITO**

According to the Gas Directive, the ITO is required to carry out the activity of gas transmission, including all the tasks of a TSO under Article 12 as well as a number of

additional tasks listed in Article 17(2) Gas Directive. For all these tasks the ITO has to be autonomous. The Commission acknowledges HEO's positive assessment regarding FGSZ's human, technical, physical and financial capabilities to carry out these tasks. In this regard the Commission takes note of HEO's statement, as set out in chapter IV, point 6 of the notified draft decision, that it will entrust FGSZ with the referred tasks in a dedicated TSO license once it has completed the present certification procedure..

- **Contracts for services between the VIU and the ITO**

*A. 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 from other parts of the VIU to 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 it appears that HEO, as a condition for a positive certification decision, has asked for the termination of all contracts for services provided to the ITO by other parts of the VIU, at the latest by 3 March 2012. The Commission supports this requirement and invites HEO to verify compliance before issuing its final certification decision and on an ongoing basis thereafter.

*B. Services provided by the ITO to other parts of the VIU*

Article 17(1)(c) Gas Directive allows in specific circumstances for the provision of services by the ITO to other parts of the VIU, in particular if there is no discrimination of other system users, if there is no restriction of competition in production or supply and if the regulatory authority has approved the provision of the services concerned. In paragraph II, point 1 of its draft decision HEO requires FGSZ to terminate all its contracts with the VIU except its commercial and financial agreements with the VIU as referred to in Article 18(7) of the Gas Directive. However, HEO does not make clear in its draft decision which agreements between the ITO and the VIU can remain in place. The Commission considers that HEO should provide an analysis of the contracts concerned and assess whether the conditions of Article 17(1)(c) Gas Directive have been met. The Commission furthermore considers that in situations where a functioning market for the services concerned cannot be identified, HEO should assess whether the terms of the contract can be considered cost reflective so as to ensure that there is no undue cross subsidization between the ITO and the VIU. HEO should take the outcome of its assessment into account in its final certification decision.

- **Corporate identity, communication and branding**

According to Article 17(4) Gas Directive, the ITO must not, in its corporate identity, communication or branding create confusion in respect of the separate identity of other parts of the VIU. This implies a general obligation to avoid any confusion for consumers between the ITO and the supply company. From FGSZ's corporate handbook, as submitted in the notification, it appears that FGSZ consistently adds to its logo the words 'Member of the MOL Group'. Although the MOL Group, as a reference to the VIU to which FGSZ belongs, does not appear in the official name of the ITO, adding these words consistently in its official communication and in its general appearance creates confusion as to its independence from the VIU and is not in line with the Gas Directive. Therefore, the Commission considers that HEO in its final certification decision should require FGSZ to desist from adding the words 'Member of the MOL Group' to its logo in its public communication and appearance.

- **Shareholding in subsidiary of VIU**

According to Article 18(3) Gas Directive, the ITO shall neither have any direct nor indirect shareholding in any subsidiary of the VIU performing the functions of production or supply. In its draft decision HEO has not made clear whether it has verified that FGSZ indeed has no such shareholdings. The Commission considers that HEO should clarify in its final certification decision how the above requirement has been met.

- **Management Board - independence**

According to Article 19(3) Gas Directive, the majority of members of the Management Board cannot have exercised any professional position or have had any responsibility or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. HEO's notification provides declarations that these conditions are met for all three sitting board members of FGSZ. However, FGSZ's statutes provide that the term of the three sitting board members will end on 31 December 2011. The Commission considers that HEO should examine the independence of the new members as soon as they are nominated by the Supervisory Body and make its assessment explicit in the final certification decision.

- **Supervisory Body - independence**

According to Article 20(3) *juncto* 19(3) Gas Directive, the independent members of the Supervisory Body cannot have exercised any professional position or have had any responsibility, interest or business relationship, directly or indirectly, with any part of the VIU, or with its controlling shareholders, for a period of three years before their appointment. HEO's draft decision considers that these conditions are met for two of the six members of the Supervisory Body. At the same time the statutes of FGSZ provide that the term of four Supervisory Body members including the two independent members will end on 31 December 2011. The Commission considers that HEO should examine the independence of the new members as soon as they are nominated and make its assessment explicit in the final certification decision.

- **Compliance programme and compliance officer**

According to Article 21(2) Gas Directive, the compliance officer of the ITO must fulfil requirements of independence similar to those which relate to the majority of members of the Management Board. HEO states in its draft decision that since FGSZ's compliance officer has not yet been appointed it cannot assess whether the requirements of independence are met. From the draft decision it appears that HEO, as a condition for a positive certification decision, has requested FGSZ to provide evidence in due course that a compliance officer fulfilling the requirements of the Gas Directive has been appointed. The Commission supports this requirement and invites HEO to examine the independence of the compliance officer as soon as the person is nominated and make its assessment explicit in the final certification decision.

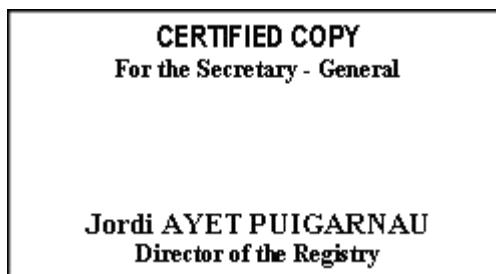
Pursuant to Article 3 Gas Regulation, HEO shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of FGSZ, and when it does so, shall communicate this decision to the Commission.

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, on 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. HEO 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 you wish to have deleted prior to such publication<sup>3</sup>. Reasons should be given for any such request.

Done at Brussels, 6.12.2011

*For the Commission*  
*Günther OETTINGER*  
*Member of the Commission*



---

<sup>3</sup> Your request should be sent by email to [to be completed]