



EUROPEAN COMMISSION

Brussels, **XXX**  
[...] (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 - terranets bw GmbH**

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### I. PROCEDURE

On 10 July 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 "terrannets bw GmbH" (hereafter, "terrannets") 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

terrannets is a transmission system operator for gas in Germany. It operates a gas transmission network of 1900 km covering the area of Baden-Württemberg and some parts of Switzerland, Austria and Liechtenstein. terrannets employs approximately 186 persons. terrannets is owned and controlled by EnBW Eni Verwaltungsgesellschaft mbH (hereafter, "EnBW Eni"), which is a 50-50 joint venture of EnBW Energie Baden-Württemberg AG (hereafter, "EnBW") and Eni International B.V., a 100% subsidiary of Eni S.p.A. (hereafter, "Eni"). EnBW Eni also owns 100% of GasVersorgung Süddeutschland GbmH (hereafter "GVS"). EnBW, Eni and GVS are all active in generation, production and supply of electricity and/or gas.

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

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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.

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

- a) The provision of services to the applicant by RBSwave GmbH shall be terminated by 30 June 2013 at the latest.
- b) The IT separation is to be completed in full by 1 August 2012 at the latest.
- c) The physical separation from Gasversorgung Süddeutschland GmbH is to be completed by 31 December 2012 at the latest.
- d) Point 3.1.5 shall be deleted from the internal regulations for management at the latest six months after certification is issued.
- e) The existing joint credit agreement between the applicant, EnBW ENI and GVS shall be terminated by 31 December 2014 at the latest.
- f) The suspended employment contract between the Director-General of the applicant, and [BUSINESS SECRET] shall be rescinded at the latest six months after certification is issued, or the employment contract and position as Director-General of the applicant shall be terminated.

Moreover it is stipulated in the draft decision that the management of the divisions 'Finance & IT' and 'Committees, legal and personnel' are subject to the provisions of Section 10c(6) EnWG.

### **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. 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 while terranets owns the largest part of the transmission system it operates, a part of approximately 150 kilometer of the transmission system is co-owned for 50% together with Open Grid Europe GmbH (hereafter, "OGE"). OGE is another gas TSO in Germany which must be certified.

Bundesnetzagentur explains in its draft decision that co-ownership ("Bruchteilsigentum") implies in the present case that terranets, as co-owner, is free to operate and commercially exploit 50% of the capacities of the relevant part of the transmission system. The freedom of terranets to operate and manage its part only ends where it would affect the rights of the other party. terranets also has the right to make investments in the expansion of its part of the system, which the other party is not entitled to refuse.

The Commission agrees with Bundesnetzagentur that in cases as the present one, where there is co-ownership ("Bruchteilseigentum") by two TSOs of a part of a transmission system, where these TSOs have rights of use and disposal on their respective parts of the transmission system which allow them to operate their part and develop it independently without being hindered, so that the TSOs have entitlements in practice equivalent to those arising from a sole owner of the transmission system assets, the certification of such TSOs should in principle not be withheld as regards compliance with Article 9(1)(a) of the Directive.

### **3. 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. As a preliminary remark the Commission considers that in view of the general prohibition of services provided to the ITO by other parts of the VIU, derogation could only be envisaged in exceptional circumstances. Such derogation should be construed narrowly and should not go beyond what is strictly necessary to protect overriding interests, such as the security and the reliability of the transmission system. Only in exceptional cases, where the services concerned are strictly necessary to protect overriding interests as referred to above, and where no other service provider except for the VIU could provide these services to the ITO, could a derogation possibly be considered justified. Such derogation should also in principle be of a transitional nature, limited in time. In addition, it should be ensured that transactions between other parts of the VIU and the ITO occur at arm's length in order to avoid cross subsidisation.

In its draft decision Bundesnetzagentur has not sufficiently clearly demonstrated that all the services which are provided to the ITO by other parts of the VIU in the present case are strictly necessary to protect the overriding interests referred to above. Nor has Bundesnetzagentur assessed whether the services concerned, even if strictly necessary, could also be provided by other service providers not related to the VIU, now or in the foreseeable future.

The Commission considers that in the present case contracts for services provided to the ITO by other parts of the VIU, in particular those listed in Sections 2.3.4 and 2.4.5 of the draft decision (such as, but not limited to, the provision of immediate safety measures in case of interruptions and emergencies, the provision of security services, the maintenance of the stations at the interconnection points to the network of terranets, a framework contract for the supply of electricity, a supply contract for the supply of natural gas, and telecommunication services as regards to the use of glass fiber infrastructure), should be critically reassessed by Bundesnetzagentur in its final certification decision in accordance with the principles referred to above, in order to ensure the independence of the ITO.

