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COMMISSION OPINION

of 12.5.2021

pursuant to to Article 3 of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Austria – Certification of Gas Connect Austria GmbH as transmission system operator for gas

(Only the German version is authentic)

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I. PROCEDURE

On 17 March 2021, the Commission received a notification from the regulatory authority in Austria, E-Control, of a preliminary decision concerning the certification of Gas Connect Austria GmbH (hereafter “GCA”) as transmission system operator for gas (hereafter “TSO”).

Pursuant to Article 3 of Regulation (EC) 715/2009¹ (hereafter "Gas Regulation") and Article 10 of Directive 2009/73/EC² (hereafter "Gas Directive"), the Commission is required to examine the notified draft decision and to deliver an opinion within two months to the relevant national regulatory authority as to its compatibility with Articles 9 and 10(2) of the Gas Directive.

II. DESCRIPTION OF THE NOTIFIED PRELIMINARY DECISION

On 6 July 2012 GCA was certified by E-Control as Independent Transmission Operator (hereafter “ITO”) in the meaning of Article 9(8)(b) of the Gas Directive, for the operation of the following gas pipelines:

- *Süd-Ost-Leitung* (SOL) which supplies Italy, Slovenia and Croatia;
- *Hungary-Austria-Gasleitung* (HAG) which supplies Hungary;
- *Penta West* (PW) which supplies Germany, France and Central Europe;
- *Kittsee-Petržalka-Gasleitung* (KIP) which supplies the Slovak Republic;
- *Primärvertersystem I* (PVS I) which supplies the Vienna region.

This certification was subject to a Commission Opinion of 1 June 2012³.

GCA was certified anew on 18 July 2014 for additionally operating the *West-Austria-Gasleitung* (WAG) which supplies Austria, Germany and France. This certification was subject to a Commission Opinion of 16 June 2014⁴. GCA was again certified anew on 15

¹ 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, 14.8.2009, p. 36.

² 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, 14.8.2009, p. 94.

³ C(2012) 3734 final

⁴ C(2014) 4092 final

February 2018 following a partial change of ownership. This certification was subject to a Commission Opinion of 20 December 2017⁵.

The present preliminary decision concerns a new certification of GCA as ITO due to another partial change of ownership: on 23 September 2020, a 51% share in GCA was sold by *OMV Gas Logistics Holding GmbH*, a 100% subsidiary of *OMV AG*, to *Verbund AG* (hereafter “Verbund”). This sale shall be finalised in the first half of 2021.

With this newest change, the ownership structure of GCA will be as follows:

- A 51% share in GCA is owned by Verbund, a utility listed on the stock exchange. 51% of its shares are owned by the Austrian federal government, more than 25% by *EVN AG* (which is majority owned by the government of *Niederösterreich*), more than 5% by a syndicate of *EVN AG* and *Wiener Stadtwerke* and less than 20% of shares are free float. Verbund is sole shareholder of *Austrian Power Grid AG* (hereafter “APG”), an electricity TSO and certified ITO.
- As previously, a 49% share is owned by *AS Gasinfrastruktur GmbH*, a 100% subsidiary of *AS Gasinfrastruktur Beteiligung GmbH*. 60% of the latter are owned by different subsidiaries of the German insurance company *Allianz SE* and 40% by Italian TSO *SNAM SpA*.

Since, as previous ultimate controller *OMV AG*, Verbund is a utility active in the electricity and gas sector, GCA will remain part of a vertically integrated undertaking (hereafter “VIU”). Therefore, the continued certification as ITO is possible.

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

As regards availability of financial resources, E-Control sees no reason to change its assessment made in the previous certification decisions of 6 July 2012 and 15 February 2018: Verbund will take over slightly amended Cash Pooling and Loan Agreements. Since both agreements were only available in draft form and only enter into force when the ownership change is finalised, E-Control intends to make the certification of GCA conditional to it submitting legally valid agreements by 1 September 2021⁶.

In its application for re-certification, GCA declared that Verbund will take over the current rights and duties of *OMV Gas Logistics Holding GmbH* and that no changes to the relevant corporate governance rules and to the independence of GCA from other entities of the VIU, as required by the ITO model, are planned.

E-Control explains that Verbund intends full consolidation of GCA in its accounts. For this purpose an “interface contract” (*Schnittstellenvertrag*) is planned, governing the necessary reporting by GCA for this purpose, while ensuring compliance with the legal requirements for ITOs. E-Control intends to make the certification of GCA conditional to it submitting a legally valid contract, that corresponds to the draft provided by GCA, by 1 September 2021.

In its application for re-certification, GCA declares that there are no financial or other links to Verbund subsidiary APG. In order to ensure that GCA continues to have no links with other entities of the VIU or their subsidiaries, E-Control intends to require GCA to bring any

⁵ C(2017) 9028 final

⁶ Exceptionally, E-Control can extend all three intended 1 September 2021 deadlines by 6 month in case of delays outside of the control of GCA.

possible commercial and financial agreements with APG or its subsidiaries before E-Control for approval.

Verbund will nominate three of the six members of GCA's supervisory board (*Aufsichtsrat*). *AS Gasinfrastruktur GmbH* nominates one member and the remaining two members are representatives of the employees of GCA. With reference to previous certification decisions, E-Control concludes that the requirements pursuant to Article 20(3) of the Gas Directive as regards the independence of the supervisory board of an ITO are continued to be fulfilled, as required, by half of its members minus one.

On this basis, E-Control considers that GCA can be certified as TSO under the ITO model and submitted its draft decision to the Commission requesting an opinion.

III. COMMENTS

Against the background of the information provided in the preliminary decision notified by E-Control, the Commission agrees with E-Control that also after the sale by *OMV Gas Logistics Holding GmbH* of its 51% share in GCA to Verbund, and conditional to the requirements planned by E-Control for its final decision, GCA continues to fulfil the requirements for certification as TSO under the ITO model.

Ongoing monitoring

The Commission recalls the obligation set out in Article 10(4) of the Gas Directive for regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of the Gas Directive.

Should E-Control decide to certify GCA, the Commission invites E-Control to continue monitoring the case also after the adoption of the final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment.

IV. CONCLUSION

Pursuant to Article 3 of the Gas Regulation, E-Control shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of GCA, and when it does so, shall communicate its decisions to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* Member State regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* Member State 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 therein to be confidential. E-Control is invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 12.5.2021

For the Commission
Kadri SIMSON
Member of the Commission