



Brussels, 20.12.2017  
C(2017) 9028 final

**COMMISSION OPINION**

**of 20.12.2017**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of  
Directive 2009/73/EC – Austria – Certification of Gas Connect Austria GmbH**

## COMMISSION OPINION

of 20.12.2017

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Austria – Certification of Gas Connect Austria GmbH**

### I. PROCEDURE

On 31 October 2017, the Commission received a notification from the Austrian national regulatory authority, Energie-Control Austria (hereafter, "E-Control"), 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 the transmission system operator (hereafter, "TSO") for gas, "Gas Connect Austria GmbH" (hereafter "GCA"), on the basis of the application of GCA of 5 July 2017.

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 Directive 2009/73/EC.

### II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

GCA is a transmission system operator for gas in Austria. By decisions of E-Control of 6 July 2012 and 18 July 2014, respectively, for different parts of the network operated by GCA, GCA has been certified as Independent Transmission Operator (ITO) in the meaning of Article 9(8)(b) Gas Directive.

By decision of E-Control of 6 July 2012<sup>3</sup>, GCA was certified for the operation of the following pipelines:

- South-East Gaspipeline (SOG)
- Hungary-Austria Gaspipeline (HAG)
- Penta West Gaspipeline (PW)
- Kittsee-Petržalka Gaspipeline (KIP)
- Primärverteilungssystem 1 (PVS 1)

By decision of E-Control of 18 July 2014,<sup>4</sup> GCA was certified for the operation of the West-Austria Gaspipeline (WAG).

*New certification application of GCA*

---

<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> Cf. the Commission's Opinion of 1 June 2012 on E-Control's draft certification decision (C(2012)3734).

<sup>4</sup> Cf. the Commission's Opinion of 16 June 2014 on E-Control's draft certification decision (C(2014)4092).

By transaction of 15 December 2016, 49% of the shares in GCA, previously held by OMV AG via its subsidiary OMV Gas & Power GmbH, were sold and transferred to AS Gasinfrastruktur GmbH. AS Gasinfrastruktur GmbH is a holding company which is indirectly owned by Allianz SE (holding 60% of the shares) and Snam SpA (holding 40% of the shares).

Further to this transaction, GCA submitted on 5 July 2017 an application for re-certification as ITO pursuant to Article 9(8)(b) Gas Directive.

E-Control has analysed whether and to what extent GCA continues to comply with the unbundling rules of the ITO model as laid down in the Austrian legislation transposing the Gas Directive.

In its draft decision, E-Control has identified in its preliminary decision a number of measures which still remain to be taken in order to ensure full compliance with the unbundling rules. E-Control thus proposes to issue a positive certification decision subject to the fulfilment of the following conditions:

- (a) GCA shall have valid articles of association in accordance with the draft submitted in its application, by 1 May 2018 at the latest.
- (b) GCA shall have valid by-laws for the supervisory board in accordance with the draft submitted in its application, by 1 May 2018 at the latest.
- (c) GCA shall have valid by-laws for its management in accordance with draft submitted in its application, by 1 May 2018 at the latest.
- (d) The deadlines laid down in points a to c may be exceeded by six months in exceptional cases, if the regulatory authority finds that the delay is attributable to circumstances beyond the control of GCA.

### **III. COMMENTS**

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

#### **Scope of the vertically integrated undertaking (VIU)**

The provisions of Chapter IV of the Gas Directive on the ITO model impose a number of structural and behavioural safeguards in order to reduce the risk of undue influence over the ITO by the VIU.

Pursuant to Article 2(17) Gas Directive, a VIU is defined 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.

For the purpose of establishing whether a TSO applying for certification as ITO complies with these requirements of Chapter IV Gas Directive, it is thus necessary to first establish the scope of the VIU.