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

According to Article 17(5) Gas Directive TSOs 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 terranets to complete the separation of its IT system from the system used by the VIU. However, from Bundesnetzagentur's draft decision it appears that terranets 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 terranets can continue to employ the same external IT contractors provided that these contractors ensure that specific employees are designated to exclusively advise terranets.

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 terranets, 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 interests and abuses are avoided. The Commission invites Bundesnetzagentur to either require in its final certification decision that terranets 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. Separation of premises**

According to Article 17(5) Gas Directive, the ITO shall not share the physical premises and security access systems with any part of the VIU. terranets 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. However, it does not become sufficiently clear from the draft decision whether the envisaged separation will be effective, and will be able to remove any confusion in respect of the separate identities of the ITO and the VIU. In particular, the Commission notes that terranets envisages to continue sharing certain working space, building infrastructure and even the company restaurant with 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 criteria in its final decision in order to ensure an effective separation in accordance with Article 17(5) Gas Directive.

## **6. Management Board – powers**

Chapter V 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 rules of procedure of the Management Board of terranets, prior authorisation by the shareholders is required for numerous decisions, e.g. for the conclusion of contracts longer than [BUSINESS SECRET] years and of a value above [BUSINESS SECRET]/year, or for the purchase or divestiture of shareholdings and general consultancy services of a value above [BUSINESS SECRET]/ year or [BUSINESS SECRET] in total. The Commission underlines that thresholds should not be set at a too low level as this could undermine the autonomy of the Management Board as enshrined in the Gas Directive. The Commission considers it necessary that Bundesnetzagentur reassesses whether the levels of the thresholds as referred to in the rules of procedure of the Management Board are appropriate. In any event, these thresholds should not apply to decisions related to the preparation and implementation of the Ten Year Network Development Plan, as this is an exclusive competence of the Management Board.

## **7. Independence of management**

According to Article 19(3) *juncto* Article 19(8) Gas Directive, the majority of the management 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 other than the TSO, for a period of three years before their appointment.

In its draft decision, Bundesnetzagentur makes reference to the German legislation implementing the Gas Directive, the EnWG, according to which the independence requirement referred to above should not apply to members of the management of the ITO

who were appointed before 3 March 2012. The Commission questions whether the German implementing legislation is in compliance with the Gas Directive on this point and underlines that it might in certain cases undermine the effective independence of the ITO. The Commission notes that one member of the management of terranets was appointed on 2 March 2012 and has worked for the VIU before that date. Furthermore, the Commission notes that another member of the management still has an employment contract with one of the owners of terranets, even if this contract is currently suspended. A transitional period of 6 months after the certification of terranets as ITO seems inappropriate as the independence criteria of Article 19(3) Gas Directive must be complied with on the date of certification. The Commission therefore invites Bundesnetzagentur to reassess in its final certification decision whether the majority of the management of terranets in fact fulfils the independence criteria laid down in Article 19(3) Gas Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require in its final certification decision that the majority of the management of terranets complies with the independence criteria laid down in Article 19(3) Gas Directive.

According to Article 19(5) Gas Directive, management and employees of the ITO shall hold no interest in any part of the VIU. In its draft decision, Bundesnetzagentur makes reference to the German implementing legislation which requires that shares in the VIU 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 implementing 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 management sell their financial interests in the VIU 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 terranets which are not part of the management.

## **8. Independence of the Supervisory Body**

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.

From Bundesnetzagentur's draft decision and documents submitted to support the request of terranets for certification it does not become clear whether or not this condition has been applied to the independent members of the Supervisory Body of terranets. With reference to the considerations in the previous section concerning Article 19(3) Gas Directive, the Commission invites Bundesnetzagentur to reassess in its final certification decision that the independent members of the Supervisory Body of terranets have in fact complied with the independence criteria of Article 19(3) Gas Directive in full, also if their appointment predates 3 March 2012. If this is not the case, the Commission invites Bundesnetzagentur to require terranets in its final certification decision to comply with the independence criteria of Article 19(3) Gas Directive also in relation to its independent member of the Supervisory Board.

## **9. Certification of OGE**

The Commission notes that the co-owner of a part of the pipeline system, OGE, has to date not been certified. OGE carries out a number of tasks on behalf of terranets with regard to e.g. the maintenance of the pipeline system concerned. In the absence of certification, the independent operation of the pipeline is not guaranteed. The Commission invites

Bundesnetzagentur to clarify in its final decision that the certification of terranets is conditional upon the positive certification of OGE as an unbundled TSO.

#### **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 terranets, 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*