In Section 3 of the draft decision, E-Control elaborates on the scope of the VIU. E-Control refers to the ownership structure of GCA (i.e. 51% OMV Gas & Power GmbH; 49% AS Gasinfrastruktur GmbH) but does not provide any information on the extent to which the respective shareholders exercise control over GCA. In respect of the new shareholders of GCA, E-Control notes that Allianz SE does not control any undertakings active in the

production or supply of natural gas, and that SNAM RETE Gas SpA, a 100% subsidiary of SNAM SpA, has been certified as a TSO under the ownership unbundling model.

While it appears, based on the above, that E-Control considers neither Allianz SE nor SNAM SpA to qualify as a VIU in the meaning of Article 2(17) Gas Directive, the Commission invites E-Control to clarify this point in its final decision.

### **Independence of the management of the ITO**

Pursuant to Article 19(3) Gas Directive, the persons responsible for the management of the ITO shall not hold a professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking for a period of three years before their appointment.

The provision in Austrian law transposing this requirement (§ 114(1) point 2 of the Gas Act) had previously been applicable only to appointments occurring after 3 March 2012. The respective provision has recently been amended and the reference to this cut-off date has been removed, effective as from 26 July 2017.

The Commission considers that, further to this amendment, E-Control should re-assess in its final decision whether the management of GCA complies with the independence requirements set out in Article 19(3) Gas Directive.

### **Independence of the Supervisory Body of the ITO**

Pursuant to Article 20(3) Gas Directive, at least half of the members of the Supervisory Body minus one shall comply with the independence requirements applicable to the persons responsible for the management of the ITO as set out in the first subparagraph of Article 19(2) and Article 19(3) to (7) Gas Directive.

The provision in Austrian law transposing this requirement (§ 115(2) of the Gas Act) had previously provided that employee representatives appointed to the Supervisory Body are automatically deemed to fulfil this requirement. The respective provision has recently been amended and the aforementioned presumption of compliance has been removed, effective as from 26 July 2017.

The Commission considers that, further to the amendments to §§ 114(1) point 2 and 115(2) of the Gas Act, E-Control should re-assess in its final decision whether the supervisory board of GCA complies with the independence requirements set out in Article 20(3) Gas Directive.

### **Competences of the Supervisory Body**

Pursuant to the third condition imposed by E-Control in its draft decision (Point II.c.), GCA shall have valid by-laws for its management in accordance with draft submitted in its application, by 1 May 2018 at the latest.

The draft by-laws stipulate that for certain transactions and measures, the management of GCA has to obtain the approval of the supervisory board of GCA.

Article 20 Gas Directive provides that the decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day to day activities of the transmission system operator and management of the network.

In its draft decision, E-Control considers that the envisaged changes of the management by-laws of GCA do not undermine the independence of GCA or the decision-making authority of its management.

However, the Commission considers that some of the areas where the draft by-laws submitted by GCA require the approval of the supervisory board may fall into the area of day to day activities of the TSO or the management of the network. In particular, this concerns the approval requirements set out in § 4 (1) (s)<sup>5</sup>, (u)<sup>6</sup> and (v)<sup>7</sup> of the draft by-laws. Requiring the approval of the supervisory board in these areas could impede the independent decision-making by the management of GCA, notably for the purpose of hiring expert staff, procuring services essential for the management of the network (such as IT services) or seeking legal redress in relation to the provision of transmission services.

Therefore, the Commission invites E-Control to re-assess the compatibility of the draft by-laws for the management of GCA with the provisions of Article 20 Gas Directive and to order GCA to amend the by-laws to the extent necessary to ensure compliance.

#### IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, E-Control shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of GCA, 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.

---

<sup>5</sup> Conclusion and significant amendments of employment contracts setting out a gross annual salary of more than 150 000 Euro.

<sup>6</sup> Conclusion, termination or amendment of contracts with a run-time of more than three years and a value of more than 5 million Euro.

<sup>7</sup> Initiating court proceedings if the value of the claim exceeds 35 million Euro.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. E-Control 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 for such a request should be given.

Done at Brussels, 20.12.2017

*For the Commission  
Miguel ARIAS CAÑETE  
Member of the Commission*